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RETURNING TO *M'NAGHTEN* TO AVOID MORAL MISTAKES: ONE STEP FORWARD, OR TWO STEPS BACKWARD FOR THE INSANITY DEFENSE?

Robert F. Schopp

The history of the not guilty by reason of insanity (NGRI) defense has been characterized by an extended search for a satisfactory standard. For many years, the *M'Naghten* test was the standard applied by the majority of courts in the United States. The *M'Naghten* test has been widely criticized, however, as being too narrow, over-emphasizing the cognitive aspect of personality, and artificially restricting the scope of expert testimony. In 1955, the American Law Institute (ALI) proposed an alternative standard as part of its Model Penal Code. Since that time, there has been a marked trend in many jurisdictions from the *M'Naghten* test to the ALI standard.

During the last few years, however, a new series of developments suggests a reversal of this trend, and a move back toward *M'Naghten*. These developments include recent recommendations of the American Bar Association (ABA) and the American Psychiatric Association (APA), a recently passed federal statute, and a recently passed California statute as interpreted by the Supreme Court of California in *People v. Skinner*. This Note will examine these recent developments and their reported purposes, with

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1. See infra notes 15-24 and accompanying text.
2. *M'Naghten's Case*, 8 Eng. Rep. 718 (1843). This test is often called an ignorance standard because it directs attention toward the defendant's capacity to know the nature, quality and wrongfulness of his act. For text and discussion see infra notes 15-19 and accompanying text.
4. MODEL PENAL CODE (Fourth Tentative Draft 1955); MODEL PENAL CODE (Proposed Official Draft 1962). This test is framed in terms of the defendant's capacity to appreciate rather than to know, and it directly addresses his capacity to conform to the law. For text and discussion see infra notes 20-21 and accompanying text.
5. See infra notes 23-24 and accompanying text.
6. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE PROPOSED CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (Official Draft 1984) [hereinafter ABA STANDARDS]. For text and discussion see infra notes 39-43 and accompanying text.
8. 18 U.S.C. 17(a) (1986). For text and discussion see infra notes 28-38 and accompanying text.
9. CAL. PENAL CODE § 25(b) (West 1985); For text and discussion see infra notes 47-94 and accompanying text.
particular attention directed toward their apparent success in achieving these purposes which include clarifying the insanity defense standard and avoiding moral mistakes.\textsuperscript{11}

\textbf{CURRENT STATUS AND HISTORICAL CONTEXT}

With the exceptions of three states, all American jurisdictions allow a defendant to raise mental disease or defect as an affirmative defense against criminal charges.\textsuperscript{12} The three remaining states allow the defendant to raise the issue of mental disease or defect in order to negate an element of the offense by demonstrating that he lacked a necessary mental state.\textsuperscript{13} Approximately twenty percent of the states have adopted some form of the guilty but mentally ill (GBMI) verdict in addition to the NGRI defense.\textsuperscript{14}

Historically, the predominant standard for the NGRI defense has been the \textit{M'Naghten} test.\textsuperscript{15} According to this test, the defendant is exculpated if he committed the offense while he "was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."\textsuperscript{16}

This test has been widely criticized by those who think that it overemphasizes the cognitive aspect of personality at the expense of emotional and volitional factors, and that it unduly limits the scope of expert testimony to these narrow cognitive issues.\textsuperscript{17} The nature and quality requirement has usually been interpreted narrowly to require only awareness of the physical characteristics of the act and awareness that the act is harmful.\textsuperscript{18} Given this narrow interpretation of the nature and quality disjunct, most plausible candidates for the NGRI defense will qualify for exculpation under the wrongfulness disjunct, if at all.\textsuperscript{19}

\begin{itemize}
\item[11.] See infra notes 36-43 and accompanying text.
\item[13.] P. Robinson, supra note 12, at § 173(a) n.5. For details regarding these three states see Idaho Code § 18-207 (Supp. 1986); Mont. Code Ann. § 46-14-102 (1985); Utah Code Ann. § 76-2-305(1) (Supp. 1986).
\item[14.] S. Brakel, J. Parry & B. Weiner, supra note 12, at 714. The GBMI verdict applies when the defendant is guilty of the offense charged, and was mentally ill but not legally insane at the time of the offense. Defendants found GBMI are evaluated upon entering the correctional system and the appropriate mental health services are supposed to be provided within the system. The GBMI verdict may be adopted in addition to the NGRI defense, or in place of it. This Note addresses only the NGRI defense.
\item[16.] M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).
\item[19.] H. Fingarette & A. Hasse, Mental Disabilities and Criminal Responsibility 29 (1979).
\end{itemize}
The ALI test provides an alternative standard which appears to remedy these perceived deficiencies in the M'Naghten test. The ALI test provides that "[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 the law." 20

Many prefer this standard to the M'Naghten test because it substitutes "appreciate" for "know," suggesting a broader and more personalized evaluation of the defendant's understanding. In addition, it is often preferred because it explicitly addresses volitional impairment, and requires only that the defendant lack substantial, not complete capacity. 21

Since the ALI test was officially adopted in 1962, there has been a general trend toward it from M'Naghten. In 1961, M'Naghten was applied, alone or in combination with other tests, in the federal jurisdictions, the armed forces, and all but three states. 22 Only one state had a standard similar to the ALI test. 23 By 1985, only about one third of the states used M'Naghten in its original form and a few more employed variations of it. Approximately one half of the states used the ALI test, either verbatim or with slight modifications. 24

RECENT DEVELOPMENTS

A series of recent developments suggest a reversal of this general trend toward the ALI standard. Major indicators of this reversal of the older trend include recommendations of professional organizations as well as changes in statutory law and case law. During the late 1970s, 24 states altered their NGRI defenses in order to make them more restrictive. 25 Since the 1982 Hinckley 26 verdict, seven jurisdictions have restricted the definition and use of the insanity defense: four changed to the M'Naghten standard from the ALI test or a supplemented form of M'Naghten, two restricted use of the insanity defense by barring its use to negate mens rea or its use as a defense to certain offenses, one repealed the plea entirely. Only two jurisdic-
tions expanded the test from *M'Naghten* to the ALI standard.27

**Federal Statute**

The federal government has recently adopted its first NGRI statute which authorizes the NGRI finding only when "the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts."28 This standard is similar to *M'Naghten* in that it directs attention to the defendant's capacity to understand the nature, quality and wrongfulness of the act, and provides no direct volitional test.

On its face, this federal statute differs from *M'Naghten* in that it refers to the defendant's ability to "appreciate" rather than to "know." Critics of *M'Naghten* have argued that the use of "know" limits the defense to a superficial and narrowly cognitive sort of intellectual awareness.29 The term "appreciate" is sometimes seen as a remedy for this limitation. Unfortunately, it is not clear what "appreciate" means in this context.30

"Appreciate" is sometimes thought to suggest a broader sense of understanding, including affective or emotional aspects of the defendant's personality.31 Some writers have interpreted "appreciate" as "affective understanding" or "knowledge fused with affect." This interpretation requires that the defendant not only have cognitive awareness that the act is wrong, but also that the defendant experience the usual or normal affective responses associated with the act.32 This requirement, however, would seem to exculpate the cold or vicious criminal who victimizes innocent people without experiencing sympathy or remorse. Yet, the insanity defense certainly is not intended to exculpate such criminals. Rather, these are just the people that the criminal law, and the prison system, are designed to deter.

One might respond that these criminals would not meet the psychopathology requirement. This response raises the issue of the relationship between the psychopathology and disability clauses in an NGRI standard. The NGRI defense is usually thought to excuse certain persons, not merely because they are mentally disturbed, but because their mental disorder causes certain excusing conditions such as impairment of capacity to comprehend or to reason.33 When the condition caused would not excuse a person who was not mentally disturbed, and the mental disturbance itself is not grounds for excuse, it is difficult to understand why that condition would excuse the

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27. Callahan, Mayer & Steadman, *supra* note 26. The authors tabulate state by state changes as summarized in this paragraph and describe the pattern of changes that occurred before, during and after the Hinckley trial.
mentally disturbed offender.\textsuperscript{34}

Contrary to the claims of those who have criticized the traditional M'Naghten standard, there appears to be no good reason to think that the "know" of M'Naghten is necessarily more narrow than the unspecified "appreciate." Many jurisdictions present the M'Naghten standard to the jury without any interpretation of "know," and of those that have interpreted the term, the majority have favored the broader interpretation that is consistent with the vague "appreciate" used in the NGRI defense.\textsuperscript{35}

While it is not clear what "appreciate" means in this context, there is no apparent reason to think that it differs substantially from the broad sense of "know." Thus, the mere fact that the federal statute employs the term "appreciate" while the M'Naghten test uses "know" does not establish a substantial difference between the two standards.

According to the legislative history, the federal statute was intended to replace the ALI test in the federal jurisdiction because it was thought that the statute would provide a clear standard that would avoid moral mistakes. Although the term "moral mistakes" is not very clearly explicated, it apparently refers to erroneous decisions based on guesses regarding who is morally blameworthy. Some critics have identified the volitional standard as a likely source of such mistakes.\textsuperscript{36}

Some who favor the abolition of volitional tests have described such standards, and accompanying expert testimony, as confusing to the jury because the tests have no clear meaning. They argue that such tests preclude rational deliberation because it is often impossible to distinguish between those who are unable to conform to the law and those who merely fail to conform.\textsuperscript{37}

\begin{quote}
M'Naghten-type standards, including the new federal statute,
\end{quote}

\textsuperscript{34} The mere fact that neither the psychopathology nor the lack of usual affective responses would exculpate independently does not establish that the conjunction of the two factors does not. Simple ignorance of wrongfulness is not usually sufficient grounds for excuse, but such ignorance as a product of mental disease or defect can excuse under M'Naghten, the ALI test, or the federal statute. One could argue that mental illness excuses in certain cases just because it is a nonculpable source of ignorance. Even if one accepts this interpretation of the role of mental illness in the NGRI defense, however, the lack of usual affective response does not occupy a position in the law of excuse analogous to that occupied by ignorance. Ignorance of fact, and in certain circumstances ignorance of law, can excuse independently of mental illness. There is no comparable excuse of "nonculpable lack of usual affective response." For a more complete account of ignorance excuses see MODEL PENAL CODE § 2.04 (Proposed Official Draft 1962); W. LAFAVE & A. SCOTT, supra note 15, § 5.1, at 405-20; P. ROBINSON, supra note 12, at § 62, 181-85.

\textsuperscript{35} A. GOLDSTEIN, supra note 17, at 49-50; W. LAFAVE & A. SCOTT, supra note 15, § 4.2(b), at 313; People v. Wolff, 61 Cal. 2d 795, 800-01, 394 P.2d 959, 961-62, 40 Cal. Rptr. 271, 273-74 (1964) (noting that California trial courts give a commendably broad interpretation to the M'Naghten "knowledge" test); State v. Davies, 146 Conn. 137, 144, 148 A.2d 251, 255 (1959) (responsible requires the capacity to judge the act wrong and criminal); State v. Esser, 16 Wis. 2d 567, 598, 145 N.W.2d 505, 521-22 (1962) (requiring the capacity to make normal moral judgments about the act).

\textsuperscript{36} ABA STANDARDS, supra note 6, at 329-32; 1984 U.S. CODE CONG. & AD. NEWS 3408-9 (reporting the testimony of professors Bonnie and Robinson at the hearings on the insanity defense before the Committee on the Judiciary, and the Subcommittee on the Criminal Law of the Committee on the Judiciary, U.S. Senate, 97th Congress, 2d session (1982)). By "moral guesses" these writers seem to mean guesses regarding whether or not the defendant had the capacity to conform his behavior to the law. For a further discussion of moral mistakes see infra notes 95-107.

\textsuperscript{37} 1984 U.S. CODE CONG. & AD. NEWS 3405, 3408 (reporting the testimony representing the Department of Justice at the Crime Control Act Hearings, and the testimony of professors Bonnie and Robinson), supra note 36; See also APA STATEMENT, supra note 7, at 685.
which emphasize cognition are presented as workable tests with clear and definite meaning that will prevent these moral mistakes.38

Recommendations of Professional Organizations

The ABA and the APA have recently issued statements on the insanity defense in which they have supported tests which focus on the defendant's capacity to appreciate the wrongfulness of his conduct. The ABA recommended that the defendant be exculpated only when "as a result of mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct."39 The APA did not formally recommend a test, but it indicated approval of a standard which would declare a person NGRI when "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."40

Both organizations opted for primarily cognitive tests without volitional prongs because they held experts to lack the capacity to distinguish irresistible from merely unresisted impulses. In addition, they considered the phrase "appreciate the wrongfulness" to be sufficiently broad to accommodate appropriate expert testimony regarding the relevant aspects of mental disorder.41 They endorsed their respective standards as tests that would not confuse the jury and would avoid moral mistakes based on moral guesses.42

The federal statute, the ABA recommendation, and the APA endorsement are all similar to M'Naghten in that they are ignorance standards which focus primarily on the defendant's lack of capacity to understand the wrongfulness of his act.43 All three reject volitional prongs on the ground that such standards are not amenable to precise clarification, and thus are likely to confuse the jury and lead to moral mistakes. All three present M'Naghten-type standards as sufficient to accommodate the relevant aspects of mental disorder, while they avoid more inclusive tests as likely to be over-inclusive.

People v. Skinner44

This Note will review the reasoning of the California Supreme Court in People v. Skinner in some detail because this reasoning, in conjunction with the federal statute and the recommendations of the professional organizations, seems to suggest that a M'Naghten-type test can be expected to provide a clear standard which is both necessary and sufficient to avoid moral mistakes.

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38. ABA Standards, supra note 6, at 329-32 (claiming that the standard is in concert with current clinical expertise and theoretical possibility), See also 1984 U.S. CODE CONG. & AD. NEWS 3404-11; Wexler, supra note 26, at 532.
39. ABA Standards, supra note 6, at 323.
40. APA Statement, supra note 7, at 685.
41. ABA Standards, supra note 6, at 329-34; APA Statement, supra note 7, at 684-85.
42. ABA Standards, supra note 6, at 329-34; APA Statement, supra note 7, at 685.
43. 18 U.S.C. 17(a) (1986) also exculpates those who, by virtue of severe mental disorder, are ignorant of the nature or quality of their act. It is rare, however, for a defendant in an actual case to meet this requirement. H. FINGARETTE AND A. HASSE, supra note 19, at 29.
a. *The facts of People v. Skinner*

Skinner strangled his wife while he was at home on a day pass from Camarillo State Hospital. He held the delusional belief that the words “till death do us part” in the marriage vows bestowed upon a marital partner a God-given right to kill a spouse who violated, or was inclined to violate, the marital vows. He believed that this right had both legal and moral force. Skinner was convicted of second-degree murder. The trial judge found that Skinner would have been insane under California’s most recent common law version of the ALI test or under the *M’Naghten* test. However, Skinner was not insane under the nature and quality conjunct of the recently passed Section 25(b) of the California Penal Code, which was the controlling law. Skinner was sentenced to 15 years to life in the state prison. The case was appealed to the California Supreme Court.45

b. *Legal setting and background*

The California constitution reserves the right of the people to pass laws by initiative and referendum.46 In June 1982, the electorate passed the initiative known as Proposition 8 which has been codified as Section 25(b) of the California Penal Code.47 According to Section 25(b), a defendant is exculpated under the NGRI defense only when “he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.”48 As written, Section 25(b) differs from the traditional *M’Naghten* test in that it takes the conjunctive form. The defendant must be incapable of knowing both the nature and quality of his act and the wrongfulness of his act. Despite the fact that the statute is unambiguous on its face, the *Skinner* court interpreted it as a return to *M’Naghten*.49

Immediately prior to the passage of Proposition 8, the NGRI defense in California was governed by the ALI test which the California Supreme Court adopted in *People v. Drew*.50 Prior to *Drew*, the California rule regarding NGRI was a version of the *M’Naghten* test recognized by the Supreme Court of California in *People v. Coffman*,51 and applied by the court through *People v. Kelly*.52

In *Kelly*, the court stated that, “[i]nsanity, under the California *M’Naghten* test, denotes a mental condition which renders a person incapable of knowing or understanding the nature and quality of his act, or incapable of distinguishing right from wrong in relation to that act.”53 A defendant would qualify as NGRI under the *Kelly* version of the *M’Naghten*

45. Id. at 765-70, 704 P.2d at 752-55, 217 Cal. Rptr. at 685-88.
46. CAL. CONST. art. 4 § 1; CAL. CONST. art. 2 § 8 (1983).
47. CAL. PENAL CODE § 25(b) (West Supp. 1987) (added by initiative measure, approved by the people, June 8, 1982).
52. Id. at 574, 516 P.2d at 881, 111 Cal. Rptr. at 177.
test if he were unable to know either the nature and quality of his act or the wrongfulness of his act. In contrast, a defendant would qualify under a literal interpretation of Section 25(b) only if he were unable to know both the nature and quality of his act and the wrongfulness of his act.

In *Skinner*, the California Supreme Court addressed two issues. The first was whether it was the intent of Proposition 8 to establish a conjunctive standard for the NGRI defense that would require a defendant to establish that he was unable to know both the nature and quality of his act and the wrongfulness of his act, or whether the actual intent of the electorate was to return to the more traditional disjunctive *M'Naghten* test.\(^{54}\) The second issue was whether a schizophrenic defendant who kills his wife under the delusional belief that he has a God-given right to do so qualifies as insane under California's version of the *M'Naghten* test.\(^{55}\)

As to the first issue, the court held that Section 25(b) reinstated California's previous disjunctive version of the *M'Naghten* test of criminal insanity.\(^{56}\) Secondly, the court held that the defendant, who held the delusional belief that he had a God-given right to kill his wife, was not able to distinguish right from wrong with regard to his act and is therefore not guilty by reason of insanity under the second disjunct of Section 25(b).\(^{57}\)

c. Statutory construction of Section 25(b)

The court began its analysis by deciding whether the conjunctive test had been intended by the electorate, or whether "and" had been accidentally substituted for "or," in which case the electorate would actually have intended a disjunctive test. The latter interpretation would constitute a return to the pre-Drew *M'Naghten* test, while the former would establish a much more restrictive standard.\(^{58}\)

The court relied on two arguments in favor of the disjunctive construction. The first depended on the court's claim that a *M'Naghten*-type test is fundamental to our system of jurisprudence, while the second was grounded in deterrence, which the court identified as the purpose of Proposition 8.\(^{59}\)

The court recognized its obligation to preserve the intent of the legislature or electorate and the constitutionality of the statute.\(^{60}\) The basic principle of statutory and constitutional construction that the court should not rewrite unambiguous language\(^ {61}\) admits to an exception when a word has been erroneously used such that a correction by the court would more faith-

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55. Id. at 769-70, 704 P.2d at 754-55, 217 Cal. Rptr. at 687-88.
56. Id. at 769, 777, 704 P.2d at 754, 759, 217 Cal. Rptr. at 687, 692.
57. Id. at 770, 784, 704 P.2d at 755, 764, 217 Cal. Rptr. at 687-88, 697.
58. Id. at 776-77, 704 P.2d at 759, 217 Cal. Rptr. at 692.
59. Id. at 775-77 and n.8, 704 P.2d at 758-59 and n.8, 217 Cal. Rptr. at 691-92 and n.8.
60. Id. at 769, 704 P.2d at 754, 217 Cal. Rptr. at 687; Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 245, 583 P.2d 1281, 1299, 149 Cal. Rptr. 239, 257 (1978); Associated Home Builders Etc., Inc. v. City of Livermore, 16 Cal. 3d 382, 398, 557 P.2d 473, 482, 135 Cal. Rptr. 41, 50 (1976); People v. Amor, 12 Cal. 3d 20, 30, 523 P.2d 1173, 1179, 114 Cal. Rptr. 765, 771 (1974).
fully apply the will of the people.\textsuperscript{62} A drafting error such as misusing "and" in place of "or" is the type of error that the court can rectify under this exception.\textsuperscript{63}

In order to determine whether a correction by the court would more accurately represent the will of the people, a court reviews the legislative history of the statute. The Supreme Court of California had previously noted that ballot pamphlets may constitute the sole source of legislative history regarding an initiative measure adopted by the voters.\textsuperscript{64} In the argument from the fundamental nature of the \textit{M'Naghten}-type NGRI test, the court in \textit{Skinner} noted that the ballot summaries and arguments did not indicate whether the electorate intended to return to \textit{M'Naghten} or whether it intended to require a more restrictive test. Hence, the intent of the statute could only be derived from the statute itself and its legal context.\textsuperscript{65}

The court started with the premise that the essence of a criminal offense in our system of jurisprudence is wrongful intent, and reasoned that the NGRI defense, and the \textit{M'Naghten} test as the measure of minimum cognitive functioning necessary to form wrongful intent, have become fundamental principles of our common law.\textsuperscript{66} A conjunctive interpretation would not only abandon the \textit{Drew} test, it would also abrogate the pre-\textit{Drew M'Naghten} test. Given the requirement of wrongful intent for culpability, and the status of the \textit{M'Naghten} test as the measure of minimal cognitive capacity to form such intent, abandoning the \textit{M'Naghten} standard would entail abandoning the requirement of wrongful intent which in turn would alter the essential nature of a criminal offense.

Putting aside questions of constitutionality, the court reasoned that if the electorate had intended such a drastic revision of fundamental principles of our legal system, the initiative would have clearly and explicitly stated that intent. Merely substituting "and" for "or" is not a clear indication of such intent. The court concluded, therefore, that the intent of Proposition 8 (and Section 25(b)) was not to require a fundamental change, but only to return to the disjunctive \textit{M'Naghten} test.\textsuperscript{67}

In its second argument, the court claimed that the purpose of Proposition 8, from the perspective of the criminal justice system, was deterrence of criminal behavior.\textsuperscript{68} The court reasoned that the disjunctive test will serve this purpose as well as the conjunctive test would because a person who fails either of the two prongs of Section 25(b) is not likely to be deterred by the

\textsuperscript{62} \textit{Skinner}, 39 Cal. 3d at 775, 704 P.2d at 758, 217 Cal. Rptr. at 691; Pepper v. Board of Directors, 162 Cal. App. 2d 1, 4, 327 P.2d 928, 930 (1958).


\textsuperscript{64} Board of Supervisors of San Diego County v. Lonergan, 27 Cal. 3d 855, 866, 616 P.2d 802, 808, 167 Cal. Rptr. 820, 826 (1980).


\textsuperscript{66} \textit{Id.} at 771-77, 704 P.2d at 755-59, 217 Cal. Rptr. at 688-91.

\textsuperscript{67} \textit{Id.} at 776-77, 704 P.2d at 759, 217 Cal. Rptr. at 692.

\textsuperscript{68} \textit{Id.} at 777 n.8, 704 P.2d at 759 n.8, 217 Cal. Rptr. at 692 n.8.
prospect of punishment.\textsuperscript{69}

Both of the court's arguments are problematic. In the argument from the fundamental nature of the \textit{M'Naghten}-type NGRI test, the court concluded that the electorate did not intend the conjunctive test primarily because there was no clear evidence to show that it did so intend. As such, this argument approaches perilously close to the fallacious claim that a proposition can be proven true by virtue of the fact that it has not been proven false.\textsuperscript{70} The court avoided a clear case of this fallacious reasoning only by including an additional premise stating that intent to drastically revise fundamental principles of law would be explicitly stated.\textsuperscript{71} This principle seems reasonable when applied to legislators who have an opportunity to state their intent in the body of a statute and at various steps in the legislative history. It is not immediately clear, however, how the voting members of the electorate would be expected to signal such intent as they cast their votes.

The authors of the initiative did have an opportunity to state their intent to work a drastic revision in the law if that was their purpose. But while the writers had this opportunity, the constitution of California reserves the right of initiative for the people, not selected drafters.\textsuperscript{72} It is an established principle of construction that the court will interpret a measure adopted by the vote of the people in such a manner as to give effect to the intent of the electorate.\textsuperscript{73}

The court had already concluded that the ballot arguments and summaries were unilluminating regarding this question.\textsuperscript{74} In the absence of any other procedure for expressing their intent, it is difficult to understand how the electorate would be expected to indicate that they actually intended the more fundamental change. In short, the court avoided fallacious reasoning only by relying on the premise that if the electorate had intended a drastic revision of the law, they would have clearly indicated such intent. Yet, there appears to be no procedure by which the electorate could have done so.

While the court's argument is problematic, this does not necessarily indicate that the court made the wrong decision, or that it decided for the wrong reasons. Changes of law through judicial or legislative decision provide a record of judicial reasoning or legislative intent for courts to construe.

As Justice Mosk indicated in his concurring opinion, the court was forced to construe this statute on the basis of inadequate information. He reasoned that the well-established procedures of the legislative process decrease the probability of a transcriptional error and increase the likelihood that the intent of the statute will be clearly declared. Mosk identified the latent ambiguity of Proposition 8 and the minimal basis on which the court was forced to ground its construction as factors that call into question the

\textsuperscript{69} Id.
\textsuperscript{70} I. Copi, \textsc{Introduction to Logic} 101 (6th ed. 1982) (the argument from ignorance).
\textsuperscript{71} People v. Skinner, 39 Cal. 3d at 776-77, 704 P.2d at 759, 217 Cal. Rptr. at 692.
\textsuperscript{72} \textsc{Cal. Const.} art. 4 § 1; \textsc{Cal. Const.} art. 2 § 8 (1983).
\textsuperscript{74} See supra note 65.
wisdom of changing principles of law through the initiative process.\textsuperscript{75}

In the second argument, from the deterrent purpose of Section 25(b), the court reasoned that one who does not know that his act is wrong is not likely to be deterred by the fact that wrongful behavior is punished.\textsuperscript{76} The court interpreted the wrongfulness requirement as one which turns on the defendant's capacity to know that his act is morally, and not merely legally, wrong.\textsuperscript{77}

In light of this interpretation of "wrongfulness," it is not at all obvious that the prospect of punishment would not deter a person who knows the nature and quality of his act and the illegality of his act, even if he is not aware that the act is wrong. To the extent that punishment deters through the anticipation of aversive consequences, one who is aware that a given act is illegal may be deterred by the prospect of punishment whether or not he considers the act to be morally wrong.

Furthermore, even if one accepts the assertion that one who does not know that his act is wrong can not be deterred by punishment, it is still possible that punishing that person could serve a deterrent function. Briefly, the point is that either actual or anticipated punishment may deter either specifically or generally. Anticipated punishment deters insofar as persons refrain from performing a proscribed act in order to avoid a punishment they have not experienced, but which they expect to experience if they perform the act. Actual punishment deters specifically when it renders the punished person less likely to repeat the offense, and it deters generally when the application of punishment to the offender discourages others who might commit similar offenses.\textsuperscript{78}

The argument put forward by the court would establish, at best, that the threat of punishment would not specifically deter those who did not know that their act was wrong and likely to be punished. It does not support the claim that those persons could not be deterred from repeating the act through actual punishment, or that punishing them could not serve a general deterrent function.\textsuperscript{79}

Suppose, for example, that a certain percentage of culpable criminals would be encouraged to risk criminal activity by the belief that even, if caught, they might be able to avoid punishment by feigning insanity. The deterrent function of punishment might be potentiated for these persons by eliminating or stringently limiting the NGRI defense.

Finally, the common assumption that threatened and actual punishment will not alter the behavior of the seriously psychologically disturbed or deficient is questionable. Studies have shown that clinical employment of punishment paradigms are effective with retarded and seriously disturbed clients. Some highly psychopathological patients have responded to punishment when other approaches were unsuccessful.\textsuperscript{80} Although this data is not

\textsuperscript{75} Skinner, 39 Cal. 3d at 784, 704 P.2d at 765, 217 Cal. Rptr. at 697 (Mosk, J., concurring).
\textsuperscript{76} Id. at 777 n.8, 704 P.2d at 759 n.8, 217 Cal. Rptr. at 692 n.8.
\textsuperscript{77} Id. at 777-84, 704 P.2d at 760-64, 217 Cal. Rptr. 692-97.
\textsuperscript{78} See H.L.A. Hart, PUNISHMENT & RESPONSIBILITY 128-29 (1968).
\textsuperscript{79} Id. at 18-19.
\textsuperscript{80} See Pazulinec, Meyerrose and Sajwaj, Punishment via Response Cost, in THE EFFECTS OF
directly applicable to the criminal justice system because punishment is applied under different conditions in clinical situations.\(^{81}\) It nevertheless suggests that one cannot assume that punishment is necessarily ineffective with the insane. There may be very good reasons for exculpating the insane, but we cannot rely with great confidence on the argument that punishing the insane cannot be effective.

In summary, the court’s argument from deterrence is seriously flawed. The prior argument from the fundamental nature of the M’Naghten-type NGRI principle is also questionable, although it may well represent the most supportable construction available in light of the paucity of information regarding the intent of the electorate.

d. Interpretation of Section 25(b)

Having decided that Proposition 8 mandated a return to the disjunctive M’Naghten test, the court turned to an interpretation of that standard.\(^ {82}\) The prosecution set out two theories. First, it argued that the nature and quality disjunct and the wrongfulness disjunct actually state the same requirement. Second, the state argued that the wrongfulness disjunct was intended to be satisfied by the knowledge that the act was illegal.\(^ {83}\)

The court quickly dismissed the first claim, reasoning that, while a defendant who did not know the nature and quality of his act could not know that it was wrong, the defendant who knew the nature and quality of his act would not necessarily know that it was wrong. The court cited the instant case as one in which the defendant knew the nature and quality of his act but believed that he had a right to perform it.\(^ {84}\) In this case, it was undisputed

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\(^{81}\) Clinical applications of punishment usually allow more precise and immediate control of the stimulus conditions than is available in the criminal justice system. In addition, the methods identified in note 80 would raise constitutional questions if applied in the penal setting. These questions are beyond the scope of this Note. See sources cited supra note 80.

\(^{82}\) Skinner, 39 Cal. 3d at 777-84, 704 P.2d at 759-64, 217 Cal. Rptr. at 692-97.

\(^{83}\) Id. at 777-78, 704 P.2d at 759-60, 217 Cal. Rptr. at 692-93.

\(^{84}\) Id. Although the court was willing to accept without debate the contention that one who does not know the nature and quality of his act cannot know that it is wrong, this is not completely obvious. Due to the conjunctive form of this requirement, it is possible at least in principle, for an individual to fail to satisfy the nature and quality requirement because he knows the quality (i.e., that it is harmful) but is mistaken about the nature (i.e., the physical characteristics). Suppose A pours powder into B’s sugar bowl believing that it is poison that will kill B when B next adds the powder to his tea thinking it is sugar. In fact, A is mistaken, the powder is actually a chemical that explodes when it comes into contact with hot water. When B next adds “sugar” to his tea, he is injured in the explosion. Although A knew that his act was wrong, he did not know the nature and quality of his act because he was mistaken about the nature. Similar cases can be described in which the actor who knew that his act was wrong would fail the “nature and quality” requirement because he knew the nature but not the quality. Such examples raise perplexing legal, moral, and epistemological problems which cannot be addressed here.

It is traditional to refer to the M’Naghten test as having two prongs: the nature and quality requirement, and the wrongfulness disjunct. The first of these, however, is itself a conjunctive requirement that is met only when the defendant was able to know both the nature and the quality of his act. In effect then, the test has three disjunctive requirements. The defendant is exculpated if he
that the defendant believed that his act was both legally and morally justified. Although Skinner would have been exculpated under either the legal or the moral interpretation of "wrongfulness," the court went on to analyze the wrongfulness requirement, and concluded that in order to be culpable, the defendant must be capable of knowing that the act was morally, and not merely legally wrong.

The court grounded its argument for the moral interpretation of "wrongfulness" in its prior conclusion that the intent of Section 25(b) was to return to the pre-Drew M'Naghten test. California cases that discuss the M'Naghten standard have repeatedly distinguished between awareness that an act was illegal and knowledge that it was wrongful, and have required that the defendant know that his act is both wrong and criminal.

The Skinner court noted that other jurisdictions have reached the same conclusion and quoted with approval Judge Cardozo indicating that a defendant who knew that his act was illegal, but believed that God had ordained the crime, did not know that it was wrong in the sense required by M'Naghten. The court concluded that Section 25(b) exculpates a defendant who is incapable of knowing that his act is morally, as well as legally, wrong.

The court documented the long and generally consistent history of the moral interpretation of "wrongfulness" in the California version of the M'Naghten test. If, as the court asserts, the intent of Section 25(b) was to return to the pre-Drew M'Naghten test, then the court has firm support for declaring that the two disjuncts provide separate grounds for exculpation and for the moral interpretation of "wrongfulness."

The court, however, did not fully clarify its conception of "moral wrongfulness." The moral interpretation of this disjunct has been inter-

86. Id. at 777-84, 704 P.2d at 759-64, 217 Cal. Rptr. at 692-97.
89. People v. Skinner, 39 Cal. 3d at 783-84, 704 P.2d at 764, citing People v. Schmidt, 216 N.Y. 324, 338-40, 110 N.E. 945, 949-50 (1915); State v. Carrigan, 93 N.J. Law 268, 273, 108 A. 315, 317 (1919) (defendant was responsible unless at the time of the act, he was not conscious that what he was doing was morally wrong); State v. Allen, 231 S.C. 391, 398, 98 S.E.2d 826, 829 (1959) (requiring impairment of mental capacity to distinguish moral or legal right from moral or legal wrong); State v. Kirkham, 7 Utah 2d 108, 110, 319 P.2d 859, 860 (1958) (the jury cannot convict if the defendant was unable to know that his act was illegal, or if he was unable to know that it was condemned morally).
interpreted and applied by courts and commentators in at least two distinct ways. Under the social variation, a defendant is exculpated only if he was incapable of knowing that his act violated the prevailing moral standard of the community. In contrast, the subjective variation would exculpate the defendant if he was incapable of knowing that the act was immoral by his own subjective standard.91

While the court did not specify either of these two standards, there is some basis for interpreting the court's opinion as endorsing the social standard. The court quoted with approval the language of Judge Cardozo found in People v. Schmidt: "Knowledge that an act is forbidden by law will in most cases permit the inference of knowledge that, according to the accepted standards of mankind, it is also condemned as an offense against good morals."92 This quote suggests that the accepted standards of mankind, rather than the subjective standards of the actor, are determinative. In addition, the Supreme Court of California, in a previous case, explicitly rejected the subjective moral standard.93

In summary, the court not only interpreted Section 25(b) as a return to M'Naghten, it identified the M'Naghten-type standard as fundamental to our system of jurisprudence. The court identified M'Naghten as the measure of cognitive functioning that is required to form the intent necessary to constitute an offense. The less inclusive conjunctive interpretation of Section 25(b) was ruled out as inconsistent with our basic principles of jurisprudence. The federal statute and recommendations of professional organizations described earlier94 advocated M'Naghten-type standards, and rejected more inclusive ones as likely to lead to moral mistakes. Taken together these recent developments seem to recommend M'Naghten-type standards as the kind that will provide a clear standard with determinate meaning that will be both necessary and sufficient to minimize moral mistakes; i.e., it will be neither over-inclusive nor under-inclusive.

EVALUATION OF THE RECENT DEVELOPMENTS

It is reasonable to ask whether the M'Naghten test, which was so highly criticized in the past,95 can be expected to provide a clear standard to avoid moral mistakes. At least two problems arise regarding the clarity of the standard. First, the test turns on the defendant's capacity to know or appreciate. As discussed above, however, it has never been established what either of these terms means, or whether there is any intelligible difference between the two terms.96 The second, and perhaps more problematic, difficulty with

91. A. Goldstein, supra note 17, at 52. For an explanation of these three interpretations (i.e., "wrongfulness" as illegality, or as moral wrongfulness by the social or subjective standards) see infra notes 98-101 and accompanying text.
93. People v. Rittger, 54 Cal. 2d 720, 734, 355 P.2d 645, 653, 7 Cal. Rptr. 901, 909 (1960) (The fact that the defendant claims and believes that his acts are justifiable according to his own distorted standards does not compel a finding of legal insanity.).
94. See supra notes 28-43 and accompanying text.
95. See supra notes 17-19 and accompanying text.
96. See supra notes 29-35 and accompanying text.
the M'Naghten test is that it turns on the defendant's capacity to know (or appreciate) the wrongfulness of his act.\textsuperscript{97}

Three distinct meanings have been attributed to "wrongfulness." "Wrong" may mean: (1) illegal, (2) contrary to the socially accepted moral standard, or (3) contrary to the defendant's subjective moral standard. The first interpretation is the accepted one in England,\textsuperscript{98} and it has been accepted by some courts in the United States.\textsuperscript{99} Other authorities consider this interpretation to be too restrictive, and select one of the two moral variations. The social moral standard, the second interpretation above, has been endorsed by the \textit{Skinner} court and others.\textsuperscript{100} At least one court has reasoned that there is no effective difference between the legal and social moral interpretations, and thus has explicitly rejected both of these in favor of the third interpretation, the subjective moral standard.\textsuperscript{101}

An anticipated advantage of a clear standard with definite meaning is that a jury would be able to apply it consistently and fairly in order to avoid moral mistakes. Given the intent to avoid moral mistakes, it would be consistent with the purpose of the test to select the interpretation of "wrongfulness" that would preclude such mistakes. As indicated previously, the term "moral mistake" is apparently intended to refer to cases in which the decision regarding legal culpability is inconsistent with the defendant's state of moral blameworthiness for the offense with which he is charged.\textsuperscript{102} The appropriate interpretation of "wrongfulness," therefore, would be that which avoids decisions regarding the defendant's legal culpability that are inconsistent with his moral blameworthiness for the offense.

On this understanding of the purpose of the NGRI defense, and the meaning of "moral mistake," the courts are charged with formulating a moral standard. The court should select and apply the interpretation of wrongfulness that inculpates all and only those who are morally blameworthy, and exculpates all and only those who are not morally blameworthy. The court faces the task of measuring each standard against the moral correctness of the decisions it would produce. This process of standard selec-

\textsuperscript{97} Most plausible candidates for the NGRI defense will qualify for exculpation under the wrongfulness disjunct, if at all, because the nature and quality disjunct has usually been interpreted narrowly to require only awareness of the physical characteristics of the act and awareness that it was harmful. See sources cited \textit{supra} notes 18-19.

\textsuperscript{98} A. \textit{Goldstein}, \textit{supra} note 17, at 52; W. \textit{LAFAVE} \& A. \textit{SCOTT}, \textit{supra} note 15, § 4.2(b)(4), at 315.

\textsuperscript{99} State v. Foster, 44 Haw. \textit{403}, 426, 354 P.2d \textit{960}, 972 (1960) (defendant is exculpated only if he is incompetent to discern the nature and criminality of the act); State v. Boan, 235 Kan. \textit{800}, 810, 686 P.2d \textit{160}, 168 (1984) (defendant is exculpated only if he was unable to know that his actions were contrary to Kansas law); State v. Andrews, 187 Kan. \textit{458}, 469, 357 P.2d \textit{739}, 747 (1961) (wrong means that which is prohibited by the law of the land).


\textsuperscript{101} United States v. Segna, 555 F.2d \textit{226}, 232 (1977) (defendant is not responsible if he believes he is morally justified in his conduct even though he may appreciate that his act is contrary to law and public morality).

\textsuperscript{102} \textit{See supra} note 28 and accompanying text.
tion is virtually identical to the procedure followed by many philosophers when they evaluate moral principles.

John Rawls described the process of "reflective equilibrium" by which proposed moral principles are tested against deeply held and carefully considered intuitions regarding real or hypothetical situations. Morally significant cases are evaluated according to the proposed principle. If the principle produces moral evaluations and prescriptions for action that are consistent with these considered moral intuitions, and provides a common foundation for them, the principle is supported. If, however, there is a discrepancy between the considered intuitions and the evaluations or prescriptions provided by the principle, then either the principle must be modified or the intuitions reconsidered in light of the principle and the other intuitions that support that principle.

The process is one of careful reasoning back and forth from principle to intuitions. Ideally, the result would be an integrated set of principles that would provide a common foundation for our entire set of morally relevant intuitions. A real or hypothetical situation constitutes a counter-example that defeats a principle if it demonstrates that the principle would require an evaluation or action that is contrary to moral intuitions that remain firmly held after careful consideration.

In the context of selecting a standard for the NGRI defense, the court measures proposed NGRI tests, or interpretations of those tests, against the results that these standards would produce in cases. A satisfactory standard should exculpate all and only those defendants who were not morally blameworthy for their offenses. As it pursues this task, the court is applying the method of reflective equilibrium to proposed insanity tests, and searching for a standard that embodies an accurate measure of moral blameworthiness.

Justice Cardozo's reasoning in People v. Schmidt can be understood as an example of judicial reasoning that conforms to the process of reflective equilibrium. Cardozo reasoned that a defendant who knew that his act was illegal, but believed that God had ordained it, would not be morally blameworthy. If the "wrongfulness" disjunct of the M'Naghten test were interpreted as requiring only that the defendant was capable of knowing that his act was illegal, then such a defendant would be inculpated under the NGRI test. Therefore, "wrongfulness" must mean "morally wrongful," not merely "illegal." By this reasoning, Cardozo accepted the case as a counter-example to the moral principle represented by the M'Naghten standard with "wrongful" interpreted as "illegal."

A similar pattern of reasoning can be applied to the social and subjective variations of the moral interpretations of the "wrongfulness" standard. Unfortunately, there appear to be counter-examples to both variations. One can propose plausible hypothetical cases in which the defendant appears to be the sort of person who should be found NGRI, but who would not be

105. Id. at 339, 110 N.E. at 949.
under these tests, thus resulting in moral mistakes. Consider the following cases.

(1) According to the social standard, the defendant would be culpable if he were capable of knowing both the nature and quality of his act and the fact that his act violated the prevailing community standard of morality.

X is psychotic, and as a result of his psychosis, believes that the universe is powered and directed by an impersonal cosmic force represented by the sun and the moon. He understands the television weather reports as messages directed personally to him that worship of the traditional Christian God is misguided. He begins a program to correct this erroneous worship by burning down churches.

X understands the physical nature of his actions, and that they will be harmful to the churches as well as to anyone who happens to be in one when it burns. He also is fully aware that his actions are both illegal and immoral by the prevailing community standard, but he believes that this standard is wrong. In his psychotic view of the world, it seems to him that he ought (morally) to continue. Under the social standard, X would not qualify for exculpation under the NGRI defense.

(2) According to the subjective standard, the defendant would be culpable if he were capable of knowing both the nature and quality of his act and the fact that his act was immoral by his subjective standard.

Y is psychotic. He interprets his experiences in traffic and the regulations requiring drivers to yield to pedestrians in crosswalks as indicating that it is legal and moral by the prevailing standard for drivers to kill pedestrians who cross outside of the crosswalks. By his personal standard, he considers this to be morally abhorrent and he takes it as evidence of the dangerous and immoral society he lives in. Due to his personal moral beliefs he usually avoids hitting pedestrians wherever they are.

One day, in a moment of anger, he intentionally hits a pedestrian who has crossed in the middle of the block and yelled obscenities at Y. When Y realizes that he has broken the pedestrian’s leg, he feels guilty and remorseful because he thinks he has done something morally wrong, but he makes no attempt to escape because he is convinced that his act was legal as well as approved by public moral standards. He is startled and confused when the police arrest him. Under the subjective standard, Y would not qualify for exculpation under the NGRI defense.

(3) Some might wish to argue that these cases demonstrate that the wrongfulness standard should require that the defendant is capable of knowing that his act is wrong by both the prevailing social morality and his subjective standard. Note, however, the following example.

Z is suffering a major depressive disorder with psychosis. He believes that Satan has temporarily prevailed in his eternal struggle with God. Consequently, he believes that the next 100 years will be a period of great misery for all good people. He knows that it is illegal to kill and that it is wrong by the prevailing moral standard. In addition, he endorses that standard. Despite his firm belief that it is legally and
morally wrong to kill, he finds the thought that his children will experience the same misery of existence that he has already begun to live intolerable. After careful, prolonged deliberation, and with great sadness and remorse regarding the terrible wrong he is doing, he strangles them.

It is tempting to argue that $Z$ did not "really" know that his act was wrong. But $Z$ did know that the act violated the prevailing moral standard, and he did believe that the prevailing standard was the morally correct one. He felt remorse just because he was convinced he was doing a great wrong. If someone were to commit a crime of profit despite knowing that act to be wrong, and feeling guilt regarding it, there would be no apparent reason to think that he did not "really" know that it was wrong. Furthermore, there seems to be no reason to think that one could do what he believes to be wrong for his own benefit, but not for his children's benefit. $Z$ would not qualify as insane under any of the three interpretations of "wrongfulness." He knew that the act was illegal as well as contrary to both the accepted social morality and his own personal moral beliefs.

$X$, $Y$, and $Z$ all appear to be legitimate candidates for the NGRI defense. Yet, if we accept the interpretation provided by the authorities cited above of the nature, quality, and wrongfulness requirements of the $M'Naghten$-type tests, they all seem to fall clearly outside of the scope of the test. Each knows the physical characteristics of his acts, the harmful quality of those acts, and the fact that those acts are wrong by the respective standards. While the move toward the cognitive $M'Naghten$ test was apparently intended to make the NGRI defense more precise and predictable, and to avoid "moral mistakes," it is not at all clear that it has provided a satisfactory standard for these purposes.

Finally, it may well be the case that, in practice, a court would exculpate the hypothetical actors described above. But, to do so, a court would have to manipulate the standard in order to accommodate the cases. A standard that requires distortion in order to serve its function falls short of the intent to develop a test with a clear and definite meaning. In addition, standards that can be distorted to accommodate cases in a manner that is consistent with common intuitions of justice are also likely to be vulnerable to distortion resulting in moral mistakes.106

These examples all involve cases in which a defendant would be found culpable under a strict interpretation of a $M'Naghten$-type test despite the fact that each appears to be the sort of person usually thought to be a plausible candidate for exculpation. This may not be the type of moral mistake that the changes in the standard were intended to avoid. To the extent that the changes were a response to the concerns raised or exacerbated by the Hinckley acquittal, they were probably directed primarily toward the problem of acquitting the guilty rather than toward avoiding convictions of the innocent.

106. This argument should not be taken as an endorsement of the ALI standard because it is not at all clear that these cases could be accommodated by that test either (assuming that it were strictly applied).
There is no apparent reason, however, to think that inculpating those who should be exculpated is any less a moral mistake than exculpating those who should be inculpated. There may be policy reasons for preferring to risk the former sort of error over the latter, but if this change is really based on such policy considerations, then it requires justification in terms of those considerations rather than in the guise of putative moral rectitude.

CONCLUSIONS

The history of the NGRI defense reveals a long and frustrating search for a satisfactory standard. The M’Naghten test has been the dominant standard for most of the last century and a half. That test was severely criticized, however, and there was a discernible trend away from it and toward the ALI test for approximately twenty years following the introduction of the ALI test.

Recent developments, however, suggest a general trend toward restricting the scope of the NGRI defense, and specifically, a return to M’Naghten-type standards. This move is motivated by a desire for a clear standard with determinate meaning that will avoid moral mistakes. Interpreted collectively, the arguments advanced in support of the recently passed federal statute, section 25(b) of the California Penal Code as interpreted by the Skinner court, and the recommendations of the ABA and the APA seem to suggest that M’Naghten-type standards are necessary and sufficient for these purposes.

Unfortunately, there appears to be no good reason to think that either of these goals has been accomplished. The analysis in this Note suggests that we are left with the same fundamental problems that have traditionally plagued the search for a satisfactory standard. In addition, the Skinner decision raises questions regarding the wisdom of attempting to solve perplexing legal and moral problems through fundamental changes in the law by public initiative,107 particularly in the wake of highly publicized and controversial cases.108 Regretfully, this Note does not advance a positive alternative. It can only suggest that if we are to develop an adequate standard we will probably not do so through recourse to other past tests or public initiatives, but rather through deeper inquiry into the moral foundations of criminal responsibility as informed by a thorough appreciation of the nature of psychopathology.

108. See generally Callahan, Mayer & Steadman, supra note 26 (describing recent changes in the NGRI defense following the Hinckley decision).