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Jeanne Matthews Bender

University of Montana School of Law

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AFTER ABOLITION: THE PRESENT STATE OF THE INSANITY DEFENSE IN MONTANA

Jeanne Matthews Bender

I. INTRODUCTION

A successful insanity plea tends to generate publicity far in excess of its importance in the criminal law. The acquittal of John Hinckley focused public concern on the use of insanity as a criminal defense. Millions of television viewers saw Hinckley shoot President Reagan and three other men. Many were outraged when Hinckley was found not guilty by reason of insanity. Because of this and several other well-publicized cases, a number of states are reevaluating their treatment of the insanity defense.

In Montana Hinckley could very well have been found guilty. In 1979 the legislature passed "An Act To Abolish The Defense Of Mental Disease Or Defect In Criminal Actions And To Provide An Alternative Sentencing Procedure . . . ." Under this law, "sanity" may be considered at sentencing, but only evidence as to whether a defendant had the required mental state is admissible during the guilt phase of the trial.

The Act failed to abolish the insanity defense entirely. This comment attempts to delineate the boundaries of the collection of defenses now included within the rubric of mental disease or defect. A clear need exists for legislative and judicial action to eliminate ambiguities in the interpretation and application of current law.

1. "Insanity defense" is a popular name for the defenses under which a criminal defendant claims that he was incapable of forming intent or mental state due to some mental defect or illness. In this comment the terms "mental disease or defect" and "insanity" are used interchangeably.


5. Act of May 14, 1979, ch. 713, 1979 Mont. Laws 1979. The Act amended the laws by removing the test for mental disease or defect, eliminating all reference to mental disease or defect as an affirmative defense, and making certain procedural changes. See infra note 29.
II. THE HISTORY OF THE INSANITY DEFENSE

A. In General

In early common law most criminal offenses were strict liability offenses. As the concept of mens rea developed, the law evolved to accommodate the insane defendant. Exculpation on the grounds of mental disease or insanity was rooted in the Christian moral notion that man was given free will to choose good over evil. If a person’s freedom of choice was impaired by mental disease, he should not be held accountable for his acts. When a defendant claimed that mental disease excused him, juries judged his mental state using current popular notions of insanity. 7

Insanity was primarily a legal concept, not a scientific one. As the study of human behavior advanced, it became apparent that more objective tests for insanity were possible and desirable. One such test was developed when Daniel M’Naghten was acquitted by reason of insanity after he attempted to assassinate the British Prime Minister in 1843. The queen and the public were so outraged that the judges of the common law courts announced M’Naghten’s Rules. 8 The Rules stated that, in order to establish a defense of insanity, a defendant must prove that, at the time of the crime, he either did not know the “nature and quality” of his act, or he did not know that it was wrong. 9 It was no longer possible to base a defense on testimony of a few witnesses who thought the defendant was insane. 10

The M’Naghten test is basically a cognitive test, but “know” has been broadly construed by most courts. 11 To answer critics who held that M’Naghten did not allow for mental diseases affecting only self-control, many jurisdictions added the “irresistible impulse” test to M’Naghten. This test implies “knowledge of right and wrong in some degree, but, coupled with it, the absence of power, resulting from a disordered mind, to successfully resist the

6. Mens rea means a guilty mind. It is used in the criminal law to refer to the element of mental state or intent. For a discussion of the development of mens rea, see Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1932).

7. S. Glueck, Mental Disorder and the Criminal Law 123-38 (1925).

8. M’Naghten’s Case, 8 Eng. Rep. 718 (H.L. 1843). After debate in the House of Lords, the Lords asked five questions of the judges in an attempt to arrive at a general standard. Id. at 720.

9. Id. at 722.

10. M’Naghten introduced evidence that he believed himself to be persecuted by Prime Minister Peel. Witnesses testified to his insanity, although some had not seen him until he appeared in court. Id. at 719.

11. A. Goldstein, supra note 2, at 49-50.
impulse to do the criminal act."\(^{12}\)

Advances in psychiatric theory coupled with criticisms of the M'Naghten and irresistible impulse tests\(^{13}\) led Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit, in 1954, to formulate an even broader standard. In *Durham v. United States*,\(^{14}\) the court adopted the rule that there was no criminal responsibility if the "unlawful act was the product of mental disease or mental defect." This new rule allowed the jury a wide range of inquiry to determine "simply whether the accused acted because of a mental disorder, and not whether he displayed particular symptoms . . . ."\(^{15}\)

Although hailed in some quarters as a more enlightened view, *Durham* was also criticized as vague and ineffective. Consequently, it was not widely adopted.\(^{16}\) In 1972, the District of Columbia Circuit\(^{17}\) and Judge Bazelon himself (then Chief Judge) rejected *Durham* in favor of the American Law Institute (ALI) test.\(^{18}\) The ALI test states: "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."\(^{19}\)

The ALI standard added the element of "appreciation" and expanded the earlier tests. The language of the ALI test indicates that the defendant must have an understanding or emotional realization of the wrongfulness of his conduct.\(^{20}\) This is broader than the mere knowledge required by the M'Naghten test. The defendant need not be unable to control his behavior, but only has to show that he "lacks substantial capacity" to act in a lawful manner. This portion of the test excuses impulsive behavior at a somewhat less than irresistible standard. All federal jurisdictions and about half the states have adopted the ALI test.\(^{21}\) This standard

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15. Id. at 876.
18. Id. at 1010 (Bazelon, C.J., concurring in part and dissenting in part).
19. Model Penal Code § 4.01(1) (Proposed Official Draft 1962). The bracketed word "wrongfulness" was inserted "to indicate an option in the choice of words." Id. note on status of section.
was used in *Hinckley*.\textsuperscript{22}

The United States Supreme Court has never adopted a particular test for insanity. Moreover, it has not explicitly determined that an accused person has the right to an insanity defense, although at least three state courts have declared that it would violate due process to deprive a defendant of the defense of insanity.\textsuperscript{23}

\section*{B. In Montana}

The M'Naghten and irresistible impulse tests were judicially adopted in Montana in 1899.\textsuperscript{24} Confusion soon arose as to whether insanity was a question of law or fact,\textsuperscript{25} and whether the defendant had to prove insanity before asserting irresistible impulse.\textsuperscript{26} In 1967, the Montana Legislature accepted the ALI test, changing the phrase "lacks substantial capacity" to "is unable."\textsuperscript{27} This change in the wording imposed a greater burden on the defendant than the ALI standard.\textsuperscript{28}

In 1979, the ALI test was shifted to the sentencing statutes; the definition of mental disease or defect and all reference to mental disease or defect as an affirmative defense were stricken.\textsuperscript{29}

\addcontentsline{toc}{section}{Notes}

\footnotesize


27. Mont. Rev. Codes Ann. § 95-501 (1947). The commission comment to this section says, "It is felt that this section provides as simple and as positive a test as is possible at the present time for separating the truly mentally irresponsible from the 'criminal' without the invitation to the abuse of the 'defense of sanity' that is inherent in the indefinite language of many tests of criminal responsibility."


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

(2) As used in this chapter, the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or other antisocial conduct.

Mont. Code Ann. § 46-14-201 (1978) provided:

(1) Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by a preponderance of the evidence.

(2) Evidence of mental disease or defect excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within 10 days thereafter or at such later time as the court may for good cause permit, files a written notice of his purpose to rely on such defense.

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The abolition of mental disease or defect as an affirmative defense was not triggered by a particular incident, but was apparently an attempt to curtail the role of the mental health professional in criminal trials. The statutory changes shifted the focus on the defendant's mental condition from the trial phase to the sentencing phase of the process. The only relevant inquiry at trial is whether the defendant had the state of mind that is an element of the offense. This attempt at simplification has created some confusion.

III. REMAINING STATUTORY REFERENCES TO MENTAL DISEASE OR DEFECT

The removal of the test for insanity from section 46-14-101 of the Montana Code Annotated left only the portion of that statute which says, "As used in this chapter, the term 'mental disease or defect' does not include an abnormality manifested only by repeated criminal or other antisocial conduct." Although the 1979 amendments removed all reference to the affirmative defense of mental disease or defect, they left section 46-14-102 intact. That section, adopted in 1967, provides that "[e]vidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense."
Under present law, then, a defendant claiming mental disease or defect may still raise that issue to rebut the prosecution’s evidence of mental state. Technically this sort of attack on mental state has always been available. Before 1979, however, the Montana Supreme Court would not allow use of this statute for a defense of mental disease or defect. It held that such a defense had to be proven under the affirmative defense statute by a preponderance of the evidence.

Mental state is an element of all but the most minor crimes. In Montana criminal responsibility requires a mental state of "knowingly," "purposely," or "negligently." The United States Supreme Court has held, in In re Winship, that due process requires the state to prove every fact necessary to constitute the crime charged beyond a reasonable doubt. In Mullaney v. Wilbur the Court further held that requiring the defendant to disprove an element of the crime violated due process. The defendant in that case challenged a Maine statute that established malice aforethought as an element of homicide. The state was not required to prove malice, which was, in effect, presumed. If the defendant wanted to reduce the crime to manslaughter, he had to disprove malice by showing that he acted "in the heat of passion on sudden provocation." The Court in Mullaney said that Winship would prevent the state from shifting the burden to the defendant in this fashion.

By treating the defendant’s evidence of mental disease or defect as rebuttal evidence and eliminating any burden of proof on the defendant, the state can avoid the claim that the defendant is being required to disprove an element of the crime. Whether the state has succeeded in proving all facts establishing mental state beyond a reasonable doubt is a question for the jury to decide. If

34. Maynard, supra note 31.
40. Id. at 687.
41. Id. at 703-04.
the jury has a reasonable doubt as to the defendant's ability to have the required mental state, the defendant should prevail.

Under former law, the affirmative defense of mental disease or defect placed a double burden on the defendant. First, he had to produce enough evidence to raise the issue of insanity. In Patterson v. New York the Supreme Court held that it did not violate due process for a state to place both the burdens of production and persuasion on the defendant who asserts an affirmative defense. The Court emphasized that, while the state always has the burden of proving all the facts constituting the crime charged beyond a reasonable doubt, the state is not required to prove the non-existence of all the affirmative defenses which it chooses to recognize. While the 1979 amendments may have narrowed the scope of the insanity defense, they also lessened the burden of proof born by the defendant.

In all states there is a rebuttable presumption that the defendant is sane. The presumption prevails unless the defendant produces enough evidence to put sanity into issue. The Montana Rules of Evidence require a defendant to overcome a disputable presumption by a preponderance of the evidence. In Sandstrom v. Montana the Supreme Court held that such a requirement shifted both the burdens of production and persuasion to the defendant. This was found to be constitutionally unacceptable if it

45. 432 U.S. 197 (1977). In Patterson the defendant claimed that requiring him to prove mitigating factors to reduce a homicide charge to manslaughter unconstitutionally placed the burden on him of disproving an element of the crime charged.
46. Id. at 210. See generally Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 YALE L.J. 1325 (1979).
48. MONT. R. EVID. 301(b)(2) provides:
All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.
49. 442 U.S. 510 (1979). In Sandstrom, the Supreme Court held that this rule with regard to the presumption that "a person intends the ordinary consequences of his voluntary acts" could have shifted the burden of proof to the defendant. It would violate due process to require a defendant to disprove a fact essential to establishing an element of the crime. Id. at 524.
could shift the burden to the defendant of disproving a fact establishing an essential element of the crime charged. Since sanity is probably essential to mental state in most cases,\textsuperscript{50} it would violate Sandstrom to require more than that a defendant introduce some evidence to defeat the presumption and raise the issue of mental disease or defect.

Once the issue of sanity has been raised, some commentators feel that the burden should be on the prosecution to prove beyond a reasonable doubt that the defendant is sane.\textsuperscript{51} This is a requirement in the federal courts imposed by an early case, \textit{Davis v. United States}.\textsuperscript{52} The analysis in \textit{Davis} reasons that sanity is a fact so essential to mental state that it becomes part of the element which must be proven by the prosecution.\textsuperscript{53} The Montana court has, however, rejected this position.

In \textit{State v. Doney}\textsuperscript{54} a defendant was accused of attempted deliberate homicide and attempted robbery. He relied on expert testimony to show that he was incapable of acting purposely and knowingly. Doney was convicted of attempted robbery and the lesser included offense of aggravated assault, but found not guilty of attempted deliberate homicide. On appeal he claimed that, because he had proven his inability to form mental state by his “con-
vincing ‘uncontroverted’ expert testimony,” the state was obliged to overcome this evidence by proving sanity as well as mental state. The court disagreed:

It is sufficient that the State prove beyond a reasonable doubt the existence of the mental state that is an essential element of each of the offenses charged. Implicit in the jury’s conviction is its conclusion that the defendant possessed the requisite mental state, and therefore had the capacity to form that mental state. The State has met the requirements of Montana law.

Since the 1979 amendments to the law, a person who claims (under section 46-14-102) that mental disease or defect prevented formation of mental state no longer must prove insanity by a preponderance of the evidence. After introducing some evidence to raise the issue of sanity, the defendant need only raise a reasonable doubt as to his mental state at the time of the offense in the minds of the jurors. The defendant may, however, introduce additional evidence as to his mental condition at the sentencing hearing. Under section 46-14-311 the sentencing court can consider “any relevant evidence presented at the trial and . . . such additional evidence as it considers necessary” to determine if the convicted defendant suffers from a mental disease or defect.

This provision in the statute was apparently intended to remove much of the expert testimony from the consideration of the jury and shift it to the sentencing court. The judge is presumably better able to evaluate such evidence. This provision may be weakened, however, by the court’s interpretation of section 46-14-102 in State v. McKenzie. In that case, decided after passage of the 1979 amendments but under former law, the court characterized section 46-14-102 as a “codification of the ‘diminished capacity’ defense.” Jurisdictions adopting diminished capacity have found that it “has one major defect: it opens the courtroom doors to virtually unlimited psychiatric testimony.” Recognition of this defense would bring the expert testimony back into the trial setting.

55. Id. at ___, 636 P.2d at 1382.
56. Id.
59. Id. at ___, 608 P.2d at 452.
IV. RELATED DEFENSES UNDER CURRENT MONTANA LAW

A. Diminished Capacity Due to Mental Disease or Defect

In McKenzie the court held that evidence of mental disease or defect was admissible for two statutory defenses.61 One was the "legal insanity" defense eliminated by the 1979 amendments. The other was the diminished capacity defense. The court said that a defendant who suffered from a mental disease or defect that was insufficient to establish the complete defense of insanity could use the diminished capacity defense to show that, while he lacked the capacity to form the intent to kill, he could form the intent to commit a lesser offense.62 The court held that diminished capacity was an affirmative defense that had to be proven by the defendant by a preponderance of the evidence.63

This raises the question of whether mental disease or defect, under section 46-14-102, is currently available as both an attack on the state's proof of mental state where the defendant can succeed by raising a reasonable doubt, and a separate affirmative defense that must be proven by a preponderance of the evidence. State prosecutors have interpreted the statute to mean the former.64 The latter injects confusion into the law.

Diminished capacity has traditionally been used to assert that a legally sane defendant lacked the "specific intent" required for the crime charged, e.g. malice aforethought, premeditation, or deliberation,65 and was therefore less guilty. These elements of specific intent were used to distinguish degrees of serious crime such as homicide. The 1967 revisions of Montana's criminal code eliminated the degrees of homicide and now Montana requires mental states of "knowingly" and "purposely" for most crimes.66 Under these circumstances, diminished capacity would seem to have little application in Montana.

A diminished capacity defense will not help a defendant unless he can prove that mental disease or defect prevented him from acting knowingly or purposely. Diminished capacity results only in conviction of a lesser crime and must be proven by a preponderance of the evidence. It would be a better choice for a defendant

61. McKenzie, __ Mont. at __, 608 P.2d at 452.
62. Id. at __, 608 P.2d at 453.
63. Id. at __, 608 P.2d at 454.
64. Maynard, supra note 31.
65. McKenzie, __ Mont. at __, 608 P.2d at 452.
66. Id. at __, 608 P.2d at 453. For the purposes of this article the mental state of negligently has not been considered.
who has some evidence of mental disease or defect to make a straightforward attack on mental state, where he would only need to raise a reasonable doubt as to his ability to act knowingly or purposely.

The court in McKenzie described diminished capacity as an alternative to the insanity defense. It would be fair to assume that the abolition of the affirmative defense of mental disease or defect would change the nature of the diminished capacity defense. It is difficult to argue that a defendant who was “aware” that it was “highly probable that such a result would be caused by his conduct,” could be found to lack the intent to cause that result. The court in State v. Doney, however, quoted the McKenzie discussion of the diminished capacity defense to answer “the question whether a jury could reasonably have concluded defendant was precluded by mental disease or defect from formulating a conscious purpose to kill, yet was still capable of formulating a conscious purpose to frighten or injure.” The court concluded that the jury could have decided that the defendant meant to frighten his victim, but was incapable of forming the intent to kill.

B. Diminished Capacity Due to Intoxication

In a confusing development, some recent cases indicate that the defense of diminished capacity due to intoxication or drugged condition may be merging with that of mental disease or defect. Involuntary intoxication or drugged condition is still a bar to criminal responsibility if the defendant has no “capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.” The defendant’s condition can be considered when determining mental state.

It should be noted that the language of the above statute is identical to the test formerly used to determine sanity. In State v. Ostwald the court held that when a defense of intoxication was based on a claim of alcoholism, it then became a defense of mental disease or defect. A later case, State v. Peavler, involved a defen-
dant who claimed that, because he was a chronic alcoholic, he had no control over his drinking and was involuntarily intoxicated at the time of an alleged burglary. In support of this claim defendant attempted to introduce expert testimony to show that his "intoxicated condition deprived him of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Following Ostwald, the court held that the district court had properly excluded the expert testimony. Since Peavler based his defense on expert testimony as to the effects of alcoholism, it became a defense of mental disease or defect under the statutes. Peavler could not rely on the old test of ability to appreciate criminality or to conform conduct because the 1979 amendments abolishing the affirmative defense of mental disease or defect had eliminated those standards—even though the intoxication statute was unchanged by the amendments.

C. Voluntary Act

In addition to the defense of diminished capacity, the court may have recently recognized a new way for a defendant to assert irresistible impulse or lack of control. Every offense must have the element of voluntary act. Voluntary act has always been thought to describe a physical movement rather than a conscious intellectual choice. In State v. Zampich, the defendant contended that, although he was able to act purposely and knowingly, he was not acting with "'moral control' (voluntarily). That is, he might have been acting with cognition and without volition" due to various physical and emotional problems. In support of this contention the defendant introduced expert testimony. He appealed his conviction on the ground that the trial court refused to instruct the jury that the state had to prove beyond a reasonable doubt that the defendant had "acted knowingly, purposely and voluntarily."

Although the supreme court rejected that instruction and af-

74. Id. at 380-81, 636 P.2d at 270.
75. Id. at 381, 636 P.2d at 271.
77. Although the code does not define voluntary act, it does limit "involuntary act" to "(a) a reflex or convulsion; (b) a bodily movement during un consciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; or (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual." Mont. Code Ann. § 45-2-101(31) (1983). By implication voluntary act has meant a physical movement. See Mont. Code Ann. § 45-2-202 (1983) commission comments.
79. Id. at ___, 667 P.2d at 957.
80. Id. (emphasis added).
firmed the defendant's conviction, language in the decision may indicate that psychological evidence is acceptable as proof of voluntary act. The court said:

Instruction No. 6 as given by the trial court, stated: "A material element of every offense is a voluntary act." Section 45-2-202, MCA. That instruction properly called the jury's attention to the psychological evidence defense counsel had marshalled. Instructions No. 2 and No. 5 stated that the State of Montana has the burden to prove each element of the crime beyond a reasonable doubt. . . . [I]t is clear the jury was properly instructed regarding defendant's theory of the case.81

Psychological testimony is not relevant to proof of a mere physical movement. Testimony of this nature can be used to explain the reasons for the act and should be allowed only to show that the defendant acted knowingly or purposely.

V. Procedure When Raising the Issue of Mental Disease or Defect

A. Expert Testimony

1. In General

Testimony by mental health professionals is essential to a defense of mental disease or defect. As previously noted, problems with expert testimony spurred the abolition of the affirmative defense.82 Underlying most of the objections to psychiatric testimony is the concern that the jury function will be usurped by the expert. Critics fear that the jury will be confused by jargon and may give expert testimony undue weight in reaching a verdict. Elimination of the affirmative defense of mental disease or defect has not, however, eliminated expert testimony.83

81. Id.

82. See supra note 30 and accompanying text. Psychiatric evidence has been criticized as imprecise and speculative. McKenzie, supra, Mont. at 608 P.2d at 455. Some observers ask if the experts can be truly impartial or whether there is "a tendency to espouse the cause of the party by whom they are called." State v. Noble, 142 Mont. 284, 307, 384 P.2d 504, 516 (1963) (Doyle, J., dissenting). A more cynical view asserts that insanity is a rich man's defense, success depending on the quality of testimony that the defendant can afford to buy. Kadiash, The Decline of Innocence, 26 Cambridge L.J. 273, 277 (1968).

83. One commentator has said, "You can change the name of the game, but you cannot avoid playing it so long as mens rea is required." Kadiash, supra note 82, at 282.
2. In Defendant's Case-in-Chief

Procedurally, the expert's role is governed by statute. If the defendant is planning to use a defense of mental disease or defect in his case-in-chief, he must give notice. The court must then appoint a psychiatrist to examine the defendant and report on his mental state. The supreme court has held that as long as the defendant is examined by a psychiatrist, the spirit of the law has been "substantially fulfilled."

To facilitate this examination, the court may order the defendant to be committed to a "hospital or other suitable facility" for up to sixty days. In State v. Buckman the supreme court held that Montana State Prison will be considered a suitable facility unless the defendant shows that it is not. Hearsay evidence that the prison is unsuitable was held to be insufficient.

The examination has a dual purpose. First, the expert is to determine if the defendant is competent to stand trial. Second, the defendant's capacity to have the requisite mental state may be evaluated. In order to testify to the defendant's mental condition at trial, an expert must have examined the accused. Although the question of whether the defendant actually had the state of mind required is a question of fact for the jury, the expert may give an opinion as to the ability of the defendant to have a particular state of mind.

3. The Rebuttal Witness

An expert may always testify without notice to rebut the prosecution's evidence of mental state. In one case, where the prosecution had no notice, the court reversed a conviction on the ground that refusal to admit the defendant's expert testimony deprived the defendant of a fair trial.

84. MONT. CODE ANN. § 46-14-201 (1983).
90. MONT. CODE ANN. § 46-14-203 (1983). Under former law only the defendant could raise the question of his or her fitness to proceed. A 1983 amendment now permits the county attorney to raise the issue as well. MONT. CODE ANN. § 46-14-221(1) (1983).
94. State v. Fish, ___ Mont. ___, 621 P.2d 1072, 1078 (1980).
95. Id. In Fish, the court held that even if notice was not given, a defendant could not be denied his right to rebut an essential element of the crime charged.
B. Evidentiary Considerations

Elimination of the definition of mental disease or defect also eliminated the guidelines as to what testimony is relevant. There are no standards for judges to follow. This may leave the door open for development of a judicially made test of mental disease or defect.

There will probably be less evidence allowed than formerly with regard to the defendant's mental state at the time of the offense. The more removed the evidence is from the time of the crime, the more difficult an accurate diagnosis becomes. It is not clear, however, how far the courts will go in allowing testimony with regard to the defendant's ability to have a certain mental state. A great deal of evidence regarding the defendant's background and personality could be allowed to show ability or lack of it.

The introduction of diminished capacity and voluntariness into consideration of mental state may mean previously inadmissible testimony may now be allowed. As noted above, the supreme court apparently found no problem with psychological testimony supporting the defendant's lack of "moral control."  

C. Verdict

The 1979 Act provided for a special verdict form to be used when a defendant is found not guilty by reason of a mental disease or defect that prevented him from having the requisite mental state. This may be in conflict with the requirement in another statute that the verdict in all cases must be general.

D. Disposition

1. In General

One of the purposes of the Act abolishing the affirmative defense was to provide an alternative sentencing procedure. The procedure to be followed varies depending on whether the defendant is found not guilty by reason of mental disease or defect, or is found guilty but then raises the issue of mental disease to be considered in sentencing. There are problems associated with both
procedures.

2. If Not Guilty Due to Mental Disease or Defect

If a defendant succeeds in showing that he could not have the required mental state due to mental disease or defect, the criterion determining disposition is dangerousness to others. If the defendant is found to be a danger, then he is "committed to the custody of the superintendent of the Montana state hospital to be placed in an appropriate institution for custody, care, and treatment." If a defendant is suffering from a mental illness and is not provided with adequate treatment, he may well have grounds to argue constitutional violations of due process and cruel and unusual punishment.

A defendant so committed receives a hearing within 180 days. Since the person has been found not guilty, if he can prove by a civil standard—preponderance of the evidence—that he is no longer dangerous, then he must be released. The release may be conditional within certain limits. Conditions that are unconstitutional or punitive cannot be included in the release. The court has held that a woman found not guilty under the former law could not have supervision by the Parole Division imposed upon her as a condition of release. The type of supervision sounded too much like conditions that would be imposed on a criminal parolee.

3. If Convicted on a Verdict or Plea of Guilty

If a convicted felon is found by the court at the sentencing hearing to be suffering from a mental disease or defect, then commitment is part of the sentence. The term is limited to the maximum that could be imposed under the regular sentencing statute, but an abnormally long period of incarceration could

101. Federal courts have held that involuntarily committed persons have a right to treatment for their illness. In Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966), this right was extended to a person found not guilty by reason of insanity. Chief Judge Bazelon pointed out that a shortage of staff or facilities would not be an excuse for denial of treatment. Id. at 457-58. See also Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972).
104. Id. at 476, 585 P.2d at 1090.
105. Mont. Code Ann. § 46-14-312 (1983). Instead of an automatic hearing, the statute provides that the defendant may petition for review if a professional certifies that he or
 Convicts serving time in the state prison have the opportunity to accumulate "good time," which results in shortening their sentences. A convict who is found to be mentally ill and sent to the state hospital cannot accumulate good time. He also cannot be completely released from confinement or supervision before his original sentence would have terminated. If a convict recovers, he could be sent to the prison to finish his sentence. Either way, the mentally ill convict may very well be incarcerated longer than a person with a similar sentence who is not ill and is able to accumulate "good time."

Critics of the sentencing procedure have pointed out that neither the prison nor the state hospital has facilities for dealing with the very dangerous criminally insane. Psychotic criminals who can form intent are being sent to the prison where they cannot be treated. Convicted criminals with a mental illness have no incentive to recover as they will be sent to the prison if they are cured. The 1979 Act made an attempt to provide fair treatment for mentally ill criminals, but the result may be inequitable and inadequate treatment.

VI. CONCLUSION

Since 1979 no cases have reached the Montana Supreme Court in which the defense of mental disease or defect has been successfully asserted. Since there were few cases under the former law, it is not yet clear if the 1979 Act has succeeded in restricting the use of the defense. It is logical to conclude that the insanity defense will never be totally abolished and that expert testimony on
mental health issues will not be completely eliminated. A defendant always has the right to attack the state's proof of mental state by raising a reasonable doubt in the minds of the jurors. The defendant raising this defense will be allowed to use expert testimony, but such testimony should be limited to evidence which will assist the jury in determining if the defendant acted purposely and knowingly. These terms are defined by statute and have been sufficiently challenged so that case law provides relatively clear guidelines.

The effect of the 1979 Act in limiting expert testimony at trial is diluted by the defense of diminished capacity due to mental disease or defect. Allowing a defendant to raise this affirmative defense to mental state opens the door to extensive expert testimony and is not in keeping with the spirit of the new law. Also inappropriate under current law is the use of the voluntary act requirement to determine intent. This interpretation is not supported by existing authority and should not be permitted.

The 1979 Act also provided an alternative sentencing procedure for the convicted defendant who is found to be suffering from mental disease or defect. In the case of a person who has been found guilty, this new procedure could result in a longer period of incarceration. In effect, a convicted defendant could be punished for successfully raising mental disease or defect at sentencing. The law should be amended to allow convicts committed to the state hospital to accumulate "good time" in some way so that their time served in an institution would be equal to that of convicted defendants who are sent directly to the prison.

While the public must be protected, the mentally ill convict has a right to treatment. If truly ill defendants are being sent to prison and are unable to get treatment there, then the 1979 Act is deficient and should be amended to address this problem.