

Position Statement 57: In Support of the Insanity Defense

Policy

Mental Health America (MHA) supports the ongoing availability of the not guilty by reason of insanity plea (hereinafter, “insanity defense”) and opposes “guilty but insane” laws which preclude the use of the insanity defense. Specifically, MHA supports the American Law Institute Model Penal Code Standards (described below). In addition to the legal nuances, a critical issue in the use of the insanity defense is ensuring that individuals whose cases are decided on this basis are hospitalized and provided appropriate, recovery-based treatment rather than treated as if they have been found guilty. In addition, Mental Health America urges that an independent review board be empowered to make release decisions based on the individual’s recovery and consequent lack of danger to the public.

Background

MHA is on record as supporting the maximum diversion from the criminal justice system of all persons accused of crimes for whom voluntary mental health treatment is a reasonable alternative to the use of criminal sanctions, at the earliest possible phase of the criminal process, preferably before booking or arraignment.

Further, MHA has expressed skepticism concerning mental health court initiatives as they risk further criminalizing persons with mental illness. Mental Health America does not support mental health courts unless a particular court provides a meaningful alternative to criminal sanctions and meets the guidelines established in its position statement.

Historically, MHA has been a leader in supporting the insanity defense.

Because of its use in the criminal justice system, the “insanity defense” is, by definition, legal in nature. Any detailed discussion of the topic involves legal analysis and justification. Therefore, the attached draft position description in this topic is different from other position statements concerning the criminal justice system and seeks to give the history and analysis of alternative versions of the insanity defense.

Society has long recognized the need for judges and juries to discern which defendants are “criminally responsible” for their acts and which are not. The insanity defense refers to a defendant’s plea that he or she is not guilty of a crime because he or she lacked the mental capacity to appreciate that what she or he did was wrong.¹

There have been many well-publicized court cases involving the insanity defense. The public perception of the insanity defense is that it is overused and exploited. The reality is that the insanity defense is rarely used. The defense is, inevitably, less successful when community

feeling is high and, given the certainty of involuntary treatment, it is rarely used in minor crimes. The implication that the insanity defense is used by “fakers” is disputed by the fact that in 80 percent of the cases where a defendant is acquitted on a “not guilty by reason of insanity” plea, the prosecution and defense have agreed on the appropriateness of the plea before the trial.²

Mental illness is real, serious and treatable. Failure to recognize this results in unnecessary criminalization of persons with mental illness. Recognition of a broad form of the insanity defense is essential for the judicial system to address these issues.

American Law Institute, Model Penal Code

Mental Health America endorses the standards articulated in the American Law Institute’s Model Penal Code, which represent the consensus of American legal scholars on the appropriate scope of the defenses of not guilty by reason of insanity and of not guilty on an element of the offense because of diminished capacity, and as a basis for clemency in capital cases if the accused’s capacity was impaired due to mental illness at the time of the crime, Model Penal Code Rules Sections 4.01 and 4.02, respectively. This position affirms that people suffering from a mental health crisis frequently have moral, rational, emotional and volitional impairments, all of which could provide a complete defense to a criminal charge, or, after conviction, a compelling factor precluding the death penalty. Mental health advocates and mental health associations should form coalitions to enact the Model Penal Code insanity and diminished capacity rules wherever they do not yet exist and to amend existing standards to better fit the Model Penal Code language wherever possible. [See Appendix 1.](#)

The provisions of the American Law Institute’s Model Penal Code are contained in Section 4.01(1) and (2) and Section 4.02(1) and (2) and read as follows:

Section 4.01. Mental Disease or Defect Excluding 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 (or she) lacks substantial capacity either to appreciate the criminality/wrongfulness of his (or her) conduct or to conform his (or her) conduct to the requirements of the law.

(2) As used in this Article the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Section 4.02. Evidence of Mental Disease or Defect Admissible When Relevant to Element of the Offense; Mental Disease or Defect Impairing Capacity as Ground for Mitigation of Punishment in Capital Cases.

(1) Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the defense.

(2) Whenever the jury or the Court is authorized to determine or to recommend whether or not the defendant shall be sentenced to death or imprisonment upon conviction, evidence that the capacity of the defendant to appreciate the criminality/wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect is admissible in favor of a sentence of imprisonment.

Analysis

The Model Penal Code was promulgated by the American Law Institute in 1962. The American Law Institute (known as “ALI”) is a nongovernmental organization composed of judges, lawyers, and law professors from all over the United States and several foreign countries selected on the basis of professional achievement and demonstrated interest in the improvement of the law.¹ Since its establishment in 1923, the ALI has published “Restatements” in almost every area of law.

The Institute decided to draft a model criminal law code rather than a restatement because existing criminal law was “too chaotic and irrational to merit ‘restatement.’”² Herbert Wechsler, a law professor at Columbia who had participated in the Nuremberg trials, was the Chief Reporter for the project. Wechsler assembled an advisory committee composed of law professors, judges, lawyers, prison officials, and experts in psychiatry, criminology and English literature. Tentative drafts of parts of the Code with detailed commentary were presented to and debated by the entire membership of the ALI at its annual meetings until 1962, when the ALI approved the Code. Sections 4.01 and 4.02 have remained unchanged. “The formulation of the Model Code . . . has become widely accepted in the United States The great majority of states . . . have chosen the Model Code’s approach [to the insanity defense] in preference to traditional standards.”³

Beginning in 1962, the Model Penal Code prompted a wave of criminal law reform, as thirty-four states recodified their criminal laws and adopted Model Penal Code provisions in substantial part. Previous law reform initiatives were abandoned in favor of the Model Penal Code formulations.⁴ As of 1998, twenty-one states have adopted Section 4.01 substantially in the form adopted in 1962.⁵ As of 2003, six states have adopted Section 4.02,⁶ and two additional states have adopted a limited version of the rule.⁷ But the element of intent, called *mens rea*, remains a critical element of proof in most states, and a potential defense, notwithstanding the lack of the express protection of Section 4.02 in those states that have not yet adopted it. Thousands of court opinions have relied on the Model Penal Code as persuasive authority and have referred to the Code’s official commentaries. The Model Penal Code has been described by two commentators as the “closest thing to being an American criminal code.”^{8, 9}

Section 4.01.

The not guilty by reason of insanity test articulated by Section 4.01 is the most respected test for the insanity defense, and is endorsed by other national mental health advocacy organizations.¹⁰ As mentioned, it has been expressly adopted in twenty-one states. While leaving room for emotional and moral “incapacity,” it focuses on the rational and volitional tests,

based on the principles that criminal conviction is not appropriate for an irrational or uncontrollable act. Most people would agree that such a person is beyond the reach of the restraining influence of the law. Thus, criminal conviction would be both futile and unjust.

The insanity defense goes back to *M'Naughten's Case*.¹⁰ M'Naughten attempted to kill the Prime Minister of England but mistakenly killed the Prime Minister's secretary. His motivation for this attempted assassination was his belief that the Prime Minister was involved in a conspiracy to kill him. Due to his incapacity to appreciate the difference between right and wrong, M'Naughten was acquitted.¹¹

Thus, from the origins of the insanity defense, considerations of morality were combined with the factual question of whether or not the accused rationally appreciated the consequences of his or her act. And though the language of *M'Naughten's Case* discouraged juries from focusing on noncognitive impairments, on the boundary between rational appreciation and moral appreciation, an understanding was reached that the impaired emotional system of a person with serious mental illness going through a life crisis may not permit the person to appreciate the consequences of his or her act. Mental illness now is understood to entail moral, rational and emotional impairments, all of which bear on guilt or innocence if they impair the persons' "substantial capacity" to "appreciate" the "wrongfulness" (the Model Penal Code's Reporter's preferred term)¹² or "criminality" of the person's act. Thus, the insights of psychiatry concerning personal responsibility found their way into the courtroom.¹³ But all of these formulations failed to address the final element: the ability for the individual to have volitional control over his or her conduct. This element was added in later case law and legislation.¹⁴

The American Law Institute's insanity defense rule, Section 4.01 of the Model Penal Code, is a consensus standard, based on the post-*M'Naughten* evolution of the case law. It uses the more global concept of "substantial capacity," which includes rational, moral and emotional capacity, and uses the noncognitive verb "to appreciate" rather than "to know" (giving deference to moral and emotional as well as rational insights), all of which are to be determined relative to the diagnosis of a "mental disease or defect" (left wisely undefined, "to accommodate developing medical understanding").¹⁵ Thus, the Model Penal Code accommodates evolving diagnostic and treatment insights. Further, the Model Penal Code states that the capacity must relate either to the accused's ability to appreciate the criminality/wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law, the volitional test. It should also be noted that the volitional test is completely separated from the "appreciation of criminality/wrongfulness" test, and a person may fully appreciate the criminality/wrongfulness of his or her act but be unable to control himself or herself under this formulation. This seems profoundly right.

The insanity defense has come under attack from several quarters, including the development of "guilty but insane" laws which deny the accused the right to claim insanity as a defense to the crime and permit only that the accused confess to the crime and seek to explain his or her conduct, requesting clemency through that process. This is the common traffic court plea of "guilty with an explanation." Yet people with mental illness who are convicted and treated pursuant to "guilty but insane" laws are not treated better, or granted any enforceable right to treatment.¹⁶ A tragic example of the misuse of the "guilty but insane" plea occurred in *Wilson*

case, in South Carolina.³ Such defendants are inappropriately saddled with a criminal conviction, even if they would have been not guilty by reason of insanity under the consensus test of the Model Penal Code.¹⁷ For those who argue that the *mens rea* defense survives, it should be understood that in crimes of negligence, there is no such defense. Thus, with guilty but insane, a conviction of some sort is assured, independent of the person's real responsibility/capacity. This seems profoundly unfair. Therefore, Mental Health America vigorously opposes "guilty but insane" laws.

The other attack has been of a more populist nature, seeking repeal of the insanity defense. In response to sensational cases, the public has become concerned about the notion that a person who committed a heinous crime may be adjudicated "not guilty." This is not surprising when studies are made that in popular belief, "the insane, through the insanity defense, escape punishment," that "an insanity defense is easily engineered," and that "the insanity defense places an unfair burden on the prosecution."¹⁸ According to the Commentary, the insanity defense is in fact very rarely invoked, and then only for very serious crimes—especially capital crimes.¹⁹ Goldstein documented this in his seminal text, *The Insanity Defense*, which urges adoption of the ALI Model Penal Code model.²⁰ In fact, successful invocation of the insanity defense entails an indeterminate commitment to a mental health treatment facility, often with a standard much tougher than the civil commitment standard for release.²¹ And the defense is certainly not easy to make in practice.²²

The scholarly response to popular dissatisfaction with the insanity defense, ably fought by Goldstein and his intellectual progeny, has been to urge that the *mens rea* or "guilty mind" defense be used instead of the insanity defense, thus combining Sections 4.01 and 4.02 of the Model Penal Code.²³ The great flaw in this idea is that crimes of negligence have no *mens rea* element. And M'Naughten himself would have been guilty under the *mens rea* test, since he clearly intended to kill, whether or not he was able to understand the wrongfulness of his conduct.²⁴

Mental Health America takes the position as a matter of policy that persons accused of crimes should be permitted to plead the insanity defense provided by Section 4.01 of the Model Penal Code as well as the defense of diminished capacity provided by Section 4.02 of the Model Penal Code. The Mental Health America commends the analysis of Daniel J. Nussbaum, in "The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of 'Abolishing' the Insanity Defense," 87 Cornell Law Review 1509, at 1571 (2002):

While it has not yet confronted this country's highest court, the abolition of the extrinsic defense of insanity in favor of the *mens rea* approach has become a hotly contested issue among legal scholars as well as the few state court judges who have grappled with it. It clearly raises questions of constitutional magnitude in the areas of due process, equal protection, and cruel and unusual punishment.

The ability of persons with serious mental illness to plead the combined tests provided by the Model Penal Code should be preserved based on the logic of the English and American common law courts which elaborated the *M'Naughten* defense embodied in Section 4.01 of the Model Penal Code, that a person should not be accountable for an irrational or an uncontrollable

act. Abolition of the insanity defense would convict of serious crimes people who act purposefully even though they do not appreciate that their acts are wrong or lack volitional control over their actions. Whether or not elimination of the insanity defense is unconstitutional, as the state courts considering the question have consistently held,²⁵ rejection of the premise that only those who are responsible should be treated as criminal would constitute abandonment of a deservedly fundamental value in the Anglo-American system of criminal justice and would represent a seriously regressive step in the development of American criminal law.²⁶

Section 4.02.

The diminished capacity standard of Section 4.02(1) of the Model Penal Code has been criticized because it allows any evidence that the defendant may wish to present on the question of *mens rea*, notwithstanding the severity of the mental illness at issue. That having been said, the threshold of seriousness is probably a subject appropriately left to the discretion of the judge and jury, since even a transient illness or a limited impairment might have a significant impact on the individual's ability to appreciate the seriousness of a particular crime. And absent a countervailing value, it is appropriate to allow an accused to present all relevant evidence to a judge and jury, in the interest of justice.

Thus, the diminished capacity rule of Section 4.02(1) of the Model Penal Code also deserves support, although the issue of the seriousness of the mental illness which should be required in order to allow use of the defense will remain controversial. The concept of "serious mental illness" and prior formulations like "persistent" or "severe" have not expressed a clear scientific consensus on the issue of severity, and mental health professionals have not been able to make reliable distinctions between the different levels of impaired capacity experienced by persons with mental illness. The best course, therefore, seems to be to allow presentation of evidence about mental illness "whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense," as required by Rule 4.02(1).

This is the *mens rea* defense, and it seems essential that it be preserved at every stage of the proceedings, as the modern critique of the insanity defense would do as well. But it should be noted that disproof of "guilty mind" is quite distinct from the moral, rational, emotional and volitional tests which are at the base of the insanity defense. As stated above, M'Naughten himself would have been guilty under the *mens rea* test. Thus, *mens rea* must be considered an independent legal principle to be applied in the admission of evidence dealing with mental illness, separate and distinct from the insanity defense. This is what Section 4.02(1) does.

For an organization on record in support of a death penalty moratorium,²⁷ endorsement of Section 4.02(2) is self-evident. It is axiomatic that the Mental Health America supports admission of evidence concerning diminished capacity as an element in sentencing and that impairment of capacity due to mental illness should weigh against imposition of the death penalty.

Treatment

While beyond the scope of this policy, it is essential that successful invocation of the insanity defense be followed up with appropriate treatment as well as compassionate care during confinement and protection of human and civil rights. A person found not guilty should not be imprisoned, as a guilty person would be. It is also essential that recovery through treatment lead to release back to the community, although it is realistic to anticipate long delays in notorious cases. The treatment and release process should be removed from the criminal justice system and be placed in the clinical treatment process, and a comprehensive review of the person's mental health and recovery should be the basis for a finding of dangerousness or release. Psychiatric review boards are a promising model for such decisions.

Call for Action

Affiliates and advocates should support adoption and retention of the Model Penal Code definition of the insanity defense and should support effective treatment and a fair release process for people who have successfully invoked the defense.

Effective Period

The Mental Health America Board of Directors approved this policy on June 13, 2009. It is reviewed as required by the Mental Health America Public Policy Committee.

Expiration: December 31, 2014

1. American Law Institute, About the American Law Institute, available at <http://www.ali.org/thisali.htm>.
2. Paul H. Robinson & Markus Dirk Dubber, An Introduction to the Model Penal Code, available at <http://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf>.
3. Model Penal Code 4.01, Commentary (hereinafter, "Commentary") at 175.
4. Durham rule, based on a vaguer formulation, has been completely abandoned. See *Durham v. United States*, 214 F.2d 852 (D.C. Cir. 1954), overruled by *U.S. v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).
5. Department of Justice, Bureau of Statistics, State Court Organization, The Defense of Insanity: Standards and Procedures (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco98.pdf>. For a list of the states that have adopted Section 4.01 in substantial part, see [Appendix 1](#).
6. Alaska St. 12.47.020 (2003); Ark. Code Ann. 5-2-303 (2003); Haw. Rev. Stat. 704-401 (2003); Mont. Code Ann. 46-14-102 (2003); Mo. Rev. Stat. 552.030 (2003); N.J. Rev. Stat. 20:4-2 (2003).
7. Conn Gen. Stat. 53a-54a (2003); Or. Rev. Stat. 161.300 (2003).
8. Robinson & Dubber, op. cit., n.2.
9. California, have expressly rejected the broad ALI Model Penal Code standards. California first, by judicial decision, adopted the ALI Model Penal code insanity defense standards. Then, in 1978, through the initiative process, the electorate adopted a restrictive M'Naughten standard that joined the two-pronged definition (quoted in footnote 12). Subsequent case law has made the California standard more useable, but it, and many other states, need to consider broader standards that fill in the contours of relevant disability and criminal responsibility for persons afflicted with mental illness consistent with this policy.
10. NAMI, Criminal Justice and Forensic Issues, <http://www.namimass.org/policy/crimnal.htm>. The American Psychiatric Association supports a variant of the American Law Institute insanity test. Under the APA test, "a person charged with a criminal offense should be found not guilty by reason of insanity if it shown that as a result of mental disease or mental retardation he was unable to appreciate the wrongfulness of his conduct at the time of the offense. As used in this standard, the terms "mental disease" or "mental retardation" include only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or

- understanding of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances.”American Psychiatric Association, Public Information, available at http://www.psych.org/public_info/insanity.cfm.
11. 8 Eng. Repts. 718, 10 Clark & Fin. 200 (1843).
 12. The exact rule enunciated in M’Naughten’s Case was as follows: “To establish a defense on the grounds of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.” Commentary at 169-170.
 13. Commentary at 167.
 14. See, e.g., *Parsons v. State*, 2 So. 854 (Ala. 1887); *Davis v. U.S.*, 165 U.S. 373 (1897). A test focusing on the capacity of the defendant to control his conduct has been described as the “irresistible impulse”test. Goldstein, Abraham S., *The Insanity Defense* (Yale University Press, New Haven, 1967), at 75.
 15. Commentary at 164.
 16. Mark A. Woodmansee, *The Guilty But Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, *Notre Dame Journal of Law, Ethics and Public Policy* 341, 357 (1996).
 17. In 1989, James W. Wilson was found to have suffered from a mental illness that robbed him of the capacity to conform his conduct to the requirements of the law at the same time of the office * two murders. He was found to be “guilty but mentally ill”under the South Carolina statute, which was first constructed in his case. He was then sentenced by the trial court to death by electrocution, and the South Carolina Supreme Court affirmed the sentence, thus effectively giving no insanity defense to the imposition of the death penalty in South Carolina. This case demonstrates the fundamental flaw of guilty but mentally ill statutes: Wilson has been deprived of the insanity defense enunciated in the Anglo-American law since the mid-nineteenth century.
 18. Concerning the inappropriateness of such “criminalization,”see Mental Health America Policy P-50, “In Support of Maximum Diversion of Persons with Serious Mental Illness from the Criminal Justice System.” (2003).
 19. The studies are annotated in “The Craziest Reform of Them All: A Critical Analysis of the Constitutional Implications of ‘Abolishing’ the Insanity Defense”by Daniel J. Nussbaum, 87 *Cornell L. Rev.* 1509 (2002), at n.9.
 20. Commentary at 182.
 21. Goldstein, Abraham S., *The Insanity Defense* (Yale University Press, New Haven, 1967), at 23-24. The Insanity Defense traces the history from M’Naughten’s Case to the Model Penal Code in sumptuous detail.
 22. *Id.* at 143-169. The difficulty of obtaining release after a NGRI commitment is a major deterrent to use of the defense and can be therapeutically very damaging as well. The modern trend is to remove release decisions from the criminal courts by the use of psychiatric review boards. Thomas L. Hafemeister & John Pettila, *Treating the Mentally Disordered Offender: Society’s Uncertain, Conflicted and Changing Views*, 21 *Fla. St. U. L. Rev.* 729, 749-50 (1994).
 23. See, e.g., the recent and very comprehensive proposal by Laura Ryder, “Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Political and Legal Theories,”46 *U.C.L.A. L. Rev.* 289 (1998); see also materials noted in Commentary at n.51, pp. 180-181.
 24. Commentary at 182.
The issue of insanity defense reform is, no doubt, a political hotbed. Moreover, the issue concerns a relatively small, unpopular group of individuals who are unable to participate meaningfully in the political process and therefore are highly vulnerable. While it should be the goal of the courts to interpret the Constitution correctly every time, the political popularity of insanity defense reform certainly makes result-oriented and politically motivated decision-making all the more tempting.
 25. See *Finger v. State*, 27 P.3d 66 (Nev. 2001) (holding that the legislature’s abolishment of insanity as a defense in criminal prosecutions violated the due process clause of the federal and state constitutions); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931) (invalidating statute providing that insanity is no defense for murder, but is only a factor to be considered in mitigation of punishment and post-trial disposition of the offender); *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910) (invalidating statute providing that insanity is no defense to any crime, but may be considered in determining post-trial disposition). See also *State v. Lange*, 168 La. 958, 123 So. 639 (1929).
 26. Commentary at 186.

27. Mental Health America Policy Number p-45, "Death Penalty and Persons with Mental Illness" (2001).
