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IDAHO'S REPEAL OF THE INSANITY DEFENSE: WHAT ARE WE TRYING TO PROVE?

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"If the deeply rooted principle in our society against killing an insane man is to be respected," Justice Frankfurter wrote, "at least the minimum provision for assuring a fair application of that principle is inherent in the principle itself."[1]

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1. Solesbee v. Balkcom, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting).

I. INTRODUCTION

As the title suggests, Idaho's repeal of the insanity defense has created dilemmas not only in the criminal justice system, but it has also created problems in the social arena which touch fundamental concepts of criminal responsibility and culpability. Under the current state of Idaho law, there does not exist a meaningful way for the trial court to instruct the jury on how it should deal with mental illness evidence; from a social viewpoint, Idaho is now incarcerating people that suffer from severe mental illnesses instead of providing care and treatment. Thus, we do not know how to prove how mental illness evidence affects mens rea and it is difficult to understand what we are trying to prove by punishing people who lack responsibility for their actions. Idaho's repeal of the insanity defense, though no doubt based upon the legislature's belief that it would be good for the citizens of this State (or at least popular with the legislator's constituents), presents troubling ramifications. The simple fact is that Idaho courts have sentenced a schizophrenic to death,[2] sentenced another schizophrenic to life in prison,[3] and sentenced a retired medical doctor, age sixty-six, who suffers from Alzheimer's, to a unified fifteen year sentence.[4] It is also a fact that each of these three defendants could have availed themselves to the protection afforded by Idaho's old insanity defense. Whether that is right or wrong, depending on one's views, the question is no longer an issue for the Idaho courts,[5] but is left to the discretion of the legislature.

It is indeed amazing, that after centuries of the development of common law, and over a hundred years of the development of state law, we still struggle with fundamental concepts of criminal intent. Though concepts of criminal intent and mens rea[6] have received ex-

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2. *See* State v. Card, 121 Idaho 425, 825 P.2d 1081, *cert. denied*, 113 S. Ct. 321 (1992), under federal habeas review, Card v. Arave, No. 93-0030-S-HLR (D. Idaho).

3. *See* State v. Odiaga, ___ Idaho ___, 871 P.2d 801 (conviction reversed and remanded) *cert. pending* (1994).

4. *See* State v. Moore, No. 20261 (Idaho Supreme Court, opinion filed August 1, 1994).

5. State v. Searcy, 118 Idaho 632, 798 P.2d 914 (1990), upheld legislative action abolishing the insanity defense. *See* State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991), *cert. denied*, 113 S. Ct. 321 (1992); State v. Rhoades, 119 Idaho 594, 809 P.2d 455 (1991), *cert. denied*, 112 S. Ct. 2970 (1991); State v. Odiaga, ___ Idaho ___, 871 P.2d 801 (1994); State v. Winn, 121 Idaho 850, 828 P.2d 879 (1992); State v. Rhoades, 121 Idaho 63, 822 P.2d 960 (1991); State v. Rhoades, 120 Idaho 795, 820 P.2d 665 (1991); State v. Gomez, No. 20254 (Idaho Supreme Court, opinion filed July 11, 1994); State v. Moore, No. 20261 (Idaho Supreme Court, opinion filed August 1, 1994).

6. "Mens rea" is defined in BLACK'S LAW DICTIONARY (6th ed. 1990) as "a

tensive attention at hands and minds of very eminent men and have produced elaborate treatises and articles discussing the concepts, we still struggle with what these terms mean. Maybe that is the answer—that we cannot neatly define what mens rea means but rather, the issue must be decided by a fact finder after applying the current understandings of psychiatry and psychology and current social mores to a definition of responsibility. Nonetheless, Idaho no longer allows a fact finder to assess how mental illness relates to culpability, responsibility and moral blameworthiness of a defendant suffering from a mental illness.

This Article will address the current law in Idaho and the inability to properly instruct the fact finder as to how it should assess mental illness evidence. With a factfinder being unable to properly evaluate evidence of mental illness, that leads to questions if Idaho is convicting individuals who lack criminal responsibility or a culpable mental state. This Article will conclude that criminal "responsibility" needs to be defined by using the definition formulated by the American Law Institute. The concept of criminal responsibility must be defined for the fact finder. Otherwise, we will continue to face the likelihood of convicting people who are not criminally responsible. With these initial observations, we turn to what has happened in Idaho.

II. THE HISTORY OF THE INSANITY DEFENSE IN IDAHO

Until 1982, the insanity defense was available in Idaho criminal cases as a matter of common law since the time judicial decisions were first reported in the territory.[7] The Idaho judiciary had always played an active role in overseeing the operation of the insanity defense and in constructing a fair definition of insanity.[8]

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guilty mind; a guilty or wrongful purpose; a criminal intent." And as stated in Williamson v. Norris, 1 Q.B. 7, 14 (1899), "[t]he general rule of English law is, that no crime can be committed unless there is mens rea." *See also* Duncan v. State, 26 Tenn. (7 Hum.) 148, 150 (1846) ("It is a sacred principle of criminal jurisprudence that the intention to commit the crime is of the essence of the crime, and to hold that a man shall be held criminally responsible for an offense of the commission of which he was ignorant at the time would be intolerable tyranny.")

7. *See, e.g.* State v. Van Vlack, 57 Idaho 316, 65 P.2d 736 (1937); State v. Fleming, 17 Idaho 471, 106 P. 305 (1910); State v. Wetter, 11 Idaho 433, 83 P. 341 (1905); People v. Walter, 1 Idaho 386 (1871).

8. *See* HENRY WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 140 (1954).

In 1969, the Idaho Supreme Court undertook a reexamination of the common law test for insanity applied in earlier cases, the M'Naghten test,[9] and concluded that the test needed modification to take account of modern developments in psychiatry and the law.[10] The court's opinion canvassed that law in other American jurisdictions, expert views as embodied in the American Law Institute's Model Penal Code, the history of the M'Naghten test, and the relative advantages and disadvantages of the different insanity tests available, and then adopted the Model Penal Code formulation[11] for use in the Idaho courts.[12]

Shortly thereafter, the Idaho legislature, recognizing that the *White* standard had brought Idaho insanity defense law into conformance with contemporary authority and the law of many states, codified the test for insanity adopted there.[13]

Beginning in 1982, after the furor created by a federal jury which found John H. Hinckley, Jr. not guilty by reason of insanity in his trial for the attempted assassination of President Reagan, the insanity defense received intense critical attention throughout the country. Congress responded to public outcry and misapprehension over the Hinckley verdict by considering a number of proposals to abolish the insanity defense.[14] Congress decided against adopting

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9. This test, derived from M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843), focused on the cognitive abilities of the accused. The test provides "that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

10. *See* State v. White, 93 Idaho 153, 158, 456 P.2d 797, 802 (1969).

11. "(1) A person is not *responsible* for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962) (emphasis added).

12. *White*, 93 Idaho at 158, 456 P.2d at 802.

13. MENTAL ILLNESS AS DEFENSE. —

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

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

IDAHO CODE § 18-207 (1972) (repealed 1982).

14. *See* H.R. 47, 98th Cong., 1st Sess. (1983); H.R. 682, 98th Cong., 1st Sess. (1983); ALAN A. STONE, M.D., LAW, PSYCHIATRY AND MORALITY, 77-98 (1984); L.

any of these bills when even the Reagan administration, which initially had called for elimination of the defense, changed its position and retracted its call for abolition.[15] Instead, Congress enacted the Insanity Defense Reform Act of 1984, which codified the federal insanity defense for the first time, and changed some of the evidentiary rules and procedures related to it.[16]

During the same period of time and responding to the same political climate, a number of state legislatures initiated their own parallel debates. According to a survey compiled by the American Bar Association, during 1981-82, insanity defense revisions received legislative consideration in Alabama, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Iowa, Kansas, Missouri, Nebraska, New Hampshire, New Jersey, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, Wisconsin and Wyoming.[17] Each of these states followed Congress and the Reagan administration in abandoning the idea of abolishing the insanity defense and focused instead on the issue of whether the defense was in need of reform.[18]

The debate that took place in the Idaho legislature in 1982, therefore, was not in the least unusual; only the conclusion of the debate was. Idaho stands almost alone in deciding to abolish its insanity defense, joined only by Montana and Utah.[19]

CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN H. HINCKLEY, JR., 130-58 (1987).

15. *See* William F. Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 MO. L. REV. 605 (1982).

16. *See* 18 U.S.C. § 17 (1984). This section provides an insanity defense if "at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. . . ."

See also FED. R. EVID. 704(b) (prohibiting witnesses, when testifying with respect to the mental state or condition of a criminal defendant, from stating an opinion or inference as to the ultimate issue of defendant's mental state).

17. *ABA Report on the Insanity Defense*, app. 1 (Table on Current Tests for Insanity, Allocation of Burden and Quantum of Proof within Federal Jurisdictions and the Several States) (Feb. 9, 1983), *reprinted in The Insanity Defense: ABA and APA Proposals for Change*, 7 MENTAL DISABILITY L. REP. 136, 140 (Mar. - Apr. 1983).

18. *See, e.g.* Bradley D. McGraw et al., *The "Guilty But Mentally Ill" Plea and Verdict: Current State of the Knowledge*, 30 VILL. L. REV. 117 (1985); Joseph H. Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397 (1983).

19. Montana, whose statute abolishing the insanity defense is similar to Idaho's, had enacted its law in 1979. *See* MONT. CODE ANN. §§ 46-14-102, 46-14-103, 46-14-201(2), 46-14-221 (1993); State v. Korell, 690 P.2d 992 (Mont. 1984).

The other state to abolish the insanity defense is Utah. *See* UTAH CODE ANN. § 76-2-305 (1993).

However, these three states—Idaho, Montana and Utah—were not the first states to think about doing away with the insanity defense. About a half a century before, Louisiana, Mississippi, and Washington enacted statutes barring all evidence of mental condition. These statutes ultimately failed on constitutional grounds—primarily based upon violations of due process.[20]

Since the Legislative repeal in 1982, Idaho appellate courts have heard several appeals in cases involving the current statute,[21] but did not consider the due process implications of abolition of the insanity defense, until *State v. Searcy*.[22]

In *Searcy*, the Idaho Supreme Court, with a pro tem justice, considered for the first time a due process challenge. Chief Justice Bakes, writing for the majority, rejected the challenge.[23] The majority reasoned that the defense did not qualify as being founded on deeply rooted legal traditions such that it could be embedded in concepts of due process.[24] Rather, the majority found that since the new law still allowed evidence of mental illness to rebut the state's evidence offered to prove the defendant had the requisite criminal intent, the legislative action was constitutionally permissive.[25]

Given the composition of the court, however, the most important feature of *Searcy* is its two dissents. In a lengthy and scholarly dissent, Justice McDevitt rejected the majority's conclusion that authori-

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

21. *See* State v. Beam, 109 Idaho 616, 710 P.2d 526 (1985), *cert. denied*, 476 U.S. 1153 (1986); State v. Potter, 109 Idaho 967, 712 P.2d 668 (1985); State v. McDougall, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988).

Neither *Potter*, a *pro se* case, nor *McDougall* raised any issue concerning the constitutionality of the statute. *See Potter*, 109 Idaho at 970-71, 712 P.2d at 671-72; and *McDougall*, 113 Idaho at 902, 749 P.2d at 1027. In *Beam* the defendant argued that the statutory modification of the insanity defense conflicted with other sections of the Idaho Code which require a showing of intent, and thereby denied him due process. The court found no inconsistency among these statutes. 109 Idaho at 621, 710 P.2d at 531. Beam also argued that the current Idaho statute violated the constitutional requirement of In re Winship, 397 U.S. 358 (1970), that the prosecution be required to prove guilt beyond a reasonable doubt, in that the statute operated as a presumption of mens rea. The court disagreed with this characterization of the statute. *Beam*, 109 Idaho at 621, 710 P.2d at 531.

22. 118 Idaho 632, 798 P.2d 914 (1990).

23. *Id.* at 634, 798 P.2d at 916.

24. *Id.* at 637, 798 P.2d at 919.

25. *Id.* at 634-37, 798 P.2d at 916-19.

ty for repeal of the insanity defense could be found between the lines of United States Supreme Court opinions.[26] To the contrary, he concluded[27] that treating the insanity defense as nonfundamental would be inconsistent with *Penry v. Lynaugh*[28] and *Leland v. Oregon*.[29]

Moreover, he concluded affirmatively that the defense is one of those legal principles which is "'implicit in the concept of ordered liberty, . . .' such that 'a fair and enlightened system of justice would be impossible without them.'"[30] He reached this conclusion primarily by a careful tracing of the existence of the defense in Anglo-American law, which begins with the observation that the defense was available at least as early as the reign of Edward I between 1272 and 1307.[31] The conclusion also rested in part on the near unanimity of the state and federal governments in treating the absence of blameworthiness due to mental condition as an excusing factor.[32] From this characterization of the insanity defense as "fundamental," it followed that its repeal was a violation of the due process clause of the United States Constitution.[33]

Justice Johnson also dissented, and would have held that repeal of the defense violated the due process clause of art. 1, § 13 of the Idaho Constitution. His dissent which was joined by Justice McDevitt, concluded with this language:

> I am aware that there are other death penalty cases that will be argued before this Court within a matter of days that will again raise the issue of the unconstitutionality of the abolition of the insanity defense. Because the insanity defense is fundamental and because of the awesomeness of death penalty cases, I announce to my brethren on this Court today that I will be prepared to address this issue again in these future death penalty cases, despite the ruling of the Court in this case.[34]

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26. *Id.* at 641-46, 798 P.2d at 922-27.
27. *Id.* at 653, 798 P.2d at 935.
28. 492 U.S. 302 (1989).
29. 343 U.S. 790 (1952).
30. *Searcy*, 118 Idaho at 645, 798 P.2d at 927 (quoting Palko v. Connecticut, 302 U.S. 319, 324-25 (1937)).
31. *Id.* at 646, 798 P.2d at 928.
32. *Id.* at 652, 798 P.2d at 934.
33. *Id.* at 653, 798 P.2d at 935.
34. *Id.* at 640, 798 P.2d at 922.

That statement, however, was short-lived. For the next death penalty case that was able to properly present the issue to the court, the dissenters in *Searcy* aligned themselves with the legality of legislative abolition of the defense relying upon the doctrine of stare decisis.[35] How the *Card* decision holds up to federal scrutiny remains to be seen, but it seems axiomatic that it stands on tenuous ground.[36]

The *Searcy* decision has been criticized in a Harvard Law Review article as having left a "tangled relationship between mens rea and mental illness."[37] This same article concluded by saying:

> Abolition of the insanity defense brings mens rea concepts underlying the fabric of criminal law under new scrutiny. In the face of this challenge, the *Searcy* court took the path of least resistance, silently relying on the legislature to develop the relationship between mens rea and mental illness. The court thus failed to acknowledge either the policy implications or the potential constitutional difficulties of its holding. For mentally ill defendants, *Searcy* provides little guarantee of a criminal justice system that will evaluate them with fairness as well as consistency.[38]

Those questions of fairness and consistency have come to light in the Idaho appellate decisions following *Searcy*.

III. THE UNITED STATES SUPREME COURT OPINIONS

While the United States Supreme Court has never had occasion to address directly the question of whether the insanity defense is constitutionally based, the Court's opinions suggest the question is open to debate. Starting with *Penry v. Lynaugh*, the Court considered whether it was cruel and unusual punishment for a state to execute a mentally retarded individual.[39] The existence of the insanity defense

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35. *See* State v. Card, 121 Idaho 425, 825 P.2d 1081, *cert. denied*, 113 S. Ct. 321 (1992).

36. Justice Marshall, stated in the opening paragraph in Ford v. Wainwright, 477 U.S. 399, 401 (1985), "[f]or centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does."

37. Recent Developments, *Due Process—Insanity Defense—Idaho Supreme Court Upholds Abolition of Insanity Defense Against State and Federal Constitutional Challenges.—State v. Searcy, 118 Idaho 632, 798 P.2d 914 (1990)*, 104 HARV. L. REV. 1132, 1133 (1991).

38. *Id.* at 1138.

39. 492 U.S. 302 (1989).

was critical to the Court's decision that such punishment would not be cruel and unusual. The Court characterized the insanity defense as our society's traditional method of guaranteeing that those who are truly insane will not be punished at all.[40] Because the insanity defense gives juries an opportunity to winnow the blameworthy from the truly insane, the Court reasoned that to then allow the sentencing authority the choice of a particular form of punishment is not objectionable. If a jury is unconvinced by that defendant's insanity defense, reasoned the Court, the defendant is not insane within the meaning of the criminal law.

In Idaho, the safeguard the Court relied on in *Penry* does not exist. There is no guarantee that when a defendant goes before the sentencing authority, he has been determined to be sufficiently culpable for any form of punishment to be fair.[41] It is therefore open to question whether the United States Supreme Court would regard the mens rea defense permitted by Idaho Code Section 18-207[42] as an adequate substitute: The Court's description of those who are not likely to face the prospect of punishment in our society includes not only those who lack intent, but also those who do not appreciate the wrongfulness of their acts.[43]

Penry is not the first case in which the United States Supreme Court has seemed to regard the insanity defense as an indispensable feature of criminal law. In *Leland v. Oregon*, for example, the Court ruled that the states may decide how to allocate the burden of persuasion on the issue of insanity.[44] In *Leland*, and later in *Powell v. Texas*, the Court indicated its unwillingness to impose any particular uniform definition of insanity upon the states, but again without ever

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40. *Id.* at 333. The Court continued by stating:

> The common law prohibition against punishing "idiots" for their crimes suggests that it may indeed be "cruel and unusual" punishment to execute persons who are profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions. Because of the protections afforded by the insanity defense today, such a person is not likely to be convicted or face the prospect of punishment.

Id.

41. *See* IDAHO CODE § 19-2523(1)(f) where the sentencing authority, not the fact finder, is directed to consider "[t]he capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law at the time of the offense charged."

42. *See* Part IV, *infra*.

43. *See* 492 U.S. at 333.

44. 343 U.S. 790 (1952).

suggesting that the states were free simply to abandon all attempts to define insanity.[45]

While the Court has allowed the states some margin of freedom to experiment with the form of the insanity defense, there is reason to believe that the Court would not approve a complete abandonment of the defense. This is comparable to the Court's approach in other areas of criminal procedure. The Court held, for example, that the states must afford criminal defendants the right to a jury trial,[46] but has allowed the states some leeway to define whether jury trials must involve a jury of twelve,[47] or unanimity.[48] More recently however, Justice O'Connor in her concurring opinion in *Foucha v. Louisiana*, suggests the Idaho scheme is constitutionally valid.[49] She reads *Foucha* as placing "no new restriction on the States' freedom to determine whether and to what extent mental illness should excuse criminal behavior. The Court does not indicate that States must make the insanity defense available."[50] How that statement will square with Justice O'Connor's opinion in *Penry* remains to be seen, but at this point, the *Foucha* language can be viewed as dicta in its purest sense. For the inconsistencies in Justice O'Connor's words in these two opinions do not withstand scrutiny.

If Justice O'Connor allows Idaho's current statutory scheme to remain valid and find that it is constitutionally permissive to abolish the insanity defense, then the holdings of *Ford v. Wainright* and *Penry* are in trouble. Under *Ford*, the government is prohibited from executing the insane yet in Idaho, that possibility exists. David Card qualified as being insane,[51] but yet is facing the death penalty. Nor will Justice O'Connor's words in *Foucha* be compatible with her decision in *Penry*. *Penry* found err in the fact that the fact finder and the sentencing authority were not informed how to consider and give effect to the mitigating evidence of the defendant's mental retardation and abused background.[52] *Penry* concluded that the fact finder was not provided the means for expressing its "reasoned moral re-

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45. 392 U.S. 514, 536 (1968).
46. Duncan v. Louisiana, 391 U.S. 145 (1968).
47. Williams v. Florida, 399 U.S. 78 (1970).
48. Apodaca v. Oregon, 406 U.S. 404 (1972).
49. 112 S. Ct. 1780 (1992).
50. *Id.* at 1790 ("If a State concludes that mental illness is best considered in the context of criminal sentencing, the holding of this case erects no bar to implementing that judgment.").
51. 121 Idaho at 428, 439, 825 P.2d at 1084, 1093 (1992).
52. 492 U.S. at 327-28.

sponse" to that type of evidence.[53] That deficiency which was found to constitute error in *Penry* exists in Idaho. The Idaho fact finder is prevented from making a "reasoned moral response" to mental illness evidence because it is not instructed how to apply that type of evidence.

A. History in General

As the Court in *Penry* recognized, the roots of the insanity defense are truly ancient.[54] Insanity was recognized as a defense by ancient Moslem law, Hebraic law and Roman law.[55] Beginning no later than the thirteenth century, the criminal law of England and then of the United States has treated the insane as *sui generis*. Since the time of Henry III (1216-1272), insanity consistently has been viewed as a mitigating or exculpating factor exempting the accused from criminal punishment.[56] Legal scholars from Lord Bracton, Chief Justiciary in the mid-thirteenth century,[57] to Lord Coke,[58] have agreed that fairness requires the insane to be treated differently from the sane criminal.[59]

The mode of different treatment has varied over the centuries. In the time of Henry III, the insane were regularly pardoned after conviction.[60] Edward I (1272-1307) introduced the use of a special verdict declaring the accused to be insane, which led to a pardon.[61] During the reign of Edward II (1307-1327), insanity began to be recognized as a defense, and by the time of Edward III (1327-1377), it had become a complete defense to a criminal charge.[62] As Justice Frankfurter observed, "[e]ver since our ancestral common law

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53. *Id.*

54. *Id.* at 331.

55. *See* MICHAEL S. MOORE, LAW AND PSYCHIATRY 65-66 (1984) (punishment applied only to those who "are in full possession of their facilities").

56. *See* 2 F. POLLOCK & W. MAITLAND, HISTORY OF ENGLISH LAW 480 (2nd ed. 1898); ROLLIN M. PERKINS, CRIMINAL LAW 850-51 (2nd ed. 1969); and historical material cited in HERBERT FINGARETTE, THE MEANING OF CRIMINAL INSANITY (1972).

57. *See* Henrici de Bracton, *De Legibus et Consuetudinibus Angliae, in* II BRACTON ON THE LAWS OF CUSTOMS OF ENGLAND, 424 (G. Woodbine ed. 1968).

58. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 24-27 (Lewis ed. 1897).

59. *See* 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 1-2 (8th ed. 1824).

60. *See* POLLOCK & MAITLAND, *supra* note 56.

61. *See* 2 SIR JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 151 (1883).

62. *See* 3 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 371-75 (3rd ed. 1923).

emerged out of the darkness of its early barbaric days, it has been a postulate of Western civilization that the taking of life by the hand of an insane person is not murder."[63]

Early on, there was no attempt to distinguish the appropriate legal treatment of those who were delusional and those who lacked intent because no one recognized there were two different categories into which those individuals could be sorted. In the thirteenth century, for example, Bracton defined a "madman" as one who does not know what he is doing, "who lacks mind and reason, and is not much removed from a brute."[64] In 1603, Lord Coke quoted this definition approvingly.[65] The *Arnold's Case*, defined an insane defendant as one who "doth not know what he is doing, no more than . . . a wild beast."[66] *Hadfield's Case*,[67] shows that these rough definitions of insanity should not be interpreted as limiting. In that case, the delusional defendant was acquitted by a jury instructed simply to decide whether the defendant was "under the influence of insanity at the time the act was committed" and not "under the guidance of reason."[68]

As understanding of the human mind developed, the law perceived that there were different types of mental diseases and defects. By the time of the *M'Naghten* Case, in 1843, English law had become able to distinguish those who lacked mens rea from those who, like M'Naghten, intended their acts but acted under the influence of abnormal delusions. The House of Lords had no difficulty in concluding that this distinction, while interesting, presented no reason to treat those whose mental deficiencies caused delusions differently from those whose mental deficiencies caused a lack of intent. The famed *M'Naghten* test posits that a form of mental disease or defect causing an inability to distinguish right from wrong is also grounds for exculpation. This test is not so much an addition to the law of insanity as it is a refusal to create an exception to the fundamental principle, clearly enunciated in *Hadfield*, that the insane are not blameworthy.

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63. United States ex rel. Smith v. Baldi, 344 U.S. 561, 570 (1953) (Frankfurter, J., dissenting).

64. *See* JOHN BRIGGS JR., THE GUILTY MIND 82 (1955).

65. *See* Beverly's Case, 2 Coke 123, 124 (1603).

66. 16 Howell State Trials 695, 764 (1724).

67. 27 Howell State Trials 1281 (1800).

68. *Id.*

B. General Acceptance

The vast majority of courts, legislatures and professional organizations to have considered the question have all opposed abolition of the insanity defense. Despite the attentive reexamination of the viability of the insanity defense around the time of the Hinckley case, 47 states, the federal government, England and the Model Penal Code of the American Law Institute, all continue to include the insanity defense as a central feature of their allocation of criminal responsibility. It is also significant that both the American Bar Association and the American Psychiatric Association have vigorously opposed abolition of the insanity defense.[69] While numbers alone do not settle the question of whether a particular procedure is constitutionally required, this overwhelming consensus is certainly relevant to the inquiry of whether the insanity defense is fundamental to our system of justice.[70]

The explanation for this broadly based acceptance of the insanity defense can be traced, like the history of the insanity defense itself, to the complementary concepts of mens rea-guilty mind-and culpability and responsibility. Mens rea is unquestionably the keystone of the distinction between civil and criminal liability. The United States Supreme Court has described the principle of mens rea as "the ancient requirement of a culpable state of mind."[71]

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[72]

The mens rea requirement represents a firm commitment to the legal principle that one should not be branded a criminal unless one is blameworthy and thus deserving of punishment.[73]

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69. See ABA Report, *supra* note 17.

70. *See* Medina v. California, 112 S. Ct. 2572, 2577 (1992) ("Historical practice is probative of whether a procedural rule can be characterized as fundamental.").

71. Morissette v. United States, 342 U.S. 246, 250 (1952).

72. *Id.* (footnote omitted).

73. *See* H.L.A. Hart, *Legal Responsibility and Excuses, in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968); HERBERT FINGARETTE, THE MEANING OF CRIMINAL INSANITY (1972); Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273-74 (1968).

IV. THE RELATIONSHIP BETWEEN MENS REA AND MENTAL ILLNESS

A. The Current Law Under Idaho Code Section 18-207

The new law proclaims that "[m]ental condition shall not be a defense to any charge of criminal conduct."[74] However, in seemingly contradictory language, the law does allow the "admission of expert evidence on the issues of mens rea or any state of mind. . . ."[75]

The Idaho Supreme Court has interpreted this language to conveniently mean that Idaho Code section 18-207 "reduces the question of mental condition from the status of a formal defense to that of an evidentiary question."[76] Thus, a mentally ill defendant is prohibited from raising the affirmative defense of insanity, but the defendant is nevertheless permitted to present evidence, through expert testimony, that his or her mental illness prevented the formation of mens rea or requisite state of mind for the crime charged.

In a practical sense, what does this mean? Under the old insanity defense, the accused would prevail with the insanity defense if the defendant could introduce evidence that the defendant suffered a mental disease or defect at the time of the commission of the crime charged. The burden would then shift to the state to prove beyond a reasonable doubt that the defendant did not have a mental disease or defect or that, despite some mental disease or defect, the defendant had substantial capacity both to appreciate the wrongfulness of the defendant's conduct and to conform his conduct to the requirements of the law.

Under the current law, the insane defendant can present evidence that he lacked the necessary mental element to commit the crime. And though he does not benefit from the requirement of the state rebutting the defense beyond a reasonable doubt, the state still has to prove the mental element beyond a reasonable doubt.[77] So the

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74. *See* IDAHO CODE § 18-207(a).

75. *See id.* § 18-207(c).

76. State v. Beam, 109 Idaho 616, 621, 710 P.2d 526, 531 (1985).

77. *See* Justice Kennedy's dissenting opinion in Foucha v. Louisiana, 112 S. Ct. 1780 (1992), where he writes:

> Mental illness may bear upon criminal responsibility, as a general rule, in either of two ways: First, it may preclude the formation of *mens rea*, if the disturbance is so profound that it prevents the defendant from forming the requisite intent as defined by state law; second, it may support an affirmative plea of legal insanity. Depending on the content of state law,

end result is somewhat the same, it is just that Idaho does not define how to reach that result.[78]

Another Idaho statute merits consideration. For over twenty years Idaho Code section 18-115 was left untouched by the repeal of the insanity defense. That section provided that "[t]he intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots or lunatics, nor affected with insanity."[79]

This law no doubt provided an interesting twist for courts that were dealing with the repeal of the insanity defense, but yet were requested to submit instructions to a fact finder defining "affected with insanity" and what it meant for the accused to have a "sound mind."

In 1994, however, the legislature deleted this troubling language from the statute[80] making it even easier for the prosecution and the trial judges to deal with intent questions, but no doubt harming an accused's ability to address questions of responsibility for criminal liability.

B. How Responsibility, Culpability, and Moral Blameworthiness Relate to Mens Rea and Mental Illness

Interestingly, even with the repeal of the insanity defense, Idaho courts still recognize the common law concept that only "responsible" individuals can be held accountable for their actions.[81] What this seems to suggest, is that the mens rea language found in Idaho Code Section 18-207(c) embodies a much broader concept than mere intent to perform an interdicted act. But rather, the words "mens rea" in

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> the first possibility may implicate the state's initial burden, under *In re Winship*, 397 U.S. 358, 364 . . . (1970), to prove every element of the offense beyond a reasonable doubt, while the second possibility does not.

Id. at 1791 (citations omitted).

78. *See* Part V, *infra*, for a discussion on the topic that even though the end result may be analytically similar as far as proving the mental element of a crime, the dramatic difference is that the insanity defense supplemented the central requirement of mens rea in demanding "responsibility" as the predicate for criminal conviction.

79. IDAHO CODE § 18-115 (1972) (amended 1994).

80. IDAHO CODE § 18-115 reads as amended: "Intent or intention is manifested by the commission of the acts and surrounding circumstances connected with the offense."

81. *Beam*, 109 Idaho at 621, 710 P.2d at 531 ("Section 18-207(c), Idaho Code, continues to recognize the basic common law premise that only responsible defendants may be convicted.").

the current law embodies the common law notion that responsibility plays an important role in assessing criminal liability.[82] The Idaho Supreme Court also recognizes that "moral culpability" plays an important role in determining an appropriate sentence.[83] Though Idaho courts recognize that "responsibility" and "moral culpability" play an important role, they have failed to define how those terms are to be applied.[84]

It is evident that the insanity defense and the doctrine of mens rea both address the identical concern of criminal culpability. But that fact does not merge the one concept into the other. "The issue of criminal blameworthiness merits deeper inquiry [than whether the defendant harbored the requisite mens rea for the offense] because it implies a certain *quality* of knowledge and intent transcending a minimal awareness and purposefulness."[85]

History suggests there would have been no need for the development of the insanity defense if it had been merely a variant expression of the mens rea doctrine. While mens rea is concerned with the guilty mind, the insanity defense questions whether the guilty mind with which the act is done is a product of a person's cognitive or volitional impairment.[86] "The conception of blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choosing evil rather than good; there can be no criminality in the sense of moral shortcoming if there is no freedom of choice or normality of will capable of exercising a free choice."[87]

V. WHY THE CURRENT LAW HAS FAILED

Simply put, there does not exist, under the current state of Idaho law, a meaningful way to instruct a fact finder as to how it is to assess mental illness evidence or how that evidence affects mens rea. In Idaho, there is no excuse for criminal liability if a psychotic person knowingly and intentionally kills another, even if the psychotic individual is grossly out of touch with reality. If somebody was "grossly

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82. *See* State v. McDougall, 113 Idaho 900, 749 P.2d 1025 (Ct. App. 1988) (Burnett, J., specially concurring).

83. State v. Card, 121 Idaho 425, 439, 825 P.2d 1081, 1095 (1991) ("It is clear that a mental defect may diminish an individual's culpability for a criminal act.").

84. This observation certainly suggests a due process violation that has yet to be litigated in Idaho.

85. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 337 (1984).

86. *See* State v. Searcy, 118 Idaho 632, 653, 798 P.2d 914, 935 (1990) (McDevitt, J., dissenting).

87. Francis B. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1004 (1931).

out of touch with reality," it would seem that our criminal justice system would be hard pressed to say that such a person is responsible and should be punished.

Idaho still recognizes the basic fundamental notion of criminal responsibility, but we do not know what it means; i.e., there is no way to prove what it means to be "responsible" or what it means to have a culpable mental state. And until that question is resolved by a court, we will continue to confront the "tangled relationship between mens rea and mental illness,"[88] and the likely prospect that defendants who are not responsible for their actions, will be convicted of crimes.

What one Idaho trial court has done is to merely state, "only responsible persons can be convicted of a crime."[89] That court refused to define "responsibility"[90] because, it said, it would revert the law back to the standards of the old insanity defense. So on the one hand, juries are instructed that a mental condition is not a defense,[91] while on the other hand they are told that only responsible individuals can be convicted of a crime. The logical inconsistencies inherent in those two statements are obvious and it is doubtful juries understand how to apply the facts of a given case to these type of instructions.[92]

That is where the current law has failed. There must be some way to determine who is a responsible person and whether they indeed possess a culpable mental state.

Even opponents of the insanity defense concede that delusional defendants who do not have the capacity to understand that they are committing a wrongful act, should be entitled to an acquittal.[93] The problem with that concession is there is no way to measure if, or how, an accused is delusional.

Take for example the delusional defendant who is commanded by "voices" to shoot another human while thinking he was actually shooting at an apparition.[94] Under the current law, the accused

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88. Recent Developments, *supra* note 37, at 1133.

89. *See* Jury Instruction No. 8, Record, Vol. V, at 1027, State v. Odiaga, ___ Idaho ___, 871 P.2d 801 (1994).

90. *See* Defendant's Requested Jury Instruction No. 49, Supp. Record at 104, State v. Odiaga, ___ Idaho ___, 871 P.2d 801 (1994).

91. *See* IDAHO CODE § 18-207(a).

92. One recent Idaho case attempted to raise this issue, but the argument was rejected by the Idaho Supreme Court since appropriate jury instructions were not requested at the trial level. *See* State v. Gomez, No. 20254, 1994 Opinion No. 88, filed July 11, 1994.

93. *See* Lynn E. Thomas, *Breaking the Stone Tablet: Criminal Law Without the Insanity Defense*, 19 IDAHO L. REV. 239, 254 (1983).

94. This was exactly the factual scenario that was presented by the Odiaga

would be allowed to present expert evidence on his state of mind at the time of the incident. But that statement begs the question: How is a jury to consider the impact of his "volitional" actions?

Of course, the examination of a defendant's "volitional" conduct was a criterion under the old insanity defense. When articulating the insanity defense that was to be adopted by the Idaho Supreme Court in State v. White,[95] the court carefully examined the relationship, and the deficiencies, between the M'Naghten Test and the test of criminal responsibility adopted by the American Law Institute. The court said this:

> The [M'Naghten] test very narrowly asks only whether the defendant was capable of *recognizing* the difference between right and wrong and thus, considers only the *cognitive* aspects of personality. The test omits the *volitional* aspect, that is, whether the person is able to decide to do or not to do something and has the capacity to conform to that decision by controlling conduct accordingly.[96]

Under the old insanity defense, the jury was instructed to examine the "volitional" conduct of the accused and was asked whether the accused was able to "conform his conduct to the requirements of the law." Under the current state of Idaho law, there is no useful way to instruct a jury on that issue.

Furthermore, under Idaho law, there is no useful way to instruct the jury as to how it is to consider the cognitive impairment of a particular defendant. That element was examined by the jury under the old insanity defense by determining whether the accused was "able to appreciate the wrongfulness of his conduct."

Nor do the proposed Idaho Criminal Jury Instructions provide much help. The fact that mental illness may "throw light" on what happened surely does not help a jury gauge the effects of mental illness on questions of responsibility.[97] Juries are also instructed to "consider" the defendant's mental condition "in determining whether he had the requisite state of mind."[98] Again, not much help exists in making sure that we are convicting defendants who are responsible for their actions.

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case. Thus, it would appear that by the standards of Idaho's most vocal opponent of the insanity defense, Odiaga should have been entitled to an acquittal.

95. 93 Idaho 153, 456 P.2d 797 (1969).

96. *Id.* at 157, 456 P.2d at 801.

97. Idaho Criminal Jury Instruction 1104.A (April 1992 proposed draft).

98. Idaho Criminal Jury Instruction 1104.B (April 1992 proposed draft).

We must be able to tell a fact finder what it means to be responsible for criminal conduct. But courts will be very reluctant to do that because concepts of responsibility embrace the standards of the old insanity defense.

A. Psychiatric Testimony

When a case involves questions of mens rea and responsibility, courts and the litigants are necessarily involved with mental health expert testimony.

Opponents of the insanity defense complain that since the sciences of psychiatry and psychology are unreliable, they are not appropriate for consideration in the guilt phases of criminal law.[99] But our system of criminal jurisprudence has found that psychiatry and psychology are reliable enough to be used in many other areas of criminal law.

Beginning at the accusatory stage, an accused must be competent to stand trial.[100] If there is reason to doubt a defendant's competency to stand trial, then a court is required to appoint one qualified psychiatrist or licensed psychologist to examine and report on the mental condition of the defendant to assist counsel with defense of the charge or understand the proceedings.[101] Even under current Idaho law, Idaho Code Section 18-207 allows expert evidence on issues of mens rea or any other state of mind during the guilt phases of a criminal proceeding.

In *Ford v. Wainright*,[102] the United States Supreme Court held that the Eighth Amendment prohibits the state from imposing the death penalty on a prisoner who is insane. In that context, psychological or psychiatric testimony must be submitted to show that the particular inmate is "insane."

In 1983, the United States Supreme court authorized the use of mental health expert testimony at the sentencing hearing in a capital offense case even though such testimony may be unreliable.[103] Even with the perceived unreliability of psychology and psychiatry, the United States Supreme Court has said that it is proper evidence to

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99. *See* Thomas, *supra* note 93, at 245.

100. IDAHO CODE § 18-210.

101. *Id.* § 18-211.

102. 477 U.S. 399 (1986).

103. Barefoot v. Estelle, 463 U.S. 880, 899 (1982) ("We are not persuaded that such testimony is almost entirely unreliable and that the fact finder in the adversary system will not be competent to uncover, recognize and take due account of its shortcomings.").

consider in these types of situations and it is up to the adversary system to point out the weaknesses, or strengths, in the evidence.

VI. CONCLUSION

The current law in Idaho still allows mental illness evidence to be submitted to the fact finder, but the system fails because there is no way to define how a jury is to apply that evidence. The answer is that the term "responsibility" must be defined by using the definition of criminal responsibility set forth in section 4.01[104] of the American Law Institute's Model Penal Code. In this situation however, the definition will not be offered as an instruction on the affirmative defense of insanity; rather, it will be submitted as an instruction to assess the "evidentiary question"[105] as to whether the accused had the requisite mens rea. In this context, we will not be reverting to the old insanity defense, but will be following the guidelines set forth by the Idaho Supreme Court in assessing the true meaning of the evidentiary questions offered in these types of situations. Concepts of mens rea and mental illness involve the most basic and fundamental principles of criminal jurisprudence, yet we do not tell a fact finder how to apply those terms when determining intent. We must split the finest of hairs when determining a person's intent and when we look at the difference between first degree murder and involuntary manslaughter, we must assess culpability and moral blameworthiness. Our courts were able to do this throughout common law and this State was able to do this analysis up until 1982. Our laws still demand that we do this, but we have no guidance now with the insanity defense gone.

The Idaho Supreme Court has said that the viability of the insanity defense is properly left to the discretion of the legislature. And until the United States Supreme Court decides the issue, the Idaho criminal justice system will be left dealing with this "tangled relationship" between mens rea and mental illness. For it is highly doubtful the Idaho Legislature will seriously consider the needs of the mentally ill—especially when they do something bad.

At a minimum, we must ensure that truly "responsible" individuals are being punished for their misdeeds. That is the main purpose behind our criminal justice system. It is a frightening thought, to

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104. *See supra* note 11 for the American Law Institute's definition of "responsibility".

105. State v. Beam, 109 Idaho 616, 621, 710 P.2d 526, 531 (1985) (stating Idaho Code § 18-207 reduces the question of mental condition from the status of a formal defense to that of an evidentiary question).

think that people are being incarcerated for conduct that they did not understand, or could not control: Yet that possibility appears to exist in Idaho. The thesis of this Article offers a solution to this problem.

The current law in Idaho, as it relates to people suffering from mental illness, is barbaric. If supporters of the current system do not agree with that, then they better be ready to punish not only the mentally ill, but also other classes of people which traditionally have been excused for their acts of violence such as the accident-prone, infants, somnambulists, and the mentally retarded.

If society is ready for that, then we are indeed in a sorry state—or should I say State.