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Insane: James Holmes, *Clark v. Arizona*, and America's Insanity Defense

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**INSANE: JAMES HOLMES, CLARK V. ARIZONA,
AND AMERICA'S INSANITY DEFENSE**

BY: ERIC COLLINS

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I. INTRODUCTION

In sentencing James Holmes, the shooter from the 2012 Aurora, Colorado massacre,¹ Judge Carlos A. Samour² stated, “James Holmes was an angry quitter who gave up on life and turned his hatred into murder and mayhem against innocent victims. It’s almost impossible to comprehend how a human being is capable of such acts.”³ He sentenced Holmes to twelve consecutive life sentences equaling 3,318 years.⁴

“The severity and intensity of his psychosis was so high so severe, as to render him incapable of distinguishing between right and wrong.”⁵ A psychiatrist who treated James Holmes described him as an anti-social “odd-ball” who thought obsessively about killing people in the months before the shooting.⁶ His psychiatrist testified that James Holmes had “homicidal thoughts” as often as three or four times a day in March 2012 and had an obsession with killing that was only getting worse.⁷

This begs the question how does there exist a deeply divided dichotomy to describe the mental state of one man? The explanation is rooted in the definition of insanity. Insanity is a legal term of art that changes definitions depending on the legal standard in American jurisprudence.⁸ This explains why a man who mental health professionals described as having an uncontrollable obsession with killing people can be found not insane and guilty. Nevertheless, would James Holmes’ fate be different had John Hinckley been found guilty for his attempted assassination of President Ronald Reagan?

John Hinckley’s attempted assassination on Ronald Reagan changed the course of the insanity plea.⁹ John Hinckley successfully pleaded not guilty by reason

¹ Richard Esposito, Jack Date et al, *Cops: Aurora ‘Dark Knight’ Suspect James Holmes Said He ‘Was the Joker’*. (July 20, 2012), <http://abcnews.go.com/Blotter/aurora-dark-knight-suspect-joker-cops/story?id=16822251>. Holmes dyed his hair like the Joker (from the 2008 film *The Dark Knight*) and told authorities that he “was the Joker”. *Id*

² *Colorado theatre shooter James Holmes formally sentenced to life in prison by judge*, <http://www.nydailynews.com/news/national/james-holmes-formally-sentenced-life-prison-article-1.2338030>. (Nov. 28, 2016)

³ *Id.*

⁴ Ann O’Neill, *Theatre shooter Holmes gets 12 life sentences, plus 3,318 years* (Aug. 27, 2015), <http://www.cnn.com/2015/08/26/us/james-holmes-aurora-massacre-sentencing/>.

⁵ Julie Turkewitz, *Aurora Gunman Legally Insane, Psychiatrist Says* (July 8, 2015), http://www.nytimes.com/2015/07/09/us/aurora-gunman-james-holmes-legally-insane-psychiatrist-says.html?_r=0.

⁶ Ann O’Neill & Sara Weisfeldt, *Psychiatrist: Holmes thought 3-4 times a day about killing* (June, 17, 2015), <http://www.cnn.com/2015/06/16/us/james-holmes-theater-shooting-fenton/> (Nov. 28, 2016)

⁷ *Id.*

⁸ *Insanity*, THEFREEDICTIONARY.COM, <http://medical.dictionary.thefreedictionary.com/insanity> (last visited Nov. 28, 2016).

⁹ *John Hinckley, Jr.*, *The American Experience*, PBS.ORG, <http://www.pbs.org/wgbh/americanexperience/features/biography/reagan-hinckley/>. (last visited Nov. 28, 2016).

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of insanity.¹⁰ The public outcry was such that there was a legislative push for a new insanity standard in the United States. The Hinckley verdict shocked the world and consequently birthed The Insanity Defense Reform Act of 1984. The public push for a stricter standard made the passing of the act uncontroversial.¹¹

This article addresses the current state of the Insanity Defense Reform Act of 1984 and its widespread implementation at the state level. Part II of this Note supplies background information on the history of the insanity defense and how it has transformed over the years in American jurisprudence. Part III provides an analysis of the of the insanity defense. Part IV suggests a new standard of for the insanity defense with a more accommodating application to a wider degree of mental diseases.

I. BRIEF HISTORY OF THE INSANITY DEFENSE

A. *Criminal Act Requirements*

To understand the history of the insanity defense it is paramount to understand the two elements required for a criminal offense. Outside of inchoate offenses, a criminal act requires a finding of causation: the actus reus and mens rea.¹² The actus reus is the wrongful act or omission that comprises the physical components of a crime.¹³ The mens rea is the mental component of the crime comprised of guilty knowledge and willfulness.¹⁴ In other words, a person is considered liable for the criminal act if during the offense he or she was believed to have a guilty state of mind.¹⁵ The restraining of the insanity defense limits the inclusion of many mental diseases as being the true causation of criminal acts. The limiting of mental diseases does not allow for a greater understanding of whether the accused theoretically had the guilty state of mind required. Thus, in effect, the current insanity defense does not allow criminal justice to be achieved. The current insanity test is most similar to the M'Naghten test, created in 1843.¹⁶

¹⁰ *Id.*

¹¹ There was an immediate public outcry against what many perceived to be a loophole in the justice system that allowed an obviously guilty man to escape punishment. There were widespread calls for the abolishment, or at least the substantial revision of the insanity-plea laws. *A Brief History of the Insanity Defense*, Frontline, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html>. (last visited Nov. 28, 2016).

¹² *Elements of a Crime: Mens Rea and Actus Reus*, <http://law.jrank.org/pages/22506/Criminal-Law-Elements-Crime-Mens-Rea-Actus-Reus.html>. (last visited Nov. 28, 2016).

¹³ *Actus Reus*, THEFREEDICTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/actus+reus>. (last visited Nov. 28, 2016)

¹⁴ *Mens Rea*, THEFREEDICTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/mens+rea>. (last visited Nov. 28, 2016)

¹⁵ *Id.*

¹⁶ *Insanity Defense*, Legal Information Institute, https://www.law.cornell.edu/wex/insanity_defense. (last visited Nov. 28, 2016).

B. The M’Naghten Test

Daniel M’Naghten suffered from delusions of persecution.¹⁷ He considered the Prime Minister of England, Robert Peel, to be his major persecutor.¹⁸ To alleviate himself of his perceived persecutor, M’Naghten traveled to London in 1843 intending to assassinate Peel. M’Naghten shot into the wrong carriage, which he believed was carrying the Prime Minister, but was in fact carrying Robert Peel’s secretary, Edward Drummond.¹⁹ M’Naghten’s defense was based upon the *Medical Jurisprudence of Insanity*, which advocated “the human mind is not compartmentalized and that a defect in one aspect of the personality could spill over and affect other areas.”²⁰ Lord Chief Justice Tindal was so impressed with this rationale that he essentially directed a verdict for M’Naghten.²¹

The M’Naghten test, which was born from the M’Naghten case, came from the jury instructions from Lord Chief Justice Tindal.²² In short, the M’Naghten test is a cognition test that determines whether a defendant knew right from wrong at the time of a crime.²³ The test determines whether a defendant had the requisite mens rea to form criminal intent at the time of a crime.²⁴ The test also puts the burden of proof on the defendant to prove he or she was insane at the time of a crime.²⁵ The M’Naghten test emphasizes knowledge of right or wrong. Thus, conceptualizing a single element of personality as the sole symptom of existence of a mental illness.²⁶ In practice, the test is an all-or-nothing approach, requiring total incapacity of cognition.²⁷ The difficulties of the applicability the M’Naghten led the to use the newly created Irresistible Impulse test.²⁸

¹⁷ *Queen v. M’Naghten*, 8 Eng. Rep. 718 (1843).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *M’Naghten Rules Definition*, Duhaime’s Law Dictionary, <http://www.duhaime.org/LegalDictionary/M/MNaghtenRules.aspx>. (last visited Nov. 28, 2016). “The 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 defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as to not 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”. *Id.*

²³ *The M’Naghten Rule*, USLEGAL.COM, <https://criminallaw.uslegal.com/defense-of-insanity/the-mnaghten-rule/>. (last visited Nov. 28, 2016).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Joshua Dressler & Stephen P. Garvey, *Cases and Materials on Criminal Law*, 601 (6th ed. 2012).

²⁷ *Id.*

²⁸ *Parsons v. State*, *Infra* note 29.

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C. *Irresistible Impulse Test*

On January 31, 1885 Nancy and Joe Parsons shot and killed Bennett Parsons.²⁹ Nancy raised the defense of insanity, stating that the killing was the result of an insane delusion that the deceased, Bennet, possessed supernatural power to inflict her with disease and take her life.³⁰ Thus, Nancy claimed that she was under the insane delusion that she was in great danger of the loss of her life.³¹ The court decided that the M'Naghten test was difficult to apply practically.³² The Supreme Court of Alabama came up with a new standard for legal responsibility that created a volitional justification for not bearing criminal liability:

If, by reason of duress of such mental disease, he had so far lost the *power* to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if at the same time the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.³³

The Irresistible Impulse test expounded on the M'Naghten test by requiring not only a mental disease, but also that the mental disease be the cause of the actions.³⁴ This expanded the M'Naghten test by not requiring a mental disease that caused the defendant to know the nature and quality of his act.³⁵ Therefore, there are

²⁹ *Parsons v. State*, 81 Ala. 577 (1887). Nancy Parsons was the wife of Bennett Parsons, and Joe Parsons was the daughter of the deceased. *Id.* at 580.

³⁰ *Id.* “The evidence on behalf of defendants tended to show that defendant Joe Parsons was, at the time of said killing, and had always been, an idiot; and that defendant Nancy Parsons was, at the time of said killing, insane; that the act of Nancy, assisting in the killing of deceased, was the result of an insane delusion that deceased possessed supernatural power to inflict her with disease, and power by means of a supernatural trick to take her life; that deceased by means of such supernatural power had caused said Nancy to be sick and in bad health for a long time, and that her act, at the time of said killing, in assisting therein, was under the insane delusion that she was in great danger of the loss of her life from deceased, to be affected by a supernatural trick.” *Id.*

³¹ *Id.* at 581.

³² *Id.* “The courts, in effect, charge the juries, as matter of law, that no such mental disease exists as that often testified to by medical writers, superintendents of insane hospitals, and other experts; that there can be, as matter of scientific fact, no cerebral defect, congenital or acquired, which destroys the patient's power of self-control, his liberty of will and action, provided only he retains a mental consciousness of right and wrong. The experts are immediately put under oath, and tell the juries just the contrary, as matter of evidence; asserting that no one of ordinary intelligence can spend an hour in the wards of an insane asylum without discovering such cases, and in fact that “the whole management of such asylums presupposes a knowledge of right and wrong on the part of their inmates.” Guy & F. *Forensic Med.* 220. The result in practice, we repeat, is that the courts charge one way, and the jury, following an alleged higher law of humanity, find another, in harmony with the evidence” *Id.* at 587.

³³ *Id.* at 597.

³⁴ *Id.*

³⁵ *Id.*

a wider range of mental diseases for a defendant to have to successfully plead insanity.³⁶

There are many criticisms of the Irresistible Impulse Test. When applied in cases subsequent *Parsons*, difficulty arose as to how the test should be applied. The court stated, “We do not know that the impulse was irresistible, but only that it was not resisted.”³⁷ The court went on to reject the Irresistible Impulse test, and apply the M’Naghten standard, where the defendant must be held responsible if he knew the nature and quality of the act, and of its wrongfulness.³⁸ A notable critic of the Irresistible Impulse test was *Durham v. U.S* court.³⁹

D. The Durham Product Test

Monte Durham was convicted of housebreaking in 1951.⁴⁰ He asserted the defense that he was of an unsound mind at the time of the crime.⁴¹ Durham had a long history of mental illness, and psychiatrists determined that he suffered from hallucinations and delusions.⁴² During the psychiatrist’s expert testimony, however, the psychiatrist was unable to formulate an opinion as to Durham’s understanding of right from wrong.⁴³ The circuit judge applied a new rule to determine Durham’s legal sanity at the time of the crime: “An accused is not criminally responsible if his unlawful act was the product of mental disease or defect.”⁴⁴ This rule required the giving of convoluted jury instructions thus relying heavily on expert testimony for the finder of fact to determine whether the defendant was insane at the time of the crime.⁴⁵ The test facilitated full and complete expert testimony and permitted the jury to consider all relevant information.⁴⁶

³⁶ *Id.*

³⁷ *People v. Hubert*, 119 Cal. 216, 223 (1897). “...Whether irresistible or not must depend upon the relative force of the impulse and the restraining force, and it has been well said to grant immunity from punishment to one who retains sufficient intelligence to understand the consequences to him of a violation of the law, may be to make an impulse irresistible which before was not.” *Id.*

³⁸ *Id.* at 217.

³⁹ *Durham v. United States*, 214 F.2d 862, 864 (D.C. Cir. 1954)

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 868.

⁴³ *Id.* at 868. “The Witness: ‘I can only answer this way: That I can’t tell how much the abnormal thinking and the abnormal experiences in the form of hallucinations and delusions- delusions of persecution- had to do with his anti-social behavior. ‘I don’t know how anyone can answer that question categorically, except as one’s experience leads him to know that most mental cases can give you a categorical answer of right and wrong, but what influence these symptoms have on abnormal behavior or anti-social behavior’.
The Court: ‘Well, your answer is that you are unable to form an opinion, is that it?’
The Witness: I would say that that is essentially true, for the reasons that I have given.’”
Id. at 868.

⁴⁴ *Id.* at 874.

⁴⁵ *Id.* at 875. “Under the rule now announced, any instruction should in some way

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In application, the test faced many difficulties.⁴⁷ The Durham Product test tended to result in the expert witness assuming the jury function.⁴⁸ However, Federal Rules of Evidence 704(b) now protects expert witnesses from assuming the jury function and making legal conclusions about a defendant's mental state.⁴⁹ The rule was added into the evidentiary rules in 1984 after the passing of the Insanity Defense Reform Act of 1984 to further limit expert testimony in criminal cases.⁵⁰ Expert testimony is now restricted to medical matters, and the expert is barred from making legal conclusions in court as to whether the defendant had the sufficient mens rea to be held criminally responsible.⁵¹ While 704(b) was not added until 1984, the obvious problems with the Durham Product Test led to the American Law Institute to create own insanity definition.⁵²

E. Model Penal Code Test

The American Law Institute created an insanity test for the 1962 Model Penal Code. The proposal for a new insanity rule was made in 1955.⁵³ The Model Penal Code relieves the defendant of responsibility under two circumstances:⁵⁴ "A person

convey to the jury the sense and substance of the following: If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. Thus, your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case." *Id.*

⁴⁶ Joshua Dressler & Stephen P. Garvey, *Cases and Materials on Criminal Law*, 602 (6th ed. 2012).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Fed. R. Evid. 704(b).

⁵⁰ *Insanity—Scope of Expert Testimony*, OFFICES OF THE UNITED STATES ATTORNEY, <https://www.justice.gov/usam/criminal-resource-manual-639-insanity-scope-expert-testimony>. (last visited Nov. 28, 2016).

⁵¹ *Id.*

⁵² *Id.*

⁵³ Joshua Dressler & Stephen P. Garvey, *Cases and Materials on Criminal Law*, 603 (6th ed. 2012).

⁵⁴ *Id.*

is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect, he or she lacks the substantial capacity to: (1) appreciate the criminality of his conduct; or (2) conform his conduct to the requirements of law.⁵⁵

The Model Penal Code test is much broader than the previous insanity tests.⁵⁶ Its use of “appreciate” rather than “know” conveys a broader understanding than the simplistic cognitive test applied in M’Naghten.⁵⁷ This volitional element of the test calls for a distinction between incapacity and mere reluctance to conform one’s conduct to the requirements of the law.⁵⁸

In direct contrast with the M’Naghten and Irresistible Impulse standards, the Model Penal Code test reflects the conclusion that no test is workable that calls for complete impairment of ability to know or control.⁵⁹ This test broadens the jurors understanding of the mental health condition that the defendant faced when committing the crime, as it allows for the introduction of expert testimony into the volitional and cognitive elements of the crime and is not as narrowly construed as the M’Naghten standard.⁶⁰ The M’Naghten test only asks the expert whether the defendant suffered from delusional psychosis.⁶¹ That simple question makes it difficult to apply to defendants and harder for defendants to succeed in the eyes of the fact-finder.

The “substantial capacity” requirement delivers legal practicality to understanding the complexities of the human brain.⁶² The wide berth the test offers the fact-finder to hear a range of mental diseases which can replace the mens rea of the crime.⁶³ Thus, the defendant is not responsible for the criminality of her conduct.⁶⁴ The test was widely adopted by State courts by the 1970s.⁶⁵ The more

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 603.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 604.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *The Model Penal Code Test for Legal Insanity*, FINDLAW.COM, <http://criminal.findlaw.com/criminal-procedure/the-model-penal-code-test-for-legal-insanity.html>. (last visited Nov. 28, 2016). “In addition to the popularity of the more expansive test for legal insanity among state legislatures, many state courts during the ‘60s and ‘70s issued ruling demonstrating a growing concern with protecting the civil rights of the mentally ill. Many courts struck down laws providing for the automatic and indefinite confinement of defendants who had been acquitted by reason of insanity. The courts said that due process and equal-protection concerns required that those found not guilty but confined due to mental illness had the right to periodic reassessment of their mental health status and dangerousness. If the evaluations did not find justification for continued confinement, the defendants would be released. By the early 1980s, all but 10

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forgiving test to the defendant ultimately saw its downfall in American jurisprudence when the test was applied to John Hinckley Jr. after his assassination attempt on Ronald Reagan.

F. *Insanity Defense Reform Act of 1984*

After John Hinckley's acquittal, America was in uproar.⁶⁶ Jurors felt unreasonably restrained to the trial judge's instructions and the offering of only two options: not guilty by reason of insanity or guilty.⁶⁷ The jurors expressed that they believed Hinckley was mentally ill at the time of the crime, but felt he was still criminally culpable.⁶⁸ The Attorney General of the United States, William French Smith, exclaimed, "abolish the insanity defense to the maximum extent possible."⁶⁹

The Attorney General's and Hinckley jurors' comments were given before a Senate subcommittee on reforming the insanity defense.⁷⁰ Congress acted swiftly

state legislatures had responded to these decisions and reformed their laws to provide for such review procedures." *A Brief History of the Insanity Defense*, Frontline, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/crime/trial/history.html>. (last visited Nov. 28, 2016).

⁶⁶ *Hinckley Acquittal Brings Moves to Change Insanity Defense*, N.Y. TIMES, (June 24, 1982), <http://www.nytimes.com/1982/06/24/us/hinckley-acquittal-brings-moves-to-change-insanity-defense.html>. 76% of Americans did not believe justice had been done and 90% of Americans did not think Hinckley should go free even if he recovered from his mental illness. *Id.* Four states also abolished the Insanity Defense all together: Montana, Utah, and Idaho, joined by a fourth, Kansas, in 1995). *See also Insanity Defense*, USLEGAL.COM, <http://lawdigest.uslegal.com/criminal-laws/insanity-defense/7204>. (last visited Nov. 28, 2016)

⁶⁷ Stuart Taylor Jr., *5 Hinckley Jurors Testify in Senate*, N.Y. TIMES, (June 25, 1982), <http://www.nytimes.com/1982/06/25/us/5-hinckley-jurors-testify-in-senate.html>.

⁶⁸ *Id.* Hinckley had grown obsessed with the movie *Taxi Driver*, in which the protagonist plots to assassinate a presidential candidate. He called and sent letters to Jodie Foster, one of the movie's stars.

In Hinckley's trial, there was no question that he was a troubled young man. The defense argued that Hinckley should not be held accountable for the shootings because he was suffering from a major depressive disorder and from schizophrenia. Prosecutors argued that he was sane and should be found guilty because he was only suffering from depressive neurosis and personality disorders. *See also* Natalie Jacewicz, *After Hinckley, States Tightened Use of the Insanity Plea*, NPR, (July 28, 2016), <http://www.npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea>.

⁶⁹ *Ideas and Trends; Taking Aim at insanity Defense*, N.Y. TIMES, (July 25, 1982), <http://www.nytimes.com/1982/07/25/weekinreview/ideas-and-trends-taking-aim-at-insanity-defense.html>. Ronald Reagan also expressed desire for the insanity defense to be abolished. *Id.* The Attorney General went on to state: "There must be an end to the doctrine that allows so many persons to commit crimes of violence, to use confusing procedures to their own advantage, and then to have the door opened for them to return to the society they victimized." *Quotation of the Day*, N.Y. TIMES, (June 23, 1982), <http://www.nytimes.com/1982/06/23/nyregion/quotation-of-the-day-230601.html>.

⁷⁰ Stuart Taylor Jr., *5 Hinckley Jurors Testify in Senate*, N.Y. TIMES, (June 25, 1982), <http://www.nytimes.com/1982/06/25/us/5-hinckley-jurors-testify-in-senate.html>.

passing a law to change the insanity defense.⁷¹ The Insanity Defense Act of 1984 did not revolutionize the insanity defense, instead it was a reversion to the 19th century definition of insanity. The main issue became whether defendant had the requisite mens rea for the crime. Title IV of the Comprehensive Crime Control Act of 1984⁷² laid out the new insanity defense standard:

Affirmative Defense

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense

Burden of Proof

The defendant has the burden of proving the defense of insanity by clear and convincing evidence.⁷³

The Insanity Defense Reform Act of 1984 made three major changes to the insanity defense.⁷⁴ First, the act significantly restricted the standard of insanity to the M’Naghten test.⁷⁵ Second, the burden of proof was shifted from the government to the defendant.⁷⁶ Third, the law prohibits experts from testifying as to the ultimate legal issue of whether the defendant was insane at time of the commission of the crime.⁷⁷ Following the passage of the act, many states today have adopted the standard of insanity set forth by the act with some states abolishing the insanity defense entirely.⁷⁸ Colorado, the state where James Holmes was tried, adopted a modified standard of the M’Naghten test with the State bearing the burden of

⁷¹ Anne Lawson Braswell, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 Cornell L. Rev. 620, 624 (1987).

⁷² PL 98-473. <https://www.congress.gov/bill/98th-congress/senate-bill/1762>.

⁷³ 18 U.S.C. § 17 (West, 2016).

⁷⁴ *Id.*

⁷⁵ *United States v. Freeman*, 804 F.2d 1574, 1575 (11th Cir. 1986). First, the definition of insanity was restricted so that a valid defense only exists where the defendant was “unable to appreciate the nature and quality or the wrongfulness of his acts” at the time of the offense. The amendment thus eliminated the volitional prong of the defense. *Id.*

⁷⁶ *Id.* Prior to the Act, the government was required to prove beyond a reasonable doubt that the defendant was sane at the time of the offense. Under the current act, the defendant must prove his insanity by clear and convincing evidence to escape criminal liability. *Id.*

⁷⁷ *Id.* The act changes Federal Rules of Evidence 704 to provide: 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. *Id.* Insanity is a purely legal term, and thus is a legal conclusion. See Hinckley Jr., *supra* note 9.

⁷⁸ *The Insanity Defense Among States*, FINDLAW.COM, <http://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html> (last visited Nov. 29, 2016). 25 of the 46 states that allow an insanity defense adopted the M’Naghten standard. While 36 of 46 states adopted the burden of proof shift from the state to the defendant. *Id.*

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proving the defendant's insanity.⁷⁹ This means that if a defendant pleads not guilty by reason of insanity, the State has the burden of disproving the insanity plea.⁸⁰ Thus, ultimately trying to prove that the defendant was sane at the time of the crime. While the less restrictive standard for insanity was the law for the James Holmes case, it was not enough to save him being found sane at the time of his mass shooting.

II. ANALYSIS

"From the perspective of the prosecution, it's kind of like shooting fish in a barrel."⁸¹ Although nearly all of the States in the United States have insanity defenses, the insanity defenses that are currently in place present difficulties in practical application. The insanity defense is raised in only one percent of cases with only a twenty-six percent success rate.⁸² That is the most widely cited data point on the insanity defense use and success in the United States, but the problem arises in the years the study was conducted. The study was conducted between the years 1976-1987, which concentrates the success rate to a higher percentage of cases decided before the Insanity Defense Reform Act of 1984 was passed and subsequently the insanity defense resembled the M'Naghten standard in most States.⁸³ Without proper understanding of the available data, the twenty-six percent

⁷⁹ *Id.* The applicable test of insanity shall be: (a) A person who is so diseased or defective in mind at the time of the commission of the act as to be incapable of distinguishing right from wrong with respect to that act is not accountable; except that care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions, for when the act is induced by any of these causes, the person is accountable to the law; or

(b) a person who suffered from a condition of mind caused by mental disease or defect that prevented the person from forming a culpable mental state that is an essential element of a crime charged, but care should be taken not to confuse such mental disease or defect with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred, or other motives and kindred evil conditions because, when the act is induced by any of these causes the person is not accountable to the law. Colo. Stat. § 16-8-101.5 (2013).

⁸⁰ *Id.*

⁸¹ Russ Buettner, *Mentally Ill, but Insanity Plea is Long Shot*, N.Y. TIMES, <http://www.nytimes.com/2013/04/04/nyregion/mental-illness-is-no-guarantee-insanity-defense-will-work-for-tarloff.html>. Those comments were made by Charles P. Ewing, a forensic psychologist, lawyer, and professor at the University of Buffalo Law School. *Id.* Charles Ewing went on to state: However, even when the insanity defense is successful, defendants are rarely set free. Those defendants are typically sent to secure state psychiatric institutions until they are deemed no longer mentally ill or dangerous. Most will spend longer in a lockdown psychiatric center than they would have spent in prison had they pleaded guilty. "I tell my students you have to be crazy to plead insanity," Dr. Ewing said. "And I say that because the consequences are so grave." *Id.* "In terms of responsibility, you have to be extremely mentally ill not to be able to understand what you are doing, or that it's wrong." *Id.*

⁸² Lisa A. Callahan, Henry J. Steadman, et al. *Journal of the American Academy of Psychiatry and the Law Online* 331, <http://jaapl.org/content/jaapl/19/4/331.full.pdf>.

⁸³ *Id.*

success rate number can be misconstrued by proponents of abolishing the insanity defense or in favor of keeping the restrictive standard currently in place. Thus, the success rate of people pleading not guilty by reason of insanity is certainly much lower. The Supreme Court decision in *Clark v. Arizona* all but assured the success rate of defendants pleading not guilty by reason of insanity would be lowered.⁸⁴

A. *Clark v. Arizona*

This problem metastasized in American jurisprudence in the landmark *Clark v. Arizona* Supreme Court decision. The Supreme Court held that narrowing of the definition of insanity by eliminating the requirement of the M’Naghten test, as to whether the mental defect left defendant unable to understand what he was doing, did not violate due process.⁸⁵ The Supreme Court held that the requirement of whether a mental disease or defect left defendant unable to understand that his action was wrong, was constitutional.⁸⁶ The appellant, Eric Clark, suffered from paranoid schizophrenia, but the Supreme Court held that Arizona can preclude use of expert testimony to negate the mens rea element of the crime.⁸⁷ This restricts the insanity defense to a pre-M’Naghten era, when the mentally ill were put in asylums, little was known about mental health, and strait jackets and spiritual discussion were common forms of treatment.⁸⁸

Justice Anthony Kennedy dissented in the case and focused on the practical effects of limiting the M’Naghten rule. “The rule forces the jury to decide guilt in a fictional world with undefined and unexplained behaviors but without mental illness.”⁸⁹ He goes on to state that the court’s evidentiary framework for proving

⁸⁴ *Clark v. Arizona*, 548 U.S. 735 (2006).

⁸⁵ *Id.* Due process challenge to state trial court’s alleged restriction of observation evidence supporting defendant’s claim of mental disease would not be considered by Supreme Court, where issue was neither pressed nor passed upon in state appellate court; trial judge did not specify any particular evidence that he refused to consider on mens rea issue, nor did defense counsel specify any observation or other particular evidence that he claimed was admissible but wrongly excluded on issue of mens rea, so as to produce clearer ruling on what evidence was being restricted. *Id.*

⁸⁶ *Id.* at 747. Arizona’s narrowing of its definition of insanity, eliminating the part of M’Naghten test asking whether mental defect left defendant unable to understand what he was doing, leaving only the question whether mental disease or defect left defendant unable to understand that his action was wrong, did not violate due process; elimination of part of M’Naghten test did not offend fundamental principle or shortchange some constitutional minimum. *Id.*

⁸⁷ *Id.* at 765. A psychiatrist testified that Clark was suffering from paranoid schizophrenia with delusions about “aliens” when he killed the police officer, and concluded that Clark was incapable of luring the officer or understanding right from wrong and was thus insane at the time of the killing. *Id.* at 735.

⁸⁸ Allison M. Foerschner, *The History of Mental Illness: From Skull Drills to Happy Pills*, INQUIRIESJOURNAL.COM, <http://www.inquiriesjournal.com/articles/283/2/the-history-of-mental-illness-from-skull-drills-to-happy-pills>. (last visited Nov. 29, 2016).

⁸⁹ *Clark v. Arizona*, 548 U.S. 735, 800 (2006). “While defining mental illness is a difficult matter, the State seems to exclude the evidence one would think most reliable by allowing unexplained and uncategorized tendencies to be introduced while excluding relatively well-understood psychiatric testimony regarding well-documented mental

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insanity is unworkable in many cases.⁹⁰ “The Court classifies Clark’s behavior and expressed beliefs as observation evidence but insists that its description by experts must be mental-disease evidence or capacity evidence. These categories break down quickly when it is understood how the testimony would apply to the question of intent and knowledge at issue here.”⁹¹ Justice Kennedy’s dissent sums up the evils of the contraction of the insanity defense.

The American Psychiatric Association (hereinafter “APA”) is an organization of psychiatrists working to ensure humane care and effective treatment for persons with mental illness.⁹² They filed an amicus brief in support Clark arguing that due process rights demand the opportunity to introduce evidence that might negate the mental state element of a crime.⁹³ The brief specifically noted that the court, denying consideration of evidence of Clark’s psychotic delusions, may have had direct bearing on his mens rea at the time of the crime.⁹⁴ The amicus brief advocated for the importance greater expert evidence about mental disorders. It stated, as follows:

“Expert evidence about mental disorders, pervasively treated as reliable and in fact relied on in our legal system, can bear directly on mens rea questions. For example, the delusions that are one defining characteristic of schizophrenia affect an individual’s beliefs and, hence, the individual’s understanding of what he is doing and, hence, his knowledge, intent, or purposes.”⁹⁵

The APA further opined that an insanity defense should preclude serious criminal punishment for a defendant.⁹⁶ It reasoned that, as a result of the mental disorder, the defendant lacks understanding of the wrongfulness of his conduct at the time of the crime.⁹⁷ Thus, the stringent standards of insanity may not alleviate the defendant from a guilty verdict, but the sentencing should reflect the impact the mental

illnesses. It is unclear, moreover, what would have happened in this case had the defendant wanted to testify that he thought Officer Moritz was an alien. If disallowed, it would be tantamount to barring Clark from testifying on his behalf to explain his own actions. If allowed, then Arizona’s rule would simply prohibit the corroboration necessary to make sense of Clark’s explanation. In sum, the rule forces the jury to decide guilt in a fictional world with undefined and unexplained behaviors but without mental illness. This rule has no rational justification and imposes a significant burden upon a straightforward defense: He did not commit the crime with which he was charged.” *Id.*

⁹⁰ *Id.* at 782

⁹¹ *Id.*

⁹² *APA’s Vision, Mission, Values, and Goals*, AMERICAN PSYCHIATRIC ASSOCIATION, <https://www.psychiatry.org/about-apa/vision-mission-values-goals>. (last visited Mar. 29, 2017)

⁹³ *Clark v. Arizona*, AMERICAN PSYCHIATRIC ASSOCIATION, <http://www.apa.org/about/offices/ogc/amicus/clark.aspx>. (last visited Mar. 29, 2017).

⁹⁴ *Id.*

⁹⁵ *Brief for Clark* at 12-13, *Clark v. Arizona*, 548 U.S. 745 No. 05-5966, (2006).

⁹⁶ *Id.*

⁹⁷ *Id.*

disorder had on the defendant who committed the crime.⁹⁸ The APA's concession and plead for lighter punishment for mental health patients is a microcosm of the larger problem in America jurisprudence. The Supreme Court's ruling in *Clark* made it constitutional for State's right to ban all meaningful psychiatric testimony in constructing their not guilty by reason of insanity statutes.

In holding that it is constitutional to bar expert testimony to negate mens rea, the Supreme Court allowed for more States to handicap the insanity defense even more than the Insanity Defense Reform Act endorsed.⁹⁹ Without expert testimony to negate mens rea, the rule forces the jury to decide guilt in a fictional world with unexplained behaviors but without a mental illness to attribute to the cause of the behaviors.¹⁰⁰ This holding allows for state statutes to further limit the insanity defense to bar expert testimony on the defendant's mens rea, similar to Arizona's statute¹⁰¹ or worse, following the lead of the four states who have already banned the use of the insanity defense.¹⁰²

However, the *Clark* case did not limit James Holmes' defense as Colorado did not adopt the *limited* M'Naghten insanity test, but the M'Naghten insanity test was still in effect.¹⁰³ The jurors did agree that James Holmes was affected by a mental health disease.¹⁰⁴ The jurors felt he knew right from wrong, and thus was not legally insane.¹⁰⁵ The jurors however could not agree on sentencing James Holmes to death because of the existence of his mental health disease.¹⁰⁶ The M'Naghten test is a high bar for the mentally-ill defendant to clear that the real issue becomes whether it is morally right to sentence the mentally-ill defendant to death for their crimes. Crimes, that the jurors know, a mental disease had a part in causing.

The issue is never more present than in the intersection of mental disease and mass shootings. According to Grant Duwe, author of the book *Mass Murder in the United States: A History*, there has been 160 mass shootings, seventy-four times the killers went to trial, and only three were found to be legally insane.¹⁰⁷ A moral

⁹⁸ *Id.*

⁹⁹ See *People v. Elmore*, 59 Cal. 4th 121, 144 (Cal. 2014). The United States Supreme Court has confirmed that state law does not violate due process by "restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of the mental element of the crime charged. *Id.*

¹⁰⁰ The Insanity Defense Among States, *supra* note 78.

¹⁰¹ AZ. Rev. Stat. § 13-502.

¹⁰² See *supra* note 53.

¹⁰³ See *supra* note 72.

¹⁰⁴ Maria L. La Ganga, *James Holmes Prosecutor Talks About the One Holdout Juror Who Spared the Killer's Life*, LA TIMES, (Aug. 24, 2015), <http://www.latimes.com/nation/la-na-holmes-da-qa-20150824-story.html>. (last visited March 23, 2017).

¹⁰⁵ Ann O'Neill, *James Holmes Life Story Didn't Sway Jury*, CNN, (Aug. 11, 2015), <http://www.cnn.com/2015/08/02/us/13th-juror-james-holmes-aurora-shooting/>.

¹⁰⁶ See *Clark v. Arizona*, *supra* note 89.

¹⁰⁷ *Sinister but Sane, or Schizophrenic?*, Chi. Trib. (Apr. 27, 2015), <http://www.chicagotribune.com/news/nationworld/chi-james-holmes-colorado-20150427-story.html>.

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challenge poses itself when a jury has to decide how to weigh the defendant's mental illness with the presence of the victim's family in the courtroom, seeking justice by finding the defendant guilty. The victim's family can provide a powerful presence and powerful testimony when testifying before a sentencing hearing.¹⁰⁸ The victim's family does not find the closure it is seeking in a not guilty by reason of insanity verdict.¹⁰⁹ The threatening issue of disappointing a victim's families even further by finding the defendant not guilty.

The main crux of the problem is when the mental illness satisfies the mens rea of the crime. Thus, the mental health expert can no longer explain why the defendant committed the act charged. That problem is present in cases involving defendants who have been previously diagnosed with schizophrenia and are unable to mitigate the mens rea element with expert testimony regarding the intricacies of their disorder.¹¹⁰

B. *Schizophrenia*

Schizophrenia is a chronic brain disorder that affects the way a person behaves, thinks, and sees the world.¹¹¹ People who suffer from Schizophrenia see or hear things that don't exist, believe others are trying to harm them, or feel like they're being constantly watched.¹¹² Schizophrenia causes people to withdraw from the outside world or act out in confusion and fear.¹¹³ Schizophrenia is a common diagnosis among defendants pleading not guilty by reason of insanity.¹¹⁴ Schizophrenia is a common disorder that shows recognizable symptoms where those

¹⁰⁸ "I don't think we'll ever do a family picture again because every time you do a family picture, it jumps out at you who's missing," said Kathleen Larimer, mother of John Larimer, who was among those killed. *Victims Families Offer Emotional Testimony at James Holmes Trial*, CBS NEWS, (Aug. 5, 2015). <http://www.cbsnews.com/news/colorado-shooting-victims-families-offer-emotional-testimony-at-james-holmes-trial/>. "I am now a single mother of one child," she said. "I have lost half of what I was put on this Earth to do." *Id.*

¹⁰⁹ Nick Zizaza, *Family of Murdered Woman Finds No Closure In Not Guilty by Reason of Insanity Verdict*, WWMT.COM, (Mar. 13, 2017). <http://wwmt.com/news/local/family-of-murdered-woman-finds-no-closure-in-not-guilty-by-reason-of-insanity-verdict>.

¹¹⁰ See *State v. Bethel*, 275 Kan. 456 (2003).

¹¹¹ Melinda Smith, M.A. & Jeanne Segal, Ph.D., *Schizophrenia*, HELPGUIDE.ORG, (2016), <http://www.helpguide.org/articles/schizophrenia/schizophrenia-signs-types-and-causes.htm>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See A Brief History of the Insanity Defense, *supra* note 11. John Du Pont was diagnosed as a paranoid schizophrenic and pleaded not guilty by reason of insanity to the murder Olympic Wrestler David Schultz. Mark Hay, VICE, *The Mental Illness Behind the Foxcatcher Murder* (Nov. 17, 2014). https://www.vice.com/en_us/article/the-mental-illness-behind-the-foxcatcher-murder-425. John Du Pont was found guilty. *Id.* Andrew Goldstein was a diagnosed schizophrenic who was released from the hospital weeks before pushing Kendra Webdale in front of New York Subway train. Anemona Hartocollis, NY TIMES, *Nearly 8 Years Later, Guilty Plea in Subway Killing*, (Oct. 11, 2006). <http://www.nytimes.com/2006/10/11/nyregion/11kendra.html>. Andrew Goldstein pleaded not guilty by reason of insanity. *Id.* Andrew Goldstein was found guilty of murder. *Id.*

individuals cannot control their thoughts or actions. Even with obvious symptoms for the public to observe, schizophrenics are still found criminally culpable by juries. However, an even greater problem comes in the form of a subtype of schizophrenia—paranoid schizophrenia.

Paranoid schizophrenia is the presence of auditory hallucinations or prominent delusional thoughts about persecution or conspiracy.¹¹⁵ Paranoid schizophrenia symptoms include delusions of persecution and hallucinatory voices that threaten the patient or give them commands.¹¹⁶ The hallucinatory voices that threaten the diseased or given them commands is particularly present in mass shooting perpetrators.¹¹⁷ The difficulty in detecting paranoid schizophrenia lies in the fact that the ailing do not exhibit observable features and live high functioning, normal lives.¹¹⁸ The symptoms are thus internalized by the person and the outside world does not know that the person is seriously sick.¹¹⁹ Naturally, that causes a jury to be skeptical of the expert psychiatrist who opines that the defendant's paranoid schizophrenia negates the mens rea of the crime. Paranoid schizophrenia paralyzes a person's free thinking and action such that the medical community and a lay person would conclude that are colloquially insane.

James Holmes suffered from schizophrenia.¹²⁰ Twenty doctors confirmed his diagnosis of schizophrenia.¹²¹ He pleaded not guilty by reason to get treated for his paranoid schizophrenia.¹²² Holmes attempted suicide at age 11.¹²³ His mental illness continued and worsened throughout his adolescence and into adulthood.¹²⁴ A key

¹¹⁵ Michael Bengston, M.D., *Types of Schizophrenia*, PSYCHCENTRAL, <http://psychcentral.com/lib/paranoid-schizophrenia/>. (last visited Nov. 30, 2016). Symptoms include a. Delusions of persecution, reference, exalted birth, special mission, bodily change, or jealousy; b. Hallucinatory voices that threaten the patient or give commands, or auditory hallucinations without verbal form, such as whistling, humming, or laughing; c. Hallucinations of smell or taste, or of sexual or other bodily sensations; visual hallucinations may occur but are rarely predominant. *Id.*

¹¹⁶ *Id.*

¹¹⁷ The Insanity Defense Among States, *supra* note 79. See also Christopher Hoffman, *Wethersfield Man Found Not Guilty By Reason of Insanity In Death of Mother*, HARTFORD COURANT, (July 14, 2016). <http://www.courant.com/breaking-news/hc-waszynski-insanity-killed-mother-trial-0714-20160714-story.html>. A man found not guilty by reason of insanity testified he killed his mother because, as a diagnosed schizophrenic, the voices in his head returned and they (the voices) were calling his mother a “demon” and demanded he kill her.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Sinister but Sane, or Schizophrenic?*, Chi. Trib., (Apr. 27, 2015). <http://www.chicagotribune.com/news/nationworld/chi-james-holmes-colorado-20150427-story.html>.

¹²¹ *Id.*

¹²² *James Holmes found guilty of killing 12 in 2012 theatre massacre*, SAN DIEGO UNION TRIBUNE, (July 16, 2015).

¹²³ *Sinister but Sane, or Schizophrenic?*, *supra* note 100.

¹²⁴ *Id.* Holmes had "intrusive thoughts" in high school, and his mental illness worsened in his 20s. By grad school, his psychosis bloomed. *Id.*

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contributor to the cause of his schizophrenia is the destructive mental illness ran through both sides of his family.¹²⁵ Biology along with uncertain outside factors is one of the leading causes of schizophrenia.

C. *Schizophrenia Causes*

Schizophrenia is present in less than one percent of the general population but inflicts ten percent of individuals who have an immediate family member with the disorder.¹²⁶ Scientists believe schizophrenia is a genetic disorder that is caused by a combination of different genes that contribute to an increased risk of schizophrenia.¹²⁷ However, scientists believe that genes alone are not the cause to schizophrenia but that the combination of different genes, along with environmental factors is the cause of schizophrenia.¹²⁸ Medical News Today used an apt analogy to describe the cause of schizophrenia: "Imagine your body is series of buttons, and some of those buttons result in schizophrenia if somebody comes and presses them enough times and in the right sequences. The buttons would be your genetic susceptibility, while the individual pressing them would be the environmental factors"¹²⁹

Scientists think an imbalance in the interrelated chemical reactions of the brain involving the neurotransmitters dopamine and glutamate play a role in schizophrenia.¹³⁰ The brain structures of schizophrenics are slightly differently than normal people.¹³¹ In fact, scientists have found small changes in the location or structure of brain cells that are formed before birth of schizophrenics.¹³² Experts think problems during brain development before birth may lead to faulty connections.¹³³ However, the problem may not show up in a person until puberty.¹³⁴

¹²⁵ *Id.* James Holmes had an aunt with schizophrenia affective disorder. *Id.*

¹²⁶ *Schizophrenia*, NATIONAL INSTITUTE OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/publications/schizophrenia-booklet/index.shtml#pub7> (last visited Mar. 23, 2017). Scientists have long known that schizophrenia sometimes runs in families. The illness occurs in less than 1 percent of the general population, but it occurs in 10 percent of people who have a first-degree relative with the disorder, such as a parent, brother, or sister. *Id.* People who have second-degree relatives (aunts, uncles, grandparents, or cousins) with the disease also develop schizophrenia more often than the general population. *Id.*

¹²⁷ *Id.*

¹²⁸ Scientists think that interactions between genes and aspects of the individual's environment are necessary for schizophrenia to develop. *Id.* Many environmental factors may be involved, such as exposure to viruses or malnutrition before birth, problems during birth, and other, not yet known, psychosocial factors. *Id.*

¹²⁹ Christian Nordqvist, *Paranoid Schizophrenia: Causes, Symptoms, and Treatments*, MEDICAL NEWS TODAY, (May 27, 2015), http://www.medicalnewstoday.com/articles/192621.php#causes_of_schizophrenia.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

Thus making detection and treatment difficult for those affected by schizophrenia. The biggest problem in the study of schizophrenia is the unknown aspect.

Since the causes of schizophrenia are unknown, treatments are a guessing game. Doctors treat schizophrenia by focusing on eliminating the symptoms of the disease.¹³⁵ Treatments can include antipsychotic medications and psychosocial treatments.¹³⁶ The most encouraging results for treatment of schizophrenia is “coordinated specialty care.”¹³⁷ Coordinated specialty care is where the patient works with a case manager and psychosocial treatment while also taking medication.¹³⁸ This individualized and complicated treatment to schizophrenia shows there is no clear path to recovery for anyone inflicted with the disease. In fact, Holmes was being treated with a psychiatrist at the time of the attack.¹³⁹

“Mr. Holmes happens to be Bob and Arlene’s son, but he could be anyone’s son. Schizophrenia does not play favorites.”¹⁴⁰ That was part of the opening statements at trial made by Holmes’s attorney, Daniel King.¹⁴¹ King later stated that Holmes lost his struggle with schizophrenia disease.¹⁴² As a result, Holmes pleaded not guilty by reason of insanity with the goal of being sent to a psychiatric institution to treat his paranoid schizophrenia.¹⁴³ Holmes was part of a family that was affected by the mental disease.¹⁴⁴ Holmes was tragically born with a pre-disposition of schizophrenia, and was treated for schizophrenia when the symptoms arose.¹⁴⁵ As a result of his disease, twelve people lost their lives, and those families lost their loved ones.¹⁴⁶ However, Holmes could not present in court the violent symptoms that occurred from his genetically pre-disposed disease as proof of his insanity.

A solemn problem exists where an individual with paranoid schizophrenia cannot receive relief from the current insanity test and subsequent freedom from criminal

¹³⁵ *Schizophrenia*, NATIONAL INSTITUTE OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/publications/schizophrenia-booklet/index.shtml#pub7>. (last visited Mar. 23, 2017).

¹³⁶ *Id.* Antipsychotic medications are no guarantee of fixing or suppressing the disease, as the medications can work differently for each individual treated for schizophrenia. *Id.* “Long term-use of antipsychotic medications may lead to a condition called tardive dyskinesia (TD). TD causes muscle movement a person can’t control.” *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ O’Neill and Weisfeldt, *supra* note 7.

¹⁴⁰ Maria L. La Ganga, *James Holmes Painted As a Cunning Killer, Or A Victim of Schizophrenia*, LOS ANGELES TIMES, (Apr. 27, 2015).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Supra* note 101.

¹⁴⁴ Maria L. La Ganga, *James Holmes Painted As a Cunning Killer, Or A Victim of Schizophrenia*, LOS ANGELES TIMES, (Apr. 27, 2015) (March 23, 2017).

¹⁴⁵ Turkewitz, *supra* note 5.

¹⁴⁶ *Id.*

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culpability, all as a result of their genetic disorder. This problem arises when the paranoid schizophrenic must fit a legal standard for insanity created 170 years ago.

D. American Psychiatric Association on Legal Insanity

The American Psychiatric Association's¹⁴⁷ position on the insanity defense calls for a standard broad enough to allow meaningful consideration of the impact of serious mental disorders on individual culpability.¹⁴⁸ The APA defines serious mental disorders as substantially impairing an individual's capacities to reason rationally and to inhibit behavior that violates the law.¹⁴⁹ The APA cites to the unreasonableness of the American criminal justice system, punishing persons who exhibit substantial impairment of mental function at the time of their actions.¹⁵⁰ Although the APA does not endorse a specific insanity defense, one can glean some evidence as to how they feel about the reversion back to the M'Naghten standard.¹⁵¹ "Meaningful consideration" of "serious mental disorders" is suggesting a standard that is *not* the current M'Naghten rule.¹⁵² (Emphasis added).

The standard it suggests is a standard more appropriate and sophisticated for the advances and discoveries made in mental health over the 170 years that have passed between M'Naghten original decision and subsequent rule. The standard that would be broad enough to allow meaningful consideration of serious mental disorders is one that allows for the acceptance of the symptoms of a multitude of mental diseases that negate *individual culpability*.

III. PROPOSING CHANGE

The Supreme Court of the United States must overturn their *Clark v. Arizona* decision finding the limiting of the insanity defense constitutional. The highest court must find that the M'Naghten standard violates due process, and subsequently force the States that have the M'Naghten standard to change their laws and, more importantly, force states that do not have *any* insanity defense to create one. However, the Supreme Court has denied several petitions for a writ of certiorari challenging the Court's ruling in *Clark*.¹⁵³ Hindering the change, the affected class of people are the mentally ill. The mentally ill who then subsequently commit a heinous, illegal act. Public pressure is minimal for federal representatives to make any substantive changes to the insanity defense.

¹⁴⁷ *Clark v. Arizona*, *supra* note 84.

¹⁴⁸ *Position Statement on the Insanity Defense*, APA OFFICIAL ACTIONS, (November 2014). "Serious Mental disorders can substantially impair an individual's capacities to reason rationally and to inhibit behavior that violates the law. The APA strongly supports the insanity defense because it offers our criminal justice system a mechanism for recognizing the unfairness of punishing persons who exhibit substantial impairment of mental function at the time of their actions." *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Hinckley Acquittal Brings Moves to Change Insanity Defense, *supra* note 66.

¹⁵³ *Delling v. Idaho*, 133 S.Ct. 504 (2012). *See also*, *Samha v. Lagana*, 134 S.Ct. 1889 (2014).

Thus, the best way to enact change in the insanity defense is for the Supreme Court to change their stance on the constitutionality of the M’Naghten standard. An ideal standard allows for more expert testimony from psychiatrists resembling the *Durham Product* test. More opinions on the complexities of the human brain allow for more understanding than the current standard of limiting the scope of the medical opinions. A juror’s confusion about the brain is preferable to the simplicity of the M’Naghten standard.¹⁵⁴ The brain does not make decisions in a black and white manner. The brain is not a calculator.

The ideal standard for mens rea allows for the existence of mental diseases or defects that *substantially* overbear the will of the defendant to make a free choice. This permits the inclusion of paranoid schizophrenia and other types of schizophrenia. The burden is still on the defendant to prove by clear and convincing evidence that he or she suffered from a mental disease or defect at the time of the crime and their actions were the result of the mental disorder. Importantly, the mentally ill who claim not guilty by reason of insanity have a *duty* to mitigate their known mental illness by seeking treatment. (Emphasis added). The purpose is to prevent their disease from causing harm to the public.

IV. WHY POTENTIAL CRITICISMS OF PROPOSED LEGISLATION ARE MISGUIDED

Some people are concerned that defendants exaggerate their mental conditions to win not guilty verdicts.¹⁵⁵ In fact, that is the prosecution’s argument in most not guilty by reason of insanity cases. In a recent case, a defendant pleading not guilty by reason of insanity was called a “manipulative murderer” by the prosecution.¹⁵⁶ The psychiatrist in the same case said the defendant was “faking” his mental illness to plead not guilty by reason of insanity.¹⁵⁷ That technique was used in the James Holmes trial by the prosecutors during opening statements.¹⁵⁸

There would be potential concerns about a proposed criminal statute being forced onto state’s and thus trampling the state’s rights given to them by the Tenth Amendment of the Constitution. The 10th Amendment of the Constitution states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”¹⁵⁹ The powers to create criminal law are not powers specifically delegated to the United

¹⁵⁴ Taylor, *supra* note 67. Some of them said that the psychiatric testimony had been so confusing and contradictory that it had been difficult for the prosecution to prove Mr. Hinckley’s sanity beyond a reasonable doubt. *Id.*

¹⁵⁵ Joan Biskupic, *Court: Insanity Defense Not a Right*, WASHINGTON POST, (Mar. 29, 1994), <http://www.washingtonpost.com/wp-srv/local/longterm/aron/scotus032994.htm>

¹⁵⁶ Amanda Marazzo, *Man Accused of Killing Island Lake Woman Claims He Was Insane at the Time*, CHICAGO TRIBUNE, (Sept. 12, 2016) <http://www.chicagotribune.com/news/local/breaking/ct-murder-trial-mchenry-county-insanity-met-20160912-story.html> (Mar. 29, 2017)

¹⁵⁷ *Id.*

¹⁵⁸ Meghan Keneally, *Aurora Shooting Trial: James Holmes ‘Not Faking’ Insanity Plea, Defense Tells Jury*, ABC NEWS, (Apr. 27, 2015). <http://abcnews.go.com/US/aurora-shooting-trial-james-holmes-faking-insanity-plea/story?id=30619051>.

¹⁵⁹ U.S. Const. Am. X. (West, 2017).

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States, except for few criminal powers vested in the Article I, section of the Constitution.¹⁶⁰ Congress would have a power to impose that standard in the Federal courts, but that power does not extend to State jurisdictions. Thus, Congress would not have the power to impose a national standard for the insanity defense.

However, the power of the proposed legislation would be akin to the Insanity Defense Reform Act of 1984.¹⁶¹ States would be encouraged to adopt the national standard proposed and passed by Congress. The passing of a national act would highlight the importance of mental health reform in relation to the criminal justice system. Additionally, the concerns about defendant's "faking" their mental health problem to plead not guilty by insanity would be minimized by the requirement causing the defendant's to be proactive in treating their disease.

V. CONCLUSION

One of the goals of criminal justice system is to punish the morally blameworthy to provide justice for the crime committed.¹⁶² Justice is not achieved by punishing the mentally diseased who cannot control their actions or their mind. The criminal justice system and American jurisprudence need to adopt a new standard to better achieve the purpose of the criminal justice system. That standard would allow for more medical opinion as to defendant who is pleading not guilty by reason of insanity. Acknowledging a broader standard for insanity would not undercut the deterrent factor of the strict insanity defense, as a defendant's will must be substantially overborne by the mental disease as to render rational thought of the consequences useless.

The Supreme Court in *Clark* ruled that the defendant's due process rights were not violated in limiting expert testimony in relation to the mens rea of the crime when the defendant pleads not guilty by reason of insanity.¹⁶³ However, expanding the insanity defense to the proposed standard was never found unconstitutional. It was never found unconstitutional because the previous broader insanity standards were not found unconstitutional by the Court. Thus, the proposed standard would pass constitutional muster to be upheld by the courts.

The broader proposed insanity defense standard allows for acceptance of more mental diseases as being the cause of the crime. Mental diseases such as schizophrenia and its subset paranoid schizophrenia are commonly seen in not guilty by reason of insanity defendants. A mental health patient suffering from the effects of schizophrenia who commits a crime, should be able to trust the reasoned American criminal justice system for reprieve. Unfortunately, in the current

¹⁶⁰ U.S. Const. Art. I § 8 (West, 2017). Section 8 grants Congress authority to define & punish counterfeiting, piracies and felonies committed on the high seas & offenses against "the Laws of Nations". *Id.* Section 8 also grants Congress to make criminal laws when necessary to enforce powers vested by the Constitution in the federal government. *Id.* Commonly known as the necessary and proper clause.

¹⁶¹ Taylor, *supra* note 67.

¹⁶² Mike C. Materni, *Criminal Punishment and The Pursuit of Justice*, 2 Br. J. Am. Leg. Studies (2013).

¹⁶³ *Supra* note 76.

situation, the biologically and environmentally impaired defendant suffers more harm from the criminal justice system. He or she suffers more harm not only by not receiving mental health treatment, but also because he or she is found criminally responsible for the criminal act fostered by the disease.

Would James Holmes have been found not guilty by reason of insanity with this new adopted standard? First, a trier of fact could find Holmes satisfied his duty of trying to prevent the harm his disease would cause.¹⁶⁴ There is clear and convincing evidence that James Holmes suffered from schizophrenia at the time of the crime.¹⁶⁵ The main issue of fact would be whether there is clear and convincing evidence Holmes' schizophrenia *substantially* overbore the will of him making a free choice. This would complicate the decision for the trier of fact deciding between guilty and not guilty by reason of insanity. Which is favorable to the current decision most jurors are left with: whether the defendant should receive the death penalty.¹⁶⁶ Did Holmes' schizophrenia cause him to be legally insane? The jurors would have a complex choice on whether to decide Holmes was legally insane at the time of the crime. But at least they would have a real, practical choice.

VI. PROPOSED STATUTE

Affirmative Defense

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 the product of a mental disease or defect, substantially overbore the will of the defendant to make a free choice.

Burden of Proof

The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

Duty

If there is evidence that defendant knew or should have known of the presence of a mental disease. The defendant has the duty to treat the mental disease before he or she is permitted plead not guilty by reason of insanity.

¹⁶⁴ Margaret Hartmann, *James Holmes Called Mental-Health Hotline Moments Before Theatre Shooting*, NEW YORK MAGAZINE, (June 2, 2015), <http://nymag.com/daily/intelligencer/2015/06/james-holmes-called-hotline-before-shooting.html>. James Holmes sought and received help from a school psychiatrist, he called a mental-health hotline the night of the murder to try to stop himself. But he hung up, when no one answered. *Id.*

¹⁶⁵ *Sinister but Sane, or Schizophrenic?*, Chi. Trib., (Apr. 27, 2015), <http://www.chicagotribune.com/news/nationworld/chi-james-holmes-colorado-20150427-story.html>.

¹⁶⁶ Steve Almasy, Ann O'Neil, et al. *James Holmes Sentenced to Life in Prison*, CNN, (Aug. 8, 2015), <http://www.cnn.com/2015/08/07/us/james-holmes-movie-theater-shooting-jury/>. "There was one firm holdout against the death penalty and two ... who were on the fence," said the juror, who would not give her name. "I don't know if they could have been swayed or not." *Id.*