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March 28, 2003

Assemblyman Bernie Anderson
Assembly Chambers

Dear Assemblyman Anderson:

As Chairman of the Assembly Committee on Judiciary, you have asked me to provide an overview of the relevant issues concerning Assembly Bill No. 156. As you are aware, A.B. 156 was drafted in response to the decision of the Nevada Supreme Court in Finger v. State, 117 Nev. Adv. Op. 48 (2001), which held that legislation which abolished the insanity defense in this state was unconstitutional. Below, we provide a summary of the holding and the effect of that case on Nevada law. Next, we summarize the major provisions of A.B. 156 and the policy choices that the Committee may wish to consider with respect to this bill. We then discuss the various legal theories for determining whether a defendant qualifies as insane pursuant to an insanity defense. Finally, we discuss the insanity defense in other states.

I. Background

Prior to 1995, Nevada statutes provided that a person lacking the capacity to appreciate the wrongfulness of his or her act could not be convicted of a crime. Insanity was recognized as an affirmative defense, with the burden on the defendant to prove insanity by a preponderance of the evidence. Finger v. State, 117 Nev. Adv. Op. at 13.

In 1995, the Nevada Legislature considered changes to the insanity defense in response to several concerns raised by prosecutors. The prosecutors asserted that courts were allowing the insanity defense to be raised when evidence did not support such a defense. They further asserted that witnesses were allowed to opine about the sanity of a defendant without an understanding of the requirements for determining legal insanity. The prosecutors complained that instructions to expert witnesses and juries were incomplete and that courts were reluctant to deny a person the opportunity to raise an insanity defense. Finally, the prosecutors complained of the time and cost involved in rebutting an insanity defense. Id. at 14-15; *see also* Hearing on S.B. 314 Before the

ASSEMBLY JUDICIARY
DATE: 3/31/03 ROOM: 3138 EXHIBIT L
SUBMITTED BY: RISA LANG

Senate Committee on Judiciary, 68th Leg. Sess. (Nev. April 4, 1995). As a result, the Nevada Legislature passed Senate Bill No. 314 of the 1995 Legislative Session which repealed the provisions of Nevada law that provided for insanity as a complete defense to a criminal offense and in its place created the plea of "guilty but mentally ill." Finger, 117 Nev. Adv. Op. at 16-18.

A. Summary of Finger v. State

In 2001, the Nevada Supreme Court ruled in Finger v. State that the abolishment of the insanity defense by the Legislature was a violation of the Due Process Clauses of both the United States and Nevada Constitutions. Id. at 25. The Nevada Supreme Court held that the new statutory scheme in S.B. 314 was a violation of due process guarantees because it would allow a person to be convicted of a criminal offense under circumstances where the person lacked the mental capacity to form a necessary element of the offense, the intent to commit the crime. Id.

The Nevada Supreme Court recognized that the Supreme Courts of three other states, Idaho, Montana and Utah, had upheld statutory schemes which abolished the insanity defense. Id. at 21. Those courts found that there is no federal constitutional right to assert a defense of insanity. Id. at 21. The Nevada Supreme Court further recognized that the U.S. Supreme Court has not yet directly considered this issue. Id. at 22. However, the Nevada Supreme Court disagreed with the Supreme Courts of those other states and held that:

> [L]egal insanity is a well-established and fundamental principle of the law of the United States. It is therefore protected by the Due Process Clauses of both the United States and Nevada Constitutions. The Legislature may not abolish insanity as a complete defense to a criminal offense. Thus the provisions of S.B. 314 abolishing the insanity defense are unconstitutional and unenforceable.
>
> The Legislature is free to decide what method to use in presenting the issue of legal insanity to a trier of fact, *i.e.,* as an affirmative defense or rebuttable presumption of sanity. It may also determine that legal insanity be proven by the defendant by any one of the established standards. But it cannot abolish legal insanity or define it in such a way that it undermines a fundamental principle of our system. . . . [S]o long as a crime requires some additional mental intent, then legal insanity must be a complete defense to that crime.

Id. at 25-26.

The Court in Finger further held that although the remaining provisions of S.B. 314 might be construed in a constitutional manner, they were "inextricably intertwined with the provisions designed to abolish the insanity defense." Id. at 26. The held that to enforce one without the other would broaden the scope of legal insanity, which would contradict the intent of the Legislature in enacting S.B. 314. Id. Thus, the Court held that S.B. 314 "should be rejected in its entirety." Id. The Court then held that "[a]ll prior versions of the statutes amended or repealed by S.B. 314 remain in full force and effect." Id.

B. Effect on Nevada Law

The Nevada Supreme Court in Finger held unconstitutional the entire statutory scheme which established the plea of guilty but mentally ill. Id. Thus, these statutes no longer reflect the state of the law in Nevada. By stating that prior versions of those statutes became effective, the Court effectively revived the laws as they existed before the 1995 Legislative Session as well as the case law interpreting those laws. In its decision, the Nevada Supreme Court explained that before "the 1995 Legislative Session, Nevada statutes codified the rule that a person cannot be convicted of a criminal offense if [he] lack[ed] the capacity to appreciate the wrongfulness of [his] act." Id. at 13. Nevada courts applied the "M'Naghten rule" in determining what constitutes legal insanity. Id. at 13-14. Because of confusion resulting from previous case law interpreting the M'Naghten rule, the Court in its written opinion in Finger attempted to clarify the rule. Under the M'Naghten rule, the Court stated that "[t]o qualify as being legally insane, a defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law." Id. at 26-27. Although the M'Naghten rule appears to provide two alternative ways to assert an insanity defense, in its clarification of the rule, the Court provides that "[d]elusional beliefs can only be the grounds for legal insanity when the facts of the delusion, if true, would justify the commission of the criminal act." Id. at 27. Thus, when the delusion, if true, would not present a legal defense, the person may not assert the defense.

In addition to reviving the M'Naghten rule, the Court also revived the procedural rules that applied to the insanity defense as they existed before the 1995 Legislative Session. At that time, Nevada procedurally treated insanity as an affirmative defense which the defendant had to prove by a preponderance of the evidence. Id. at 13. Finally, in the very rare instance where a person was found not guilty by reason of insanity, the person was immediately committed to a mental health facility and released only if a judge determined that the person was no longer mentally ill and was not a danger to himself or others. Id. at 14.

In conclusion, the current law as summarized by the Nevada Supreme Court is the law that was in effect before the 1995 Legislative Session. Thus, a criminal defendant

may assert the affirmative defense of insanity which must be proved by a preponderance of the evidence, the M'Naghten rule applies in determining what constitutes legal insanity and a person who successfully proves his innocence by way of insanity must be immediately committed to a mental health facility where he must remain until he is no longer mentally ill or a danger to himself or others. Noting that very few people would qualify as legally insane under the M'Naghten rule, the Nevada Supreme Court stated that "the adoption of a more expansive definition of legal insanity is not required by the [F]ederal or Nevada [C]onstitutions and is therefore a legislative, not judicial prerogative." Id. at 27.

II. Assembly Bill No. 156

Because of the decision in Finger, the laws as codified in the Nevada Revised Statutes concerning the plea of guilty but mentally ill are no longer enforceable. In addition, the Court revived the previous laws concerning the insanity defense. Thus, those laws, though not codified, may be relied upon for purposes of asserting that defense. For that reason, as Chairman of the Assembly Committee on Judiciary, you requested the drafting of Assembly Bill No. 156 to codify what the Nevada Supreme Court declared in Finger to be the current state of the law. Therefore, A.B. 156 abolishes the plea of guilty but mentally ill, reinstates exculpation by reason of insanity and provides a procedure for committing a person who is acquitted by reason of insanity to a mental health facility.

A. Explanation of Assembly Bill No. 156

Assembly Bill No. 156 consists of 71 sections. The majority of these sections remove references to the term "guilty but mentally ill." The remaining sections make the substantive changes that were necessary to return the laws to their pre-1995 status. Next, we describe some of the substantive provisions of A.B. 156.

Section 4 of A.B. 156 amends NRS 174.035 to remove the plea of guilty but mentally ill from the types of pleas which are available to a defendant. In addition, this section is amended to provide that the defendant may, in the alternative or in addition to any of the permissible pleas, plead "not guilty by reason of insanity." Under this plea, the defense has the burden of proving insanity by a preponderance of the evidence.

Section 9 of A.B. 156 adds a new section to Chapter 175 of NRS to provide the procedure for committing a person who has been acquitted by reason of insanity to a mental health facility. This section provides that a person who pleads insanity and is found not guilty by reason of insanity by a jury, must be taken into protective custody and examined by court-appointed psychiatrists and psychologists. There must then be a judicial determination as to whether or not there is clear and convincing evidence that the person is mentally ill. If the court finds that the defendant is mentally ill, he must be committed to the custody of the Administrator of the Division of Mental Health and

Developmental Services of the Department of Human Resources until he is discharged in accordance with law. If there is not clear and convincing evidence that the person is a mentally ill person, then the court must order his discharge.

Section 26 of A.B. 156 amends NRS 178.460 to provide that a person who is committed to the custody of the Administrator of the Division of Mental Health and Developmental Services may not be held in custody for longer than the longest period of incarceration provided for the crime with which he is charged or 10 years, whichever is shorter. This section applies to person who are determined to be incompetent to assist in their own defense. It also applies pursuant to section 9 of the bill, to a person who is found innocent by reason of insanity who is placed in a mental health facility. After 10 years, the person must be returned to the court for a determination of whether the person must be involuntarily committed.

Section 35 of A.B. 156 amends NRS 193.210 to clarify that a person is not "of sound mind" if he is "affected with insanity."

Section 37 of A.B. 156 amends NRS 194.010 to provide that a person is not liable for an act or omission committed while in a state of insanity.

Section 57 of A.B. 156 amends NRS 616A.250 to provide that the definition of "incarcerated" includes being confined in an institution or facility for the mentally ill as a result of a plea of not guilty by reason of insanity.

Section 69 of A.B. 156 repeals NRS 174.041, 176.127 and 176.129. NRS 174.041 provides for various procedural matters relating to a plea of guilty but mentally ill, including a hearing and examination to determine if the person was mentally ill at the time of the act. NRS 176.127 provides for a determination of the mental condition of a defendant who pleads guilty but mentally ill at the time of sentencing. NRS 176.129 provides that a final judgment of guilty but mentally ill is deemed to be a judgment of guilty.

B. Policy Choices

Assembly Bill No. 156 proposes to revive the insanity defense and amends the Nevada Revised Statutes to its pre-1995 status concerning the insanity defense which is, as indicated earlier, the current state of the law as ordered by the Nevada Supreme Court. However, although the Nevada Supreme Court held that the insanity defense could not be abolished, it left certain policy decisions related to the defense for the Legislature to determine. First, section 4 of A.B. 156 revives the insanity defense, however, that section does not state the standard for determining whether or not a person qualifies for such a defense. As discussed above, before 1995, the courts adopted the M'Naghten rule for making that determination. Thus, the Nevada Supreme Court in Finger provided that the

M'Naghten rule would apply unless the Legislature passed a law setting forth a different standard. Finger v. State, 117 Nev. Adv. Op. at 25-26. In addition, before 1995, the issue of insanity was required to be proven by a preponderance of the evidence. However, the appropriate burden of proof is a matter of policy for the Legislature to decide. Id. at 25. Thus, the Legislature may keep the burden of proof as a preponderance of the evidence, or may apply a higher burden, such as clear and convincing evidence or proof beyond a reasonable doubt. In addition, the procedure for committing a person who is found innocent by reason of insanity to a mental health facility may also be determined by the Legislature. Finally, the Legislature may consider any other manner of addressing the pleas, verdicts and defenses in this state. The only limitation placed on the Legislature by the Nevada Supreme Court in Finger is that the insanity defense may not be abolished. Next, we will discuss the various theories that have been used to determine whether a person may be found insane for purposes of asserting an insanity defense.

III. Legal Theories Applied to the Insanity Defense

There are four legal theories that have traditionally been advanced for determining when insanity may be used as a legal defense. Those theories are referred to as the M'Naghten rule, the irresistible impulse test, the Durham test and the Model Penal Code test.

A. M'Naghten Rule

The M'Naghten rule was first developed in England as a result of a controversial murder case in 1843 where a murderer was declared insane and not prosecuted. The rule was quickly adopted in the United States and was the most common standard applied in cases involving insanity from the mid-1800s to the middle of the 20th century.

The Nevada Supreme Court has stated that the M'Naghten rule is the standard to be used by courts in this state until a different standard is adopted in statute by the Legislature. The rule, also known as the "right and wrong" test, requires a two-part analysis for determining whether a person may be found not guilty by reason of insanity. Wayne R. LaFarve & Austin W. Scott, Jr., Criminal Law § 4.2(a) (2d ed. 1986) [hereinafter "Criminal Law"]. The first part is whether, at the time of the act, the person who committed the act knew the nature and quality of the act. Id. The second part of the test is whether, at the time of the act, the person knew the act to be morally wrong. Id. If the defendant did not know either the nature or quality of his act or that the act was morally wrong because of defect of reason or disease of the mind, the defendant cannot be held criminally responsible for his actions. *See* 21 Am. Jur. 2d Criminal Law § 58 (1998).

Although the M'Naghten rule appears to provide two alternative ways to assert an insanity defense, the Nevada Supreme Court provided in Finger that "[d]elusional beliefs

can only be the grounds for legal insanity when the facts of the delusion, if true, would justify the commission of the criminal act." Finger v. State, 117 Nev. Adv. Op. at 27. Thus, when the delusion, if true, would not present a legal defense, then the person may not assert the defense. Under this application of the rule, if a defendant claims his delusion led him to believe he was acting in self-defense, he could be found innocent by reason of insanity. Id. However, if the defendant claims his delusion led him to believe that he had to kill someone because there was a conspiracy against him, he would not be excused because even in his delusional state he was not acting pursuant to an imminent threat which would allow him to claim self-defense. Id. at 26-27.

Like Nevada, some other states that apply the M'Naghten rule use only one part of the test. Ga. Code Ann. §§ 16-3-2 and 16-3-3. However, in contrast to Nevada, some states apply only the first part of the test - whether the defendant knew the nature and quality of the act. Alaska Stat. § 12.47.010; Ariz. Rev. Stat. § 13-502.Alaska Stat. § 12.47.010; Ariz. Rev. Stat. § 13-502.

B. The Irresistible Impulse Test

Some jurisdictions have supplemented the M'Naghten rule with the "irresistible impulse test." Under this test, a person may assert the insanity defense even if the person knew the nature of the act and that it was wrong, but demonstrates that he was forced to act by an impulse he was powerless to control. Criminal Law at § 4.2(d). Thus, if a defendant commits a criminal act as the result of a sudden brief loss of control, he may assert the insanity defense under this test. Id. Some jurisdictions have incorporated the irresistible impulse test into the M'Naghten rule by saying that a person may assert an insanity defense if an irresistible impulse rendered the person incapable of differentiating between right and wrong. *See* Finger v. State, 117 Nev. Adv. Op. at 9; 21 Am. Jur. 2d Criminal Law § 58 (1998).

The Court in Finger gave the following example of the irresistible impulse test:

> [I]f a person was under a delusion that God wanted certain people killed and, based upon hearing the voice of God, that individual immediately began killing people around them, then that person would be legally insane under the irresistible impulse test, but not under the M'Naghten standard. The individual knew that he was killing human beings and that he was not authorized by law to take a human life, but he could not resist what he perceived to be the will of God and acted under the impulse of his delusion.

Finger, 117 Nev. Adv. Op. at 9 (*citing* Cynthia G. Hawkins-León, "Literature as Law": The History of the Insanity Plea and a Fictional Application Within the Law & Literature Canon, 72 Temp. L. Rev. 381, 393-95 (1999)).

C. The Durham Rule

The Durham rule was established by the United States Court of Appeals for the District of Columbia in 1954 and was followed by that Circuit until 1972. The rule was established in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) and provided that if a person had a mental defect or disease and that mental defect or disease was the cause for the unlawful action, then that person could not be held criminally liable for the act. This rule was initially hailed as revolutionary because it allowed for advances in psychiatric and psychological research to be considered. Ultimately, however, the Durham rule was rejected by the states and overturned by the court that created it and replaced by the court with the Model Penal Code test discussed below. *See* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); 21 Am. Jur. 2d Criminal Law § 59 (1998).

The Court in Finger summarized the Durham rule by stating:

> Under the Durham standard, individuals were legally insane if they would not have committed the criminal act but for the existence of a mental disease or defect. In other words, if I did not have a delusion, I would not have committed the criminal act.

Finger, 117 Nev. Adv. Op. at 9.

D. The Model Penal Code Test

The Model Penal Code test was developed by the American Law Institute and has been widely adopted by states. American Law Institute Model Penal Code § 4.01 (1985). This test provides that a defendant may assert the insanity defense if at the time that he committed the criminal act, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The Model Penal Code test, sometimes referred to as the "substantial capacity test," applies parts of each of the other insanity tests. *See* Finger v. State, 117 Nev. Adv. Op. at 10-13, 21 Am. Jur. 2d *Criminal Law* § 60 (1998).

The Model Penal Code test broadened the M'Naghten rule in several ways. Rather than requiring the defendant to know what he is doing, he must appreciate what he is doing. This test suggests that the person must have a deeper understanding than merely knowing or being cognizant of his actions. Second, by providing that the person lacked substantial capacity to "conform his conduct," the test indicates that a person may be exonerated if as a result of mental disease or defect the person lacks the capacity to control his actions. Third, the Model Penal Code test requires only a substantial, not total, impairment of a person's ability to understand or control his actions. *See* Finger, 117 Nev. Adv. Op. at 10-13, 21 Am. Jur.2d *Criminal Law* § 60 (1998).

Under the Model Penal Code test, a person who thinks, for example, that he is shooting at a target shaped like a human being or who thought he was a soldier in the middle of a battlefield and that the individuals he was killing were enemy forces would meet the criteria of the Model Penal Code test, as well as the criteria of the M'Naghten rule. Such a person would not appreciate the criminality of his act pursuant to the Model Penal Code test.

Additionally, a person who, for example, was under a delusion that God wanted a certain person killed and, based upon hearing the voice of God, killed that person, would be legally insane under the Model Penal Code test, as well as under the irresistible impulse test, but would not be legally insane under the M'Naghten rule. However, the part of the Model Penal Code which provides for the inability to conform conduct is generally not interpreted as broadly as the irresistible impulse test.

E. Guilty But Mentally Ill

In four states, Idaho, Montana, Utah, and Kansas, the plea of not guilty by reason of insanity has been abolished. Idaho provides that a mental condition is not a defense to any charge, while Montana, Kansas and Utah provide that evidence of a mental defect may negate an element of an offense. Idaho Code §18-207; Mont. Code Ann. § 46-14-102; Kan. Stat. Ann. § 22-3220; Utah Code Ann. § 76-2-305. This has been referred to as the "*mens rea* model" because it defines the *mens rea*, or criminal intent, by the decision to do an act and ignores any appreciation or understanding of the wrongfulness of the act. Finger v. State, 117 Nev. Adv. Op. at 12. In addition, Utah also provides for a plea of guilty and mentally ill and a verdict of guilty and mentally ill. Utah Code Ann. §§ 77-16a-103 and 77-16a-104. As stated previously, the Supreme Courts of Idaho, Montana and Utah upheld the statutory schemes in those states. Finger v. State, 117 Nev. Adv. Op. at 18. Some states have made available a verdict of guilty but mentally ill in addition to allowing an insanity defense, which provides an alternative when the mental illness is insufficient to negate an element of the defense. Alaska Stat. §§ 12.47.020, 12.47.30, 12.47.05; Del. Code ann. tit. 11, § 401; Ga. Code Ann. § 17-7-131; 725 Ill. Comp. Stat. 5/115-2; 725 Ill. Comp. Stat. 5/115-3, 730 Ill. Comp. State 5/5-2-6; Ind. Code §§ 35-36-2-3 and 35-36-2-5; Ky. Rev. Stat. Ann. §§ 504.120 and 504.130; Mich. Comp. Laws Ann. § 768.36; N.M. Stat. Ann. § 31-9-3; Pa. Stat. Ann. tit. 18, § 314; S.C. Code Ann. § 17-24-20; S.D. Codified Laws §§ 22-1-2, 23A-26-12, 23A-26-14, 25-5-10.

In conclusion, the Nevada Supreme Court held in Finger that it is unconstitutional to abolish the insanity defense. In addition, the Supreme Court held that the laws as they existed prior to 1995 is again the law of this state. Assembly Bill No. 156 was drafted to codify the current state of the law as ordered by the Nevada Supreme Court. However, the Legislature may wish to consider other ways in which insanity is pleaded, proven and defined..

For your convenience, I have attached an article concerning the legal theories relating to the insanity defense, and a document based upon a 1998 survey which provides information concerning the insanity defense in each state.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By Amiee McGimpsey
Amiee McGimpsey
Deputy Legislative Counsel

By Risa Lang
Risa B. Lang
Principal Deputy Counsel

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Encl.
Ref No. 0302062131
File No. OP_Anderson030325161828

Table 38. The Defense of Insanity: Standards and Procedures

	Pre-Trial	Trial					Post-Trial		
	Standard of proof in disposition hearing:	Bifurcated	Standard of proof	Burden of Proof: Defendant (D) Prosecutor (P)	Jury informed of verdict consequences	Test for Insanity	Insanity verdict	Treatment: Mandatory (M) Discretionary (D)	Post-conviction release authority
Alabama	C		C	D		M'N	NGBD	D	Court
Alaska	C		P	D	■	M'N (nature and quality prong only)[1]	NGBI/GBMI	D for NGBI; M for GBMI	Court
Arizona	C		C	D		M'N (nature and quality)[2]	NGBI/GBI	D	Court
Arkansas	P[3]		P	D	■	A.L.I. (minus "substantial")	NGBD	D	Court
California	P	■	P	D	■	M'N	NGBI	D	Court
Colorado	P		B	P	■	M'N and Irresistible Impulse	NGBI	M	Court
Connecticut	C		P	D	■	A.L.I. (requires lack of capacity to conform)	NGBD	D	Court
Delaware	P		P	D		A.L.I. (criminal prong only)	NGBI	M	Court
District of Columbia	P[4]	■[5]	P	D	■	A.L.I.	NGBI	M	Court
Florida	P	■	B	P	■	M'N	NGBI	D	Court
Georgia	P		P for NGBI; B for GBMI/ GBMR	D	■	M'N and delusional compulsion.	NGBI/GBMI/ GBMR	M for NGBI D for GBMI/ GBMR	Court
Hawaii	P		P	D	■	A.L.I.[6]	Acquitted for physical or mental disorder	D	Court
Idaho[7]	[8]			*No Insanity Defense*			GBI	D	Court
Illinois	P		C	D		A.L.I. (requires lack of substantial capacity to conform)	NGBI	D	Court
Indiana	P		B	P		A.L.I. (no control prong)[9]	Not responsible by Insanity	D	Court
Iowa	P		P	D		M'N	NGBI	M	Court
Kansas	P		B	P	■	M'N	NGBD	M	Court
Kentucky	P[10]		P	D	■	A.L.I.	NGBI	D	Court
Louisiana	P		P	D		M'N	NGBI	M	Court
Maine	P	■	P	D		A.L.I. (no control prong)[11]	Not responsible for mental defect reasons	M	Court
Maryland	B	■	P	D	■	A.L.I.	Not responsible by reason of insanity	D	Court

Legend: B=Beyond a Reasonable Doubt, P=Preponderance of the Evidence,
C=Clear and Convincing Evidence, GBI=Guilty But Insane, GBMI=Guilty But Mentally Ill,
GBMR=Guilty But Mentally Retarded, NGBD=Not Guilty by Reason of Mental Disease or Defect,
NGBI=Not Guilty by Reason of Insanity, N/S = Not stated; ■ = Yes
ABI=Acquitted by Reason of Insanity, M'N=M'Naghten, A.L.I.=American Legal Institute

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Massachusetts	P		B	P	■, if requested by defendant	A.L.I.	NGBI	D	State Hospital[12]
Michigan	P		P	D		A.L.I.	NGBI	M	N/S
Minnesota	P	■	P	D		M'N	NGBI	M	Court
Mississippi	P	■	B	P		M'N	ABI	D	N/S
Missouri	P		P	D		M'N and incapacity to conform conduct to requirements of law	NGBD	M	Court
Montana[13]	P					N/A	GBI	D	Court
Nebraska	P[14]		P	D		M'N	NGBI	D	Court
Nevada	P		P	D		N/S	GBMI	D	
New Hampshire	P	■	C	D	■	[15]	NGBI	M	Court
New Jersey	P		P	D	■	M'N	NGBI	D	Court
New Mexico	P		B	P		MN or Irresistible Impulse	NGBI	D	Court
New York	P		P	D	■	A.L.I.	Not responsible by reason of mental defect	D	Court
North Carolina	P		Jury Satisfied	D	■	M'N	NGBI	M	Court
North Dakota[16]	P	■	P	D	■	A.L.I.	NG, lack of criminal responsibility	D	Court Annual Review
Ohio	P		P	D		M'N	NGBI	D	Court
Oklahoma	B	■	B	P		M'N	AGI	D	Court
Oregon	P		P	D	■	A.L.I.	Guilty except for insanity	D	Psych. Security Review Board
Pennsylvania	P	■	B	P	■	M'N	NGBI	D	Court
Puerto Rico	Reasonable Grounds		B	P		A.L.I.	NGBI	D[17]	Court
Rhode Island	P		P	D		A.L.I.	NGBI	D	Court
South Carolina	P		P	D	■[18]	M'N	NGBI	M (120 days)	Chief Admin. Judge
South Dakota	P		C	D		M'N	NGBI	D	Court
Tennessee	P		C	D	■	A.L.I.	NGBI	M	Court
Texas	P		P	D		M'N and Irresistible Impulse	NGBI	D for nonviolent, M for violent	Court
Utah[19]				*No Insanity Defense*			GBI	D	Court
Vermont	P		B	P		A.L.I.	NGBI	D	Dev/Men Health Services[20]

Legend: B=Beyond a Reasonable Doubt, P=Preponderance of the Evidence, C=Clear and Convincing Evidence, GBI=Guilty But Insane, GBMI=Guilty But Mentally Ill, GBMR=Guilty But Mentally Retarded, NGBD=Not Guilty by Reason of Mental Disease or Defect, GBI=Not Guilty by Reason of Insanity, N/S=Not stated, ■ = Yes, ABI=Acquitted by Reason of Insanity, M'N=M'Naghten, A.L.I.=American Legal Institute

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	Pre-Trial	Trial					Post-Trial		
	Standard of proof in disposition hearing:	Bifurcated	Standard of proof	Burden of Proof: Defendant (D) Prosecutor (P)	Jury informed of verdict consequences	Test for Insanity	Insanity verdict	Treatment: Mandatory (M) Discretionary (D)	Post-conviction release authority
Virginia	P		P	D		M'N and Irresistible Impulse	NGBI	D	Court
Washington	P		P	D		M'N	NGBI	D	Court
West Virginia	P		B	P	■	A.L.I.	NGBD	M	Court
Wisconsin	[21]	■	[21]	D	■	A.L.I.	NGBD	D	Court
Wyoming	P		P	D		A.L.I.	NGMI/D	D	Court
Federal	P		C	D		M'N	NGBI	M[22]	Court[23]

Definitions:

M'Naghten
Accused party, at the time of committing the act, was laboring under a defect of reason from disease of the mind, not to know the nature and quality of the act he/she was doing, or if he/she knew it, that he/she did not know it was wrong.

A.L.I.
Accused lacks substantial capacity to appreciate the criminality (wrongfulness) of his/her conduct or conform his/her conduct to the requirements of the law.

Irresistible Impulse
If a mental disorder caused individual to experience an irresistible impulse to commit the offense, even if he/she remained able to understand the nature of the offense and its wrongfulness.

FOOTNOTES:

Alaska
[1]Wrongfulness prong is basis for GBMI verdict.

Arizona
[2]Wrongfulness prong is basis for GBI verdict.

Arkansas
[3]Burden of proof is not explicitly stated, but sounds like P in caselaw.

District of Columbia
[4]Burden of proof not explicitly stated, but caselaw sounds like P with heavy reliance on expert witness conclusions.
[5]At discretion of trial court.

Hawaii
[6]Expands disability defense so conduct can be a result of 'physical or mental disease, disorder, or defect'.

Idaho
[7]Insanity defense abolished; evidence of mental defect may negate an offense element.
[8]Burden of proof is not explicitly stated, but sounds like P in caselaw.

Indiana
[9]Mental disease/defect must be a severely abnormal mental condition that grossly and demonstrably impairs perception.

Kentucky
[10]Burden of proof is not explicitly stated, but sounds like P in caselaw.

Maine
[11]Mental disease/defect must be a severely abnormal mental condition that grossly and demonstrably impairs perception.

Massachusetts:
[12]District attorney must be informed of release and given opportunity to file civil commitment.

Montana
[13]Insanity defense abolished; evidence of mental defect may negate an offense element.

Nebraska
[14]Burden of proof is not explicitly states, but sounds like P in caselaw.

New Hampshire
[15]Legislature has not adopted a test: Courts have held that the insanity must negate criminal intent for NGBI verdict.

North Dakota
[16]Availability of insanity defense tied to the elements of offense. Effectively abolishes insanity defense for crimes not requiring intention, knowledge, or recklessness.

Puerto Rico
[17]If court has reasonable grounds to believe imposition is necessary due to his/her dangerous character.

South Carolina
[18]But only if the jury has the right to fix punishment as well as decide guilt or innocence.

Utah
[19]Insanity defense abolished, evidence of mental defect may negate an offense element.

Vermont
[20]Court may retain the release authority.

Wisconsin:
[21]Greater weight of the credible evidence.

Federal
[22]Unless defense can prove by C that his release would not create a substantial risk of bodily injury or serious damage to property due to a present mental disease or defect.
[23]Upon certification by director of mental facility that defendant's release or conditional release would no longer create a substation risk.

Legend: B=Beyond a Reasonable Doubt, P=Preponderance of the Evidence,
C=Clear and Convincing Evidence, GBI=Guilty But Insane, GBMI=Guilty But Mentally Ill,
GBMR=Guilty But Mentally Retarded, NGBD=Not Guilty by Reason of Mental Disease or Defect,
NGBI=Not Guilty by Reason of Insanity, N/S = Not stated; ■ = Yes
ABI=Acquitted by Reason of Insanity, M'N=M'Naghten, A.L.I.=American Legal Institute

From Daniel M'Naughten to John Hinckley:
A Brief History of the Insanity Defense

Tracing the circular evolution of the insanity defense, from the 19th century trial of a would-be assassin in Great Britain to the controversial acquittal in the United States of John Hinckley Jr., the man who shot U.S. President Ronald Reagan.

The proposition that some criminal defendants should not be held responsible for their actions by reason of their mental state has been well established in Anglo-American law for centuries. As early as 1581, a legal treatise distinguished between those who understood the difference between good and evil and those who did not:

> If a madman or a natural fool, or a lunatic in the time of his lunacy do [kill a man], this is no felonious act for they cannot be said to have any understanding will.

By the 18th century, the British courts had elaborated on this distinction and developed what became known as the "wild beast" test: If a defendant was so bereft of sanity that he understood the ramifications of his behavior "no more than an infant, a brute, or a wild beast," he would not be held responsible for his crimes.

: THE "RIGHT/WRONG" M'NAUGHTEN TEST

The guidelines for evaluating the criminal responsibility for defendants claiming to be insane were codified in the British courts in the case of Daniel M'Naughten in 1843. M'Naughten was a Scottish woodcutter who murdered the secretary to the prime minister, Sir Robert Peel, in a botched attempt to assassinate the prime minister himself. M'Naughten apparently believed that the prime minister was the architect of the myriad of personal and financial misfortunes that had befallen him. During his trial, nine witnesses testified to the fact that he was insane, and the jury acquitted him, finding him "not guilty by reason of insanity."

Queen Victoria was not at all pleased with this outcome, and requested that the House of Lords review the verdict with a panel of judges. The judges reversed the jury verdict, and the formulation that emerged from their review -- that a defendant should not be held responsible for his actions if he could not tell that his actions were wrong at the time he committed them -- became the basis of the law governing legal responsibility in cases of insanity in England. The M'Naughten rule was embraced with almost no modification by American courts and legislatures for more than 100 years, until the mid-20th century. In 1998, 25 states plus the District of Columbia still used versions of the M'Naughten rule to test for legal insanity.

: "IRRESISTIBLE IMPULSE"

One of the major criticisms of the M'Naughten rule is that, in its focus on the cognitive ability to know right from wrong, it fails to take into consideration the issue of control. Psychiatrists agree that it is possible to understand that one's behavior is wrong, but still be unable to stop oneself. To address this, some states have modified the M'Naughten test with an "irresistible impulse" provision, which absolves a defendant who can distinguish right and wrong but is nonetheless unable to stop himself from committing an act he knows to be wrong. (This test is also known as the "policeman at the elbow" test: Would the defendant have committed the crime even if there were a policeman standing at his elbow?).

: THE RISE AND FALL OF THE DURHAM "MENTAL DEFECT" RULE

The 1950s saw a growing dissatisfaction with the M'Naughten test. It was criticized in both legal and psychiatric circles as rigid and antiquated. As the profession of psychiatry grew in stature, critics began to call for the introduction of medical evidence of mental illness into the insanity defense equation. In 1954, an appellate court discarded the M'Naughten rule and the "irresistible impulse" test in favor of a broader, medically based determination: In Durham v. United States, the U.S. Court of Appeals for the District of Columbia ruled that a defendant could not be found criminally responsible "if his unlawful act was the *product of mental disease* or mental defect." [emphasis added]. The decision was hailed as revolutionary because it marked the replacement of moral considerations with more neutral scientific determinations that were reflective of advances in psychiatric and psychological research. It was the first major break from the "right/wrong" M'Naughten rule in American jurisprudence.

The Durham rule proved vague and difficult to apply, however, and many were concerned that the broad definition would exonerate far more defendants than ever before. There was confusion over whether "mental disease or defect" should be interpreted to mean only psychosis, or any of the myriad of more minor disorders defined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM). Critics worried that defendants would begin to use alcoholism or other disorders whose only symptoms were antisocial behavior as excuses for their crimes. It proved difficult to determine if the question of whether a defendant's actions were the "product" of his disease was a factual question for the jury, or for expert psychiatric witnesses. And the rule was criticized for inadvertently granting psychiatrists and psychologists too much influence in the courtroom.

Twenty-two states explicitly rejected the Durham test, and in 1972 a panel of federal judges overturned the ruling in favor of the Model Penal Code test of the American Law Institute.

: THE A.L.I. STANDARD

In 1962, the American Law Institute (A.L.I.) set out a model insanity defense statute intended, like Durham, to soften the M'Naughten standard and allow for the introduction of medical and psychiatric evidence. The standard in effect consolidates the principles of the M'Naughten "right and wrong" rule and the "irresistible impulse" test. The A.L.I. formulation provides that a defendant will not be held criminally responsible if at the time of the behavior in question "as a result of a mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

The A.L.I. was a significant softening of the M'Naughten standard. Instead of requiring a defendant to have no understanding whatsoever of the nature of his acts or the difference between right and wrong, the A.L.I. standard requires merely that he lack a "substantial capacity" to understand the right from wrong, and expands the M'Naughten rule to include an "irresistible impulse" component.

The A.L.I. standard excludes those defendants whose mental illness or defect only manifests itself in criminal or antisocial conduct, thus addressing the conundrum of the serial killer whose only symptom of mental illness is the killing of his victims.

As of 1998, the states were roughly split between the two standards: 22 states used some form of the A.L.I. rule, while 26 used a version of M'Naughten, with or without an irresistible impulse component.

: See this state-by-state chart of insanity standards.

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 rulings 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 state legislatures had responded to these decisions and reformed their laws to provide for such review procedures.

: AFTER HINCKLEY

In 1981, John Hinckley Jr. shot then-U.S. President Ronald Reagan, a secret service agent, a Washington police officer, and Reagan's press secretary James Brady. Hinckley claimed that he was trying to impress the actress Jodie Foster, with whom he was infatuated. He later described the incident in a letter to *The New York Times* as "the greatest love offering in the history of the world. ... At one time Miss Foster was a star and I was the insignificant fan. Now everything is changed. I am Napoleon and she is Josephine. I am Romeo and she is Juliet."

A jury acquitted Hinckley of 13 assault, murder, and weapons counts, finding him not guilty by reason of insanity. 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.

: THE INSANITY DEFENSE REFORM ACT OF 1984

After the Hinckley acquittal, members of Congress responded to the public outrage by introducing 26 separate pieces of legislation designed to abolish or modify the insanity defense. At the time of Hinckley's trial, all but one federal circuit had adopted the A.L.I. "substantial capacity" test, and all the new proposals were aimed at creating a stricter federal standard that would avoid acquittals like Hinckley's in the future.

The debates on this legislation reflected the public's indignation over the Hinckley decision. Sen. Strom Thurmond criticized the insanity defense for "exonerat[ing] a defendant who obviously planned and knew exactly what he was doing." Sen. Dan Quayle claimed that the insanity defense "pampered criminals," allowing them to kill "with impunity."

This hyperbolic testimony was countered by psychiatric and legal professionals who called for the modification, rather than the total abolition, of the insanity defense, and ultimately the resulting legislation -- the Insanity Defense Reform Act of 1984 -- was somewhat of a compromise. The insanity defense was not abolished, but the A.L.I. test was discarded in favor of a stricter version which more closely resembled M'Naughten. In order to qualify, an insanity defendant must show that his mental disease or defect is "severe." The "volitional" prong of the test, which excused a defendant who lacked the capacity to control his behavior, was eliminated. In effect, Congress returned to the 19th century "right/wrong" standard, echoing Queen Victoria's response to the M'Naughten acquittal.

Congress also adopted a number of provisions that toughened procedural barriers to a successful insanity defense. Before Hinckley, the burden of proof in federal cases was on the prosecution to prove beyond a reasonable doubt that a defendant was sane. The post-Hinckley reform legislation shifted the burden to the defendant to prove with clear and convincing evidence that he was legally insane at the time of the crime. The scope of expert psychiatric testimony was severely limited, and stricter procedures governing the hospitalization and release of insanity acquittees were adopted.

: STATE RESPONSES TO HINCKLEY

Following Congress' lead, more than 30 states made changes to their insanity-defense statutes in the wake of the Hinckley verdict. Over the 1980s and 1990s, many shifted the burden and standard of proof in ways to make it more difficult to sustain an insanity plea, moving away from the A.L.I. standard back towards the more restrictive M'Naughten test. In addition to raising more procedural hurdles for a successful insanity defense, many states enacted laws providing for more restrictive confinement options for those acquitted by reason of insanity. Three states -- Utah, Montana, and Idaho -- abolished the defense altogether.

: GUILTY BUT MENTALLY ILL

The introduction of the "guilty but mentally ill" (GBMI) verdict in many states is the biggest development in insanity defense law since the post-Hinckley reforms. A sort of hybrid alternative to an acquittal by reason of insanity, a defendant who receives a GBMI verdict is still considered legally guilty of the crime in question, but since he is mentally ill, he is entitled to receive mental health treatment while institutionalized. If his symptoms remit, however, he is required to serve out the remainder of his sentence in a regular correctional facility, unlike a defendant who was acquitted by reason of insanity, who must be released if it is determined he is no longer dangerous to himself or others. In 2000, at least 20 states had instituted GBMI provisions.

: More on the GBMI verdict.

Huckabee, Harlow M., *Mental Disability Issues in the Criminal Justice System* (Charles C. Thomas Publisher Ltd., 2000).

Perlin, Michael, *The Jurisprudence of the Insanity Defense* (Carolina Academic Press, 1994).

Simon, Rita James, *The Jury and the Defense of Insanity* (Transaction Publishers, 1999).

Steadman, Henry J., et al., *Before and After Hinckley: Evaluating Insanity Defense Reform* (Guilford Press, 1993).

Lambard, William, *Eirenacha* (1581), as quoted in Simon, Rita James, *The Jury and the Defense of Insanity* (Transaction Publishers, 1999).

13 Insanity defense abolished, evidence of mental defect may negate an offense element.

14 Court may retain the release authority.

15 Unless defense can prove by clear and convincing evidence that his release would not create a substantial risk of bodily injury or serious damage to property due to a present mental disease or defect.

16 Upon certification by director of mental facility that defendant's release or conditional release would no longer create a substantial risk.