Notes

ARIZONA'S INSANE RESPONSE TO INSANITY

Renée Melançon*

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I. INTRODUCTION

A. The Story

On April 11, 1989, Mark Austin killed his estranged wife, Laura Griffin-Austin.[1] Mark was tried for first degree murder.[2] At his first trial, the jury was deadlocked, with eleven jurors willing to convict.[3] At the second trial, the jury found Mark not guilty by reason of insanity.[4]

Two months before her death, Laura Griffin-Austin had separated from Mark and moved out of their marital home.[5] On the afternoon of her death, Laura allegedly told Mark over lunch that she was involved with another man.[6] That evening, Mark purchased duct tape and a nylon cord before going to Laura's home.[7] Minutes later, he left these purchases unopened outside the front door of Laura's home[8] and then removed the screen from her kitchen window.[9] Through

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1. Margo Hernandez, *Tucsonan Faces Second Trial in Estranged Wife's Slaying*, ARIZ. DAILY STAR, Jan. 31, 1991, at 1B.

2. *Id.*

3. Gabrielle Fimbres, *Lobbying for Change*, TUCSON CITIZEN, Apr. 11, 1991, at 1A.

4. *Id.* In both trials, evidence was introduced that Mark was an Eagle Scout and had no criminal record before killing his wife. *See* Defense Motion for Reduction of Bond at 3, State v. Austin, No. CR–27415 (Ariz. Pima County J. Ct. May 12, 1989); Interviews with David Bjorgaard, cocounsel for Mark Austin, in Tucson, Ariz. (Sept. 16, 1996 & Nov. 6, 1997).

5. Hernandez, *supra* note 1. Both expert mental health witnesses and lay witnesses, including Laura's mother, testified that during this two-month period, Mark's physical and mental health appeared to be progressively deteriorating. Ann-Eve Pedersen, *Jurors Accept Insanity Defense, Acquit Austin*, TUCSON CITIZEN, Mar. 1, 1991, at 1B; *see also* Barbara Griffin, *Getting Away with Murder*, TUCSON WKLY., Mar. 9, 1995, at 9.

6. Ann-Eve Pedersen, *New Trial Begins for Tucsonan Who Admits Killing Wife*, TUCSON CITIZEN, Jan. 31, 1991, at 1C. Mark's cocounsel reported that Mark spent that afternoon listening to Pink Floyd's "The Wall" over and over again, cutting his own face out of photographs, and burning the pictures of himself. Interviews with David Bjorgaard, *supra* note 4.

7. Pedersen, *supra* note 5, at 1B.

8. Ann-Eve Pedersen, *Austin's Actions Called Psychotic*, TUCSON CITIZEN, Feb. 13, 1991, at 2C.

9. *See* Pedersen, *supra* note 6, at 1C; Interviews with David Bjorgaard, *supra* note 4. A large portion of Austin's defense was this sequence of unconnected, bizarre behaviors, which provided evidence of Austin's psychosis. *See* Pedersen, *supra* note 8, at 2C. For example, the window from which the screen was removed was too small for an adult to enter. Interviews with David Bjorgaard, *supra* note 4. In addition, the location of items was odd. The duct tape and cord were found in the outside planter, completely intact in their packaging. *Id.* Additionally, although it seems that a screen removed from the outside would be tossed aside, it was instead found beneath the kitchen table. *Id.* As further indicia of Mark's psychosis, mental health experts also pointed to Mark's alleged lack of memory for most of the events connected with the killing. Pedersen, *supra* note 8, at 2C.

the window, Mark allegedly saw his estranged wife in bed with her boyfriend, Timothy Lawrence.[10]

Mark knocked on the door.[11] As Laura opened the door, Mark drew a knife across her body. At the trial, Mark's karate instructor testified that the wounds were consistent with a figure-8 defensive technique that Mark had learned through repetition.[12] When Laura's lover approached him, Mark moved as if to embrace him, slashing across his back with the knife.[13] Laura Griffin-Austin died several hours later from four slash wounds to her neck and chest.[14] Timothy Lawrence survived the attack with a twenty-two inch gash across his back.[15]

Mark's own blood was found in Laura's bedroom, where he apparently slashed his own wrists and neck.[16] After leaving Laura's house, Mark wandered beneath a highway underpass.[17] The next morning, he awoke to blood on his hands, and attempted to open the coagulated blood at his throat.[18]

At his trial for first degree murder, Mark's attorney Robert Hirsh presented an insanity defense, alleging that Mark had experienced a "brief reactive psychosis" that kept him from understanding the difference between right and wrong.[19] Hirsh argued that Mark was experiencing clinical depression and was "hoping against reality" that he and Laura would reconcile.[20] One psychiatrist and two psychologists testified that Mark, who was already in a deep depression, fell into a psychotic state after learning that Laura had a boyfriend.[21] The State claimed that Mark knew all along what he was doing, that his purchase of the cord and tape and alleged attempted break-in through a window proved his intent.[22]

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10. Hernandez, *supra* note 1, at 1B.

11. *Id.* This newspaper account reported the version of these events as recounted by Laura Griffin-Austin's boyfriend, Timothy Lawrence. He testified that he heard a knock on the door, whereupon he and Griffin-Austin rushed into the bathroom, where Griffin-Austin told him to wait. *Id.* Lawrence next heard another knock followed by the sound of Griffin-Austin fumbling with the doorknob, and then the door breaking open. *Id.*

12. Interviews with David Bjorgaard, *supra* note 4; *see also* Pedersen, *supra* note 6, at 1C.

13. Hernandez, *supra* note 1, at 1B.

14. *Id.*; Pedersen, *supra* note 6, at 1C.

15. Pedersen, *supra* note 6, at 1C.

16. Interviews with David Bjorgaard, *supra* note 4.

17. *Id.*

18. *Id.*

19. Laura Greenberg, *Defender of the Dark Side*, PHOENIX MAG., Sept. 1994, at 76, 84–85.

20. *See id.* at 85.

21. Interviews with David Bjorgaard, *supra* note 4; *see also* Greenberg, *supra* note 19, at 85 (stating that three psychiatrists testified Austin suffered from a "brief reactive psychosis" at the time of the killing and did not "understand the difference between right and wrong").

22. Pedersen, *supra* note 6, at 1C.

B. An Impetus to Change Arizona's Insanity Defense

After being found legally insane, Mark Austin was committed to the Arizona State Hospital.[23] After 120 days, he received his first psychiatric hearing.[24] Following the testimony of several mental health experts, the court found that Austin was no longer a danger to himself or a threat to the community, and therefore must be released.[25] Due in large part to outrage over Mark Austin's acquittal and subsequent release after only six months of confinement, Arizona modified its insanity defense by restating its application and changing its procedures.

The most recent changes to Arizona's insanity defense were proposed in a bill named in memory of Laura Griffin-Austin, the murdered wife of Mark Austin: "Laura's Law."[26] Much of the force that drove this bill into law was emotional. Originally spearheaded by Laura's parents and sponsored by Representative Patti Noland, the bill gained the support of a citizenry outraged by this tragic death and apparent lack of justice.[27] Although the law is a triumph for Laura's aggrieved parents and their supporters, it is problematic with respect to its treatment of persons with mental illnesses and its legal rationale. Unfortunately, Laura's Law bears hallmarks of a bill that succumbed to emotional arguments and failed to analyze legal rationales, consult social science research, or consider unwanted consequences.

This Note provides a critique of Arizona's insanity defense. Section II provides a background for Arizona's insanity defense statute with a brief overview of the purpose and development of the insanity defense in the United States and in Arizona. Section III analyzes dilemmas surrounding the application and interpretation of Arizona's insanity defense while giving due consideration to both the legal justifications for having an insanity defense as well as the relevant psychological literature. Section III also considers the unresolved issue of whether Arizona's insanity defense should be treated as a conviction for the purpose of the deprivation of collateral rights. This Note concludes that Arizona's new insanity defense is replete with ambiguous language and subject to problematic interpretations. Such infirmities confirm that this new statute is an emotional

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23. Kim Kelliher, *Austin, Acquitted in Killing by Reason of Insanity, To Be Freed*, ARIZ. DAILY STAR, Aug. 23, 1991, at 1A.

24. *Id.*

25. *Id.* Austin's release was conditioned upon his participation in a court-supervised, outpatient treatment program. *Id.* He remains released pursuant to this condition today. Interviews with David Bjorgaard, *supra* note 4.

26. Greenberg, *supra* note 19, at 86.

27. *See* Jeff Herr, *Parents of Slain Woman Start PAC to Restrict Use of Insanity Defense*, ARIZ. DAILY STAR, Apr. 12, 1991, at 1B (The Griffins registered a political action group named the Committee to Address the Deficiencies, Abuses, and Inadequacies of the Insanity Defense.); Kim Kelliher, *Griffins Seek Legislative Remedy: Insanity Defense Is Their Target*, ARIZ. DAILY STAR, July 22, 1991, at 1A.

reaction to one disturbing case rather than a thoughtful solution to an ongoing problem.

II. HISTORY OF THE INSANITY DEFENSE

In 1843, Daniel M'Naghten shot and killed Edward Drummond, the British Prime Minister's private secretary.[28] The jury acquitted M'Naghten by reason of insanity.[29] This verdict resulted in a parliamentary inquiry which the common law judges were requested to attend.[30] Out of these hearings came the first legal test for insanity, the *M'Naghten* test:

> [T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[31]

Remarkably, the House of Lords did not seem concerned with articulating a purpose for this defense.[32] They wanted to create a rule to preclude a future M'Naghten from acquittal, but did not state why they needed this rule in the first place.[33] This was no cultural or historical oversight. Revisers of the insanity defense since the days of *M'Naghten* have been chary to express its purpose.[34] It would seem logical that a person who commits an otherwise criminal act while insane is not guilty because her insanity negates the necessary mens rea. The insanity defense goes beyond this, however. In creating a special defense, proponents of the insanity defense operate under the assumption that punishing someone who commits a would-be crime while insane is inconsistent with a fundamental objective of the criminal justice system—to punish the morally blameworthy.[35] Unexplained are blame, insanity, and their incompatibility.[36]

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28. M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843). For a detailed description of the facts and historical context of this case, see RICHARD MORAN, KNOWING RIGHT FROM WRONG (1981).

29. M'Naghten's Case, 8 Eng. Rep. at 720.

30. MORAN, *supra* note 28, at 2.

31. M'Naghten's Case, 8 Eng. Rep. at 722.

32. Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 859–60 (1963).

33. *Id.*

34. "A century earlier the pattern had been firmly set of accepting an insanity defense without asking: 'Why an insanity defense?'" *Id.* at 859.

35. *See infra* Part II.E.

36. *See* Goldstein & Katz, *supra* note 32, at 860 ("The court leaves without definition and without identification of purpose such ambiguous words as 'punishment' and

A. Development in the United States

M'Naghten's "cognitive standard" remained the test for criminal responsibility in the United States for over a century.[37] Eventually, some states broadened *M'Naghten* to include an "irresistible impulse" test.[38] This test establishes an insanity defense for persons who know the nature and quality of the act and know that the act is wrong, but commit the act anyway as a result of an overpowering compulsion that is the product of a mental disability.[39] The justification for this test was that individuals who were unable to control their behavior could not be deterred by criminal sanctions.[40] Hence, no moral or policy purpose could justify incarcerating them.[41]

A still broader test, the *Durham* test, was proposed in 1954 by Judge David Bazelon.[42] This test is simply: "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[43] Judge Bazelon adopted this test after reviewing extensive psychological and psychiatric literature that indicated the *M'Naghten* cognitive test failed to take into account modern scientific knowledge.[44] Furthermore, Judge Bazelon found the irresistible impulse test inadequate as it failed to consider mental illnesses "characterized by brooding and reflection and so relegated acts caused by such illness to the application" of the unsatisfactory cognitive test.[45] After rejecting these two previous tests for insanity, Judge Bazelon provided the following rationale for his new test:

> "Our collective conscience does not allow punishment where it cannot impose blame."...

'blame,' and thus in effect only says 'he who is punishable is blameworthy and he who is blameworthy is punishable.'" (footnote omitted) (discussing *United States v. Durham*, 214 F.2d 862 (D.C. Cir. 1954)).

37. David Bjorgaard, Note, State *ex rel.* Collins v. Superior Court and Patricia Mittenthal, Real Party in Interest: *Automatic Commitment of Insanity Defense Acquittee for a Minimum of 230 Days Is Unconstitutional*, 29 ARIZ. L. REV. 141, 142 n.13 (1987).

38. Barbara A. Weiner, *Mental Disability and the Criminal Law*, *in* MENTALLY DISABLED AND THE LAW 693, 710 (Samuel J. Brakel et al. eds., 1985).

39. *Id.*

40. GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS 191 (2d ed. 1997).

41. *Id.*

42. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

43. *Id.* at 874–75.

44. *Id.* at 869–74.

45. *Id.* at 874. The irresistible impulse test was also criticized by individuals in the legal community who believed that impulsivity could be faked easily. MELTON ET AL., *supra* note 40, at 191. Individuals in the medical community also criticized this test as inconsistent with medical knowledge of the human psyche and as overly restrictive. *Id.* These criticisms from the medical community are similar to those leveled against the *M'Naghten* test. *See infra* notes 125–28 and accompanying text.

> The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect..., moral blame shall not attach, and hence there will not be criminal responsibility.[46]

At least two legal scholars were discontented with Judge Bazelon's rationale for the *Durham* test.[47] Goldstein and Katz complained "the court...left unasked and therefore unanswered: 'What underlies the 'legal and moral traditions' in 'our collective conscience' which prevents us from inquiring why a rule is required?'"[48]

Just as scholars criticized Judge Bazelon's reasoning, which examined the desirable consequences of the insanity defense instead of the reason for desiring these consequences to begin with, so too have they criticized the rationale behind the American Law Institute (ALI) test.[49] In response to criticism of both the *M'Naghten* and *Durham* tests, in the 1950s the ALI drafted a "volitional standard" that was adopted by about half the states.[50] In light of the ALI's goal of discriminating between cases that deserved a punitive-correctional disposition and those that warranted a medical-custodial disposition, this test was criticized for failing to define determinative characteristics of the two cases.[51] Under the ALI test, "[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"[52]— in other words, "I couldn't control myself."[53]

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46. *Durham*, 214 F.2d at 876 (footnote omitted) (quoting Holloway v. United States, 148 F.2d 665, 666–67 (D.C. Cir. 1945)).

47. Goldstein & Katz, *supra* note 32, at 860. *But cf.* Peter Arenella, *Convicting the Morally Blameless: An Essay on Choice, Character, and Responsibility*, 39 UCLA L. REV. 1511, 1517 (1992) (noting that our criminal law theory has embraced the liberal paradigm, which requires that actors have some knowledge, reason, and control before they can be held blameworthy).

48. Goldstein & Katz, *supra* note 32, at 860 (quoting *Durham*, 214 F.2d at 876).

49. *Id.* at 860–61.

50. Weiner, *supra* note 38, at 711–12. The Court of Appeals for the District of Columbia rejected its earlier *Durham* test in favor of the ALI formulation of the insanity defense. United States v. Brawner, 471 F.2d 969, 973 (D.C. Cir. 1972).

51. Goldstein & Katz, *supra* note 32, at 861 (citing MODEL PENAL CODE § 4.01 cmt. 1, at 156 (Tentative Draft No. 4, 1956)).

52. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

53. Maureen O'Connor, The Role of Research in Advocacy: The Case of Insanity Defense Reform in Arizona, Paper Presented at the Arizona Psychological Association 11 (Oct. 23, 1992) (manuscript on file with author).

The ALI formulation of the standard of criminal responsibility has been commended for having several advantages over the *M'Naghten* and *Durham* tests. Perhaps most importantly, it facilitates legal determinations based on psychiatric knowledge by recognizing that mental illness may impair both volitional and cognitive mental processes.[54] In addition, the ALI test permits extensive input from mental health expert witnesses but continues to leave the ultimate decision to the province of the jury.[55] Finally, the ALI test's requirement of "substantial incapacity" is considered more realistic than the demand of the *M'Naghten* test for a showing of total incapacity.[56]

B. Arizona's Original Insanity Defense

Arizona's insanity defense laws originate in the Penal Code of 1901, which stated that "[a]ll persons are of sound mind who are neither idiots nor lunatics nor affected with insanity."[57] Furthermore, "[a]ll persons are capable of committing crimes except those belonging to the following classes:...(2) idiots, (3) lunatics and insane persons."[58] This Code did not attempt to define insanity but instead left the determination to the discretion of the trier of fact.[59] After becoming a state in 1912, Arizona adopted the 1901 provisions for insanity in the criminal codes of 1913,[60] 1928,[61] and 1939.[62] Arizona's original insanity defense statute was basically the *M'Naghten* test:

> A person is not responsible for criminal conduct by reason of insanity if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong.[63]

Some legal commentators argue that Arizona's insanity defense has always been one of the most difficult in the country because it is based on the *M'Naghten* test, under which it is more difficult to find a defendant insane than under the irresistible impulse test, *Durham* test, or ALI test.[64] This position is

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54. Weiner, *supra* note 38, at 712.

55. *Id.*

56. *Id.* This aspect of the ALI test, which some see as realistic and hence desirable, may be the very quality that has caused others to criticize the test as too broad and overinclusive. *See id.*

57. ARIZ. PEN. CODE § 21 (1901).

58. *Id.* § 24 (1901).

59. *See id.* § 1148 (1901).

60. *Id.* §§ 20–21, 24, 1264–1270 (1913).

61. *Id.* §§ 4486, 4489, 5197–5201 (1928).

62. *Id.* §§ 43–111, 43–114 (1939).

63. ARIZ. REV. STAT. ANN. § 13–502(A) (West 1989).

64. LESLIE J. COHEN, ARIZONA CTR. FOR LAW IN THE PUB. INTEREST, ANALYSIS OF LAURA'S LAW: WHY THIS LAW SHOULD NOT BE PASSED FROM A LEGAL AND MENTAL HEALTH PERSPECTIVE 2, 12 (Jan. 7, 1992) (on file with author) (asserting that the

supported by empirical research finding that the *M'Naghten* test results in fewer acquittals than other tests for insanity.[65] In addition, the wording of the insanity defense may have an effect on the formulation of the testimony of mental health experts, the arguments of counsel, and judicial determinations of sufficiency of evidence, all of which may impact the jury's deliberation and ultimate determination.[66] It is important to point out, however, that other empirical research has found no difference in acquittal rates among the various tests for insanity.[67]

Notwithstanding the debate over the implications of the language of the various tests for insanity, the Arizona Legislature has toughened the insanity defense twice, both times in response to public outcry.

C. Initial Changes in Arizona's Insanity Defense

Arizona's first changes to its insanity defense, like similar changes in many states, were a response to public outcry surrounding notorious insanity acquittals. On March 30, 1981, John W. Hinckley tried to assassinate then-

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M'Naghten test is harder to meet than the other three dominant formulations in existence at the time that Arizona's insanity defense was passed); *see also* Bjorgaard, *supra* note 37, at 143 n.13 ("In its report on examining the insanity defense in Arizona, the Senate Judiciary Subcommittee noted that most agree that the *M'Naghten* test is the most difficult for the plaintiff to meet of the four tests currently used." (citing FINAL REPORT OF THE SENATE JUDICIARY INTERIM SUBCOMMITTEE ON THE INSANITY DEFENSE 12 (1982))).

65. *See* RITA SIMON, THE JURY AND THE DEFENSE OF INSANITY 215–16 (1967) (juries found fewer people insane under the *M'Naghten* test than the *Durham* test); Robert M. Wettstein, M.D., et al., *A Prospective Comparison of Four Insanity Defense Standards*, 148 AM. J. PSYCHIATRY 21 (1991) (forensic psychiatrists were more likely to find defendants insane when asked to apply the volitional test as opposed to the cognitive test). One scholar examined several empirical studies of the actual effect of an alteration of the test for insanity in five different states. Ingo Keilitz, *Researching and Reforming the Insanity Defense*, 39 RUTGERS L. REV. 289 (1987). Overall, he found that a defense of insanity was more likely to be successful under the ALI or *Durham* test than under the *M'Naghten* test. *Id.* at 300–02. The author emphasized, however, that the studies from which he drew his conclusions had methodological problems, and, therefore, future empirical research was still needed. *Id.* Importantly, one limitation of these studies was the small number of cases involved, which makes it difficult to deduce a trend that is more than mere speculation. *Id.* at 301; *see also* Bruce D. Sales & Thomas Hafemeister, *Empiricism and Legal Policy on the Insanity Defense*, *in* MENTAL HEALTH AND CRIMINAL JUSTICE 253, 275 n.9 (Linda A. Teplin ed., 1984). That is, a purported change in acquittal rate may be due to some other factor, such as a sensational case or an overarching national trend, and not the changed language of the insanity test itself. Keilitz, *supra*, at 302; Sales & Hafemeister, *supra*, at 275 n.9.

66. AMERICAN BAR ASS'N, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7–6.1 commentary at 343 (1989) [hereinafter ABA STANDARDS]; *see also* Keilitz, *supra* note 65, at 299.

67. Norman Finkel et al., *Insanity Defenses: From the Jurors' Perspective*, 9 LAW & PSYCHOL. REV. 77, 80 (1985) (finding no differences in the number of acquittals for five different versions of the insanity defense).

President Ronald Reagan.[68] Fifteen months later, a jury found Hinckley not guilty by reason of insanity.[69] In the three years following this verdict, thirty-four states made changes to their insanity defenses, most designed to restrict the use of the defense or to make it a less attractive option.[70] Three states eliminated the insanity defense altogether.[71] This rush to adopt a new position on the insanity defense was not confined to the states. Both the American Bar Association and the American Psychiatric Association recommended elimination of the ALI's volitional prong as a solution to the problem of too many insanity verdicts.[72]

Two acquittals in Arizona helped push through Arizona insanity defense reform.[73] On May 28, 1981, Steven Steinberg stabbed his wife to death with a kitchen knife allegedly while sleepwalking.[74] That same year, William Gorzenski shot his wife and her lover when he found them together in their marital bed.[75] Psychiatrists testified that Steinberg was no longer a threat to himself or society.[76] Gorzenski was found to have suffered from deep depression along with suicidal feelings.[77] Both men were released after their acquittals by reason of insanity.[78] These cases were cited in legislative material as heralding the need for a thorough reexamination of Arizona's insanity defense statute.[79] The Senate Judiciary Interim Subcommittee on the Insanity Defense was formed to examine the insanity defense in Arizona and make recommendations for change.[80] In 1983, the Arizona

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68. Howell Raines, *Reagan Wounded in Chest by Gunman*, N.Y. TIMES, Mar. 31, 1981, at A1.

69. Stuart Taylor, Jr., *Hinckley Cleared but Is Held Insane in Reagan Attack*, N.Y. TIMES, June 22, 1982, at A1.

70. Lisa Callahan et al., *Insanity Defense Reform in the United States—Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54, 55 (1987).

71. IDAHO CODE § 18–207 (1997); MONT. CODE ANN. § 46–14–214 (1997); UTAH CODE ANN. § 76–2–405 (1995).

72. *See* ABA STANDARDS, *supra* note 66, Standard 7–6.1 commentary at 339–40 ("[A]ny independent volitional inquiry involves a significant risk of 'moral mistakes' in the adjudication of criminal responsibility. In short, the standard rests on a policy judgment that 'morally correct' results are likely to be achieved more often under a circumscribed test that does not include a volitional criterion than under a broader test that does."); American Psychiatric Ass'n, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681 (1983); O'Connor, *supra* note 53, at 15.

73. Bjorgaard, *supra* note 37, at 147–48. In both of these cases, the defendants were represented by Bob Hirsh, lead counsel for Mark Austin.

74. *Id.* at 147. For a detailed description of the case, see SHIRLEY FRONDORF, DEATH OF A JEWISH AMERICAN PRINCESS (1988).

75. For a brief discussion of these cases and their result on the commitment scheme of Arizona's insanity defense statute, see Bjorgaard, *supra* note 37, at 147–48.

76. *Id.* at 147.

77. *Id.*

78. *Id.*

79. *Id.* (citing FINAL REPORT OF THE SENATE JUDICIARY INTERIM SUBCOMMITTEE ON THE INSANITY DEFENSE 1–2 (1982)).

80. *Id.*

Legislature amended section 13–502(C), shifting the burden of proof to the defendant to prove by clear and convincing evidence that he was not responsible for his criminal conduct.[81] Arizona remains the only state that requires defendants to prove insanity by clear and convincing evidence.[82]

D. The Original "Laura's Law"

The second wave of reform to Arizona's insanity defense was also a result of public outcry. After Mark Austin's acquittal, Laura's parents, the Griffins, began an initiative to reform the insanity defense.[83] After substantial research of the insanity defense laws in other states, as well as petition drives and public appeals, the Griffins presented their bill, Laura's Law, to Representative Patti Noland, Chair of the House Judiciary Committee, for sponsorship in the Arizona House.[84] Their goal was to ensure that no one in Austin's position would be acquitted again.[85] The public was outraged by the result in this particular case and feared that the insanity defense was unjustly abused in many other cases.[86]

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81. *Id.* at 148 (citing ARIZ. REV. STAT. ANN. § 13–502(C) (1983)). The Legislature also adopted section 13–3994 to distinguish between insanity defense acquittees who are nonviolent and those who commit crimes involving physical harm or risk of physical harm to another. *Id.*

82. MELTON ET AL., *supra* note 40, at 202. Of the remaining states, one-third require the prosecution to prove sanity beyond a reasonable doubt, and the majority of the other states place the burden on the defendant to prove insanity by a preponderance of the evidence. *Id.* The federal courts, like Arizona, impose the clear and convincing standard of proof upon the defendant. 18 U.S.C. § 17(b) (1994). Interestingly, existing data does not show any consistent relationship between the imposition of the burden of proof and the acquittal rate. MELTON ET AL., *supra* note 40, at 202. It does not appear, however, that the imposition of the heavier burden in Arizona and the federal courts has been examined empirically.

83. *See supra* text accompanying notes 26–27.

84. *See* Herr, *supra* note 27, at 1B; *"I Want Justice for Laura." Wife Murdered by Her Husband*, LADIES HOME J., Apr. 1993, at 22, *available in* LEXIS, Arcnws Library.

85. Representative Noland testified before the Arizona House of Representatives that the bill's goal was

> to close the loopholes that have been used for people who are truly not insane, especially in the cases of murder or aggravated offenses...[including] some cases where 'brief reactive psychosis' has been used as a defense whereby a person is deemed to be temporarily insane at the time the murder was committed but is no longer insane.

ARIZONA HOUSE OF REPRESENTATIVES JUDICIARY COMMITTEE NOTES 3 (Mar. 18, 1993) [hereinafter COMMITTEE NOTES].

86. Some proponents of the bill seemed to recognize, however, that the insanity defense was not frequently used as a tool to avoid criminal responsibility. For instance, Pima County Attorney Stephen D. Neely acknowledged that the defense was not "exploited extensively in the state to escape criminal liability," but due to the result of the Austin case, which society generally considered undesirable, it had to be revised as a matter of public policy. Kelliher, *supra* note 27, at 1A.

Indeed, most people tend to grossly overestimate the frequency with which the insanity defense is entered and how often such a defense is successful.[87]

While the insanity law was eventually revised in Arizona,[88] the final version was substantially different from what the Griffins had originally proposed. A brief examination of Laura's Law as initially drafted illustrates the problems inherent in a bill that fails to consider criminal justice goals and empirical research.[89]

When it was first introduced to the House of Representatives, Laura's Law recognized only "a longstanding disease or defect of the mind extending over a considerable period of time."[90] This was a direct means to achieve one of the main goals of this bill: to eliminate the defense of "temporary insanity."[91] Demanding that a defendant prove a longstanding mental illness, however, ignores the nature of many mental illnesses.[92] For instance, the onset of schizophrenia generally occurs between the late teens and midthirties.[93] Requiring a defendant to show an extensive history of mental illness is tantamount to denying the insanity defense to young defendants who simply have not had the years to manifest a longstanding disorder or to receive a proper diagnosis of mental illness, thus giving them the requisite "history" of mental illness. Meanwhile, people aged sixteen to eighteen commit more crimes than any other age segment in the

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87. Sales & Hafemeister, *supra* note 65, at 254–56. Due to extensive media coverage of sensational cases involving the insanity defense, the public has come to believe that this defense is commonly raised and is often successful. Weiner, *supra* note 38, at 708. In fact, less than 1% of all felony prosecutions result in an acquittal by reason of insanity. *Id.* at 708 n.188. Furthermore, only 26% of those raising the defense are actually acquitted—essentially, only one-quarter of 1%. Jonas R. Rappeport, *Current Status of the Insanity Plea*, 22 PSYCHIATRIC ANNALS 550, 554 (1992); *see also* Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331, 334 (1991).

88. ARIZ. REV. STAT. ANN. § 13–502 (West Supp. 1997).

89. This bill has been redrafted numerous times. This analysis will deal with the bill as it was introduced to the Arizona House of Representatives on January 14, 1992. Earlier versions were even more strictly limiting. For example, one version required that the defendant prove both prongs of *M'Naghten*, provided that a defendant would be ineligible for the defense if she misused or did not use prescribed medication, and precluded the defendant from claiming an organic disorder as a mental illness. *See* COHEN, *supra* note 64, at 3–4, 6.

90. H.R. 2007, 40th Leg., 2d Sess. (Ariz. 1992).

91. *See* Christopher Johns, *Arizona's Crazy New Insanity Law: What's the Verdict?*, FOR THE DEFENSE (Maricopa County Public Defender's Office, Phoenix, Ariz.), Oct. 1994, at 1, 2 (suggesting that this was the main and perhaps only goal of the bill).

92. *See generally* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM–IV].

93. *Id.* at 281.

population.[94] These people have not lived long enough to have a lengthy history of mental illness. In effect, a longstanding illness rule would virtually exclude this group of defendants from using a defense of insanity.[95]

The original Laura's Law continued to place the burden to prove insanity on the defendant, but purported to change the standard from clear and convincing to "evidence that produces in the mind of the juror a firm belief and conviction of the truth of the defendant's legal insanity."[96] This eschews standards long-recognized by our legal system in favor of a new, heretofore unheard-of standard of proof. Furthermore, the bill offered no suggestions for interpretation or application of this unusual standard.[97]

Perhaps the most problematic aspect of this proposal was the requirement that the jury find the defendant guilty *and* insane.[98] The former title, "not responsible by reason of insanity," was congruent with the statute's ostensible purpose. Society declined to impose criminal responsibility upon persons incapable of exercising free will over their actions. If insanity deprived one of will, then nonresponsibility relieved one of guilt. By amalgamating responsibility with insanity, however, the original Laura's Law challenged the reasons for having an insanity defense to begin with.[99]

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94. MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 125 fig. 4 (1990) (citing 1979 U.S. Department of Justice statistics). *See generally id.* at 124–44.

95. Leslie Cohen argued that this was an unreasonable discrimination that violated the Equal Protection Clauses of both the Arizona and United States Constitutions because there is no discernible government interest in allowing persons with longstanding illness, and not those with a recently onset illness, to assert this defense. COHEN, *supra* note 64, at 3. For example, a 40-year old and an 18-year old both commit murder as a result of their schizophrenia. Both have been diagnosed with schizophrenia since the age of 17. In this case, only the 40-year old, not the 18-year old, would have a defense of insanity. *Id.* Furthermore, this requirement would exclude persons who commit a crime while having their first onset of schizophrenia. Letter from John R. Migliaro, Superintendent, Arizona State Hospital, Arizona Department of Health Services, to Representative Noland 2 (Jan. 16, 1992) (on file with author).

96. H.R. 2007, 40th Leg., 2d Sess. (Ariz. 1992). Earlier versions of the bill sought to elevate the standard to beyond a reasonable doubt. Commentators criticized this rigorous standard as unnecessary, given that the insanity defense is seldom used even under an easier standard and many states either put the burden to prove sanity on the prosecutor or put the burden on the defendant to prove insanity under a less-rigorous preponderance of the evidence standard. *See* COHEN, *supra* note 64, at 5.

97. *See* H.R. 2007.

98. *Id.*

99. "Given that, at least historically, insanity has been equated with the concept that the person is not legally responsible for his actions, the new 'guilty and insane' poses substantial philosophical difficulties for members of the clinical team at [Arizona State Hospital]." Letter from John R. Migliaro to Representative Noland, *supra* note 95.

Not unlike the original Laura's Law, the insanity defense ultimately codified in Arizona is troublesome. Before analyzing Arizona's current insanity defense, it is best to glean a basic understanding of the role of the insanity defense in our society. This requires an examination of the following questions: What are the justifications for punishment in our criminal justice system? Where does an insanity defense fit in this system? Why have an insanity defense at all?

E. Purpose of the Insanity Defense

While the various tests for insanity offer different parameters for establishing an insanity defense, they rest on a common belief that the insanity defense should exist. But why should it exist?[100] Philosophers and legal scholars have dedicated decades of thought and shelves of books to examining this question. For the purposes of this Note, however, a brief overview of the main rationales for the insanity defense should suffice.

Generally, proponents of the insanity defense contend that our legal system is fundamentally based upon notions of morality and blameworthiness.[101] Because of a mental illness, certain individuals who commit would-be crimes simply lack the capacity to be morally blameworthy. The insanity defense is an attempt to define what makes one lack the capacity to be morally and, hence, legally blameworthy. For these individuals who lack the capacity to be morally blameworthy, the principal rationales behind punishment do not apply.

American jurisprudence traditionally recognizes four main theories of punishment: deterrence, restraint, retribution, and rehabilitation.[102] If we believe that our society administers punishment with a goal defined by at least one of these theories, then we must conclude that a legally insane actor may not be

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100. Some argue that the insanity defense should not exist at all, or is valid only in very narrow circumstances. *See, e.g.*, DAVID ABRAHAMSEN, THE PSYCHOLOGY OF CRIME 106 (1967); Abraham L. Halpern, *The Politics of the Insanity Defense*, 14 AM. J. FORENSIC PSYCHIATRY 1 (1993); Stephen Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978). The clear majority of commentators, however, have rejected the abolitionist stance. MELTON ET AL., *supra* note 40, at 187. These commentators view the insanity defense both as a moral necessity and as the only method for debating the meaning of "criminal responsibility." *Id.* "[T]hose criminal defendants who are afflicted by severe mental disorder at the time of the offense...must be afforded the opportunity to argue their lack of blameworthiness or the moral integrity of the law will suffer." *Id.*

101. *See generally* Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194 (1983); Mark A. Woodmanesee, *The Guilty But Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 368–74 (1996).

102. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5 (2d. ed. 1986). Despite the longstanding national recognition of these theories of punishment, the Arizona Legislature omitted rehabilitation as a purpose of punishment in 1978. ARIZ. REV. STAT. ANN. § 13–101 (West Supp. 1997).

punished because, as explained below, such punishment is not justified by any of these theories.

The idea of deterrence is that reprimanding a wrongdoer will discourage other would-be wrongdoers.[103] Implicit in this notion is that potential wrongdoers can identify with the punished wrongdoer and her situation.[104] Since it is unlikely that a sane person will identify with an insane person, the latter will not effectively serve as an example for the former.[105] Deterrence also works, specifically, to keep the punished person from acting illegally again.[106] Here, the assumption that this person could choose how to act to begin with, and could freely choose in the future, is paramount.[107] If insanity has deprived a defendant of free will, then he will be unable to choose not to recommit, and the deterrence rationale will be for naught.[108]

Restraint is recognized as an important goal of punishment; the state has an interest in protecting society by restraining wrongdoers.[109] This interest may be equally important with respect to insanity acquittees as with other convicted felons, given that the two groups have similar rearrest patterns.[110] However, the treatment of insanity defense acquittees in most states may be better suited to meet the goal of restraint than traditional incarceration: an insanity acquittee is committed until she is no longer dangerous while a convict is imprisoned for some fixed time and released without regard to her propensity to reoffend.[111] Hence, while restraint may justify incarcerating an insane person, commitment in a mental health facility would do a better job of ensuring that she is restrained as long as necessary to protect society.

The oldest theory of punishment, retribution, is the notion that an offender should be made to suffer for the harm he inflicted.[112] Retribution is

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103. LAFAVE & SCOTT, *supra* note 102, § 1.5, at 24.

104. ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 13 (1967).

105. *Id.* Goldstein argues that even if a sane person does identify with an insane person, punishing the insane person nonetheless will not serve as a deterrent because "[i]t would be regarded as incalculably cruel and unjust to incarcerate men who are not personally responsible in order to serve social functions." *Id.*

106. LAFAVE & SCOTT, *supra* note 102, § 4.1, at 306 (referring to this theory as "prevention").

107. *See* Weiner, *supra* note 38, at 707 (stating specific deterrence is effective only when a person can understand the criminal code and its potential sanctions).

108. *See* MELTON ET AL., *supra* note 40, at 187 (commenting that society cannot hope "to deter such persons from committing other crimes or to deter others like them from crime, because 'crazy' people are oblivious to the constraints of the real world").

109. LAFAVE & SCOTT, *supra* note 102, § 4.1, at 307.

110. *See* JOHN Q. LA FOND & MARY L. DURHAM, BACK TO THE ASYLUM 135 (1992).

111. LAFAVE & SCOTT, *supra* note 102, § 4.1, at 307; *see also* MELTON ET AL., *supra* note 40, at 187 (stating insanity defense acquittees may need to be restrained, but that this goal is best met through hospitalization, not imprisonment.).

112. LAFAVE & SCOTT, *supra* note 102, § 1.5, at 25.

incommensurate with the reasoning behind the insanity defense that those who commit harmful acts but are not morally blameworthy should not be punished.[113] Hence, retribution is not a legitimate state interest for confining insanity defense acquittees—persons acquitted by reason of insanity are not responsible for their illegal act and should not be punished for it.[114] Seeking revenge on an insane actor would be to ignore a core purpose of criminal law: to punish persons who voluntarily exert harm upon others.[115]

According to the rehabilitation justification for punishment, imposing sanctions upon a convicted criminal can alter his behavior and make him a better community citizen.[116] It is generally recognized, however, that rehabilitation of insanity acquittees is better accomplished through hospitalization than incarceration.[117] Even inmates who have not been adjudicated insane but who

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113. *See* Bonnie, *supra* note 101. Bonnie, who played a key role in formulating the insanity defense tests as proposed by the American Bar Association and the American Psychiatric Association, has argued against sweeping proposals to abolish the insanity defense. *Id.* The basis for his opinion is that

> some defendants afflicted by severe mental disorder who are out of touch with reality and are unable to appreciate the wrongfulness of their acts cannot justly be blamed and do not therefore deserve to be punished. *The insanity defense, in short, is essential to the moral integrity of the criminal law.*

Id. at 194 (emphasis added).

114. State *ex rel.* Collins v. Superior Court of Maricopa County, 150 Ariz. 295, 298, 723 P.2d 644, 647 (1986). The court stated:

> Despite the pull of popular sentiment towards retribution against mentally ill individuals who commit criminal, otherwise punishable acts, the long standing policy of this state has been that persons who are insane are not responsible for criminal conduct and are therefore not subject to punishment.

Id. The court also cited *Jones v. United States*, 463 U.S. 354 (1983), for the proposition that punishment is an illegitimate government interest for confining insanity defense acquittees. The *Jones* Court held that an insanity defense acquittee has not been convicted of a crime and therefore cannot be punished. *Id.* at 369.

115. Our Anglo-American legal tradition is based on the premise that people are capable of free and rational choice, and are therefore morally accountable if they choose to harm. Weiner, *supra* note 38, at 707. Insanity deprives one of free and rational choice. As such, insanity precludes the formation of criminal intent, which is the sine qua non of a determination that a criminal defendant is blameworthy. *Id.*; *see also* MELTON ET AL., *supra* note 40, at 186 ("[S]ome mentally disturbed offenders...are so irrational in their behavior, or so unable to control it—that is, so unlike 'us'—that we feel uncomfortable imposing criminal liability on them.... Society should not feel vengeful toward persons who, at the time of the offense, 'did not know what they were doing' or 'could not help themselves.'").

116. LAFAVE & SCOTT, *supra* note 102, § 4.1, at 307.

117. *Id.*; *see also* Weiner, *supra* note 38, at 707 (commenting that it is not possible to rehabilitate through punishment someone who is unable to appreciate the nature and wrongfulness of her acts).

suffer from a mental illness can receive better treatment in a mental health facility than in prison.[118]

Despite the incongruence between society's justifications for imposing punishment and the legal recognition of insanity, the treatment of insanity acquittees suggests "the deeply felt but seldom acknowledged belief that insanity acquittees deserve something approaching punishment for their actions."[119] This unarticulated but deeply held belief, coupled with the tragic Austin case, drove the passage of Arizona's new insanity defense.

III. ARIZONA'S NEW INSANITY DEFENSE

A. Analyzing "Guilty Except Insane"

On January 1, 1994, Arizona implemented a new, unique insanity defense statute, entitled "guilty except insane."[120] This new test for insanity narrows

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118. *See* Michael J. Churgin, *The Transfer of Inmates to Mental Health Facilities, in* MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 207, 208 (John Monahan & Henry J. Steadman eds., 1983). The fact that inmates may get better mental health treatment in a hospital than in prison is widely recognized; nearly every state and the federal government have enacted special statutory authority providing for the transfer of mentally ill prisoners to mental health facilities. *Id.*

119. Grant Morris, *Acquittal by Reason of Insanity, in* MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE, *supra* note 118, at 65, 107 (quoting Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605, 623 (1981)). Such treatment includes indeterminate commitment and deplorable confinement conditions. *Id.* at 67–80. Poor hospital conditions, however, in no way suggest that an insanity acquittee could be better treated in prison or, for that matter, should be given the double stigmatization of crazy and criminal. *See* MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 68–69 (1994). Indeed, incarceration may even "exacerbate psychiatric conditions or precipitate mental illness in vulnerable individuals." *Id.* at 68.

120. ARIZ. REV. STAT. ANN. § 13–502 (West Supp. 1997). Section A of this statute lays out the test for insanity:

> A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong. A mental disease or defect constituting legal insanity is an affirmative defense. Mental disease or defect does not include disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders. Conditions that do not constitute legal insanity include but are not limited to momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a mental disease or defect or an abnormality that is manifested only by criminal conduct.

Arizona's former insanity defense in several important ways. First, it completely eliminates one prong of the *M'Naghten* test. Second, it limits the term "mental disease or defect," which has always been a prerequisite for a finding of insanity, by excluding a list of undefined disorders. Finally, this new statute enumerates specific conditions that are not sufficient to constitute legal insanity. The following discussion addresses potential problems with these three major changes. The list of problems discussed is unlikely to be exhaustive; indeed, the breadth of such problems suggests that other conflicts surrounding Arizona's new insanity defense are inevitable.

1. Narrowing M'Naghten

Since its articulation in 1843, the *M'Naghten* test established that a defendant is legally insane if he: (1) did not know the nature and quality of the act, *or* (2) did not know it was wrong.[121] Arizona's new statute excludes from consideration the first prong, such that a defendant may be found guilty except insane only "if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong."[122]

This modification was a blatant response to Mark Austin's successful insanity defense, which rested on the first prong of *M'Naghten*. What the Legislature ignored, however, was that Austin's case was the exception, not the rule. Under the old law, the first prong was not easily satisfied; in order to know the nature and quality of one's act, a person merely needed an awareness of the probable results of those acts.[123] The elimination of this already difficult-to-satisfy prong was not based on a reasoned analysis that this 150-year-old standard was remiss, but was instead a knee-jerk reaction to Mark Austin's acquittal.

Arizona's new test may lead to absurd results.[124] Take, for example, the case of a defendant who has killed somebody while afflicted with a mental disease

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Id. § 13–502(A) (West Supp. 1997). Many of the modifications in Laura's Law reflect a direct response to Mark Austin's acquittal. For example, the new statute excludes psychosocial stressors, which played a large role in Austin's trial. Interviews with David Bjorgaard, *supra* note 4. It also excludes momentary, temporary conditions from legal insanity, which was the type claimed by Mark Austin. *Id.* Finally, the new statute eliminates the *M'Naghten* prong of not knowing the nature and quality of the act, which was the prong used by Austin. *Id.*

121. *See supra* text accompanying notes 28–31.

122. ARIZ. REV. STAT. ANN. § 13–502(A).

123. State v. Chavez, 143 Ariz. 238, 239, 693 P.2d 893, 894 (1984) (holding that the words "or if he does not know the probable results of his actions," as instructed to the jury, explains and adequately covers the "nature and quality" prong). The second prong of *M'Naghten* is at least as difficult to satisfy as the first prong, given that a defendant who does not meet the first prong usually will not meet the second. *See* MELTON ET AL., *supra* note 40, at 198.

124. At least one noted insanity defense expert is likely to disagree with this analysis. Richard Bonnie proposed as the test for insanity a showing that the defendant was

or defect not otherwise preempted by Arizona's statute. If she did not know the nature and quality of her actions, if, for instance, she believes that she is chopping into a cantaloupe and not a person's head, but she could recognize that chopping someone's head is wrong, then her insanity defense must fail. If, however, she knew exactly what she was doing, but failed to recognize her act of taking another person's life as wrong, then her insanity defense should succeed. How is the person in the first instance culpable and deserving of blame while the person in the second instance is legally insane? This seems tantamount to selectively punishing different symptoms of mental illness: if your reality testing is lacking but your moral reasoning remains intact, then you are sane, but once your mental disease or defect begins to hinder your ability to recognize your act as wrong, only then will we judge you insane. How, exactly, is one more sane than the other? Arizona's new insanity defense engages in arbitrary linedrawing because of one unfortunate case.

This example may lead to an equally disturbing result. In the above discussion, it was assumed that a defendant who did not know the nature and quality of his act, but who knew the act was wrong, would be found guilty. It is possible, however, for a jury to determine that, in not knowing the nature and quality of his act, the defendant lacked the requisite mens rea to commit the crime.[125] In that case, instead of being shuttled to prison upon a finding of guilt, the defendant is shuffled back to the street upon a finding of not guilty at all. Either result further delays the psychiatric treatment no doubt needed by the defendant. In contrast, a finding of legal insanity would ensure the defendant's treatment in a mental health facility.[126]

In continuing to apply a limited version of the *M'Naghten* test, Arizona's insanity defense suffers from the same criticism originally leveled against

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unable "to appreciate the wrongfulness of his conduct at the time of his offense." Bonnie, *supra* note 101, at 197. This language is drawn from the ALI test; it is essentially the second prong of *M'Naghten* except that the term "appreciate" broadens the test to encompass cases of severe psychotic deterioration as well as affective dimensions of major mental illnesses, such as bipolar disorder (formerly called manic-depressive disorder). *Id.* Bonnie asserted that during the ten years that his clinic conducted forensic evaluations of criminal defendants, only a few cases had involved what he would consider morally compelling claims of criminal irresponsibility, and all of those would be exonerated under his proposed test for insanity. *Id.* Hence, under such an analysis, scholars might not agree with the assertion that Arizona was remiss to eliminate the first prong of *M'Naghten*.

125. Most crimes require a showing of the defendant's state of mind; very few crimes impose strict liability, or liability without fault. LAFAVE & SCOTT, *supra* note 102, § 3.4, at 213. Arizona defines "knowingly" as a person's "aware[ness] or belie[f]" that her conduct is of the nature or circumstance described by a statute defining an offense. ARIZ. REV. STAT. ANN. § 13–105(9)(b) (West Supp. 1997). This definition does not require any knowledge of the unlawfulness of the act or omission. *Id.* This mens rea is similar to the first prong of *M'Naghten*: not to know the nature and quality of an act. Hence, those same facts that would have constituted legal insanity under Arizona's former *M'Naghten* test could now be found to negate the requisite mens rea.

126. *See* ARIZ. REV. STAT. ANN. § 13–3994(A) (West Supp. 1997).

M'Naghten's cognitive test. Specifically, its attempt to separate cognitive and intellectual functioning from the dynamics of the whole person is based on outdated theories of human behavior.[127] As such, it restricts the "insights of modern psychology" by precluding useful expert testimony.[128] Moreover, by limiting the use of the insanity defense only to those persons with major cognitive impairments, the *M'Naghten* test excludes a great majority of persons with serious mental illness.[129] In limiting *M'Naghten's* already overly restrictive test, Arizona's insanity defense compounds this problem, suffering the same infirmities of being too narrow and excusing too few.[130]

2. Limiting "Mental Disease or Defect"

The presence of a mental disease or defect has been a consistent prerequisite for a finding of insanity across all the different tests.[131] The other elements, such as the presence of a defect of reason, a lack of knowledge of the

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127. GOLDSTEIN, *supra* note 104, at 46–47. In enunciating the new *Durham* test, Judge Bazelon cited numerous sources that sharply rejected the *M'Naghten* test as inadequate in light of psychological knowledge. Durham v. United States, 214 F.2d at 869–74 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). Even before the *M'Naghten* test was established, mental health professionals were already dubious of equating insanity with irrationality. *Id.* One of the founders of the American Psychiatric Association stated:

> That the insane mind is not entirely deprived of this power of moral discernment, but in many subjects is perfectly rational, and displays the exercise of a sound and well balanced mind is one of those facts now so well established, that to question it would only betray the height of ignorance and presumption.

Id. at 870 n.22 (quoting ISAAC RAY, MEDICAL JURISPRUDENCE OF INSANITY 32 (1st ed. 1838)).

128. GOLDSTEIN, *supra* note 104, at 46–47.

129. *Id.* The *M'Naghten* test has been criticized as too rigid. MELTON ET AL., *supra* note 40, at 191. A literal interpretation of the test would lead to few acquittals by reason of insanity: "[I]t would excuse only those totally deteriorated, drooling, hopeless psychotics of long-standing, and congenital idiots." *Id.* (quoting GREGORY ZILBOORG, MIND, MEDICINE, AND MAN 273 (1943)).

130. *See* Weiner, *supra* note 38, at 710 (stating critics contend that the *M'Naghten* test is too narrow and excuses too few people).

131. *Id.* at 709. It should be noted, however, that some legal scholars have expressed dissatisfaction with the "mental disease or defect" requirement as relying too heavily upon the medical model and permitting the psychiatric profession excessive discretion in the determination of insanity. *See* MELTON ET AL., *supra* note 40, at 192 (citing United States v. Brawner, 471 F.2d 969, 1029 (D.C. Cir. 1972) (Bazelon, J., concurring)). As a result, legal scholars have proposed insanity tests that do not use the medical model and are therefore free from the "mental disease or defect" requirement, but none of these tests have been adopted. *Id.* (citing nonmedical model insanity defense tests as proposed in MICHAEL MOORE, LAW & PSYCHIATRY 207, 244–45 (1985); David Bazelon, *The Morality of Criminal Law*, 49 UCLA L. REV. 385 (1976); Stephen Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 780 (1985)).

nature or wrongfulness of the act, and an incapacity to refrain from the act, have varied depending upon which definition of insanity is used.[132] Despite its consistent use, the term "mental disease or defect" usually is not clearly defined.[133] Although the term could be understood to incorporate at least all of the mental illnesses of the *Diagnostic and Statistical Manual of Mental Disorders* ("*DSM–IV*"), its meaning in practice is much more restricted.[134]

The law has yet to resolve which mental illnesses constitute a "mental disease or defect."[135] Some courts and state statutes have attempted to set parameters for the term, excluding, for example, illnesses manifested only by mild symptomatology, temporary insanity which appears to last only the duration of the offense, insanity induced by the one-time or short-term use of drugs or alcohol, insanity based upon pathological gambling, and personality disorders.[136] Regardless of what exclusions are imposed, "mental disease or defect" can be generally understood to consist of psychosis and mental retardation.[137] Psychosis is characterized by a gross impairment in reality testing, such that "the person makes incorrect inferences concerning external reality, makes improper evaluations of the accuracy of his or her thoughts and perceptions and continues to make these errors in the face of contrary evidence."[138] Additionally, psychosis, or psychotic disorders,[139] may include delusions and hallucinations.[140] Hence, "mental disease or defect" may be generally understood to include mental

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132. Weiner, *supra* note 38, at 709.

133. *Id.* Generally, however, the legal term "mental disease" is understood to be synonymous with the medical term "mental illness," and the legal term "mental defect" is equated with the medical term "mental retardation." MELTON ET AL., *supra* note 40, at 195.

134. ALEXANDER D. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 142 (1974).

135. *See id.* at 143.

136. MELTON ET AL., *supra* note 40, at 195–96.

137. *See* GOLDSTEIN, *supra* note 104, at 33 (stating most successful insanity defenses are based on psychoses); MELTON ET AL., *supra* note 40, at 188 & n.25 (citing studies indicating that 60% to 90% of defendants acquitted by reason of insanity are diagnosed as psychotic); *id.* at 195 (stating that the legal term "mental defect" is equated with "mental retardation").

138. ARTHUR S. REBER, DICTIONARY OF PSYCHOLOGY 598 (1985).

139. The psychotic disorders include, for example, schizophrenia and delusional disorder. DSM–IV, *supra* note 92, at 273–315.

140. REBER, *supra* note 138, at 598; *see also* DSM–IV, *supra* note 92, at 770. It is important to note that delusions and hallucinations are not always necessary to define a psychotic disorder; the defining features of psychosis differs depending upon which disorder is being considered. *Id.* at 273.

A delusion is a "false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary." *Id.* at 765. In contrast, a hallucination is a "sensory perception that has the compelling sense of reality of a true perception but that occurs without external stimulation of the relevant sensory organ." *Id.* at 767.

retardation and psychosis, the latter rudimentarily understood to consist of a gross impairment in reality testing, sometimes accompanied by delusions and hallucinations.[141]

Arizona's new statute has attempted to define "mental disease or defect" by a process of elimination. According to the statute, mental illnesses that do not support a claim of legal insanity include "disorders that result from acute voluntary intoxication or withdrawal from alcohol or drugs, character defects, psychosexual disorders or impulse control disorders."[142] One key difficulty with these terms is that they do not all comport with medical nomenclature. Certainly, legal terms need not mimic medical ones, but to the extent that mental health professionals are likely to provide expert evaluations and testimony on a particular legal issue, the law should make some effort to define legal terms to facilitate their use by these experts. For instance, "insanity" is not a mental health term, but since *M'Naghten*, the law has made some effort to define it such that professionals of other disciplines could understand its meaning. Thus, under Arizona's former statute, a psychiatrist or psychologist could address the legal test for insanity by opining whether or not the defendant could understand the nature and consequences of his act or knew that the act was wrong. In contrast, Arizona's new insanity statute uses terms not recognized in mental health nomenclature and makes no effort to define them. This is especially troublesome given that these are the terms likely to be debated most vigorously in court: Did the defendant merely have a psychosexual disorder? Was the defendant's impulse control disorder merely a manifestation of an underlying psychotic disorder?

Although not firmly ensconced in mental health terminology, these terms overlap with medical terminology just enough to further confuse their potential meaning. Had the statute made some effort to define them, these terms would be

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141. This is not intended to be a thorough definition. This discussion merely gives an overview of some of the issues that may be considered in an evaluation by a mental health professional. Furthermore, the ensuing discussion in this Note of various mental illnesses is not intended to imply that there is or should be a perfect fit between legal and medical terminology. Rather, such discussion is intended to illustrate some of the challenges facing mental health professionals called to conduct evaluations in insanity defense cases. To the extent that legal terms, such as "mental disease or defect," are not clearly defined by the law, mental health professionals are left to discern their meaning from their own knowledge, that is, from the medical model.

In order to reduce potential confusion between legal and medical nomenclature, scholars of mental health law have suggested that mental health professionals preparing a report or testifying about insanity should focus on symptomatology and not diagnostic labels. MELTON ET AL., *supra* note 40, at 197; *see also* DSM–IV, *supra* note 92, at xxiii ("When the DSM–IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood.... [T]he clinical diagnosis of a DSM–IV mental disorder is not sufficient to establish the existence for legal purposes of a 'mental disorder'...[and] does not imply a specific level of impairment or disability.").

142. ARIZ. REV. STAT. ANN. § 13–502(A) (West Supp. 1997).

recognized legally and mental health professionals would have no need to look elsewhere to divine their meaning. Instead, it is tempting, and perhaps fitting, to look to similar medical terminology to interpret these words. For instance, the Legislature sought to exclude "psychosexual disorders" from mental defects suitable to show insanity.[143] Although the *DSM–IV* does not use the statute's term, it does recognize "Sexual and Gender Identity Disorder."[144] Do all, some, or none of these disorders constitute "psychosexual disorders"? The statute also addresses "impulse control disorders," a term which is included in medical terminology.[145] Did the Arizona Legislature intend its use of this term to be synonymous with the medical use?[146] The *DSM–IV* notes that specific impulse control disorders, such as kleptomania and pyromania, are classified as such only if they are not already classified as part of a presentation of another disorder, such as schizophrenia or a mood disorder.[147] Thus, if a defendant is diagnosed with schizophrenia and manifests impulse control symptoms at the time of the crime, is she precluded from invoking the insanity defense?[148]

This last point raises the issue of co-morbidity.[149] Persons with mental illness are frequently given more than one psychiatric diagnosis.[150] Arizona's statute places the importance of a disorder on its temporal occurrence: the mental disease or defect does not count as insanity if it *resulted from* a list of specified defects and disorders. Thus, it appears that if, at the time he committed a crime, a defendant had a psychosis that would otherwise constitute legal insanity, but this psychosis was the result of his drug withdrawal, then his claim of insanity would be unsuccessful.[151] It is not always clear, however, which came first—the

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143. *Id.*

144. *See* DSM–IV, *supra* note 92, at 493–538.

145. *See id.* at 609–21.

146. The belief that impulse control disorders are insufficient for exoneration due to insanity is not new. In critiquing the ALI's volitional test for insanity, one scholar indicated that the most "clinically compelling" cases of volitional impairment involved the impulse control disorders, such as pyromania and kleptomania. Bonnie, *supra* note 101, at 197. He went on to assert that such disorders involved "severely abnormal compulsions" that should be taken into account during sentencing, but should not constitute legal insanity as they do not comport with society's "shared moral intuition." *Id.*

147. DSM–IV, *supra* note 92, at 609.

148. *See generally* MELTON ET AL., *supra* note 40, at 225 (stating that since a diagnosis of an impulse control disorder is inappropriate if the "misconduct stems from significant cognitive or perceptual distortions (delusions, hallucinations)," such disorders usually will not support a claim of insanity in jurisdictions that employ a cognitive test).

149. This issue was mentioned in Robert L. Hirsh & Dennis R. Murphy, Litigation Strategies: Insanity and Mental Health 10–11 (Nov. 12, 1994) (on file with author).

150. *See generally* DSM–IV, *supra* note 92.

151. It is generally established in most jurisdictions that the insanity defense is not an option for voluntary substance abuse, even if the substance produces psychotic-like effects. MELTON ET AL., *supra* note 40, at 213. If, however, the substance abuse has been

psychosis or the drug problem. Was the defendant psychotic as a result of the drug withdrawal, had he begun using drugs because of the psychosis to begin with, or was there perhaps some other stressor? If these are difficult issues for a mental health professional to parse out, they are undoubtedly even more challenging for a jury to disentangle. Arizona's statute, in its effort to ensure the accountability of persons who voluntarily ingest drugs or alcohol, may impose blame on persons whose prolonged ingestion of such substances has led to an organic disorder. A striking example is that of Korsakoff's syndrome, or alcohol-induced persisting amnestic disorder, in which prolonged, heavy ingestion of alcohol causes a vitamin deficiency, which in turn results in neurological disturbances and memory impairments.[152] Did Arizona really intend to hold blameworthy persons who commit acts while suffering from this syndrome? What if a person has both schizophrenia and Korsakoff's syndrome? Again, the common issue of co-morbidity is a complicated one for both mental health experts and juries alike.

Finally, the list of exceptions to mental disease or defect includes the archaic term "character defects" and fails to imbue it with meaning.[153] Do all mental illnesses arise from "character defects" such that no one is an innocent victim of his mental illness? Although this seems to be an absurd idea, knowledgeable persons have endorsed positions equally unusual.[154] It is possible that the term "character defects" was meant to capture mental illnesses known in medical nomenclature as "personality disorders."[155] Is it reasonable to exclude personality disorders such as paranoid, schizoid, and schizotypal, which may be related to psychotic disorders such as schizophrenia?[156] Moreover, is it reasonable to impose blame upon persons acting under some mental illnesses while withholding blame from persons acting under other illnesses? How do some mental illnesses negate moral accountability while others do not?

3. Limiting Legal Insanity

The third major change to Arizona's test for insanity is the enumeration of specific conditions that are not sufficient to constitute legal insanity, including, but not limited to, "momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred or other motives in a person who does not suffer from a

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prolonged to a point at which it has produced "settled insanity," that is, a "bona fide organic mental disease or defect," then some jurisdictions may recognize an insanity defense. *Id.*

152. DSM–IV, *supra* note 92, at 161–62.

153. ARIZ. REV. STAT. ANN. § 13–502(A) (West Supp. 1997).

154. For example, psychiatrist Thomas Szasz asserts that mental illness is a myth and a defense such as insanity serves only to abnegate responsibility for one's conduct. Jonas Robitscher & Andrew Ky Hayners, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 38–40 (1982) (citing THOMAS SZASZ, IDEOLOGY AND INSANITY 111 (1970); THOMAS SZASZ, THE MYTH OF MENTAL ILLNESS 262 (1974)).

155. *See* DSM–IV, *supra* note 92, at 629–673.

156. *See id.* at 632.

mental disease or defect or an abnormality that is manifested only by criminal conduct."[157] These exclusions are troublesome for several reasons.

First, it appears that the exception "momentary, temporary conditions arising from the pressure of the circumstances" was developed specifically to prevent defendants from succeeding by claiming a brief reactive psychosis, which was part of Mark Austin's defense.[158] If this was indeed the intent, then it has failed. Experts testified that Austin was suffering from a brief reactive psychosis,[159] now called brief psychotic disorder.[160] This diagnosis is given for a temporary but not momentary condition:[161] an episode must last for at least one day but less than one month.[162] Hence, given that Austin's condition was only temporary, and not momentary, Arizona's new insanity defense would not exclude it as insufficient to constitute legal insanity. Nonetheless, this term will probably preclude the use of the insanity defense by persons whose period of insanity is indeed momentary—perhaps lasting only as long as it takes to commit the crime.

The statute next excludes "moral decadence,"[163] which, like the term "character defects" discussed above, suffers from antiquity and lack of meaning. Moreover, it appears that this entire list of conditions not constituting insanity—"momentary, temporary conditions arising from the pressure of the circumstances, moral decadence, depravity or passion growing out of anger, jealousy, revenge, hatred, or other motives *in a person who does not suffer from a mental disease or defect*"[164]—is superfluous. The basic insanity test articulated in the first sentence of the statute provides that a defendant must suffer from a mental disease or defect.[165] If the defendant cannot be said to suffer from a mental disease or defect, then the basic test for legal insanity establishes that he is not legally insane, and it is therefore of no concern how his depravity or passion arose.[166]

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157. ARIZ. REV. STAT. ANN. § 13–502(A).

158. Representative Patti Noland commented that a main motive for revising the statute was to preclude the use of the insanity defense in cases where brief reactive psychosis is alleged. COMMITTEE NOTES, *supra* note 85, at 3.

159. Pedersen, *supra* note 8, at 2C.

160. *See* DSM–IV, *supra* note 92, at 302.

161. This point was raised in Hirsh & Murphy, *supra* note 149, at 11.

162. DSM–IV, *supra* note 92, at 302–04.

163. ARIZ. REV. STAT. ANN. § 13–502(A) (West Supp. 1997).

164. *Id.* (emphasis added).

165. "A person may be found guilty except insane if at the time of the commission of the criminal act the person was afflicted with a mental disease or defect of such severity that the person did not know the criminal act was wrong." *Id.*

166. *Id.* It seems that this language was, at best, an attempt to ensure that behavior that may have sufficed as insanity under the "irresistible impulse" test or ALI "volitional" test would not suffice in Arizona. *See supra* Part II.A. Emotions such as anger, jealousy, and fear may account for a large proportion of homicides and other assaultive crimes. Bonnie, *supra* note 101, at 196. Indeed, it is not uncommon to say someone was "out of her mind" when she committed a crime, but this is not what the law means or should mean by "insanity." *Id.*

The final phrase, which excludes "an abnormality that is manifested only by criminal conduct" as insufficient to constitute legal insanity, is less unusual than the other exceptions. As early as the 1950s, the American Law Institute decided to exclude "an abnormality manifested only by repeated criminal or otherwise anti-social conduct" from its recommended insanity defense.[167] This exception alleviated a perceived problem with the *Durham* test, under which some courts accepted a diagnosis of "sociopath" to excuse a criminal defendant from responsibility.[168] While the term "sociopath" has long since lost all official meaning, new psychiatric nomenclature is used to describe repeated or chronic antisocial behavior.[169] Hence, Arizona's statute is effective insofar as it seeks to exclude antisocial personality disorder and conduct disorder from conditions sufficient to constitute insanity.

B. Unresolved Question of Collateral Rights[170]

1. Language and Intent

In addition to the dilemmas surrounding application and interpretation of Arizona's insanity defense statute, its very title is problematic. Arizona's former insanity defense was titled "not responsible for criminal conduct by reason of insanity."[171] With the new revisions of Laura's Law came the new title, "guilty except insane" ("GEI").[172] This title itself begs the question: Is a verdict of GEI considered a conviction for the purposes of the deprivation of collateral rights?[173]

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167. Weiner, *supra* note 38, at 711. As of the American Law Institute's annual meeting of 1995, this has remained an exception to the Model Penal Code definition of a mental disease or defect sufficient to overcome criminal responsibility. *See* MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

168. Weiner, *supra* note 38, at 712.

169. *Id.* For example, the term "Antisocial Personality Disorder" is used to describe "a pervasive pattern of disregard for, and violation of, the rights of others." DSM–IV, *supra* note 92, at 645–50. When such behavior is manifested in an individual under 18-years old, it is called "Conduct Disorder." *Id.* at 85–91. If the antisocial behavior is not due to a mental disorder, it may be classified as an adult, child, or adolescent antisocial behavior under "Additional Conditions That May Be a Focus of Clinical Attention." *Id.* at 683–84.

170. A conviction can result in the deprivation of numerous collateral rights, such as social security benefits, emergency public assistance, food stamps, and welfare. *See* 42 U.S.C. § 402(x) (1994). In addition, the convict may be ineligible to receive veteran's benefits, to serve on a jury, or to obtain a firearms license. See 38 U.S.C. § 6105 (1994), 28 U.S.C. § 1865(b)(5) (1994), and 18 U.S.C. § 922(g) (1994), respectively.

171. ARIZ. REV. STAT. ANN. § 13–502 (West 1989).

172. *Id.* § 13–502 (West Supp. 1997).

173. This has already proven problematic in Arizona; the author is aware of one case in which a person with a GEI verdict had to argue that it was not a conviction, and, therefore, he should continue to receive veteran's benefits after his release from the state mental health hospital. Interviews with David Bjorgaard, *supra* note 4.

Although neither the Arizona Legislature nor case law have answered this question, several considerations lead to the conclusion that GEI is not a conviction, and therefore does not deprive a person of his civil rights. First, discussions during the hearings before the House of Representatives imply that the statute title was changed from the proposed title of "guilty but insane" to the ultimately adopted "guilty except insane" to ensure that such a verdict would not be considered a conviction.[174] During these hearings, Maureen O'Connor, board member of the Alliance for the Mentally Ill of Southern Arizona, argued persuasively for the current title:

> The "guilty but insane verdict" is a contradiction in terms and one cannot be both guilty from a legal standpoint and insane from a legal standpoint. It would be preferable to leave the current language [of "not responsible for criminal conduct by reason of insanity"] or to substitute "guilty except for insanity," which makes it clear that it is a not-guilty verdict.[175]

After adopting the GEI title instead of "guilty but insane," the Arizona Legislature evinced recognition of the problem this new verdict would pose by specifically providing that GEI is not a criminal conviction for the purpose of sentence enhancement.[176] In addition, the Arizona statute providing for an appeal by a defendant states that "[a]n appeal may be taken by the defendant only from...[a] final judgment of conviction *or* verdict of guilty except insane."[177] The fact that the Legislature set the terms out separately, rather than including a verdict of GEI within the term "conviction," suggests its intent to clarify that a GEI

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174. *See* COMMITTEE NOTES, *supra* note 85, at 3 (Senator Noland stated that the name had been changed from "guilty but insane" to "guilty except insane."). Maryland had changed its insanity defense to "guilty but insane," which it treated as a conviction for the purpose of the deprivation of collateral rights. *See* Pouncey v. Maryland, 465 A.2d 475, 478 (Md. Ct. Spec. App. 1983). One court stated:

> "[A] finding of guilty, but insane simply relieves the defendant of liability for punishment under the criminal law. It does not relieve the defendant of many other collateral consequences of a conviction of a crime, such as being prohibited from voting or serving on a jury, or from acquiring various government contracts or licenses, or being inhibited from acquiring future employment, in addition to the social stigma of a criminal conviction."

In re George V., 589 A.2d 521, 522 (Md. Ct. Spec. App. 1991).

175. COMMITTEE NOTES, *supra* note 85, at 5. It should also be noted that the word "except" as used in legal terminology means "excluded from." *See* Butler v. Engel, 68 N.W.2d 226, 239 (Minn. 1994) (holding the term "except" in a traffic statute excluded municipalities from state statute); State v. Atencio, 513 P.2d 1266, 1267 (N.M. Ct. App. 1973) (holding the term "except" in a narcotics statute meant "exclude"). "Except" is defined as "[b]ut for, only for, not including." BLACK'S LAW DICTIONARY 559 (6th ed. 1990).

176. "A guilty except insane verdict is not a criminal conviction for sentencing enhancement purposes...." ARIZ. REV. STAT. ANN. § 13–502(E) (West Supp. 1997).

177. *Id.* § 13–4033(A)(1) (West Supp. 1997) (emphasis added).

verdict is not a conviction. Furthermore, there is no record of legislative debates surrounding the effect of a GEI verdict on collateral rights. The Legislature's failure to address this issue may have been an oversight, or it may have been an intentional omission based upon a common understanding that GEI is not a conviction.

Additional considerations support the conclusion that GEI is not a conviction for the purpose of the deprivation of collateral rights. Specifically, GEI remains an affirmative defense,[178] which assumes a charge to be true but excuses or justifies the conduct.[179] Such legal justification or excuse for the conduct essentially precludes the defendant from being convicted of the crime.

Perhaps the most persuasive consideration indicating that GEI should not be considered a conviction is the intent of the proponents of Laura's Law to narrow the use of the insanity defense to preclude people like Mark Austin from successfully asserting it.[180] Neither these proponents nor the Arizona Legislature abandoned the traditional justification for the insanity defense: the recognition that our criminal justice system will not hold certain people morally blameworthy.[181]

When Laura's Law was under consideration, several state agencies expressed their opinions about the proposed bill. The following was opined on behalf of the Arizona Center for Law in the Public Interest:

> The not guilty by reason of insanity defense exists because our society does not believe it is fair to punish persons for acts they do not know are wrong because of their illness. For example, we do not incarcerate a person who causes an automobile accident when suffering from a heart attack, nor do we imprison an epileptic who damages another's personal property during a seizure. Similarly, if a person by reason of mental disease or defect cannot exercise "free will" in committing a crime and "knows not what s/he does" our society believes that person should receive treatment, not punishment.[182]

2. Post-verdict Confinement

Further indicia that Arizona's new insanity defense statute continues to recognize that a finding of GEI is inconsistent with the traditional justifications for punishment is the type of confinement provided for persons found GEI. Specifically, once a person is determined to be GEI, he is committed to a state mental health facility for treatment.[183] He is required to remain in the mental

178. *Id.* § 13–502(A) (West Supp. 1997).

179. State v. Cohen, 568 So. 2d 49, 51 (Fla. 1990); People v. Bolden, 217 Cal. App. 3d 1591, 1601 (1990).

180. *See supra* Parts I.B, II.D.

181. *See supra* Part II.E.

182. COHEN, *supra* note 64, at 1.

183. ARIZ. REV. STAT. ANN. § 13–3994(A) (West Supp. 1997).

health facility until he can prove by clear and convincing evidence that he no longer suffers from a mental disease or defect.[184] This law is therefore clearly designed to ensure adequate mental health treatment for a person found GEI. Moreover, it in no way attempts to punish a person so adjudicated by committing him to the mental health facility for longer than necessary or having him serve the remainder of his sentence in prison.[185]

Arizona's commitment procedure for persons found GEI differs markedly from some states that have implemented a guilty but mentally ill ("GBMI") defense in an effort to curb the number of insanity acquittals and to provide greater protection to the public.[186] Most states that have adopted GBMI treat it as an alternative verdict, such that a jury may find the defendant guilty, not guilty, not

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184. *Id.* § 13–3994(C)(1), (F)(2)–(3) (West Supp. 1997). A brief description of the statutory requirements will show that this process is actually rather complicated. Once a defendant has been found GEI, the trial court must make a finding of whether the act the defendant committed involved death, physical injury, or threat of death or physical injury. *Id.* § 13–502(D) (West Supp. 1997). If such a finding is made, then the person is placed under the jurisdiction of the Psychiatric Security Review Board (PSRB) for the duration of the sentence that would have been imposed had the person been found guilty. *Id.* § 13–3994(E) (West Supp. 1997); *see id.* § 31–501 (West Supp. 1997) (delineating members, terms, and compensation of PSRB). At regular release hearings, the PSRB may make one of three determinations. First, the PSRB may find that the person continues to suffer from a mental disease or defect and is dangerous, in which case the person remains committed to the mental health facility. *Id.* § 13–3994(F)(1) (West Supp. 1997). Second, if the person proves by clear and convincing evidence that he no longer suffers from a mental disease or defect, the PSRB must order his release. *Id.* § 13–3994(F)(2). Third, if the PSRB finds that the person still suffers from a mental disease or defect or that the disease or defect is in stable remission but the person is no longer dangerous, then the PSRB shall order the person's conditional release. *Id.* § 13–3994(F)(3). Whether the person is fully or conditionally released, the PSRB continues to maintain jurisdiction over him as discussed above, and may return him to a mental health facility if deemed necessary. *Id.* § 13–3994(L) (West Supp. 1997).

The process is different if the court finds that the act the person committed did not result in death, physical injury, or threat of death or physical injury. *Id.* § 13–3994(B) (West Supp. 1997). In this case, the person is entitled to release if he proves by clear and convincing evidence *to the court* (not to the PSRB) that he no longer suffers from a mental disease or defect. *Id.* § 13–3994(C)(1). If, however, the court determines that the person continues to suffer from a mental disease or defect, and may present a threat of danger to himself or others, is gravely disabled, or is persistently or acutely disabled, then the court shall order the county attorney to institute civil commitment proceedings. *Id.* § 13–3994(C)(2) (West Supp. 1997). In either event, the jurisdiction of the PSRB is not invoked.

For an example of the use of a PSRB with a successful history, see OR. REV. STAT. § 161.327 (1995).

185. ARIZ. REV. STAT. ANN. § 13–3994(C)(1), (F)(2)–(3).

186. *See* MELTON ET AL., *supra* note 40, at 214; *see, e.g.*, People v. Ramsey, 375 N.W.2d 297, 301 (Mich. 1985) ("The major purpose in creating the guilty but mentally ill verdict is...to limit the number of persons who, in the eyes of the Legislature, were improperly being relieved of all criminal responsibility by way of the insanity verdict.").

guilty by reason of insanity, or GBMI.[187] In contrast, Arizona's GEI verdict completely replaces the former not guilty by reason of insanity defense, which specifically provided for an acquittal upon a finding of insanity.

The difference between GBMI and GEI does not end here. Most states provide that upon a finding of GBMI, a defendant is sentenced to prison, where he may or may not receive mental health treatment.[188] The incarceration of individuals adjudicated GBMI indicates states that adopted this compromise verdict viewed it as consistent with the purposes of punishment.[189] In retaining the not guilty by reason of insanity ("NGRI") verdict, these states gave juries the option of forgoing incarceration of individuals for whom the purposes of punishment did not apply. In contrast, Arizona completely eliminated the NGRI option while retaining its policy of not imposing blame upon persons found insane by refusing to incarcerate defendants adjudicated GEI. By providing for mental health treatment instead of incarceration, Arizona has continued to recognize that a person judged legally insane is not responsible for his action and therefore should not be punished. If a person is not responsible and not deserving of punishment, it logically follows that he should not be punished in the form of the deprivation of collateral rights, which is merely an extension of punishment.

IV. CONCLUSION

The passage of Arizona's new insanity defense was an impressive feat engendered by two parents aggrieved by the senseless death of their daughter and effectuated by a society outraged by the apparent injustice of the killer's freedom. It is also a travesty for a society that has long recognized persons should not be held responsible for acts committed because of mental illness. Just shy of eliminating the insanity defense altogether, Arizona has enacted a statute that ignores empirical research and undermines traditional criminal law jurisprudence. The result is insane.

Arizona has completely eliminated one prong of *M'Naghten*, and in retaining the second prong, deserves the criticism *M'Naghten* received over a century ago. Arizona has adopted archaic, meaningless terms without any attempt to imbue them with meaning. This is confusing for all: for mental health experts asked to provide evaluation and testimony, for lawyers deciding how to present their cases, and for judges ruling on admissibility of evidence. If this statute is confusing for those who spend their lives in the legal arena, it is unintelligible to

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187. MELTON ET AL., *supra* note 40, at 214.

188. *Id.* at 215 (Although some states implement judicial instructions that inform the jury that a person found GBMI will receive treatment, many such persons do not actually get much-needed treatment and courts and legislatures have been chary of rectifying this situation.).

189. *See, e.g.*, United States v. Lane, 815 F.2d 1106, 1107 (7th Cir. 1987) (referring to a GBMI verdict as a conviction without further comment).

the public, including the jury, who must somehow apply this statute to the facts of a case.

Regardless of any effect it may have in the criminal justice system in Arizona, this new insanity defense proves that emotional responses to challenging cases can result in bad law. Bad law undermines the integrity of our criminal justice system and calls into question the morality upon which this system is based.