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***People v. Drew*: Adoption of the ALI Rule of Insanity In California**

Falling in line with prevailing trends of current psychological thought, California becomes one of the most recent jurisdictions to abrogate the age-old M'Naghten test for insanity, in favor of the standard articulated by the American Law Institute. The author, who views the change as a positive one, examines the projected implications of the new test from both theoretical and practical vantage points.

I. INTRODUCTION

*People v. Drew*¹ represents a change in California law regarding the legal test to be used in determining the sanity of a criminal defendant. By adding a volitional (*i.e.* the ability to control conduct) element to the sanity standard, this decision enlarges the scope of factors considered by a court or jury in making a determination of a defendant's sanity.

The case is seen to be the culmination of a line of decisions which had gradually departed from the strict cognitive view of sanity set forth in the M'Naghten test.² The California Supreme Court, in discarding the M'Naghten approach for the American

1. *People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978). Prior to this decision California used the M'Naghten test as a standard of legal sanity which reads:

[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing the act, the party accused 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.

M'Naghten's Case, 10 Clark & Fin. 200, 210 8 Eng. Rep. 718, 722 (1843).

2. *People v. Wolff*, 61 Cal. 2d 795, 801, 394 P.2d 959, 962, 40 Cal. Rptr. 271, 274 (1964), modified M'Naghten by holding that the mere capacity to verbalize socially acceptable answers to questions did not prove sanity; the defendant also had to appreciate or understand the nature and wrongfulness of his act. *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959); and *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949); initiated the development of the concept of diminished capacity, which allowed a defendant to introduce evidence of mental incapacity to negate specific intent, malice, or other subjective elements of the charged crime. *People v. Cantrell*, 8 Cal. 3d 672, 685-86, 504 P.2d 1256, 1264-65, 105 Cal. Rptr. 792, 800-01 (1973), held that the concept of "irresistible impulse" could be utilized to prove diminished capacity. This added a volitional element to the diminished capacity concept but the availability of a defense of diminished capacity in the first place turned on the nature of the crime charged. If the defendant was charged with a general intent crime, he could not raise a defense of diminished capacity regardless of his impaired mental state. *See also* *People v. Nance*, 25 Cal. App. 3d 925,

Law Institute (ALI) standard,³ has joined several other states⁴ and federal courts⁵ in adopting a sanity standard which takes into account volitional factors as well as cognitive factors in determining sanity.

It will be the aim of this note to examine the *Drew* decision and to speculate upon its possible future impact on California law. In so doing, essential elements of the newly-adopted ALI standard and the M'Naghten test will be delineated and distinguished.

II. FACTUAL BACKGROUND

Mr. Drew became involved in a heated argument with another customer at a bar during the early morning hours of October 26, 1975.⁶ The bartender phoned for police assistance. When the officers arrived and attempted to question the customer who had been involved in the argument with Drew, Drew attempted to interfere. Officer Bonsell then asked Drew to step outside. Drew refused. At this point Bonsell and another officer attempted to escort Drew outside, but he broke away and struck Officer Bonsell in the face, causing him to strike his head against the edge of the bar. Drew then fell on the fallen policeman and attempted to bite him. He was finally restrained and arrested by other officers.

Drew was charged with battery on a police officer,⁷ obstructing

929, 102 Cal. Rptr. 266, 269 (1972); *People v. Noah*, 5 Cal. 3d 469, 477, 487 P.2d 1009, 1014, 96 Cal. Rptr. 441, 446 (1971).

3. The American Law Institute test reads: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PEN. CODE, Proposed Official Draft § 4.01, Subpart (1) (1962).

4. Alaska: *Schade v. State*, 512 P.2d 907 (1973). Connecticut: CONN. GEN. STATS., § 53a-13. Idaho: *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969). Illinois: ILL. REV. STATS., ch. 38, § 6-2. Indiana: *Hill v. State*, 252 Ind. 601, 251 N.E.2d 429 (1969). Kentucky: *Terry v. Commonwealth*, 371 S.W.2d 862 (1963). Maryland: MD. CODE, art. 59, § 25. Massachusetts: *Commonwealth v. McHoul*, 352 Mass. 544, 226 N.E.2d 556 (1967). Missouri: REV. STATS. MO. § 552.030(3)(1). Montana: MONT. REV. CODES, § 95-501. Ohio: *State v. Statten*, 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969). Oregon: OR. REV. STAT. § 161.295(1). Rhode Island: *State v. Johnson*, 399 A.2d 469 (1979). Texas: TEX. PEN. CODE, § 8.01. Vermont: VT. STATS., Tit. 13 § 4801. Wisconsin: *State v. Shoffner*, 31 Wis. 2d 412, 143 N.W.2d 458 (1966).

5. Federal Circuits—*United States v. Brawner*, 153 U.S. App. D.C. 1, 471 F.2d 969 (D.C. Cir. 1972). *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970). *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969). *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968). *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968). *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967). *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967). *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966). *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963). *United States v. Currens*, 290 F.2d 751 (3rd Cir. 1961).

6. *People v. Drew*, 22 Cal. 3d 333, 337-38, 583 P.2d 1318, 1319-20, 149 Cal. Rptr. 275, 276-77, (1978) (statement of facts).

7. CAL. PENAL CODE § 243 (Deering Supp. 1979).

an officer,⁸ and disturbing the peace.⁹ To those charges he plead not guilty and not guilty by reason of insanity.¹⁰ At the guilt trial, the jury, after hearing the testimony of the officers involved, found Drew guilty as charged.

At the sanity trial, two court-appointed psychiatrists testified that Drew suffered from "latent schizophrenia, characterized by repeated incidents of assaultive behavior and by conversing with inanimate objects and nonexistent persons. . . ." ¹¹ Both psychiatrists concluded that Drew was unable to appreciate the difference between right and wrong.

The trial court's instructions to the jury were based on the M'Naghten test.¹² The jury found Drew sane,¹³ whereupon the court sentenced him to prison on the battery conviction.

8. CAL. PENAL CODE § 148 (Deering 1971).

9. CAL. PENAL CODE § 415 (Deering Supp. 1979).

10. The California Penal Code provides for a bifurcation of the guilt and sanity trials. The relevant section in pertinent part reads:

When a defendant pleads not guilty by reason of insanity, and also joins it with another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law

CAL. PENAL CODE § 1026 (West Supp. 1979).

11. *People v. Drew*, 22 Cal. 3d 333, 338, 583 P.2d 1318, 1320, 149 Cal. Rptr. 275, 276 (1978).

12. The trial court instructed the jury that "legal insanity . . . means a diseased or deranged condition of the mind which makes a person incapable of knowing or understanding the nature and quality of his act, or makes a person incapable of knowing or understanding that his act was wrong." *Id.* at 339, 583 P.2d 1320, 149 Cal. Rptr. 277.

13. The jury apparently did not accept the psychiatric opinion offered at trial which suggested that Drew was insane under the M'Naghten standard. According to the California Supreme Court, this was probably due to the fact that no reasoning was presented by the psychiatric experts as to how they reached such a conclusion. *Id.* at 350-51, 583 P.2d at 1328, 149 Cal. Rptr. at 285. As the court stated in an earlier case: "The chief value of an expert's testimony in this field, as in all other fields, rests upon the *material* from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion . . ." (emphasis in original). *People v. Bassett*, 69 Cal. 2d 122, 141, 443 P.2d 777, 789, 70 Cal. Rptr. 193, 205 (1968).

III. M'NAGHTEN TEST NO LONGER VIABLE

The main issue considered by the California Supreme Court in the *Drew* decision was whether the M'Naghten test was still viable as a basis for determining sanity and, if not, what test should be adopted in its place.¹⁴

The M'Naghten test traces its roots to an 1843 English decision in which one Daniel M'Naghten, who had killed the British prime minister's secretary while attempting to assassinate the prime minister, was acquitted of murder charges by reason of insanity.¹⁵ Queen Victoria was so disturbed by this acquittal that she commanded the House of Lords to obtain the opinion of the judges on the law of insanity. The fifteen judges of the common law courts were called in an extraordinary session to answer five hypothetical questions on the law of criminal responsibility.¹⁶ In responding to two of the questions asked, the judges stated what has come to be regarded as the M'Naghten rule.¹⁷ From 1864 until the decision in *Drew*, California used the M'Naghten rule to define insanity in criminal cases.¹⁸

14. This issue was not presented to the court in the briefs of *Drew* in the Court of Appeal nor in his petition for hearing, but the court found this case a suitable vehicle for resolution of the sanity issue. Therefore the court granted a hearing and requested counsel by letter to submit briefs and present argument on the M'Naghten issue. See *People v. Drew*, 22 Cal. 3d 333, 339 n.4, 583 P.2d 1318, 1320 n.4, 149 Cal. Rptr. 275, 277 n.4 (1978). See also *In Re Smith*, 3 Cal. 3d 192, 203 n.3, 474 P.2d 969, 976 n.3, 90 Cal. Rptr. 1, 8 n.3 (1970).

15. *People v. Drew*, 22 Cal. 3d 333, 340-41 583 P.2d 1318, 1320, 149 Cal. Rptr. 275, 278 (1979).

16. The five questions asked are as follows:

- 1.) What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?
- 2.) What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defense?
- 3.) In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?
- 4.) If a person under an insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused?
- 5.) The fifth question dealt with the admissibility of expert testimony.

H. WEIHOFFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 59-63 (1954). In response to questions one and questions two and three (questions two and three were considered together), the M'Naghten rule was laid down. *Id.* at 62-63.

17. *People v. Drew*, 22 Cal. 3d 333, 341, 583 P.2d 1318, 1321, 149 Cal. Rptr. 275, 279 (1978).

18. See *People v. Coffman*, 24 Cal. 230, 235 (1864) (defendant charged with murder, M'Naghten test adopted in California).

The court in *Drew* mentioned several deficiencies of the M'Naghten test.¹⁹ Foremost among these, according to the court, is M'Naghten's exclusive focus upon a defendant's cognitive capacity. This cognitive approach grew out of an old psychological theory that the mind could be divided up into several compartments, each one of which could be diseased without affecting the others.²⁰ This theory is no longer considered viable.²¹ As stated by Glueck in his criticism of the judges who formulated M'Naghten:

[T]he judges take it for granted that a person can "labor under a partial delusion only" and be "not in other respects insane," while it is well known that there can be no delusions in any mental disease without expressing a condition of the mind as a whole and not of any presumable disconnected portions thereof.²²

Another deficiency of M'Naghten is that it does not address itself to the situation wherein a defendant can realize the difference between right and wrong, but is nevertheless incapable of controlling his behavior.²³

In light of modern knowledge, it is clear that the "right-wrong" test of criminal responsibility is inadequate. There are many forms of mental illness where the illness may be serious enough to deprive the person concerned of any actual choice of conduct where nonetheless he does possess knowledge of what is right or wrong in legal or moral terms.²⁴

The final aspect of the M'Naghten rule that the court criticized in *Drew* was the restriction that M'Naghten places on psychiatric testimony.²⁵ Psychiatrists typically consider a wide range of symptomatology in determining the mental condition of an indi-

19. *People v. Drew*, 22 Cal. 3d 333, 341-44, 583 P.2d 1318, 1322-24, 149 Cal. Rptr. 275, 278-81 (1978).

20. *Id.* at 341, 583 P.2d at 1322, 149 Cal. Rptr. at 278. *See also* *United States v. Baldi*, 192 F.2d 540, 567 (3d Cir. 1951) (homicide case in which the court criticized M'Naghten).

21. S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 171 (1927).

22. *Id.*

23. The concepts of diminished capacity and irresistible impulse were developed to deal with this problem but are still inadequate. *See* note 2, *supra*. Another problem with the diminished capacity concept is that, if proven successfully, it results in the release of the defendant or his confinement as an ordinary criminal for a lesser term, thereby failing to identify the mentally disturbed defendant and raising the possibility that he will not receive the care commensurate to his condition. Such a defendant may serve his term, but, upon release, will continue to represent a danger to the public. *See* BRAKEL AND ROCK, *THE MENTALLY DISABLED AND THE LAW* 395 (1971).

24. *United States v. Smith*, 404 F.2d 720, 725 (6th Cir. 1968).

25. *People v. Drew*, 22 Cal. 3d 333, 342-43, 583 P.2d 1318, 1323, 149 Cal. Rptr. 275, 279-80 (1978).

vidual.²⁶ It was the court's view that requiring psychiatrists to determine the criminal responsibility of a defendant based solely upon that individual's ability to differentiate between right and wrong was a limitation that was grossly overrestrictive.²⁷ Such restrictions, the court continued, have often resulted in severely incomplete psychiatric evaluations. As a consequence, juries have often returned verdicts of sanity despite plain evidence of serious mental illness.²⁸

The criticisms of the M'Naghten standard levied by the court in *Drew* echoed the views of numerous other authorities who have criticized M'Naghten for its failure to include a volitional element as part of its sanity test.²⁹ It is noteworthy that there are several European nations whose laws relating to insanity and criminal responsibility bear no relationship to the M'Naghten rule.³⁰ The administration of justice in those countries does not appear to have suffered as a result.³¹

Because of the deficiencies in the M'Naghten test, the California Supreme Court, using the vehicle of *Drew*, abandoned the M'Naghten rule. The court apparently agreed with Dr. Philip

26. *United States v. Currens*, 290 F.2d 751, 767 (3d Cir. 1961) (defendant convicted of a violation of national motor vehicle theft act, 18 U.S.C. § 2312; pleaded insanity, the court rejected M'Naghten and adopted ALI standard of insanity).

27. *Id.*

28. *See* *People v. Dennis*, 177 Cal. App. 2d 655, 660 (1960) (defendant accused of assault with intent to commit murder, found sane despite unanimous medical testimony of insanity); *People v. Fraters*, 146 Cal. App. 2d 305, 306, 303 P.2d 588, 589 (1956) (defendant convicted of second degree murder, found sane despite long history of mental illness); *People v. Harmon*, 110 Cal. App. 2d 545, 553, 243 P.2d 15, 19 (1952) (murder case, defendant found sane despite testimony of three psychiatrists stating otherwise); *People v. Darling*, 107 Cal. App. 2d 635, 641, 237 P.2d 691, 695 (1951) (incest case, defendant found sane despite expert testimony stating defendant was insane); *People v. Martin*, 87 Cal. App. 2d 581, 588-89, 197 P.2d 379, 386-87 (1948) (murder case, defendant found sane despite testimony of fourteen expert and lay witnesses to the contrary); *People v. Denningham*, 82 Cal. App. 2d 117, 119-20, 185 P.2d 614, 616-17 (1947) (burglary case, defendant found sane despite evidence of loss of memory); *People v. Babcock*, 57 Cal. App. 2d 54, 55-58, 134 P.2d 54, 55-56 (1943) (robbery case, defendant found sane despite evidence of experts and hospital records tending to show that defendant was insane).

29. *See e.g.* *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *Dusky v. United States*, 295 F.2d 743, 759 (8th Cir. 1961); *Durham v. United States*, 94 U.S. App. D.C. 228, 236-37 (1954); *State v. White*, 93 Idaho 153, 456 P.2d 797, 801 (1969); GUTTMACHER AND WEIHOFEN, *PSYCHIATRY AND THE LAW* 409 (1952); WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 1-9 (1954).

30. Bigg, *Procedures For Handling The Mentally Ill Offender In Some European Countries*, 29 *TEMPLE L.Q.* 254 (1956).

31. The emphasis, with respect to the mentally ill offender, is different in many European countries than in countries such as ours where M'Naghten is still used. While our emphasis seems to be on punishment of the offender, the focus in many European countries is on rehabilitation of the mentally ill criminal by use of scientific and humane procedures. *Id.* This difference in emphasis renders needless a test such as M'Naghten. Accordingly, the lack of M'Naghten in these countries does not interfere with the administration of justice.

Roche who wrote: "We have reached a place where there is a consensus that the M'Naghten test of responsibility in the defense of insanity is no longer useful."³²

IV. THE AMERICAN LAW INSTITUTE TEST ADOPTED

In place of the old M'Naghten standard, the court in *Drew* adopted the American Law Institute test³³ (hereinafter referred to as the ALI test). This test was formulated after nine years of extensive research by the American Law Institute.³⁴ Before its final articulation, drafts and redrafts of the test were submitted to, and revised by, an advisory committee comprised of distinguished judges, lawyers, psychiatrists, and penologists.³⁵ Finally, in 1962, the definitive version of the test was adopted by the Institute.³⁶ In California, Justice Mosk, in his dissent to *People v. Kelly*,³⁷ had urged the court to adopt the ALI test several years earlier. The court declined the invitation at that time, and it was not until *Drew* that the changeover occurred.

The differences between the two standards of sanity determination discussed here are striking and easily discernible. The advantages of the ALI approach are apparent. First, the ALI test adds a volitional element which is missing in M'Naghten; namely, the ability to conform to legal requirements.³⁸ Second, the all or nothing language of M'Naghten is avoided by permitting a not

32. P. ROCHE, *THE CRIMINAL MIND* 176 (1958). (This quotation found in *People v. Kelly*, 10 Cal. 3d 565, 580, 516 P.2d 875, 886, 111 Cal. Rptr. 171, 182 (1973) (Mosk J., dissenting)).

33. See note 3 *supra*.

34. The American Law Institute was organized in 1923 by a distinguished group of judges, lawyers and legal scholars as a permanent organization devoted to the clarification and improvement of the law. It has devised formulations in the fields of criminal procedure, evidence, commercial law, and criminal law. *People v. Kelly*, 10 Cal. 3d 565, 581, 516 P.2d 875, 886, 111 Cal. Rptr. 171, 182 (1973). (See Mosk J., dissenting).

35. *United States v. Freeman*, 357 F.2d 606, 622 (2d Cir. 1966) (2nd circuit criticized and rejected M'Naghten in this case and adopted ALI).

36. *Id.*

37. *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973) (See Mosk J., dissenting).

38. *Id.* at 346, 583 P.2d at 1325, 149 Cal. Rptr. at 282. Volition, as used in the context of this decision, means the ability to control one's conduct. BLACK'S LAW DICTIONARY 1746 (4th ed. 1968). An example of volition vs. cognition would be if a defendant who commits a crime knows (cognition) that what he did was wrong but due to his mental condition (e.g. schizophrenia) was unable to control his conduct (volition).

guilty verdict based on substantial incapacity.³⁹ As Justice Kaufman explained in *United States v. Freeman*: "By employing the telling word 'substantial' to modify 'incapacity' the rule emphasizes that 'any' incapacity is not sufficient to justify avoidance of criminal responsibility but that 'total' incapacity is also unnecessary."⁴⁰ Third, the ALI test is broad enough to permit a psychiatrist to present a full picture of the defendant's mental impairments and flexible enough to adapt to future changes in psychiatric theory and diagnosis.⁴¹ Fourth, by referring to the defendant's capacity to "appreciate" the wrongfulness of his conduct, the ALI test takes note of the fact that mere verbal knowledge of right and wrong does not prove sanity.⁴² Intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior, can have little significance.⁴³

The ALI test, by viewing the mind as a unified entity, brings the legal test of insanity into harmony with modern theory, which is opposed to any concept which divides the mind into separate

39. *Id.* at 346, 583 P.2d at 1325, 149 Cal. Rptr. at 282. An example wherein an accused could be found not guilty by reason of insanity under the ALI formulation, but could be found sane and therefore criminally responsible under the M'Naghten test, is in a case in which a defendant, suffering from a type of schizophrenia which makes it impossible for him to control his conduct, is accused of a general intent crime (i.e. rape, etc.). Assuming it can be shown that the defendant knew the nature and quality of his act or that he knew his act was wrong, he would be found sane under the traditional M'Naghten test. *See* note 1, *supra*. The defense of diminished capacity would not be available in this hypothetical situation, because the defense of diminished capacity is only available for a specific intent crime and cannot be used where a general intent crime is charged. *See* note 2, *supra*. Under the ALI formulation this defendant could be found insane, assuming, of course, that it can be shown that the nature of the defendant's mental disease is such that he lacks substantial capacity to conform his conduct to the requirements of law. *See* note 3, *supra*. Under the ALI test it makes no difference that the defendant can appreciate the nature or wrongfulness of his act. As long as he lacks the substantial capacity to control his conduct, he can be found insane. As Justice Mosk stated earlier, under the ALI test the offender must be *emotionally* as well as intellectually aware of his conduct in order to be found sane. *People v. Kelly*, 10 Cal. 3d 565, 582, 516 P.2d 875, 887, 111 Cal. Rptr. 171, 183 (1973) (Mosk J., dissenting) (emphasis added).

40. *United States v. Freeman*, 357 F.2d 606, 622-23 (2d Cir. 1966).

41. *People v. Drew*, 22 Cal. 3d 333, 346, 583 P.2d 1318, 1325, 149 Cal. Rptr. 275, 282 (1978).

42. The ALI formulation is consistent with the concept that mere verbal knowledge of right and wrong does not prove sanity. This concept was expressed by the court earlier when M'Naghten was modified to recognize this. *See People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964). *See also* note 2 *supra*.

43. Justice Kaufman noted that the ALI test, by using the word "appreciate" instead of "know" in the first branch of the test, acknowledges the fact that mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal impact of behavior, is not significant. *United States v. Freeman*, 357 F.2d 606, 623 (2d Cir. 1966). (Kaufman J. wrote the majority opinion which adopted the ALI test in that jurisdiction).

compartments as the M'Naghten test does.⁴⁴ The ALI test, moreover, reflects awareness that from the perspective of psychiatry, absolutes are ephemeral and gradations are inevitable.⁴⁵ As the commentary to the American Law Institute's Model Penal Code observes, "The law must recognize that when there is no black and white it must content itself with different shades of gray."⁴⁶

Many thoughtful observers assert that the ALI test is a significant improvement over the M'Naghten rule.⁴⁷ These writers generally agree that by adding a volitional aspect to a sanity determination, the ALI test allows a more accurate evaluation of an accused's state of mind at the time of the offense than does the M'Naghten rule. The court, in adopting the ALI test stated: "[A]dhering to the fundamental concepts of free will and criminal responsibility, the American Law Institute test restates M'Naghten in language consonant with the current legal and psychological thought."⁴⁸ While California's abandonment of M'Naghten and adoption of the ALI test was not without criticism,⁴⁹ the court felt that the continuing inadequacy of M'Naghten could not be cured by the creation of additional concepts (*i.e.* diminished capacity) designed to evade its limitations.⁵⁰ In the court's opinion, the ALI test, having won

44. *Id.* at 623.

45. *Id.*

46. ALI, MODEL PEN. CODE, Tent. Drafts, 1-4 (1962).

47. See *e.g.* *People v. Kelly*, 10 Cal. 3d 565, 581, 516 P.2d 875, 886-87, 111 Cal. Rptr. 171, 182-83 (1973) (See Mosk J., dissenting); FINGARETTE, THE MEANING OF CRIMINAL INSANITY 242 (1972); WECHSLER, CODIFICATION OF CRIMINAL LAW IN THE UNITED STATES 24 (1968); GOLDSTEIN, THE INSANITY DEFENSE 86 (1967).

48. *People v. Drew*, 22 Cal. 3d 333, 345, 583 P.2d 1318, 1324, 149 Cal. Rptr. 275, 281 (1978).

49. Justices Richardson, Clark, and Manuel dissented to the majority opinion mainly on the grounds that M'Naghten was firmly imbedded in California's criminal law by precedent and legislative inaction, therefore any changes to the law governing sanity standards was solely within the purview of the legislature. *Id.* at 352-62, 583 P.2d at 1329-35, 149 Cal. Rptr. at 286-92 (JJ. Richardson and Clark, dissenting). The majority opinion rejected this argument stating that the M'Naghten rule, never having been enacted by the legislature, was not an integral part of the statutory structure of California's criminal law. Thus, the court stated, "Replacement of the M'Naghten rule with the ALI test will not contradict or nullify any legislative enactment." *Id.* at 347, 583 P.2d at 1325-26, 149 Cal. Rptr. at 282-83.

50. *Id.* at 345, 583 P.2d at 1324, 149 Cal. Rptr. at 281. The court, having decided to replace M'Naghten with the ALI standard, remanded the *Drew* case for retrial on the sanity issue. *Id.* at 352, 583 P.2d at 1329, 149 Cal. Rptr. at 286. Information received from the Superior Court of Imperial County, the court of the original ju-

widespread acceptance,⁵¹ is the best replacement for M'Naghten now available.⁵²

V. FUTURE IMPACT

California's decision to discard the M'Naghten test in favor of the more flexible ALI standard can be viewed as having its greatest impact principally in two areas.

A. *Expert Psychiatric Testimony Broadened*

Perhaps the greatest impact of *Drew* will be felt in the area of psychiatric testimony at trial. Prior to adoption of the ALI test, testifying psychiatrists were restricted to examining the question of the defendant's knowledge of right and wrong. This restriction placed the psychiatrist in a position in which he was compelled to render what is essentially a moral judgment. As a consequence, there resulted a certain unavoidable usurpation of the jury's function.⁵³ Under the ALI formulation, the use of meaningful psychiatric testimony is permitted.⁵⁴ A testifying psychiatrist can now paint a complete picture of the defendant's mental state, enabling the jury to make its decisions and judgments more fully ap-

risisdiction, revealed that *Drew* was not retried due to inadvertance on the part of the district attorney's office. The case against *Drew* was never refiled.

A recent case has indicated that the ALI standard will be applied retroactively in cases where the M'Naghten test had been used and the possibility exists that the result would have differed had ALI been applied. *See* C.A. 1st, 1 Crim. 18496 Oct. 31, 1979.

51. *People v. Drew*, 22 Cal. 3d 333, 345, 583 P.2d 1318, 1324, 149 Cal. Rptr. 275, 281 (1978).

52. *Id.*

53. *United States v. Currens*, 290 F.2d 751, 767 (3rd Cir. 1961) (usurping of jury function one of main criticisms this court levied against the M'Naghten test).

54. Expert psychiatric testimony which would be considered relevant under the ALI test and not under M'Naghten would be testimony tending to show that a defendant could not control his actions even though he can discern the difference between right and wrong. An example of this would be a case where the expert psychiatric testimony is to the effect that a defendant suffers from schizophrenia such that his illness is characterized by a disintegration of the personality, a complete disassociation between intellect and emotion, an incapacity to think conceptually, and an impairing of his judgment to a considerable degree. Under M'Naghten this defendant probably would be found sane since his illness does not affect his "concrete" thinking (as opposed to conceptual thinking), and thus his ability to discern right from wrong. Under the ALI test the fact that the defendant knew right from wrong does not preclude a finding of insanity, because the testimony describing the defendant's illness would tend to show that he was incapable of controlling his actions. Therefore, the ALI test makes relevant the complete psychiatric picture of the defendant, not merely that portion relating to his ability to discern right from wrong. An example of a case where a defendant was found sane under M'Naghten despite an illness similar to the one just described can be found in *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

praised of the facts.⁵⁵ As stated by the majority opinion in *United States v. Freeman*:

The most modern psychiatric insights will be available, but, even more importantly, the legal focus will be sharper and clearer. The twin branches of the test, significantly phrased in the alternative, will remove from the pale of criminal sanctions precisely those who are in no meaningful sense responsible for their actions.⁵⁶

Generally speaking, jurors are acutely conscious of their responsibilities as jurors, and they prefer for the most part a division of labor whereby the experts advise and they, the jurors, decide whether the defendant was responsible for his behavior.⁵⁷ The adoption of the ALI test solidifies this division of labor as it relates to the sanity trial.

B. Increase in Sanity Hearings

A second significant impact of the *Drew* decision will be felt in the area of the number of sanity hearings actually held. Statistics indicate that prior to the *Drew* decision in November of 1978, there was an average of twenty-one sanity hearings conducted each month in Los Angeles County.⁵⁸ Since the *Drew* decision, the number of sanity hearings per month has remained approximately the same. However, the total number of criminal filings in Los Angeles County in that same time span has *decreased* by 30 to 40%. It is evident, therefore, that in relation to the total number of criminal filings, the number of sanity hearings has *increased* since *Drew*.⁵⁹ Although this could be due to other nonapparent factors, it is suggested that by broadening the scope of factors considered in a sanity determination, the ALI sanity standard has made the insanity defense available to persons having types of mental impairments not previously recognized under

55. *United States v. Freeman*, 357 F.2d 606, 623 (2d Cir. 1966) (court pointed out some advantages of the ALI test in this case).

56. *Id.* at 623.

57. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 218 (1967).

58. This information was obtained from the statistical analysis department of the Superior Court of Los Angeles and may be representative of statewide trends. The decrease in the total number of criminal filings since the *Drew* decision is due to policy changes by the District Attorney regarding criminal prosecution. Statistics were not available for defendants who did not join the plea of insanity with another plea. See CAL. PENAL CODE § 1026 (West Supp. 1979). This discrepancy may render the apparent statistical increase in sanity hearings invalid; but it must also be noted that these statistics have remained constant since *Drew* through June, 1979, giving them some apparent validity.

59. *Id.*

M'Naghten. For example, a defendant having a mental deficiency affecting his volitional capacity but not his cognitive ability to differentiate between right and wrong, (*i.e.* forms of schizophrenia) can now be found insane, a finding which would have not occurred under the old M'Naghten approach.

VI. CONCLUSION

People v. Drew does not represent such a radical departure from the prior test of sanity in California as might be imagined.⁶⁰ It appears, rather, to be another step in the progression of California's sanity law, as were the concepts of irresistible impulse and diminished capacity.⁶¹ The *Drew* decision does, however, represent what seems to be a positive change in the law. By recognizing the volitional as well as the cognitive aspects of sanity, the ALI formulation brings the law more in step with modern psychological theory. It appears that this change will allow a more accurate determination to be made of an accused's criminal responsibility for his actions, by permitting more complete psychiatric testimony. It is anticipated by this writer that the court will continue to modify the law in this area as further advances in the psychological sciences reveal a need to do so.⁶²

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60. The California Supreme Court also seemed to view their decision as more of a progression in the law of sanity rather than a radical departure from previous precedent. See *People v. Drew*, 22 Cal. 3d 333, 348, 583 P.2d 1318, 1326, 149 Cal. Rptr. 275, 283 (1978).

61. See note 2 *supra*. (Concepts of irresistible impulse and diminished capacity set forth).

62. On Monday, January 21, 1980, the California Assembly Criminal Justice Committee defeated a bill (A.B. 1907 by Assemblyman McAlister, D-San Jose) which would have resurrected the M'Naghten rule and abolished the ALI test. *The Los Angeles Daily Journal*, Jan. 23, 1980, at 1, col. 3.