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INSANITY AND RELATED ISSUES

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The insanity defense has long been controversial, and thus it is not surprising that efforts to "reform" the defense periodically surface. The acquittal of John Hinckley has spawned another period of reexamination. United States v. Hinckley, Crim. No. 81-306 (D.D.C. June 21, 1982). The American Psychiatric Association, the National Commission on the Insanity Defense, and the American Bar Association have all taken positions on the issue. Moreover, legislatures have responded with a number of statutory revisions. This article surveys these "reform" efforts, as well as several related evidentiary issues. In addition, diminished capacity and competency to stand trial are examined.

At the outset, it seems helpful to acknowledge the public perception of the insanity defense because that perception undoubtedly influences the legislative response. One commentator, citing the findings of the National Commission on the Insanity Defense, wrote:

> The commission report found that the public's perceptions of the insanity defense are largely formed by selective news reporting, and it sought to separate the myth from the reality. For example, the Commission discovered that, contrary to public perceptions, the insanity defense is rarely used and is infrequently successful. It noted, too, that the public believes "most insanity defendants are murderers who commit random acts of violence," although in reality most insanity defendants are charged with committing nonviolent crimes. Further, most acquittees are confined for long periods of time. The Commission also found that the well-publicized case is the exception, not the rule. In fact, "[m]ost insanity cases relfect agreement among the experts, the defense, and the prosecution." Few go to trial and even fewer go to a jury. Wexler, *Redefining the Insanity Problem,* 53 Geo. Wash. L. Rev. 528, 537-38 (1985), *citing* National Mental Health Association, Myths and Realities: A Report of the National Commission on the Insanity Defense (1983).

INSANITY TESTS

Insanity raises a legal, not medical, issue: whether a defendant, due to his mental condition, should be held criminally responsible for his conduct. Various legal tests have been used to define insanity.

Under the M'Naghten rule (1843), sometimes known as the "right-wrong" test, insanity exists if:

> [A]t 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. M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

Many jurisdictions supplemented the M'Naghten test, which focuses on cognition, with a volitional or control test. This test exonerates a defendant who, due to his mental condition, cannot control his conduct even though he knew what he was doing and knew it was wrong. This test is often referred to as the "irresistible impulse" test. That term, however, is misleading because it suggests that a *sudden* impulse is required, which is usually not the case. W. LaFave & A. Scott, Criminal Law 284 (1972)("[I]n practice the test is broader than the misleading 'irresistible impulse' language suggests, for the jury is not ordinarily told that the defendant must have acted upon a sudden impulse or that his acts must have been totally irresistible.").

Durham Test

The M'Naghten and "irresistible impulse" tests represented the principal tests for insanity until the 1950s. In that decade two noteworthy changes were proposed. In 1954, the famous *Durham* decision, rejected both M'Naghten and its volitional supplement and in their place substituted a "product test." Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). According to the D.C. Circuit, an "accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874-75. After numerous attempts to clarify the *Durham* rule, the D.C. Circuit overruled *Durham* in 1972. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). *See generally Symposium, United States v. Brawner,* 1973 Wash. U.L.Q. 17-154.

Model Penal Code Test

Soon after the *Durham* case had been decided, the drafters of the Model Penal Code (MPC) proposed a different insanity 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

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conduct or to conform his conduct to the requirements of law." Model Penal Code §4.01 (Proposed Official Draft 1962). The MPC test can be described as a "modernized version of the M'Naghten and irresistible impulse tests." W. LaFave & A. Scott, Criminal Law 292 (1972). Although the MPC test contains the cognitive and volitional prongs of the earlier tests, both prongs are modified by the term "substantial." Thus, unlike the earlier tests, complete cognitive incapacity or complete lack of control is not required under the MPC test. The MPC test eventually became the majority rule in this country. *See* P. Low, J. Jeffries & R. Bonnie, Criminal Law 659 (1982) ("The Model Penal Code test has been adopted . . . in more than half of the states; it is also used in the federal courts.").

Nevertheless, the MPC test, like the M'Naghten and irresistible impulse tests, was the subject of criticism. Dissatisfaction with the insanity defense remained. *See* Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law,* 51 S. Cal. L. Rev. 527, 640-45 (1978). The successful use of the insanity defense by John Hinckley in his trial for the attempted assassination of President Reagan increased this dissatisfaction. Consequently, several changes in the insanity defense have been proposed or adopted. Some of the proposed changes, such as the guilty but mentally ill verdict, predated the *Hinckley* decision.

Abolition

A few jurisdictions have abolished the insanity defense. *E.g.,* Idaho Code § 18-207 (Supp. 1985); Mont. Code Ann. § 46-14-102 (1985); Utah Code Ann. § 76-2-305(1)(Supp. 1985). These statutes permit evidence of mental abnormality only to negate the mens rea of the charged offense. For example, the Montana statute provides: "Evidence of mental disease or defect is not admissible in a trial on the merits unless the defendant . . . files a written notice of his purpose to rely on a mental disease or defect to prove that he did not have a particular state of mind which is an essential element of the offense charged." Mont. Code. Ann. § 46-14-102 (1983). *See generally* Comment, *After Abolition: The Present State of the Insanity Defense in Montana,* 45 Mont. L. Rev. 133 (1984).

The ABA Mental Health Standards reject the abolitionist position on policy grounds:

> Questions regarding the defense are moral rather than scientific questions. . . . To label as criminals those so severely disturbed that they could not appreciate the wrongfulness of their acts offends the moral tenets of the criminal law and the moral intuitions of the community. This approach would mean that judges and juries would be forced either to return convictions which would be morally obtuse or to acquit in outright defiance of the law. The abolitionist approach . . . would prevent the exercise of humane moral judgement — and it is that exercise which has distinguished our criminal law heritage. ABA, Criminal Justice Mental Health Standards 7-263 to -264 (1st Tent. Draft 1983).

For a discussion of the policy issues involved in the abolition of the insanity defense, compare N. Morris, Madness and the Criminal Law (1982) (favoring abolition), with Morse, *Excusing the Crazy: The Insanity Defense Reconsidered,* 58 S. Cal. L. Rev. 777 (1985) (favoring retention).

The commentary to the ABA Standards also questioned the constitutionality of abolition. ABA Standards, *supra,* at 7-262 ("This issue of basic fairness may be of constitutional dimension."). Nevertheless, the Montana Supreme Court has upheld the constitutionality of the Montana statute. State v. Korell, 690 P.2d 992 (Mont. 1984).

Burden of Proof

Traditionally, the initial burden of production or going forward with evidence of insanity has been placed on the defendant, either because insanity was explicitly recognized as an affirmative defense or because of the presumption of sanity. The burden of persuasion, however, was different. Some jurisdictions placed this burden on the defendant, while others placed it on the prosecution. In 1972 a leading text could make the following statement: "In about half of the states and the federal government, this burden rests with prosecution; in these jurisdictions the prosecution must then proceed to prove responsibility beyond a reasonable doubt." W. LaFave & A. Scott, Criminal Law 313 (1972).

Recent statutory changes have altered this picture. They restrict the insanity defense by allocating the burden of persuasion to the defendant. In some jurisdictions, the standard of proof placed on the defendant is a preponderance of evidence. *E.g.* Ind. Code Ann. § 35-41-4-1(b) (West Supp. 1985); Iowa Code Ann. § 701.4 (West Supp. 1985); 18 Pa. Cons. Stat. Ann. § 315(a) (Purdon 1983). Other jurisdictions require the defendant to establish insanity by clear and convincing evidence. *E.g.,* 18 U.S.C.A. § 20 (b) (West Supp. 1985); Ariz. Rev. Stat. Ann. § 13-502(B) (Supp. 1985); S.D. Codified Laws Ann. § 22-5-10 (Supp. 1985).

The constitutionality of allocating to the defense the burden of persuasion on insanity has been upheld by the Supreme Court. In Leland v. Oregon, 343 U.S. 790 (1952), the Court upheld a state rule allocating the burden of persuasion to the defendant. Nevertheless, the Court's later decision in Mullaney v. Wilbur, 421 U.S. 684 (1975), although not involving the insanity defense, cast some doubt on the continued vitality of *Leland.* However, when the Court was presented with the insanity issue in a subsequent case, it dismissed for want of a substantial federal question, a disposition which is accorded precedential weight. Rivera v. State, 351 A.2d 561 (Del. 1976), *appeal dismissed,* 429 U.S. 877 (1976). *See also* Krzeminski v. Perini, 614 F.2d 121 (6th Cir.), *cert. denied,* 449 U.S. 866 (1980); C. McCormick, Evidence 990 (3d ed. 1984). If, however, insanity is treated under state law as an element of a crime, due process precludes the state from allocating the burden of persuasion to the defendant. Duffy v. Foltz, 772 F.2d 1271, 1277 (6th Cir. 1985) ("[W]e conclude that . . . sanity [under Michigan law] was an element of the crime for federal due process purposes.").

Rejection of the Volitional Test

Another recent change involves the rejection of the volitional or irresistible impulse prong of the insanity defense. For example, the ABA Mental Health Standards provide that a person "is not responsible for criminal conduct if, at the time of such conduct, and as a result of mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct." ABA Standard 7-6.1 (1984). This test does not recognize lack of control as a defense. The principal argument for this

change is the lack of a

> scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of that capacity. There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment. Bonnie, *The Moral Basis of the Insanity Defense,* 69 A.B.A.J. 194, 196 (1983).

This position is supported by the American Psychiatric Association, which concluded that the "line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk." *American Psychiatric Association Statement on the Insanity Defense,* 140 Am. J. Psychiatry 681, 685 (1983). The Fifth Circuit adopted the ABA approach soon after it was proposed. United States v. Lyons, 731 F.2d 243, 248-49 (5th Cir.), *cert. denied,* 105 S.Ct. 323 (1984).

In October 1984, Congress enacted the first federal insanity statute. This statute provides:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his acts. 18 U.S.C.A. § 20(a) (West Supp. 1985).

Like the ABA test, the federal test eliminates the volitional prong of the insanity defense; thus, whether or not a defendant can control his conduct is no longer relevant. The federal statute does, however, differ from the ABA proposal in one important respect. Under the ABA proposal, once insanity is raised the prosecution has the burden of proving the defendant sane beyond a reasonable doubt. ABA Standard 7-6.9 (1984). Under the federal statute, the defendant has the burden of proving insanity by clear and convincing evidence. 18 U.S.C.A. § 20(b) (West Supp. 1985).

Similarly, California has returned to the M'Naghten rule. For over a century California followed this rule. In 1978, however, the California Supreme Court adopted the MPC test. People v. Drew, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978). In 1982 the voters adopted an initiative measure, known as Proposition 8, which established a statutory definition of insanity. Cal. Penal Code § 25(b) (West 1986). This provision reinstated the M'Naghten rule. *See* People v. Skinner, 39 Cal. 3d 765, 704 P.2d 752, 217 Cal. Rptr. 685 (1985).

Guilty But Mentally Ill

Another "reform" effort involves the adoption of a "guilty but mentally ill" (GBMI) verdict. This verdict is an alternative to a not guilty by reason of insanity (NGRI) verdict; it does not replace the NGRI verdict. *E.g.,* Alaska Stat. § 12.47.030 (Supp. 1985); Del. Code Ann. tit. 11, § 408 (Supp. 1984); Ga. Code Ann. § 17-7-131 (Supp. 1985); Ill. Ann. Stat. ch. 38 § 115-2 (Smith-Hurd Supp. 1985); Ind. Code Ann. §§ 35-36-2-3 (West Supp. 1985); Ky. Rev. Stat. § 504.120 (Supp. 1984); Mich. Comp. Laws Ann. § 768.36 (1982); N.M. Stat. Ann. §§ 31-9-3, 31-9-4 (1984); 18 Pa. Cons. Stat. Ann. § 314 (Purdon 1983); S.D. Codified Laws Ann. § 23A-7-2 (Supp. 1985).

In 1975 Michigan was the first state to adopt this verdict. Studies of the GBMI verdict indicate that this verdict has not had the effect its proponents anticipated, *i.e.,* a substantial decrease in the number of NGRI acquittals. One study reported: "An empirical analysis of the GBMI verdict indicates that the verdict is not functioning as expected. The NGRI verdict continues to be used in Michigan courts." Project, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study,* 16 U. Mich. J.L. Ref. 77, 104 (1982). This study also found that "most defendants found GBMI would probably have received guilty verdicts in the absence of the GBMI statute" and "although the verdict was designed for jury trials, over 60% of those defendants found GBMI have come through plea-bargains and another 20% have come from bench trials." *Id.* Another commentator has stated:

> The guilty but mentally [ill] verdict does not seem to be achieving its intended goals. It has not substantially reduced insanity acquittals nor enhanced public safety. It has not appreciably improved treatment for mentally ill offenders and has failed to affect expert involvement in criminal adjudications. . . .
>
> At the same time, guilty but mentally ill legislation has injected a misleading and confusing element into criminal adjudications. . . . Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come,* 53 Geo. Wash. L. Rev. 494, 517 (1985).

See also McGraw, Farthing-Capowich & Keilitz, *The "Guilty But Mentally Ill" Plea and Verdict: Current State of the Knowledge,* 30 Vill. L. Rev. 117 (1985); Britton & Bennett, *Adopt Guilty But Mentally Ill? — No!,* 15 U. Tol. L. Rev. 203 (1983); Fentiman, *"Guilty But Mentally Ill": The Real Verdict Is Guilty,* 26 B.C. L. Rev. 601 (1985); Stelzner & Piatt, *The Guilty But Mentally Ill Verdict and Plea in New Mexico,* 13 N.M.L. Rev. 99 (1983); Note, *Criminal Responsibility: Changes in the Insanity Defense and the "Guilty But Mentally Ill" Response,* 21 Washburn L.J. 515 (1982); Note, *The Guilty But Mentally Ill Verdict and Due Process,* 92 Yale L.J. 475 (1983).

Constitutional challenges to GBMI legislation have been unsuccessful. *See* Hart v. State, 702 P.2d 651 (Alaska App. 1985); Keener v. State, 254 Ga. 699, 334 S.E.2d 175 (1985); People v. Ramsey, 422 Mich. 500, 375 N.W.2d 297 (1985).

EVIDENTIARY ISSUES

Expert Testimony

In some cases the qualifications of an expert to testify in support of an insanity defense has been an issue. For example, in Jenkins v. United States, 307 F.2d 637 (D.C. Cir. 1962), the trial court held that a psychologist was not competent to give an opinion concerning a mental disease or defect, apparently on the grounds that psychologists lack medical training. The D.C. Circuit reversed. According to the court, many psychologists, due to their training and experience, would not be qualified to testify concerning a mental disease or defect. Other psychologists, however, have extensive training and experience in the diagnosis and treatment of mental disorders and would therefore be qualified. Thus, it is not the title of "psychologist" that is determinative but rather the nature and extent of the individual psychologist's knowledge. *Id.* at 644-45.

The ABA Standards go beyond the traditional qualification rules and require more stringent standards, including minimum clinical educational and training re-

quirements. ABA Standard 7-3.11(a) (1984). In addition, an expert is not permitted to testify concerning a person's mental condtion unless he has conducted a thorough evaluation, including a personal interview. ABA Standard 7-3.11(a) (3) (1984).

See generally Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation,* 66 Va. L. Rev. 427 (1980); Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations,* 63 Mich. L. Rev. 1335 (1965); Morris, *Mental Health Professionals in the Criminal Justice Process: The A.B.A. Standards,* 21 Crim. L. Bull. 321 (1985); Wells, *The* 1984 A.B.A. *Criminal Justice Mental Health Standards and the Expert Witness: New Therapy for a Troubled Relationship?,* 13 W. St. U.L. Rev. 79 (1985).

Ultimate Issue Rule

Another evidentiary issue that has caused difficulty is the so-called "ultimate issue" rule. In other words, may an expert testify that the defendant was insane or knew the wrongfulness of his conduct at the time of the offense? Such an opinion might be excluded because it involves an "ultimate issue" in the case. For example, Federal Evidence Rule 704(b) provides:

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

According to the legislative history, this provision was intended, in part, "to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact." S. Rep. No. 225, 98th Cong., 2d Sess. 230, *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3412.

The underlying problem with such an opinion, however, is not that it embraces an "ultimate issue" but rather that it is beyond the witness' expertise. Undoubtedly, a psychiatrist or psychologist who has spent years diagnosing and treating mental disorders can provide a jury with much helpful information about the origin and effects of a mental disorder. Nevertheless, insanity involves a legal (moral), not a medical, issue, and therefore, no matter how the test for insanity is phrased, a psychiatrist or psychologist is no more qualified than any other person to give an opinion about whether a particular defendant's mental condition statisfies the legal test for insanity. *See also* ABA Standard 7-6.6 (1984).

For general references on the insanity defense, see W. LaFave & A. Scott, Criminal Law §§ 36-38 (1972); R. Perkins & R. Boyce, Criminal Law 950-95 (3d ed. 1982); 2 P. Robinson, Criminal Law Defenses § 173 (1984); Wilkinson & Roberts, *Insanity Defense,* 41 Am. Jur. Proof of Facts2d 615 (1985). *See also* Annot., 56 A.L.R.Fed. 326 (1982) (modern federal cases); Annot., 9 A.L.R.4th 526 (1981) (modern state cases).

"DIMINISHED CAPACITY"

Psychiatric and psychological testimony also may be admissible to show that a defendant's mental condition, even though not amounting to insanity, precluded him from having the mental state required by the charged offense. In other words, his mental condition negates the requisite mens rea. The ABA Standards recognize the admissibility of such evidence: "Evidence, including expert testimony, concerning the defendant's mental condition at the time of the alleged offense which tends to show the defendant did or did not have the mental state required for the offense charged should be admissible." ABA Standard 7-6.2 (1984). Similarly, the Model Penal Code § 4.02(1) provides: "Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense."

This issue is sometimes called "diminished capacity" or "partial responsibility." One commentator summarized the argument for this defense as follows:

> The logic of the partial responsibility doctrine would seem to be unassailable. The reception of evidence of the defendant's abnormal mental condition, totally apart from the defense of insanity, is certainly appropriate whenever that evidence is relevant to the issue of whether he had the mental state which is a necessary element of the crime charged. Were it otherwise, major crimes specifically requiring a certain bad state of mind would, in effect, be strict liability offenses as applied to abnormal defendants. W. LaFave & A. Scott, Criminal Law 331 (1972).

The mens rea defense differs from insanity in a number of ways. If an insanity defense is successful, the result is a verdict of not guilty by reason of insanity (although commitment is typical). A successful mens rea defense results in an acquittal of the charged offense, but permits conviction of a lesser included offense, *e.g.,* second degree murder rather than first degree murder.

Many jurisdictions recognize this "mens rea" defense. In some states statutory provisions govern the issue. *E.g.,* Alaska Stat. § 12.47.020 (1984); Ark. Stat. Ann. § 41-602 (1977); Hawaii Rev. Stat. § 704-401 (1976); Idaho Code § 18-208 (1979); Me. Rev. Stat. Ann. tit. 17-A, § 38 (1983); Mo. Ann. Stat. § 552.030 (3) (Vernon Supp. 1986); Mont. Code Ann. § 46-14-102 (1985); N.J. Stat. Ann. § 2C: 4-2 (West 1982); Utah Code Ann. § 76-2-305 (1) (Supp. 1985). In other states, case law recognizes this defense. *E.g.,* Hendershott v. People, 653 P.2d 385, 392-95 (Colo. 1982), *cert. denied,* 459 U.S. 1225 (1983); Novosel v. Helgemoe, 118 N.H. 115, 125, 384 A.2d 124, 130 (1978).

The scope of the mens rea defense, however, is not the same in every jurisdiction. In some jurisdictions, evidence on this issue is limited to "specific intent" crimes. *E.g.,* State v. Hines, 187 Conn. 199, 204, 445 A.2d 314, 317 (1982); State v. Jacoby, 260 N.W.2d 828, 836 (Iowa 1977); State v. Dargatz, 228 Kan. 322, 332, 614 P.2d 430, 438 (1980); State v. Muir, 432 A.2d 1173, 1176 (R.I. 1981); State v. Edmon, 28 Wash, App. 98, 102, 621 P.2d 1310, 1313 (1981). In other jurisdictions the defense is limited to homicide cases. In homicide cases, psychiatric testimony is admissible on the issue of premeditation, the distinguishing element between first and second degree murder. *E.g.,* Waye v. Commonwealth, 219 Va. 683, 695, 251 S.E.2d 202, 209, *cert. denied,* 442 U.S. 924 (1979).

A substantial number of courts, however, refuse to recognize this defense and thus preclude the admissibili-

ty of expert testimony on this issue. *E.g.,* Bates v. State, 386 A.2d 1139, 1143-44 (Del. 1978); Bethea v. United States, 365 A.2d 64, 92 (D.C. 1976), *cert. denied,* 433 U.S. 911 (1977); Zeigler v. State, 402 So.2d 365, 373 (Fla. 1981), *cert. denied,* 455 U.S. 1035 (1985); State v. Edwards, 420 So.2d 663, 678 (La. 1982); Johnson v. State, 292 Md. 405, 425-26, 439 A.2d 542, 554 (1982); State v. Bouwman, 328 N.W.2d 703, 706 (Minn. 1982); State v. Wilcox, 70 Ohio St.2d 182, 199, 436 N.E.2d 523, 533 (1982).

The new federal insanity statute appears to follow this view; it provides that, except for insanity, "[m]ental disease or defect does not. . . constitute a defense." 18 U.S.C.A. § 20(a) (West Supp. 1985). The First Circuit has remarked: "[T]he recently enacted Comprehensive Crime Control Act of 1984. . . abolished 'diminished capacity' as a defense." United States v. White, 766 F.2d 22, 25 (1st Cir. 1985). Nevertheless, a federal district court has reached the opposite conclusion:

> [W]e find that § 20 represents an attempt by Congress to define the circumstances in which an otherwise culpable defendant will be excused for his or her conduct because of mental disease or defect, and that the section has no effect on the admissibility of evidence offered by a defendant to negate the existence of specific intent and thereby show his or her innocence. United States v. Frisbee, 38 Crim. L. Rep. (BNA) 2284, 2285 (N.D. Cal. Dec. 12, 1985).

Constitutional Issues

The exclusion of defense evidence that rebuts an element of an offense on which the prosecution has the burden of persuasion raises constitutional issues. As one court has written: "The state bears the burden of proving every element of the offense charged; defendant cannot logically or constitutionally be denied the right to present probative evidence rebutting an element of the crime merely because such evidence also suggests insanity." People v. Wetmore, 22 Cal.3d 318, 321, 583 P.2d 1308, 1310, 149 Cal. Rptr. 265, 267 (1978). *See also* Hendershott v. People, 653 P.2d 385, 393-94 (Colo. 1982), *cert. denied,* 459 U.S. 1225 (1983).

This view, however has not been accepted by all courts. For example, the Seventh Circuit has ruled that "a state is not constitutionally compelled to recognize the doctrine of diminished capacity and hence a state may exclude expert testimony offered for the purpose of establishing that a criminal defendant lacked the capacity to form a specific intent." Muench v. Israel, 715 F.2d 1124, 1144-45 (7th Cir. 1983), *cert. denied,* 467 U.S. 1228 (1984).

Evidence of the defendant's mental condition that neither negates mens rea nor amounts to insanity may nevertheless be admissible in sentencing proceedings or in the penalty stage of a capital case. *E.g.,* Fla. Stat. Ann. § 921.141 (6) (b) & (f) (West 1985); Ohio Rev. Code Ann. § 2929.04 (B) (3) (Page 1982). *See also* ABA Standard 7-9.3 (1984).

For a discussion of diminished capacity, see W. LaFave & A. Scott, Criminal Law § 42 (1972); R. Perkins & R. Boyce, Criminal Law 980-85 (3d ed. 1982); 1 P. Robinson, Criminal Law Defenses § 64 (1984); Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage,* 77 Colum. L. Rev. 827 (1977); Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other Than the Defense of Insanity,* 26 Syracuse L. Rev. 1051 (1975); Morse, *Diminished Capacity: A Moral and Legal Conundrum,* 2 Int'l J.L. & Psychiatry 271 (1979). *See also* Annot., 22 A.L.R.3d 1228 (1968).

COMPETENCY TO STAND TRIAL

In addition to insanity and the mens rea defense, psychiatric testimony is often admitted when a criminal defendant's competency to stand trial is an issue. Competency refers to a defendant's mental condition at the time of *trial* and should be distinguished from insanity, which refers to the defendant's mental condition at the time of the *offense.* Moreover, the policy issues raised by the insanity defense differ substantially from those raised by an accused's competency to stand trial. Insanity concerns a defendant's culpability for his criminal acts; it is a substantive criminal law issue. In contrast, mental competency involves a due process issue. As the Supreme Court has noted, "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope v. Missouri, 420 U.S. 162, 172 (1975). *See also* Pate v. Robinson, 383 U.S. 375, 378 (1966).

At least in terms of its impact on the criminal justice system, mental competency is a far more important issue than insanity:

> One survey. . . shows that while as many as 52% of all offenders in mental institutions are there because of incompetence to stand trial, only 4% are committed as not guilty by reason of insanity. One commentator has estimated that for each defendant found not guilty by reason of insanity, at least a hundred defendants are determined to be incompetent to stand trial. ABA Criminal Justice Mental Health Standards 7-140 (1st Tent. Draft 1983).

Standard for Competency

In 1960 the Supreme Court set forth the following test for determining an accused's competency to stand trial: "[T]he test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960). While this test correctly indicates that competency is a legal, not a medical, issue, it nevertheless provides only a general definition of competency.

The ABA Mental Health Standards provide further elaboration. First, according to the Standards, incompetency may arise from "mental illness, physical illness or disability, mental retardation or other developmental disability, or other etiology so long as it results in a defendant's inability to consult with defense counsel or to understand the proceedings." ABA Standard 7-4.1(c) (1984). Second, the Standards take the position that competency should be addressed in "functional," rather than "diagnostic," terms. Under this approach five factors underlie the competency inquiry: (1) the defendant should have a perception of the process which is not distorted by mental illness or disability; (2) the defendant should have the capacity to maintain the attorney-client relationship; (3) the defendant should be able to recall and to relate factual information; (4) the defendant should have the ability to testify in his own defense, in the event that should be appropriate; and (5) the defendant's abilities

should be assessed in light of the severity of the charge and the complexity of the case. ABA Criminal Justice Mental Health Standards 7-152 to -154 (1st Tent. Draft 1983). *See generally* Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial,* 53 Geo. Wash. L. Rev. 375 (1985).

In some cases antipsychotic drugs enable otherwise unfit defendants to become competent. *E.g.,* Government of Virgin Islands v. Crowe, 391 F. Supp. 987, 989 (D.V.I.), *aff'd,* 529 F.2d 511 (3d Cir. 1975); Ake v. State, 663 P.2d 1, 7 (Okla. Crim. App. 1983), *rev'd on other grounds,* 105 S.Ct. 1087 (1985); Commonwealth v. Blair, 491 Pa. 499, 502, 421 A.2d 656, 657 (1980). One commentator has argued that due process prohibits the use of such drugs over a defendant's objection. Comment, *Antipsychotic Drugs and Fitness to Stand Trial: The Right of the Unfit Accused to Refuse Treatment,* 52 U. Chi. L. Rev. 773 (1985).

Procedural Requirements

Frequently, the procedures governing an inquiry into a defendant's competency to stand trial are specified by statute. *E.g.,* Ala. Code § 15-16-21 (1982); Cal. Penal Code §1367 (West 1982); N.M. Stat. Ann. § 31-9-1 (1984); Ohio Rev. Code Ann. § 2945.37 (Page 1982); Wyo. Stat. § 7-11-302 (1977). *See also* 2 P. Robinson, Criminal Law Defenses 502 n.4 (1984) (listing statutes). For example, the federal statute authorizes the trial court to hold a competency hearing if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent. 18 U.S.C.A. § 4241(a) (West Supp. 1985). This procedure may include a psychiatric or psychological examination. 18 U.S.C.A. § 4241(b) (West Supp. 1985).

The procedures relating to competency determinations must be read in light of constitutional requirements. According to the Supreme Court, a hearing on competency is mandated where the "evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial. . . ." Pate v. Robinson, 383 U.S. 375, 385 (1966). Moreover, the Court has indicated that the trial court has a special responsibility to ensure that a defendant is competent at trial. Drope v. Missouri, 420 U.S. 162, 181 (1975) ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."). Finally, the Court has held that a defendant found to be incompetent may not be committed indefinitely to a mental facility without further proceedings:

> [A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

Additional competency issues may arise when a defendant pleads guilty, waives counsel, or is sentenced. ABA Standard 7-5.1-.3 (1984); Note, *Competence to Plead Guilty and to Stand Trial: A New Standard When a Criminal Defendant Waives Counsel,* 68 Va. L. Rev. 1139 (1982).

For a discussion of competency, see W. LaFave & A. Scott, Criminal Law § 39 (1972); 2 P. Robinson, Criminal Law Defenses § *208 (1984);* R. Roesch & S. Golding, Competency to Stand Trial *(1980); Mickenberg, Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem,* 17 Cal. W.L. Rev. 365 (1981); Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems,* 45 U. Chi. L. Rev. 21 (1977); Wilkinson & Roberts, *Defendant's Competency to Stand Trial,* 40 Am. Jur. Proof of Facts2d 171 (1984); Winick, *Restructuring Competency to Stand Trial,* 32 U.C.L.A. L. Rev. 921 (1985); Roesch & Golding, *Who Is Competent to Stand Trial?,* Trial 40 (Sept. 1985); Note, *Incompetency to Stand Trial,* 81 Harv. L. Rev. 454 (1967). *See also* Model Penal Code § 4.04; Annot., 63 A.L.R.Fed. 696 (1983); Annot., 23 A.L.R.4th 493 (1983).