

## X. THE INSANITY DEFENSE\*

Since the Nineteenth century, California has followed, with slight variations,<sup>1</sup> the M’Naghten test for insanity and criminal responsibility.<sup>2</sup> Under the M’Naghten test, a defendant who is unable either to understand the criminal nature of the crime, or to distinguish right from wrong at the time the criminal act was committed, is not held responsible for that act.<sup>3</sup>

Over time, California courts have implemented a number of important variations on, or clarifications of, the basic M’Naghten test for insanity. These include: (1) the additional requirement of understanding and appreciating the nature of the criminal act;<sup>4</sup> (2) the

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1. See *infra* note 4.

2. See *People v. Reid*, 193 Cal. 491, 225 P. 859 (1924); *People v. Oxnam*, 170 Cal. 211, 149 P. 165 (1915); *People v. Pico*, 62 Cal. 50 (1882); *People v. Coffman*, 24 Cal. 230 (1864); *People v. Zari*, 54 Cal. App. 133, 201 P. 345 (1921); *People v. Ashland*, 20 Cal. App. 168, 128 P. 798 (1912). For a discussion of insanity tests used by other jurisdictions, see MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 218–32 (Cambridge University Press 1984); Michelle Migdal Gee, Annotation, *Modern Status of Test of Criminal Responsibility - State Cases*, 9 A.L.R. 4th 529 (1981).

3. See *M’Naghten’s Case*, 8 Eng. Rep. 718 (1843); see also, *People v. Horn*, 158 Cal. App. 3d 1014, 205 Cal. Rptr. 119 (1984) (discussing and explaining the M’Naghten test for legal insanity). For a discussion of why insane defendants are not held responsible for their criminal actions, see MOORE *supra* note 2, at 243–45; Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777 (1985).

4. See *People v. Wolff*, 61 Cal. 2d 795, 801, 394 P.2d 959, 962, 40 Cal. Rptr. 271, 274 (1964); see also, *People v. Wells*, 33 Cal. 2d 330, 351, 202 P.2d 53, 65 (1949) (explaining that in order to be subject to punishment, the defendant must not only know that the act committed is criminal, but must also appreciate its wrongfulness). The addition of the understanding or appreciation requirement to the test is significant because without it, a criminal defendant would be found sane if he was merely aware that the act he committed was unlawful, despite a failure to appreciate the significance of criminality - i.e., acts that are illegal are defined as such because they are wrong.

clarification of the “wrong” contemplated by the test;<sup>5</sup> and (3) the statutory definition of excusable “temporary” insanity.<sup>6</sup>

While the basic gist of the test for insanity has remained substantially the same since its adoption,<sup>7</sup> it has not been without criticism.<sup>8</sup>

In response to such criticism, and after much judicial dissatisfaction with the test,<sup>9</sup> the California Supreme Court rejected the M’Naghten test in *People v. Drew*.<sup>10</sup> In its place, the court adopted the American Law Institute (ALI) test for insanity.<sup>11</sup> However, that test was short lived.<sup>12</sup> In 1982, the California voters and Legislature abrogated the judicially imposed ALI test with the

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5. See *infra* Section A.3 (explaining the difference between moral and legal wrong).

6. See *infra* Section A.1.b (discussing temporary insanity).

7. See *People v. Phillips*, 83 Cal. App. 4th 170, 99 Cal. Rptr. 2d 448 (2000) (stating that California applied the M’Naghten test for insanity); see also, *People v. Coddington*, 23 Cal. 4th 529, 97 Cal. Rptr. 2d 528 (2000) (also applying the M’Naghten test for insanity) (overruled on other grounds by *Price v. Superior Court*, 25 Cal. 4th 1046, 25 P.3d 618, 108 Cal. Rptr. 2d 409 (2001)). California abandoned this approach for a brief period. See generally *People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978) (rejecting the M’Naghten test for insanity in favor of the American Law Institute (ALI) test: “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.” *Drew* was abrogated by popular initiative in 1982. See Proposition 8, in Victim’s Bill of Rights [hereinafter 1982 Victim’s Bill] (codified at CAL. PENAL CODE § 25(b) (West 1999 & Supp. 2003)).

8. See *People v. Nash*, 52 Cal. 2d 36, 46–49, 338 P.2d 416, 422–25 (1959) (discussing various criticisms of the M’Naghten test, including lack of inquiry into defendant’s ability to control his conduct, lack of causal inquiry, and the unscientific nature of the test).

9. See *id.*

10. *Drew*, 22 Cal. 3d at 336, 583 P.2d at 1319, 149 Cal. Rptr. at 275–76.

11. See *id.*; see also *supra* note 7 for definition of the ALI test. The difference between the two tests is that the ALI test includes a volitional aspect, whereas the M’Naghten test does not. See *Drew*, 22 Cal. 3d at 341, 583 P.2d at 1322, 149 Cal. Rptr. at 279 (“[The M’Naghten test] fails to attack the problem presented in a case wherein an accused may have understood his actions but was incapable of controlling his behavior.”).

12. Four years later, the ALI test was abrogated by popular initiative. See 1982 Victim’s Bill, *supra* note 7.

passage of Proposition 8, which added section 25 to the California Penal Code.<sup>13</sup>

Though codification of the test put an end to the debate over the proper test for legal insanity, it marked the beginning of an interpretational dilemma. As enacted by Proposition 8, section 25 restored the M’Naghten test for insanity. However, whereas the M’Naghten test was interpreted disjunctively, the language of section 25 suggested that it should be construed conjunctively.<sup>14</sup> Unable to determine the intent of the California Legislature,<sup>15</sup> California courts struggled to reach the appropriate construction of the statute.<sup>16</sup> Ultimately, the California Supreme Court determined that a conjunctive reading of the statute would be too harsh and, despite the literal language of the statute, settled upon a disjunctive reading.<sup>17</sup>

Pursuant to section 25, a defendant is excused from criminal liability if “he or she was incapable of knowing or understanding the nature or quality of his or her act [or] of distinguishing right from wrong at the time of the commission of the offense.”<sup>18</sup>

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13. *See id.*; CAL. PENAL CODE § 25(b) (West 1999 & Supp. 2003). For a discussion of Proposition 8, its origins and ramifications, see Jeff Brown, *Proposition 8: Origins and Impact—A Public Defender’s Perspective*, 23 PAC. L.J. 881 (1992) and Hank M. Goldberg, *Proposition 8: A Prosecutor’s Perspective*, 23 PAC. L.J. 947 (1992).

14. *See* CAL. PENAL CODE § 25. A disjunctive reading would excuse a criminal defendant if, at the time of the commission of the crime with which he is charged, he either did not understand or appreciate the nature of his act *or* was unable to differentiate right from wrong. Under a conjunctive reading, a defendant would escape liability only if he was both unable to understand or appreciate the nature or quality of his act *and* was unable to differentiate right from wrong.

15. Proposition 8 was enacted by popular referendum. It is therefore impossible to determine whether those who voted for it intended that the new test be applied conjunctively or disjunctively.

16. *See* *People v. Coddington*, 23 Cal. 4th 529, 2 P.3d 1081, 97 Cal. Rptr. 528 (2000); *People v. Skinner*, 39 Cal. 3d 765, 704 P.2d 752, 217 Cal. Rptr. 685 (1985); *People v. McCowan*, 182 Cal. App. 3d 1, 227 Cal. Rptr. 23 (1986); *People v. Horn*, 158 Cal. App. 3d 1014, 205 Cal. Rptr. 119 (1984).

17. *See generally Skinner*, 39 Cal. 3d at 765, 704 P.2d 752, 217 Cal. Rptr. at 685 (holding that the test should be read as disjunctive, despite the literal wording of section 25); *People v. Horn*, 158 Cal. App. 3d 1014, 205 Cal. Rptr. 119 (1984) (holding that the statute should be read disjunctively, as a conjunctive reading would restore the “wild beast” test of antiquity).

18. CAL. PENAL CODE § 25.

*A. The Current Law: A Return to M'Naghten*

Although it has been established that the dual requirements set forth in section 25 of the California Penal Code are to be read and applied disjunctively,<sup>19</sup> it would be inaccurate to say that the law regarding the insanity defense is settled, or even straightforward. On its face, the statute has two prongs: (1) the “act prong,” which requires that in order to escape responsibility for a criminal act a defendant must prove he or she was unaware of the nature and quality of his or her act; and (2) the “wrongfulness prong,” which predicates the insanity defense on a defendant’s inability to distinguish right from wrong.<sup>20</sup> Additionally, although not expressly stated by the statute, it is clear that a defendant pleading not guilty by reason of insanity must also meet a third prong—the “mental defect” prong.<sup>21</sup> This threshold requirement demands that the defendant show an inability to understand the nature and quality of his act or that his inability to distinguish right from wrong was caused by a mental disease or defect.<sup>22</sup>

*1. The unwritten mental defect prong*

The California statute that dictates the test for legal insanity lacks any reference to the mental capacity that is required at the time the defendant commits the act with which he is charged.<sup>23</sup> Thus, a literal reading of the statute suggests that a defendant could have a successful insanity defense even if he were not suffering from a mental disorder, as long as he is able to show that he was unable to appreciate the wrongfulness of his act.<sup>24</sup> However, such a reading of

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19. See, e.g., *Coddington*, 23 Cal. 4th at 529, 2 P.3d at 1081, 97 Cal. Rptr. at 528; *Skinner*, 39 Cal. 3d at 765, 704 P.2d at 752, 217 Cal. Rptr. at 685; *McCowan*, 182 Cal. App. 3d at 1, 227 Cal. Rptr. at 23; *Horn*, 158 Cal. App. 3d at 1014, 205 Cal. Rptr. at 119.

20. See CAL. PENAL CODE.

21. See *id.*; California Jury Instructions no. 4.02 (6th ed. 1996 & Supp. 2002) [hereinafter CALJIC]; see generally *People v. McCaslin*, 178 Cal. App. 3d 1, 223 Cal. Rptr. 587 (1986) (holding that legal insanity must be by reason of mental disease or defect).

22. See CAL. PENAL CODE § 25; CALJIC, no. 4.02; see also *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973); *McCaslin*, 178 Cal. App. 3d 1, 223 Cal. Rptr. 587 (1986).

23. See CAL. PENAL CODE § 25.

24. See *id.*

the statute was rejected in *People v. McCaslin*.<sup>25</sup> There, the defendant argued on appeal that the trial court incorrectly instructed the jury that in order to find the defendant legally insane they must find that the defendant suffered from a mental disease or defect.<sup>26</sup> The court found that the defendant did not satisfy the requirements of the insanity defense because he did not suffer from a mental disease or defect and that the court below had properly instructed the jury.<sup>27</sup> Specifically, the court found that section 25 was “intended to reinstate the defense of insanity to the status which existed prior to [*People v.*] *Drew*.”<sup>28</sup> Before *Drew*, the law required that a defendant suffer from a mental disease or defect.<sup>29</sup> Thus, the court concluded that section 25 embodies the same requirement, although it is not expressly stated in the statute.<sup>30</sup>

The court went on to discuss the likely consequences of an interpretation of section 25 that did not include a mental defect requirement.<sup>31</sup> According to the court, such an interpretation would “have the effect of recognizing an ‘antisocial personality’ as a form of insanity . . . .”<sup>32</sup> The court further noted: “Indeed, the ‘antisocial personality’ is the classic criminal; our prisons are largely populated by such persons. To classify such persons as insane would radically revise the criminal law—insanity, instead of a rare exception to the rule of criminal accountability, would become the ordinary defense in a felony trial.”<sup>33</sup>

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25. *McCaslin*, 178 Cal. App. 3d at 1, 223 Cal. Rptr. at 587.

26. *See id.* Though the statute lacks a mental defect requirement, the jury instruction given both before and after the codification of section 25 instructed the jury that it must find that the defendant suffered from a mental disease or defect that resulted in his inability to either appreciate the nature and quality of his act or to distinguish right from wrong. *See CALJIC, supra*, note 21, no. 4.02.

27. *See McCaslin*, 178 Cal. App. 3d at 8–9, 223 Cal. Rptr. at 591–92.

28. *Id.* at 8, 223 Cal. Rptr. at 591. *Drew* held that California should forsake the M’Naghten test for insanity in favor of the test set forth by the American Law Institute. *See People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

29. *See McCaslin*, 178 Cal. App. 3d at 8, 223 Cal. Rptr. at 591.

30. *See id.*

31. *See id.*

32. *Id.*

33. *Id.* at 8–9, 223 Cal. Rptr. at 591–92 (quoting *People v. Fields*, 35 Cal. 3d 329, 372, 673 P.2d 680, 708, 197 Cal. Rptr. 803, 831 (1983)). Similarly, the crime with which the defendant is charged cannot be used as the sole

Given both the state of the law before the judicial departure from California's version of the M'Naghten test for insanity, i.e., defendants must show mental disease or defect to satisfy the test, and the arguably absurd results of interpreting section 25 as *not* requiring a showing of mental disease or defect, after *McCaslin*, the statute must be understood to include such a requirement.

a. "settled" mental defect

Even before codification of the test for insanity, California courts wrestled with the question of exactly what type of mental disease or defect would suffice to relieve a defendant of criminal responsibility. Obviously, the mental defect must be present at the time the defendant committed the act with which he is charged.<sup>34</sup> But how long before the act must the condition exist, how serious must it have been, and how long after the act must the condition have persisted?

Whether a defendant is insane within the meaning of section 25 is a legal, as opposed to medical, determination.<sup>35</sup> However, medical insights inform the legal determination.<sup>36</sup> Mental defect "includes any abnormal condition of the mind which substantially impairs behavior controls."<sup>37</sup> Sociopaths, psychopaths, and defendants suffering antisocial personality disorders do not legally have mental defects; defendants must point to symptoms and manifestations of a disorder other than recidivism or antisocial acts.<sup>38</sup>

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evidence of insanity. In other words, a heinous crime is not evidence that the defendant is insane simply because only a crazy person would commit a heinous crime. *See id.*

34. *See id.* at 8, 223 Cal. Rptr. at 591.

35. *See generally* *People v. Cowan*, 38 Cal. App. 2d 144, 100 P.2d 1079 (1940) (holding that a medical determination of insanity is not sufficient to establish legal insanity, for medical insanity does not necessarily preclude a defendant from distinguishing between right and wrong).

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

37. *In re Ramon M.*, 22 Cal. 3d 419, 428, 584 P.2d 524, 530, 149 Cal. Rptr. 387, 393 (1978) (quoting *McDonald v. United States*, 312 F.2d 847, 854 (1962)). It is important to note that although the *McDonald* definition of mental defect includes a volitional aspect, California's test for legal insanity does not. *See* CAL. PENAL CODE § 25 (West 1999 & Supp. 2003).

38. *See People v. Fields*, 35 Cal. 3d 329, 370, 673 P.2d 680, 706, 197 Cal. Rptr. 803, 829-30 (1983).

Clearly, a defendant who has been medically diagnosed with a mental illness, such as paranoid schizophrenia, may be able to successfully present an insanity defense, provided that he can also meet the other requirements of section 25.<sup>39</sup> Less clear, however, are cases where a defendant claims to be insane, but the “insanity” is the result of the defendant’s voluntary use of drugs and/or alcohol.<sup>40</sup>

Can a defendant who is “temporarily insane” due to voluntary intoxication raise a successful insanity defense? Early cases held that voluntary intoxication could induce insanity that would relieve a defendant of criminal responsibility if the insanity was of a “settled” nature.<sup>41</sup>

Over half a century later, the California Supreme Court was called upon to explain the meaning of settled insanity. In *People v. Kelly*, the court was asked to determine whether an eighteen-year-old defendant, who had been continuously using hallucinogenic drugs for approximately one year prior to attacking her mother, could have been legally insane at the time she “repeatedly stabb[ed] her [mother] with an array of kitchen knives.”<sup>42</sup> Despite expert testimony that the defendant suffered from an organic brain defect caused by the drugs that rendered her “dingy,”<sup>43</sup> the trial court held that the defendant could not meet the definition of legal insanity because her condition was not settled and permanent.<sup>44</sup>

According to the *Kelly* court, the trial court was mistaken in construing “settled” to mean only “permanent.”<sup>45</sup> The term “settled” was apparently broad enough to include both permanent and temporary insanity.<sup>46</sup>

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39. See generally LAWRIE REZNEK, *EVIL OR ILL?: JUSTIFYING THE INSANITY DEFENCE* 275 (Routledge ed., 1997) (“When . . . insanity acquittees were matched for the same offenses with those whose insanity plea had failed, being psychotic [(schizophrenic)] predicted 81 percent of the acquittals.”). *But see infra* Section D (discussing the role of expert testimony).

40. See, e.g., *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973); *People v. Travers*, 88 Cal. 233, 26 P. 88 (1891).

41. See, e.g., *Travers*, 88 Cal. at 233, 26 P. at 88.

42. See *Kelly*, 10 Cal. 3d at 568, 516 P.2d at 877, 111 Cal. Rptr. at 173.

43. *Id.* at 569 n.6, 516 P.2d at 877 n.6, 111 Cal. Rptr. at 173 n.6.

44. *Id.* at 574–75, 516 P.2d at 881–82, 111 Cal. Rptr. at 177–78.

45. *Id.* at 576–77, 516 P.2d at 882–84, 111 Cal. Rptr. at 178–80.

46. Under *Kelly*, so long as the defendant’s insanity, even if it is the product of voluntary use of drugs and/or alcohol, existed prior to and persisted after the offense with which the defendant is charged, the insanity qualifies as settled.

b. “temporary” insanity redefined

Under the reasoning of *Kelly*, a defendant may be excused from criminal liability if he committed crimes while insane, even if the insanity was only temporary, as long as that insanity was of a settled nature.<sup>47</sup> However, section 25.5 of California’s Penal Code makes the insanity defense unavailable to defendants whose insanity is

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*See id.* Thus, the defendant may well have been insane when she stabbed her mother, for it would make “no difference whether the period of insanity lasted several months, as in this case, or merely a period of hours.” *Id.* at 576-77, 516 P.2d at 883, 111 Cal. Rptr. at 179. Section 25.5 expressly overrules this type of reasoning. *See* CAL. PENAL CODE § 25.5 (West 1999 & Supp. 2003); *see also infra* Section A.1.a (discussing “temporary insanity”).

47. Despite the trial court’s conclusion that his insanity was not settled, the defendant in *People v. Skinner* attempted to persuade the court of appeal that he came within the *Kelly* definition of insanity, particularly the part of that definition that seemingly recognized a form of insanity that lasts only for a period of hours but would, nonetheless, be “settled” for the purposes of section 25. *See* *People v. Skinner*, 185 Cal. App. 3d 1050, 1062, 288 Cal. Rptr. 652, 660 (1986). The defendant appealed his conviction for murder after bludgeoning his wife with a wine bottle and then slashing her throat with its broken shards following an all-night freebasing binge. At trial, expert testimony was given to the effect that the defendant’s ingestion of cocaine produced a mental condition that persisted over time, rendering the defendant unable to distinguish right from wrong. On appeal, the court expanded upon the *Kelly* definition of “settled”:

“Under *People v. Kelly*, when an effort is made to establish insanity due to alcohol, it must be shown that there exists a “settled insanity” and not the type of a temporary mental condition produced by current use of alcohol. In other words, your friendly local lush cannot get sloshed, commit a horrendous crime and slip into a state hospital free from criminal sanctions. If an alcoholic wants to use his [or her] problem as an escape hatch, he [or she] must drink enough to develop a mental disorder that continues when he [or she] is stone sober even though the damage is not permanent in the sense that it is beyond repair. *Kelly* offers us the only escape from a completely absurd situation in which those who produce distorted mental conditions by the use of such mindbenders as acid, speed, angel dust or alcohol, then commit bizarre, dangerous and ugly acts could escape criminal sanctions on the basis that their self-induced mental conditions produced an incapacity to appreciate the criminality of their conduct.”

*Id.* at 288 Cal. Rptr. at 659 (citations omitted) (quoting *People v. McCarthy*, 110 Cal. App. 3d 296, 299–300, 167 Cal. Rptr. 772, 774 (1980).

The court affirmed the conviction based on evidence that the defendant’s “insanity” was merely temporarily induced by his contemporaneous ingestion of cocaine, and consequently did not meet the legal definition of insanity. *See id.* at 1063, 288 Cal. Rptr. at 660–61.

solely the result of voluntary ingestion of drugs and/or alcohol.<sup>48</sup> Section 25.5 significantly narrows the availability of the insanity defense because “temporary” insanity now excuses criminal behavior only if it is at least in part the result of an organic mental disease or defect.<sup>49</sup>

Section 25.5 was first interpreted by the California Court of Appeal in *People v. Robinson*.<sup>50</sup> The court read the statute as changing the then-existing law, which allowed defendants to show that their insanity was of a settled nature, even if the insanity was caused solely by the voluntary ingestion of intoxicants.<sup>51</sup> The *Robinson* court held:

[The] statute makes no exception for brain damage or mental disorders caused solely by one’s voluntary substance abuse but which persists after the immediate effects of the intoxicant have dissipated. Rather, it erects an absolute bar prohibiting the use of one’s voluntary ingestion of intoxicants as the sole basis for an insanity defense, regardless of whether the substances caused organic damage or a settled mental defect or disorder which persists after the immediate effects of the intoxicant have worn off. In other words, if an alcoholic or drug addict attempts to use his problem as an escape hatch, he will find that section 25.5 has shut and bolted the opening.<sup>52</sup>

The court went on to explain that the change in the law reflected the legislative determination that a criminal defendant, who is rendered insane by voluntary substance abuse, should be treated differently from a criminal defendant who is “afflicted by mental illness through no conscious volitional choice on their part.”<sup>53</sup>

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48. See CAL. PENAL CODE § 25.5.

49. See *id.*

50. 72 Cal. App. 4th 421, 84 Cal. Rptr. 2d 832 (1999).

51. See *id.*

52. *Id.* at 427, 84 Cal. Rptr. 2d at 836.

53. *Id.* at 428, 84 Cal. Rptr. 2d at 837. The court also noted that section 25.5 was passed after the implementation of California’s Three Strikes Law in anticipation of an increase in the number of criminal defendants claiming not guilty by reason of insanity in order to avoid life sentences imposed as a result of the new sentencing laws. See *id.* at 427, 84 Cal. Rptr. 2d at 836.

In response to the holding of *People v. Robinson*, the jury instructions given in cases where a criminal defendant has invoked the insanity defense were revised to read:

A person is legally insane if, by reason of mental disease or mental defect, either temporary or permanent, caused in part by the long continued use of [alcohol] [drugs] [narcotics], even after the effects of recent use of [alcohol] [drugs] [narcotics] have worn off, [he][she] was incapable at the time of the commission of the crime of either:

1. Knowing the nature and quality of [his][her] act; or
2. Understanding the nature and quality of [his][her] act; or
3. Distinguishing right from wrong.

[However, this defense does not apply when the sole or only basis or causative factor for the mental disease or mental defect is an addiction to, or an abuse of, intoxicating substances.]<sup>54</sup>

Thus, although a defense of temporary settled insanity is still viable, the meaning of “settled” has changed. The *Robinson* case, section 25.5 of California’s Penal Code, and California jury instruction Criminal No. 4.02 all illustrate that the insanity contemplated by California’s insanity defense leaves little hope for a defendant unless he suffers from an organic mental defect or illness.

## 2. The act prong

The act prong, the first express prong of section 25, requires that a defendant prove that “he or she was incapable of knowing or understanding the nature or quality of his or her act . . . at the time of

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54. CALJIC, *supra* note 21, no. 4.02. Prior to *Robinson*, the instruction read:

A person is legally insane if, by reason of mental disease or mental defect, either temporary or permanent, caused by the long continued use of [alcohol] [drugs] [narcotics], even after the effects of recent use of [alcohol] [drugs] [narcotics] have worn off, [he][she] was incapable at the time of the commission of the crime of either:

1. Knowing the nature and quality of [his][her] act; or
2. Understanding the nature and quality of [his][her] act; or
3. Distinguishing right from wrong.

*Id.*

the commission of the offense.”<sup>55</sup> This requirement is met if, to use a familiar if simplistic illustration, a defendant believed he was squeezing a lemon, when in fact he was wringing the neck of a victim.<sup>56</sup> The lemon-squeezing defendant does not know the true nature of his act, and he is legally insane as a result.<sup>57</sup>

Courts have not often found defendants insane under this prong. For example, the defendant in *People v. Horn* was unable to meet this prong in her trial for vehicular manslaughter.<sup>58</sup> After pulling into a service station for gas and filling her tank, the defendant attempted to pay for the gas with her Automobile Club card.<sup>59</sup> Upon refusal by the gas station attendant, the defendant got into her car and drove away without paying. With the attendant in pursuit, the defendant sped through a red light and into an intersection at 60 miles per hour, striking and killing a motorcyclist.<sup>60</sup> In the appellate proceeding following her conviction, the court commented that there was no evidence in the record that the defendant could not understand the nature of her act—she knew she was driving in her car, she knew she was being followed, and she knew that the light was red before she entered the intersection.<sup>61</sup> Hence, the defendant was not relieved of criminal responsibility under the act prong of section 25.

In *People v. Skinner*, the court followed a similar analysis.<sup>62</sup> Skinner was charged with first-degree murder and attempted murder after he repeatedly struck his wife in the head with a wine bottle and then slashed her throat in order, according to the defendant, to assist her in her quest for spiritual ascendancy.<sup>63</sup> Police arrested Skinner when he drove across the center lane of a highway, stopped his car across two lanes of traffic, and proceeded to walk towards the

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55. CAL. PENAL CODE § 25 (West 1999 & Supp. 2003).

56. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 25.07[C][1] (2d ed. 1995).

57. *See id.*

58. 158 Cal. App. 3d 1014, 1020, 205 Cal. Rptr. 119, 122 (1984).

59. *See id.* at 1018, 205 Cal. Rptr. at 121.

60. *See id.*

61. *See id.* at 1033–34, 205 Cal. Rptr. at 132.

62. 185 Cal. App. 3d 1050, 1056, 228 Cal. Rptr. 652, 656 (1986).

63. *See id.* This case, involving defendant Raymond Skinner, should not be confused with the case involving defendant Jesse Skinner, which is discussed in the wrongfulness prong section *infra* Section A.3.

oncoming cars.<sup>64</sup> When apprehended, Skinner told the police that he had just killed his wife, and requested that the arresting officer kill him.<sup>65</sup> At the time of his arrest, Skinner was on his way to the home of his children in order to “assist” them in the same manner he had assisted his wife.<sup>66</sup> Like the *Horn* court, the *Skinner* court reasoned that Skinner knew what he was doing when he killed his wife—he knew he was holding a bottle, and he knew that by hitting his wife in the head with the bottle repeatedly, and then cutting her throat with the broken bottle, he would cause her death.<sup>67</sup> Consequently, Skinner was unable to convince the court that he did not know or appreciate the quality of his act, and he was unable to satisfy the act prong of section 25.<sup>68</sup>

As the above examples illustrate, it is difficult for a defendant to meet the act prong of section 25. In other words, it is rare that a defendant will not have realized what he was actually doing. For this to be the case, a defendant would have to be delusional, so that he did not know that he was committing an act of homicide.<sup>69</sup> To further illustrate: A defendant who kills his neighbor because he labors under a delusion that the neighbor was trampling his flowerbeds may indeed be deluded if the neighbor was not actually trampling the flowers. However, the delusion does not relieve the defendant of responsibility for the killing because even under the defendant’s deluded version of the facts he is still killing the neighbor.<sup>70</sup>

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64. *See id.* at 1052, 228 Cal. Rptr. at 653.

65. *See id.*

66. *See id.* at 1056, 228 Cal. Rptr. at 655.

67. *See id.* at 1061, 228 Cal. Rptr. at 659.

68. *See id.*

69. *See M’Naghten’s case*, 8 Eng. Rep. 718, 719–21 (1843). Here, M’Naghten would arguably fail the test that bears his name had his delusion not also provided him with the additional justification of self-defense. M’Naghten was well aware that by shooting his victim he was committing an act of homicide; he was only deluded as to the identity of his victim and his perception that the victim was persecuting him. *See id.* M’Naghten believed that the man he killed was going to shoot him, and thus, the homicide was justified. *See id.*; *see also* *People v. Horn*, 158 Cal. App. 3d 1014, 1021, 205 Cal. Rptr. 119, 123 (1984) (discussing M’Naghten’s case).

70. Although intellectually it makes sense that a defendant with a cognitive impairment has altered perceptions of his actions such that he thinks he is doing one thing when he is really doing another, this is not how cognitive impairment plays out in life. *See* Marc Rosen, *Insanity Denied: Abolition of*

### 3. The wrongfulness prong

The wrongfulness prong of section 25, which requires that a defendant be “incapable of . . . distinguishing right from wrong at the time of the commission of the offense”<sup>71</sup> is much more frequently used by defendants in order to fall within California’s test for legal insanity.<sup>72</sup> It is relatively easier to satisfy than the act prong<sup>73</sup> because insane people almost always know what they are doing; they are simply unable to appreciate that they should not perform the act because the act is “wrong.”<sup>74</sup> The word “wrong” encompasses two discrete meanings: (1) that which is legally wrong; and (2) that which is morally wrong.<sup>75</sup> Theoretically, simply asking a defendant whether he knows that the act with which he is charged is a criminal offense may show that the defendant is aware that this act is legally wrong; a “yes” answer would preclude finding a defendant insane if legality were the only aspect of wrong with which courts were concerned.<sup>76</sup> Such a simplistic interpretation of “wrong” is not the state of the law.<sup>77</sup>

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*the Insanity Defense in Kansas*, 8 KAN. J.L. & PUB. POL’Y 253, 257 (1999) (explaining that “disordered persons’ acts are willed even if they are the result of crazy reasons or compulsion” and that “virtually all people know . . . what they are doing and intend to do it.”); *see also* Morse, *supra* note 3, at 810–11 (explaining that most insane defendants have general knowledge of their actions, but are motivated to commit the acts by irrational perceptions of reality).

71. CAL. PENAL CODE § 25 (West 1999 & Supp. 2003).

72. *See* DRESSLER, *supra* note 56, § 25.04[C][1][a].

73. This is not to suggest that it is easy to meet—both are hard to satisfy, which is why the defense is rarely used and even more rarely successful. “[T]he insanity defense is raised in fewer than two percent of federal and state trials and is rarely successful . . . [It] is a defense of last resort that betokens an otherwise weak defense and that rarely succeeds.” *See* Morse, *supra* note 3, at 797.

74. *See id.*

75. *See generally* People v. Stress, 205 Cal. App. 3d 1259, 252 Cal. Rptr. 913 (1988) (discussing the difference between legal and moral wrong).

76. *See generally* People v. Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964) (discussing the addition of the terms “understand” and “appreciate” to the test for insanity, suggesting that mere knowledge that an act is illegal would not subject an otherwise insane defendant to criminal liability if he did not also understand *why* the act is illegal, or appreciate the consequences of his actions); *see also* People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959); People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949)

*a. legal wrong*

Although what is legally wrong frequently encompasses what is morally wrong,<sup>78</sup> they are not necessarily equivalent.<sup>79</sup> For example, a defendant may understand that killing someone is illegal. However, if he feels he has been commanded by God to kill, he may not believe that it is morally wrong.<sup>80</sup> Consequently, it is not enough for the prosecution to show that the defendant was aware of the criminal nature of the act if it cannot also show that the defendant did not believe the act was morally wrong.<sup>81</sup>

The California Supreme Court echoed this reasoning in *People v. Skinner*.<sup>82</sup> There, the defendant was convicted of murdering his wife because he believed that the marriage vow “till death do us part” bestowed upon him a God-given right to kill his wife when he became inclined to violate his vows.<sup>83</sup> In response to arguments that the California version of the M’Naghten test for legal insanity contemplates only that the prosecution show that a defendant is aware of the criminal nature of his acts before he can be found sane, the court concurred with jurisdictions that addressed the same issue

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(discussing the requirement that the defendant not only know his act is illegal, but also that he *understand* the nature and quality of his act).

77. See *infra* Sections A.3.a and A.3.b (discussing the difference between legal and moral wrong).

78. See *People v. Skinner*, 39 Cal. 3d 765, 783–84, 704 P.2d 752, 764, 217 Cal. Rptr. 685, 696 (1985).

79. See *Stress*, 205 Cal. App. 3d at 1272–75, 252 Cal. Rptr. at 921–24.

80. This is also an example of a particular variety of insanity defense known as the “deific decree.” Under the deific decree defense, a defendant is not held responsible for his act if he can show that his act was the result of an insane delusion that he has been commanded by God to commit the act. See Christopher Hawthorne, Comment, “*Deific Decree*”: *The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755, 1755 (2000). California courts do not accept deific decree defense, though the M’Naghten test for insanity may encompass it under the moral wrong prong. See *infra* Section A.3.b.

81. See *Skinner*, 39 Cal. 3d at 783–84, 704 P.2d at 764, 217 Cal. Rptr. at 696; see also *Stress*, 205 Cal. App. 3d at 1275, 252 Cal. Rptr. at 923–24 (holding that the defendant may have believed his acts were illegal yet not morally wrong and that a proper standard for determining the defendant’s sanity must include an understanding of moral wrong).

82. *Skinner*, 39 Cal. 3d at 783–84, 704 P.2d at 764, 217 Cal. Rptr. at 696. This case involving Jesse Skinner should not be confused with that of Raymond Skinner, discussed *supra* Part X.A.2.

83. See *id.* at 770, 704 P.2d at 754–55, 217 Cal. Rptr. at 687.

and concluded that “a defendant who is incapable of understanding that his act is morally wrong is not criminally liable merely because he knows the act is [legally] wrongful.”<sup>84</sup>

The court of appeal followed suit in *People v. Stress*. There the defendant was convicted of first-degree murder after striking his wife in the head with an axe.<sup>85</sup> The court found that the trial court erred in construing the “wrong” referred to in section 25 as merely that which is illegal.<sup>86</sup> Under that erroneous construction of wrongfulness, the trial court found the defendant sane because he understood at the time he killed his wife that his behavior was criminal.<sup>87</sup> Indeed, it was precisely the criminal nature of the act and its expected repercussions that led the defendant to kill his wife: he believed that he would thereby gain a forum in which to publicly voice his theory that the government and professional sports associations had conspired to keep professional athletes out of the Vietnam draft.<sup>88</sup> The defendant argued, and the court of appeal agreed, that the notion of wrong articulated by section 25 encompasses moral as well as legal wrong.<sup>89</sup> In light of this interpretation and evidence in the record that supported the theory that the defendant believed killing his wife was not morally wrong,<sup>90</sup> the court of appeal reversed the trial court’s sanity verdict and remanded the case for further proceedings consistent with its interpretation of “wrong.”<sup>91</sup>

*b. moral wrong*

Though the *Skinner* and *Stress* courts clarified that the wrong contemplated by the California test for insanity encompasses both legal and moral wrong, those cases did little to elaborate upon the appropriate standard for determining whether the defendant’s belief

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84. *See id.* at 783, 704 P.2d at 764, 217 Cal. Rptr. at 697.

85. *Stress*, 205 Cal. App. 3d at 1263, 252 Cal. Rptr. at 915.

86. *See id.* at 1274, 252 Cal. Rptr. at 922–23.

87. *See id.* at 1273, 252 Cal. Rptr. at 921–22.

88. *See id.* at 1263, 252 Cal. Rptr. at 915.

89. *See id.* at 1272, 252 Cal. Rptr. at 920–21.

90. The defendant believed his wife’s death was a sacrifice, that she died as a soldier, and that no jury would convict him when he exposed the conspiracy. *See id.* at 1273, 1275, 252 Cal. Rptr. at 922, 924.

91. *Id.* at 1275, 252 Cal. Rptr. at 924.

that his act was not morally wrong will excuse him from criminal liability.<sup>92</sup>

Adding yet another wrinkle to the test for legal insanity, California courts require not only the defendant's inability to distinguish between what is morally right and wrong, but also that the morality of the defendant reflect "generally accepted ethical or moral principals derived from an external source."<sup>93</sup> Stated another way, if a defendant's sense of morality is at variance with accepted societal notions of morality, then the defendant may not be relieved of criminal liability by compelling a finding of legal insanity.<sup>94</sup>

Under one interpretation of this requirement, a defendant who suffers from an insane delusion that *his* God had commanded him to kill would not be found legally insane if his God was not *the* God, i.e., the insanity defense excuses only acts performed as the result of delusions of commands from the Judeo-Christian God. A less

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92. In a footnote, the *Skinner* court alluded to the matter when it quoted Justice Cardozo's *People v. Schmidt* opinion:

"[I]t is not enough that [the defendant] has views of right and wrong at variance with those that find expression in the law. The variance must have its origin in some disease of the mind. The anarchist is not at liberty to break the law because he reasons that all government is wrong. The devotee of a religious cult that enjoins polygamy or human sacrifice as a duty is not thereby relieved from responsibility before the law."

*People v. Skinner*, 39 Cal. 3d 765, 784 n.16, 704 P.2d 752, 764, 217 Cal. Rptr. 685, 697 n.16 (1985).

Though Justice Cardozo's discussion speaks to the requirement that a defendant's inability to tell right from wrong be caused by a mental defect, his comments foreshadow a dilemma that is later addressed by California courts—that posed by the defendant who does not see his act as morally wrong, but subscribes to a morality that differs from that which is accepted by society at large. See *People v. Coddington*, 23 Cal. 4th 529, 2 P.3d 1081, 97 Cal. Rptr. 2d 528 (2000) (holding that defendant's version of morality could not excuse him from criminal liability because it did not conform with that subscribed to generally by society).

93. *Coddington*, 23 Cal. 4th at 608, 2 P.3d at 1143, 97 Cal. Rptr. 2d at 597; see also *Stress*, 205 Cal. App. 3d at 1274, 252 Cal. Rptr. at 923 ("[M]oral obligation in the context of the insanity defense means generally accepted moral standards and not those standards peculiar to the accused.").

94. See *Coddington*, 23 Cal. 4th at 608, 2 P.3d at 1143, 97 Cal. Rptr. 2d at 597; see also *People v. Rittger*, 54 Cal. 2d 720, 734, 355 P.2d 645, 653, 7 Cal. Rptr. 901, 909 (1960) ("The fact that a defendant claims and believes that his acts are justifiable according to his own distorted standards does not compel a finding of legal insanity.").

inflammatory explanation of this result is that the Judeo-Christian God is a proxy for generally held precepts of morality. Thus, excusing acts done by insane defendants who feel their conduct was prescribed by *the* God, but not those by insane defendants whose conduct is proscribed by some other god is simply a short hand way of saying that the former believed what he was doing was right, and that his “right” is recognized by society; while, though the latter also believed what he was doing was right, that his “right” is *not* recognized by society.<sup>95</sup>

In *People v. Coddington*, the California Supreme Court addressed a distorted sense of morality and held that the trial court reasonably determined there was no support for a finding of legal insanity.<sup>96</sup> In *Coddington*, Herbert James Coddington was convicted of kidnapping, rape, and murder after luring two teenage models and their chaperones to his mobile home for what they believed would be the filming of an anti-drug film.<sup>97</sup> Once the women arrived at the trailer, the defendant immediately strangled the chaperones, and then repeatedly raped and sexually assaulted the models.<sup>98</sup> The defendant was convicted by the trial court despite his contention that he was insane at the time he committed the acts, and that he had been instructed through a series of traffic signals to lure the women to his home and rape them. The court of appeal upheld the sanity verdict because it appeared that the defendant’s religion was not external to him, but was rather his own aberrant version of a universal order.<sup>99</sup> Indeed, there was evidence in the record to suggest that the defendant had rejected the Judeo-Christian concept of God and the moral system associated therewith, and that he subscribed to a notion of God as a force running through the universe.<sup>100</sup> Thus, the jury was justified in finding the defendant legally sane at the time he committed the acts because there was reason to believe that even if he were unable to distinguish right from wrong due to a mental

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95. See *Coddington*, 23 Cal. 4th at 608–10, 2 P.3d at 1143–45, 97 Cal. Rptr. 2d at 597–99.

96. *Coddington*, 23 Cal. 4th at 608–10, 2 P.3d at 1143–45, 97 Cal. Rptr. 2d at 597–99.

97. See *id.* at 547, 2 P.3d at 1104, 97 Cal. Rptr. at 553.

98. See *id.* at 549–53, 2 P.3d at 1105–07, 97 Cal. Rptr. at 554–56.

99. See *id.* at 610, 2 P.3d at 1145, 97 Cal. Rptr. at 599.

100. See *id.* at 609, 2 P.3d at 1144, 97 Cal. Rptr. at 598; see *supra* text accompanying note 71.

disease or defect, the defendant's concept of morality was such that would not bring him within the definition of legal insanity.<sup>101</sup> It is not enough for a defendant to claim he thought what he did was morally "right." To be relieved of criminal responsibility, the defendant's notion of "right" must square with the jury's notion of "right."

### B. Procedure

#### 1. Competency to stand trial

When a defendant pleads not guilty by reason of insanity, there is often doubt as to whether the defendant is fit to stand trial for the crimes with which he is charged.<sup>102</sup> If such a doubt arises, the defendant's competency to stand trial must be assessed in a separate proceeding before the trial on the issues of guilt and sanity may proceed.<sup>103</sup> The competency hearing can also be understood as a determination of the defendant's *present* sanity,<sup>104</sup> as opposed to the sanity of the defendant at the time of the commission of the crime.

The purpose of ensuring that a defendant is competent to stand trial echoes that of the insanity defense generally—those who cannot understand either what they have done or the consequences of their actions should not be held accountable in the same manner as those who have such an understanding.<sup>105</sup> The competency requirement is predicated upon both state and federal constitutional law, which give a criminal defendant the right to appear and defend in person.<sup>106</sup> Mere physical presence, however, does not satisfy this constitutional mandate.<sup>107</sup> Such presence, "without mental realization of what was going on would obviously be of no value to the accused" and would

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101. See *Coddington*, 23 Cal. 4th at 659, 2 P.3d at 1177, 97 Cal. Rptr. at 634.

102. See, e.g., *People v. Lawley*, 27 Cal. 4th 102, 38 P.3d 461, 115 Cal. Rptr. 2d 614 (2002); *People v. Weaver*, 26 Cal. 4th 876, 29 P.3d 103, 111 Cal. Rptr. 2d 2 (2001); *People v. Pennington*, 66 Cal. 2d 508, 426 P.2d 942, 58 Cal. Rptr. 374 (1967); *In re Dennis*, 51 Cal. 2d 666, 335 P.2d 657 (1959).

103. CAL. PENAL CODE §§ 1367, 1368 (West 2000 & Supp. 2003).

104. See *Pennington*, 66 Cal. 2d at 518, 426 P.2d at 949, 58 Cal. Rptr. at 381.

105. See *Morse*, *supra* note 3, at 783.

106. See U.S. CONST. amend. VI; CAL. CONST. art. I, § 15; CAL. PENAL CODE § 1043.

107. See *In re Dennis*, 51 Cal. 2d at 672, 335 P.2d at 660.

lead to the absurd result of a “purported trial of . . . an insane person without the least understanding of what was taking place in the courtroom.”<sup>108</sup>

Constitutional demands and moral concerns with accountability are satisfied only when the defendant is able to both understand the nature of the proceeding, and to rationally participate in his own defense.<sup>109</sup> If at any point during a criminal proceeding there is doubt that the defendant meets this standard for competency, the trial judge must suspend the criminal proceeding.<sup>110</sup> The issue of competency, or present sanity, is then tried in a separate civil proceeding where the defendant is presumed competent unless proven otherwise by a preponderance of the evidence.<sup>111</sup>

Under section 1368 of the California Penal Code, the trial judge must be the one to doubt the defendant’s competency to stand trial,<sup>112</sup> not the defense counsel or any third person.<sup>113</sup> However, section 1368 contemplates that the trial judge will order a competency hearing if informed by defense counsel that counsel harbors doubts

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108. *Id.*

109. See CAL. PENAL CODE §§ 1367, 1368; see also *People v. Lawley*, 27 Cal. 4th 102, 38 P.3d 461, 115 Cal. Rptr. 2d 614 (2002); *People v. Weaver*, 26 Cal. 4th 876, 29 P.3d 103, 111 Cal. Rptr. 2d 2 (2001); *People v. Pennington*, 66 Cal. 2d 508, 426 P.2d 942, 58 Cal. Rptr. 374 (1967); *In re Dennis*, 51 Cal. 2d at 666, 335 P.2d at 657 (all interpreting section 1368 as requiring that the defendant appreciate the nature of the proceeding). Some courts have interpreted section 1368 as also requiring that the defendant understand the purpose of the proceeding. See, e.g., *Pennington*, 66 Cal. 2d at 515, 426 P.2d at 947, 58 Cal. Rptr. at 379; *People v. Merkouris*, 52 Cal. 2d 672, 678, 344 P.2d 1, 4 (1959); *In re Dennis*, 51 Cal. 2d at 670, 335 P.2d at 659. As with insanity at the time of the act with which the defendant is charged, incompetence must be the result of mental disorder or developmental disability. See CAL. PENAL CODE § 1367(a). Furthermore, the inability to participate in the proceeding that the statute contemplates does not include differences of opinion on tactical approaches to the defense. See, e.g., *Lawley*, 27 Cal. 4th at 129, 38 P.3d at 480, 115 Cal. Rptr. 2d at 636 (defendant’s preference for a bench trial over a jury trial, though derived from a distrust of lesbian and transvestite jurors, was a difference of opinion about tactics, not a manifestation of the defendant’s inability to assist in his defense).

110. CAL. PENAL CODE § 1368.

111. See *id.*; *Lawley*, 27 Cal. 4th at 131, 38 P.3d at 482, 115 Cal. Rptr. 2d at 638. California Jury Instructions define a preponderance of the evidence as evidence that has more convincing force than that opposing it. CALJIC, *supra*, note 21, no. 2.50.2.

112. CAL. PENAL CODE § 1368(a).

113. See *In re Dennis*, 51 Cal. 2d at 670, 335 P.2d at 659.

as to the present sanity or competency of the defendant.<sup>114</sup> Read together, sections 1368(a) and (b) require a competency hearing whenever the trial judge doubts the defendant's competence, or when counsel informs the judge that the defendant is not competent.<sup>115</sup>

Nevertheless, even when the trial court does not doubt the present sanity of the defendant and has not been informed by counsel of any competency concerns, the defendant may still be constitutionally entitled to a competency hearing if substantial evidence of the defendant's incompetence exists.<sup>116</sup> Denial of a competency hearing in the face of such substantial evidence may be grounds for reversal of a conviction if the defendant is found to be sane and then convicted.<sup>117</sup>

California trial courts have made some surprising decisions regarding a defendant's competency to stand trial. For instance, in *People v. Pennington*, the defendant appealed his conviction for first-degree murder on grounds that he had been denied a competency hearing over a defense motion.<sup>118</sup> Evidence of the defendant's alleged incompetence included expert testimony that during the course of the trial, the defendant believed that he spoke with both his dead grandmother and the devil, whom he described as having "real nice eyes, . . . curly hair, and . . . little horns,"<sup>119</sup> and the defendant's unusual behavior, which included outbursts in the courtroom that led to the defendant being gagged, and an episode in which defendant displayed his penis and shouted, "come and bring Cracker Jack."<sup>120</sup> Despite these indications that the defendant may not have been sane during the trial, the trial judge stated that "this Court does not have a doubt and has not had a doubt" that the defendant was competent to stand trial.<sup>121</sup>

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114. CAL. PENAL CODE § 1368(b).

115. CAL. PENAL CODE § 1368(a)-(b).

116. *See, e.g., Lawley*, 27 Cal. 4th at 131, 38 P.3d at 482, 115 Cal. Rptr. 2d at 638; *People v. Weaver*, 26 Cal. 4th 876, 910, 29 P.3d 103, 120, 111 Cal. Rptr. 2d 2, 23 (2001); *People v. Pennington*, 66 Cal. 2d 508, 518-19, 426 P.2d 942, 949, 58 Cal. Rptr. 374, 381 (1967).

117. *See Pennington*, 66 Cal. 2d at 520-21, 426 P.2d at 950-51, 58 Cal. Rptr. at 382-83.

118. *See id.* at 511, 426 P.2d at 944, 58 Cal. Rptr. at 376.

119. *Id.* at 515 n.5, 426 P.2d at 946-47, 58 Cal. Rptr. at 378-79.

120. *Id.* at 513, 426 P.2d at 945, 58 Cal. Rptr. at 377.

121. *Id.*, 426 P.2d at 946, 58 Cal. Rptr. at 378.

The Supreme Court of California disagreed and held that the denial of the motion in the face of substantial evidence of incompetence, even absent a doubt in the mind of the trial judge, amounted to a denial of due process.<sup>122</sup>

Clearly, the *Pennington* court found the aforementioned evidence of the defendant's incompetence substantial. It did not, however, define for the lower courts what other types of evidence should be considered substantial. The California Supreme Court finally did so decades later in *People v. Danielson*. There, the Supreme Court held that evidence is substantial if it raises a reasonable doubt about the defendant's competence to stand trial.<sup>123</sup> It affirmed this definition in *People v. Marshall*, where it held that substantial evidence which requires a hearing on competency is that which is reasonable, credible, and of solid value.<sup>124</sup>

The California Supreme Court applied this standard in *People v. Lawley*. There, the defendant was adamantly opposed to having women on the jury at his trial.<sup>125</sup> The court did not consider expert testimony that the defendant believed that many women who wear pants are either transvestites or lesbians, and that all women who are transvestites or lesbians also molest children to be substantial evidence of possible incompetence.<sup>126</sup> The court accepted the trial court's characterization of this evidence as illustrating mere differences of opinion between the defendant and his counsel over

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122. See *id.* at 518, 426 P.2d at 949, 58 Cal. Rptr. at 381. Failure to order a competency hearing in the face of substantial evidence of incompetence robs the defendant of his right to a fair trial, and thus amounts to a denial of due process. See *id.* In reaching this conclusion, the court followed the reasoning of the recent United States Supreme Court decision *Pate v. Robinson*, 383 U.S. 375 (1966) (holding that a criminal defendant has a constitutional right to a competency hearing if he presents substantial evidence of incompetence). In *Robinson*, evidence of the defendant's present insanity included his mother's testimony that she had once observed him "' a little foamy at the mouth.'" See *Pennington*, 66 Cal. 2d at 517 n.7, 426 P.2d at 948 n.7, 58 Cal. Rptr. at 380 n.7 (quoting *Robinson*, 383 U.S. at 378-82).

123. 3 Cal. 4th 691, 726, 838 P.2d 729, 749, 13 Cal. Rptr. 2d 1, 21 (1992) (overruled on other grounds by *Price v. Superior Court*, 25 Cal. 4th 1046, 1069 n.13, 25 P.3d 618, 633, 108 Cal. Rptr. 2d 409, 427 (2001)).

124. 15 Cal. 4th 1, 31, 931 P.2d 262, 278, 61 Cal. Rptr. 2d 84, 100 (1997).

125. 27 Cal. 4th 102, 128, 38 P.3d 461, 480, 115 Cal. Rptr. 614, 636 (2002).

126. See *id.* at 128 n.7, 38 P.3d at 480 n.7, 115 Cal. Rptr. at 636 n.7. Strangely, the expert also testified that defendant's thinking revealed "nothing bizarre or grossly illogical." *Id.*

Summer 2003]

THE INSANITY DEFENSE

1617

tactical decisions.<sup>127</sup> Because such differences of opinion do not constitute an inability to rationally participate in one's defense, this evidence did not ultimately convince the court that the defendant was not sane at the time of the trial. The decision of the trial court was upheld.<sup>128</sup>

## 2. Bifurcated trial

Once the defendant is found competent to stand trial, the criminal trial proceeds.

The trial of a defendant who pleads both not guilty and not guilty by reason of insanity takes place in two phases—the guilt phase and the sanity phase.<sup>129</sup> Though often referred to as separate trials,<sup>130</sup> the guilt and sanity phases are actually two parts of one proceeding.<sup>131</sup> During the guilt phase of the trial, the defendant is presumed sane, and any evidence of legal insanity is inadmissible.<sup>132</sup> If the jury returns a verdict of not guilty during the guilt phase, the defendant is acquitted of the charges against him. If, however, the jury returns a guilty verdict, the sanity of the defendant is then tried.<sup>133</sup>

## 3. Pleas

A defendant may plead both not guilty and not guilty by reason of insanity.<sup>134</sup> Such a plea in effect allows the defendant two chances to avoid criminal punishment for the acts with which he is

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127. See *id.* at 134–35, 426 P.2d at 484, 58 Cal. Rptr. at 641–42; see also *supra* note 105 (discussing the nature of the basis for incompetence under CAL. PENAL CODE § 1368 (West 2000 & Supp. 2003)).

128. See *Lawley*, 27 Cal. 4th at 130, 426 P.2d at 481, 58 Cal. Rptr. at 638.

129. See CAL. PENAL CODE § 1026 (West 1985 & Supp. 2003).

130. See *id.*

131. See *People v. Villarreal*, 167 Cal. App. 3d 450, 458, 213 Cal. Rptr. 179, 184 (1985) (“In the eyes of the law there is only one trial even though it is divided into two sections or stages if insanity is pleaded as a defense.”) (citing *People v. Wells*, 33 Cal. 2d 330, 349, 202 P.2d 53, 65 (1949)).

132. See CAL. PENAL CODE § 1026; *Villarreal*, 167 Cal. App. 3d at 455, 213 Cal. Rptr. at 181–82; see also *People v. Hernandez*, 22 Cal. 4th 512, 523, 994 P.2d 354, 360, 93 Cal. Rptr. 2d 509, 516 (2000) (explaining that the trial of an insanity plea is not a separate action).

133. See CAL. PENAL CODE § 1026.

134. See *id.*

charged.<sup>135</sup> Even if the defendant is found guilty during the guilt phase, if he is found insane during the sanity phase, he will not be convicted of the crime.<sup>136</sup> This is not the case, however, if the defendant pleads only not guilty by reason of insanity without also pleading not guilty. A single plea of not guilty by reason of insanity is an admission of guilt for the act with which the defendant is charged; such a plea could also be characterized as “guilty but insane.”<sup>137</sup> Accordingly, if the defendant is found sane at the sanity phase of the trial, he must be convicted of the crime with which he is charged.<sup>138</sup>

#### 4. Burdens of proof and presumptions of sanity and insanity

California places both the burden of production and the burden of proof of legal insanity on the defendant.<sup>139</sup> In other words, in order to present a successful insanity defense, the defendant will have to come forward with enough evidence of his insanity to convince a judge or a jury that he was insane at the time he committed the crime.<sup>140</sup> Because the issue of sanity is raised as an affirmative defense, as opposed to an element of the crime with which the defendant is charged, the allocation of the burden on the defendant is not unconstitutional.<sup>141</sup>

Regardless of whether the defendant has pleaded guilty but insane, or not guilty and not guilty by reason of insanity, he will be

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135. For a discussion on the effect of the judgment of insanity, see *infra* Section C.

136. This does not mean, however, that the defendant is free to go. *See id.*

137. *See* CAL. PENAL CODE § 1026; *People v. Weaver*, 26 Cal. 4th 876, 964, 29 P.3d 103, 155, 111 Cal. Rptr. 2d 2, 64 (2001).

138. *See* CAL. PENAL CODE § 1026(a) (“[I]f the defendant pleads only not guilty by reason of insanity . . . [and] [i]f the verdict or finding is that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law.”).

139. *See* CAL. EVID. CODE §§ 550, 522 (West 1995).

140. California evidence code section 115 defines burden of proof as “the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.” CAL. EVID. CODE § 115 (West 1995 & Supp. 2002).

141. *See People v. Medina*, 51 Cal. 3d 870, 883, 799 P.2d 1282, 1290, 274 Cal. Rptr. 849, 857 (1990).

presumed sane at both the guilt phase and the sanity phase.<sup>142</sup> To escape conviction, he must prove he is insane, and he must do so by a preponderance of the evidence.<sup>143</sup>

The usual presumption of sanity at the sanity phase of the trial does not apply where there is proof that the defendant was insane before the commission of the crimes with which he is charged.<sup>144</sup> In that instance, the presumption is that the insanity “continued to exist until the time of the commission of the crime.”<sup>145</sup> Moreover, the presumption of insanity persists at the time of trial. Thus, the defendant should be presumed insane for the purposes of the competency or present sanity hearing.<sup>146</sup>

Evidence that would be deemed substantial for purposes of creating a continued presumption of insanity includes prior commitment to a state mental hospital or prior adjudication of the issue of insanity.<sup>147</sup> Thus, if, prior to the commission of a crime, a defendant has been previously committed to a mental facility or has been previously adjudged insane, he will be presumed insane both at the time of the commission of the crime and at the time of the trial.

A presumption of continuing insanity does not, however, relieve the defendant of his burden of proof.<sup>148</sup> He must still prove he is or was insane by a preponderance of the evidence. Nevertheless, he

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142. See *id.* “[T]he defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed.” *Id.*

143. See CAL. EVID. CODE § 522. In other words, the defendant bears the burden of proof on the issue of insanity. See generally *People v. Redmond*, 16 Cal. App. 3d 931, 93 Cal. Rptr. 543 (1971) (holding that in a criminal trial on the issue of sanity, the defendant must prove insanity by a preponderance of the evidence).

144. See *In re Dennis*, 51 Cal. 2d 666, 673–74, 335 P.2d 657, 661 (1959); *People v. Baker*, 42 Cal. 2d 550, 565, 268 P.2d 705, 714 (1954).

145. *In re Dennis*, 51 Cal. 2d at 674, 335 P.2d at 661.

146. See *In re Franklin*, 7 Cal. 3d at 141, 496 P.2d at 474, 101 Cal. Rptr. at 562.

147. See *id.* at 141 n.9, 496 P.2d at 474 n.9, 101 Cal. Rptr. at 562 n.9 (“[W]hen insanity has been adjudicated it is presumed to continue unless the contrary is shown.” (internal quotations omitted)); see also *In re Dennis*, 51 Cal. 2d at 669, 335 P.2d at 658 (finding evidence of prior insanity in hospitalization for schizophrenia).

148. See, e.g., *People v. Baker*, 42 Cal. 2d 565, 268 P.2d 714 (1954); 1 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW ELEMENTS § 16 (3d ed. 2000); W.E. Shipley, Annotation, *Presumption of Continuing Insanity as Applied to Accused in Criminal Case*, 27 A.L.R. 2d 121 (1953).

will be entitled to an instruction informing the jury of his insanity so that the jury may consider it when reaching its conclusion.<sup>149</sup>

### C. *The Effect of the Insanity Verdict*

One of the most misunderstood areas of the insanity defense is the effect of an insanity judgment. Because the effect of a guilty verdict is commonly understood to mean that the defendant will be punished accordingly, it does not require a great leap in logic to conclude that if a defendant is found guilty at the guilt phase and sane at the sanity phase, he should be convicted of the crime and sentenced.<sup>150</sup> Less clear, however, is what happens to a defendant who is found not guilty by reason of insanity.<sup>151</sup> What is a jury to make of a defendant whom they have found guilty, but who is not to be held responsible for his crimes? Section 1026 of California's penal code, which governs post judgment procedure, requires the defendant to be committed to an institution if he is found legally insane at the time of commission of a crime.<sup>152</sup> However, the jury may not know this. Television shows and films add to the confusion by depicting gleeful and devious defendants who use the insanity defense to "get off" or "beat the rap." It is a misconception that is popular with the entertainment industry: defendant commits a crime but successfully raises an insanity defense. But, defendant is no longer insane at the time of the trial . . . so defendant goes free! A jury that subscribes to this misconception might deliberately ignore evidence of a defendant's legal insanity in order to avoid releasing a violent criminal to walk the streets as freely as each juror.<sup>153</sup>

Jury misconception regarding the effect of an insanity judgment and its possible consequences were among the issues raised on

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149. *See id.*

150. *See* CAL. PENAL CODE § 1026(a) (West 1985 & Supp. 2003).

151. *See* *People v. Moore*, 166 Cal. App. 3d 540, 552, 211 Cal. Rptr. 856, 863 (1985).

152. *See* CAL. PENAL CODE § 1026(a). The fate of a defendant who is found insane at the time of the crime but is no longer insane at the time of trial is another matter entirely. *See infra* note 176.

153. *See generally* *Frontline: A Crime of Insanity*, (PBS television broadcast, (Oct. 17, 2002), available at <http://www.pbs.org/wgbh/pages/frontline/shows/crime> (discussing this problem generally and as it relates to New York state law)).

appeal by the defendant in *People v Moore*.<sup>154</sup> At trial, the defendant requested that the jury receive an instruction regarding the possibility that he would be institutionalized if they found him insane.<sup>155</sup> The trial court refused the defendant's request in part because the instruction offered by the defendant did not accurately reflect the law, and in part because the court reasoned that to instruct the jury on post judgment procedures would inappropriately "[focus] the juror's attention on [a] matter . . . [which] is certainly not [within] the function of the jury."<sup>156</sup>

On appeal, the defendant argued that the trial court's refusal unfairly prejudiced him.<sup>157</sup> Addressing the issue for the first time, the court of appeal agreed with the trial court. The court concluded: (1) that the role of the jury is to decide the facts that are put before it; (2) that the role of the court is to rule on issues of law; and (3) that the issue of punishment is a matter of law.<sup>158</sup> However, it also found that an exception to the general rule that juries should not be informed of the effects of judgments existed in the context of the sanity phase of a criminal trial.<sup>159</sup>

In justifying its conclusion, the court addressed three principal arguments against allowing an instruction of the type requested by the defendant: (1) as a general rule the jury is not concerned with a defendant's posttrial punishment, and to give such an instruction invites the jurors to speculate on matters beyond their province and perhaps return a compromise[d] verdict; (2) doubt that people in general are as ill-informed on postinsanity verdict disposition as [some courts have] assume[d]; and (3) the procedural aspects of requesting the instruction tend to give justice an "a la carte quality."<sup>160</sup>

In response to the first argument, the court reasoned that instructions on post verdict commitment proceedings are distinguishable from instructions on post verdict punishment. The latter address only the duration of a defendant's incarceration, while

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154. 166 Cal. App. 3d 540, 211 Cal. Rptr. 856 (1985).

155. *See id.* at 543, 211 Cal. Rptr. at 857.

156. *Id.* at 549, 211 Cal. Rptr. at 861.

157. *See id.*

158. *See id.*

159. *See id.* at 555–56, 211 Cal. Rptr. at 865–66.

160. *Id.* at 553, 211 Cal. Rptr. at 864 (citations omitted).

the former “pertain to the very nature of the defendant’s disposition—whether or not he will be detained and the circumstances of the detention.”<sup>161</sup> Thus, concerns underlying the prohibition on jury instructions relating to post verdict punishment should not apply with equal force to jury instructions relating to post sanity verdict proceedings.<sup>162</sup> The court further acknowledged that jurors, in fact, do consider the consequences of their verdict, despite prohibitions to the contrary.<sup>163</sup> The court posited that in light of this reality, and because instructions on post sanity verdict proceedings are distinguishable from those relating to punishment, a juror should know the general effect of a sanity or insanity verdict. Such knowledge should prevent false assumptions from swaying the jury’s deliberations in favor of a false determination of sanity.<sup>164</sup>

Turning to the second argument, the court noted that California’s post sanity verdict proceedings, as governed by penal code sections 1026(b)–1026.2, are highly complex and technical. The court also noted that “it is possible that at least some jurors are unaware of the postverdict disposition of an insane defendant.”<sup>165</sup> The court continued, “The very phrase ‘*not guilty* by reason of insanity’ itself could mislead some jurors to assume the defendant will walk free just as would an accused found not guilty for other reasons.”<sup>166</sup>

Finally, the court countered the third argument by deferring to the California Supreme Court, which had recently decided that an analogous instruction should be given upon request by the defendant or a juror.<sup>167</sup> In concluding that the instruction should be available when requested, the court balanced the possibility of imprisoning a

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161. *Id.*

162. *See id.* at 554, 211 Cal. Rptr. at 865.

163. *See id.* at 554, 211 Cal. Rptr. at 864.

164. *See id.* at 554, 211 Cal. Rptr. at 864–65.

165. *Id.* at 554, 211 Cal. Rptr. at 865.

166. *Id.* *But see* REZNEK, *supra* note 39, at 273 (stating that jury studies reveal that jurors who were not instructed as to the effect of an insanity verdict “assumed correctly that the defendant would be committed,” and arguing that effect-instructions do not effect the outcome of insanity trials).

167. *See Moore*, 166 Cal. App. 3d at 555, 211 Cal. Rptr. at 865. The instruction at issue in the guiding case, *People v. Ramos*, 463 U.S. 992 (1982), informed the jury that they should disregard the fact that the Governor might commute a sentence of death or life without parole.

defendant who did not deserve to be punished,<sup>168</sup> against the risk that when informed of the consequences of their verdict, the jury would shirk their responsibility to base its verdict solely on the evidence presented at trial.<sup>169</sup> Weighing these risks, the court found that the danger of improper imprisonment far outweighed that of inviting the jury to step outside their normal role.<sup>170</sup>

The court went on to suggest language to be used in the contemplated instruction.<sup>171</sup> California Jury instruction 4.01 is the codification of the court's holding in *Moore* and the instruction closely mirrors the language suggested by the court.<sup>172</sup> When requested by the defendant or a juror, the instruction informs the jury "a verdict of 'not guilty by reason of insanity' does not mean the defendant will be released from custody."<sup>173</sup> It further explains both that upon the return of such a verdict, the defendant will remain in confinement while the court determines whether the defendant is still insane, and that if the court finds the defendant's sanity has not been restored, the defendant will be hospitalized until the court determines the defendant's sanity has been fully recovered.<sup>174</sup> The instruction also tells the jury that the purpose of giving them such an instruction is to inform them of the "general scheme of [California's] mental health laws" so that they will not harbor any misunderstanding as to what will become of a defendant who is found not guilty by reason of insanity.<sup>175</sup> Finally, the jury is admonished not to consider any of what it has learned regarding the mental health laws, and that it must only decide whether the defendant was sane at the time of the commission of the acts with which he is charged, not whether he is sane at the time of the trial.<sup>176</sup>

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168. *See id.* at 555–56, 211 Cal. Rptr. at 866.

169. *See id.*

170. *See id.* at 556, 211 Cal. Rptr. at 866.

171. *See id.*

172. *See id.* at 556–57, 211 Cal. Rptr. at 866, CALJIC, *supra* note 21, no. 4.01.

173. CALJIC, *supra* note 21, no. 4.01.

174. *See id.* Interestingly, the instruction does not mention what happens if the defendant is found sane at the time of the verdict.

175. *Id.*

176. *See id.* For a more complete outline of confinement, reassessment of sanity, and terms of commitment, see CAL. WELF. & INST. CODE §§ 5000–5020.1 (West 1998 & Supp. 2003). For a detailed outline of restoration of

*D. Evidence: Expert Testimony vs. Folk Psychology*

As explained above, in order to successfully raise the insanity defense, a defendant must prove his insanity by a preponderance of the evidence.<sup>177</sup> This begs the question: What type of evidence would tend to convince a jury that the defendant was insane at the time of the crime?

Evidence of a defendant's insanity can be divided into two broad categories: (1) evidence that is presented to the jury in the form of expert testimony, which includes both medical diagnosis and opinion as to whether the defendant was sane at the time of the crime; and (2) evidence that the jury gleans from the facts and events surrounding the crime.<sup>178</sup> The latter form of evidence can be called "folk psychology," in that it enables a layperson to make a diagnosis of the defendant's mental condition at the time of the crime.<sup>179</sup> For example, evidence that a defendant hid a body where it could not easily be found suggests that he did not wish to be blamed for the murder, which in turn suggests that he knew the killing was wrong. As knowledge of wrongfulness precludes legal insanity, the body-hiding behavior would allow a jury to determine that the defendant was not insane when he killed.

Although psychiatric evaluations that lead an expert to conclude that the defendant was insane at the time of his illegal act may be valuable, it would be a mistake to say that evidence of this kind always sways a jury. Indeed, a jury could feasibly find a defendant sane despite unanimous expert testimony to the contrary.<sup>180</sup> In such a case, the jury has likely based its finding on common sense notions of insane behavior—or, stated another way, folk psychology.

As surprising as the above scenario may be, it is permitted by the nature of the role of expert testimony in an insanity proceeding.

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sanity proceedings, see *People v. Sword*, 34 Cal. App. 4th 614, 29 Cal. Rptr. 2d 810 (1995).

177. See *supra* Part X.B.4.

178. See generally *People v. Coddington*, 23 Cal. 4th 529, 2 P.3d 1081, 97 Cal. Rptr. 528 (2000); *People v. Skinner*, 185 Cal. App. 3d 1050, 228 Cal. Rptr. 652 (1985) (both discussing expert testimony as well as other types of evidence on which a jury might reasonably base a finding of sanity).

179. See REZNEK, *supra* note 39, at 287.

180. See, e.g., *People v. Lawley*, 27 Cal. 4th 102, 132, 38 P.3d 461, 483, 115 Cal. Rptr. 2d 614, 640; *People v. Skinner*, 185 Cal. App. 3d at 1059, 228 Cal. Rptr. at 658.

California courts have explained that expert testimony should be persuasive only if the jury believes that the underlying basis for the expert's conclusions is reliable and convincing.<sup>181</sup> In other words, it is not so much the opinion itself that is important, but the material on which the opinion is based and the analysis that leads to the conclusion.<sup>182</sup> Thus, if the jury does not accept the basis for an opinion as convincing or reliable, it need not give much weight to the expert's opinion. For example, a jury might conclude that the expert's examination of the defendant was insufficient,<sup>183</sup> or that the psychiatrist overlooked alternative explanations for the defendant's behavior,<sup>184</sup> or even that the psychiatrist was fooled by a malingering defendant.<sup>185</sup>

Although enlightening and potentially persuasive, expert testimony is arguably not even necessary to a determination of sanity because common sense may be all that a jury needs to render a verdict in an insanity proceeding. California courts have acknowledged that where the defendant's behavior betrays knowledge of wrongfulness, a jury can reasonably find a defendant sane despite expert opinion to the contrary. For example, in *People v. Skinner*, the court of appeal upheld the trial court's determination that the defendant was sane at the time he killed his wife in part because it found that the defendant's behavior after the killing supported the jury's conclusion that he was sane.<sup>186</sup> In particular, the court noted that after the killing, the defendant changed his bloodstained clothes and made statements to the police

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181. See *Lawley*, 27 Cal. 4th at 132, 38 P.3d at 483, 115 Cal. Rptr. 2d at 640; *Skinner*, 185 Cal. App. 3d at 1059, 228 Cal. Rptr. at 658.

182. See *id.*

183. See *Skinner*, 185 Cal. App. 3d at 1060, 228 Cal. Rptr. at 658 (explaining the jury's apparent determination that expert conclusions were "somewhat speculative" because one psychiatrist did not interview the defendant until six months after the crime).

184. See *People v. Coogler*, 71 Cal. 2d 153, 167, 454 P.2d 686, 694, 77 Cal. Rptr. 790, 798 (1969) (noting that the defendant may not have shot the victims because he was insane, but because he wished to avoid identification). However, *Coogler* is not an insanity case—it deals with the analogous determination of the defendant's diminished capacity.

185. See *People v. Coddington*, 23 Cal. 4th 529, 583, 2 P.3d 1081, 1127, 97 Cal. Rptr. 528, 579 (1985) (suggesting that the jury could find that the defendant lied during his psychological evaluation, and that the expert's assumption was based, at least in part, upon that lie).

186. See *Skinner*, 185 Cal. App. 3d at 1061, 228 Cal. Rptr. at 659.

demonstrating not only his remorse for the act, but also his understanding that what he had done was wrong.<sup>187</sup>

Similarly, in *People v. Coddington*, the Supreme Court of California affirmed the trial court's holding that the defendant was legally sane when he killed two women and raped two adolescent girls.<sup>188</sup> Again, the affirmation was based in part on the court's conclusion that the jury was justified in relying upon evidence of the defendant's behavior immediately prior to the crime, rather than on expert testimony that he was insane.<sup>189</sup> Like Skinner, Coddington betrayed his knowledge of the wrongfulness of his act in his choice of wardrobe—he donned a series of disguises to conceal his identity, both immediately prior to and during the crime.<sup>190</sup> Furthermore, Coddington planned extensively before initiating contact with his victims, presumably to avoid detection and apprehension.<sup>191</sup>

Clearly, both folk psychology and expert testimony play an important role in comprising the evidence a defendant must produce to succeed on an insanity defense. It would be wise, therefore, for a defendant not to rely too heavily on psychiatric testimony if, when he committed the crime, he behaved in a manner that would allow a jury to make a common sense determination that he was sane.

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187. *See id.*; *see also supra* Part X.A.3 (discussing the wrongfulness prong of the test for insanity).

188. *Coddington*, 23 Cal. 4th at 547, 2 P.3d at 1103, 97 Cal. Rptr. at 553.

189. *See id.* at 584–85, 2 P.3d at 1128, 97 Cal. Rptr. at 580.

190. *See id.* at 551, 2 P.3d at 1106, 97 Cal. Rptr. at 556.

191. *See id.* at 547, 2 P.3d at 1104, 97 Cal. Rptr. at 553.