SUSAN BANDES*

Developments in the Insanity Defense

Introduction

John Hinckley's attempted assassination of President Reagan—and subsequent acquittal by reason of insanity—have led to a national debate on the reform or even abolition of the insanity defense. This article will give a brief history of its evolution, and outline proposed changes and their implications.

Criminal laws are based on the idea that individuals make rational choices, including the choice to do good or evil. In more modern terms good or evil becomes right or wrong. The individual is assumed capable of conforming conduct to the public morality, as embodied in our system of criminal laws. If he chooses to do wrong, he deserves punishment.

The criminal law established minimum requirements for acceptable conduct in society. These requirements, at least in theory, are defined with relative precision to promote equal application. Included in the definition of every crime is the element of *mens rea*. That is, the accused, to be convicted, must possess a guilty mind.

This requirement is narrowly interpreted. To possess the *mens rea* for the crime of murder, one must have intended to pull the trigger and kill someone. The *mens rea* for theft requires that the accused intended to take a loaf of bread. His hungry children are irrelevant to this issue of guilty mind.

However, if the individual is incapable of rational choice, he does not deserve punishment. If he killed because his own life was threatened, the law does not consider this killing a rational choice between good or evil. It exonerates him. Likewise, if he steals because another is holding a gun to his head, he is not punished as one who made a rational choice to flaunt the public morality. Under the law, these people lacked the guilty mind which deserves punishment.

These exceptions—duress, coercion, self-defense, and others such as involuntary intoxication—are said to be measurable by objective standards. Although factual disagreements may occur, concepts such as whether one was reasonably in fear for his life are thought capable of proof.

*Ms. Bandes is currently staff counsel for the American Civil Liberties Union, Illinois Division, where, in addition to litigating constitutional issues, she lobbies in the state legislature. On behalf of the ACLU she has lobbied and testified against several bills aimed at revising the insanity defense.

Appropriateness of Punishment

Generally, the appropriateness of punishment cannot be determined by considering the actual personal unworthiness of the accused person. Oliver Wendell Holmes, in *The Common Law,* said:

> If punishment stood on this ground, the first thing to be considered would be those limitations in the capacity for choosing rightly which arise from abnormal instincts, want of education, lack of intelligence and all the other defects which may be associated with criminality.[1]

He wrote that the tests of criminal liability are independent of the degree of evil in the particular person's motives or intentions, and the legal standards take no account of incapacities, but assume that every man is as able as every other to behave as they command. He noted that the well-known exceptions to this assumption are infancy and madness.[2] The creation of the juvenile courts has rendered the infancy exception obsolete. Madness is the topic addressed herein.

The law recognizes that one who is incapable of grasping the reasons society considers his act wrong or incapable of controlling his actions to comply with the law should not be judged criminally responsible for those acts. The insanity defense represents one of the few individualized excuses in the field of criminal liability. It recognizes that none of the purposes of punishment would be served by punishing the individual incapable of rational choice because of mental illness.

Purposes of Punishment

The purposes of punishment are usually recognized as rehabilitation, deterrence, protection of the public from dangerous individuals and retribution. None of these purposes is fulfilled when one who is truly not responsible for his acts is punished as a criminal.

No rehabilitative function is served when the mentally incompetent are placed in prisons rather than in institutions specifically designed to treat them.

No deterrence is achieved, since those who cannot restrain their conduct are by definition undeterrable and their imprisonment cannot serve as an example to other individuals who may be contemplating crime.

Therefore the only benefit that comes from putting a mentally incompetent individual in a prison, rather than confining him in a hospital, is retribution. In such

a case it is a punishment that seems not at all just. It has been said that to imprison the truly incompetent is nothing but sadistic revenge. And Francis Bacon said: "Revenge is a kind of wild justice which the more man's nature runs to, the more ought law to weed it out."[3]

Development of the Insanity Defense

As long as there has been law there has been some concept of justice. Before psychiatry existed ideas of justice dictated that behavior be evaluated in terms of the intention giving rise to it. The commandment "Thou shalt not kill" became "Thou shalt not kill except in the defense of life, country, home, ideals."[4]

The focus on moral capacity is an attempt to reserve criminal sanctions for those who not only commit a blameworthy act but do so with a blameworthy state of mind. Sorting the blameworthy from the nonblameworthy offender has always been the central function of the insanity defense.

Earliest Tests

One of the tests of insanity articulated in 1582, in England was: "Whether a man or a natural fool or a lunatic in the time of his lunacy, or a child who apparently has no knowledge of good or evil committed the act." An act committed by such a person could not be considered felonious because the offender "cannot be said to have any understanding will."[5]

England devised a new test in 1724 excluding the accused from punishment where "[h]e doth not know what he is doing no more than a wild beast."[6]

In the late seventeenth and early eighteenth centuries the definition of insanity was subject to widespread belief in witchcraft as a source of mental disorders, to the beliefs of phrenologists that the brain was divided into thirty seven separate regions, each with a unique mental function, and to the concept of monomania—the idea that one insane idea could predominate over other normal cognitive processes.[7]

The M'Naghten *Rule*

Then in the 1850s Daniel M'Naghten killed the private secretary to Sir Robert Peel, in an unsuccessful attempt on the prime minister's life. At trial, the defense showed that M'Naghten suffered delusions that he was being persecuted by many people, including the prime minister. The defense relied on Dr. Isaac Ray's *Medical Jurisprudence of Insanity* (1838) which criticized phrenology, monomania and early definitions of incompetency based solely on whether the accused could tell right from wrong.

The court was very impressed with the reasoning of the defense, especially the argument that a defect in one aspect of the personality could spill over and affect other areas. M'Naghten was acquitted.

In one of the many parallels to the *Hinckley* case, M'Naghten's verdict caused a huge outcry. The Queen asked the House of Lords to review the matter, and they then repudiated the approach which led to M'Naghten's acquittal and announced instead the test of ability to tell right from wrong, entitled, ironically, the *M'Naghten* Rule, which reads:

> Every person is presumed sane, and to be found not guilty by reason of insanity, a defendant must establish that at the time of the act he suffered from such a defect of reason from disease of the mind such that he did not understand the nature of the act or that it was wrong.[8]

This test is still the rule in England and in twenty U.S. jurisdictions. Its critics say that it is based on early, erroneous concepts of mental illness, and that it limits psychiatric testimony to the defendant's ability to *know* right from wrong, resulting in punishment of individuals who cannot control their actions. M'Naghten himself would not have been acquitted under it, delusional though he was. A person killing another could not be found insane, though he thought the devil had possessed him and forced him to kill, as long as he knew he was shooting at a person and not a cabbage.[9]

Its supporters say that the ability to know right from wrong, the issue of cognitive impairment, is the only answerable question. Professor Bonnie, of the Institute of Law, Psychiatry and Public Policy at the University of Virginia, says that when the experts and the jury are asked to speculate whether the defendant had the capacity to control himself, the risk of fabrication or moral mistake is too great.[10] He says:

> [T]he inevitable result is unstructured clinical speculation regarding the "causes" of criminal behavior in any case in which a defendant could be said to have a personality disorder or an impulse disorder. For example, . . . the insanity defense is not supposed to be a ground for acquittal of persons with weak behavior controls who misbehave because of anger, jealousy, fear or some other strong emotion. . . . Many crimes are committed by persons who are not acting "normally" and who are emotionally disturbed at the time. . . . But this is not what the law means, or should mean, by "insanity." To prevent mistaken applications of the defense in such cases, I would abolish the "control" test.[11]

The Irresistible Impulse Test

The first attempt to reform the *M'Naghten* Rule was the irresistible impulse test, which excused those committing crimes because of an irresistible impulse. The obvious problem with this test was its arbitrary distinction between actions resulting from a sudden, explosive fit and those produced by other mental disorders.[12]

The Durham *Rule*

Then in 1954 Judge Bazelon of the District of Columbia Court of Appeals formulated the *Durham* Rule, which holds that a defendant is not criminally responsible if his unlawful act was the product of a mental disease or defect.[13]

The *Durham* Rule was an effort by the court to correct two serious problems with the right/wrong and irresistible impulse tests. At the time, most progressive social thinkers considered it a major advance.

The right/wrong language was felt to be antiquated,

no longer reflecting the community's judgment of who ought to be held responsible for socially destructive acts. The *Durham* Rule was considered a more accurate reflection of the sensibilities of the community in light of expanded knowledge of abnormal human behavior.

The new rule was also meant to deal with the concern of psychiatrists called as expert witnesses for their special knowledge of the problem of insanity, who often felt they were obliged to reach outside of their professional expertise when asked whether the defendant knew right from wrong. Psychiatrists further felt that the narrowness of the right/wrong test made it impossible to convey to the judge and jury the full range of information needed to assess the defendant's responsibility.[14]

The *Durham* Rule was devised to facilitate the giving of testimony by medical experts in the context of a legal rule, with the jury called upon to reach composite conclusion with medical, legal and moral components.

However, it was criticized for opening the door to "trial by label," since it failed to explain that abnormality of mind was an essential ingredient to the concepts of disease or defect. In the absence of any legal definition, medical experts naturally would attach the medical meanings which occurred to them.

A well-known example of the trial by label pitfall mentioned in *United States v. Brawner*[15] was the so-called weekend flip flop case. On a Friday a psychiatrist from St. Elizabeth's Hospital testified at a trial that a person with a sociopathic personality was not suffering from mental disease. On Monday morning a policy change at St. Elizabeth's determined administratively that a sociopathic personality did constitute a mental disease.

Dr. Willard Gaylin in *The Killing of Bonnie Garland,* discusses the problem further. He notes that at the time the *Durham* Rule was formulated, the standard diagnostic headings of the American Psychiatric Association were contained in the *Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association,* first edition (1952), referred to as DSM-I. These included homosexuality, alcoholism, drug addiction, sexual deviation and psychophysiological gastrointestinal reaction. He notes first that many of the diagnostic headings have been relabeled, or, as in the case of homosexuality, delisted. He also notes that it would be absurd to say that any act which was a product of, for example, drug addiction, or heartburn, should be nonculpable.[16]

The *Durham* test contemplated that the jury would have the guidance of wider horizons of knowledge from the medical experts than permitted under *M'Naghten,* but would ultimately perform its traditional function to apply community ideas of moral responsibility to the accused. Instead, the test seemed to lead to undue dominance by the experts. This dominance arose from the fact that there was no generally accepted understanding by the jury, the community, or the medical experts of the concept that the crime be the product of a mental disease. Thus the medical expert tended to use concepts which did not convey information to the jury, but were the expert's own conclusions about the defendant's criminal responsibility.

The ALI Test

The next attempt to redefine the insanity defense was the test adopted by the District of Columbia in 1966. This was the test proposed by the American Law Institute, which said:

> A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.[17]

This is the test accepted by the majority of jurisdictions. It is also the federal test applied in John Hinckley's case.

Under this test, a person whose perceptual capacities were so intact that he had the criminal intent required in the definition of the offense can still be found not guilty by reason of insanity if, because of mental disease or defect, he *either* could not understand the legal or moral significance of his actions *or* could not conform his conduct to the requirements of the law.

This approach was hailed as conforming to the modern view of the mind as a unified entity whose functioning may be impaired in numerous ways. It recognizes that one may know what he is doing but be driven to crime by delusions, fears or compulsions.

It is also to retain a meaningful connection between the mental illness and the incident charged, and to permit communication between lawyers, judges, experts and the jury, without allowing expert dominance over the jury's function.[18]

This is the state of the law under which John Hinckley was acquitted by reason of insanity.

Burden of Proof

One of the more controversial aspects of the Hinckley trial was the placing of the burden of proof on the prosecution to rebut Mr. Hinckley's affirmative defense of insanity. Many in the criminal justice community feel this led to his acquittal.

In all jurisdictions, the prosecution must prove all elements of the crime charged beyond a reasonable doubt. So for example, the prosecution had the burden of proving that Hinckley had the specific intent to kill Ronald Reagan, since specific intent to kill is an element of the crime of attempted murder. This burden of proving all elements of the crime is a constitutional requirement, inherent in the guarantee of due process of law.

The confusion arises when the prosecution has proved its *prima facie* case of attempted murder, and the defense then raises an affirmative defense of insanity. An affirmative defense is a legally sufficient justification for a defendant's behavior, even if that behavior would otherwise warrant conviction. Under current federal law, once the defense has raised a reasonable doubt of his sanity at the time of the crime, the burden of persuading the jury shifts to the prosecu-

tion, who must prove beyond a reasonable doubt that the defendant was sane.

Many of the proposals to reform the insanity defense include shifting the burden of proving an affirmative defense of insanity to the defendant.[19] Many U.S. jurisdictions, and England, already place this burden on the defense.[20]

The legal questions raised are complex, and unresolved. The most obvious one is that it is often difficult to separate the proof of the mental state required for conviction of a crime in the first instance, for example intent to kill, from the mental state constituting insanity. Where lack of sanity negates an essential element, such as criminal intent, the constitution seems to require the burden of proof to be on the prosecution.

Guilty but Mentally Ill

Another reform widely proposed has been the verdict of guilty but mentally ill, which has been adopted in eight states.[21] The impetus for this reform was a public perception that defendants found not guilty by reason of insanity were beating the system and returning to society without paying for their crimes.

Guilty but mentally ill was touted as a compromise verdict. It creates a nebulous middle ground in which the defendant is found mentally ill, but not to the extent that it negates his guilt of the crime charged. The jury is led to believe that by bringing in this verdict, it will insure that the convicted person is given psychiatric treatment until cured, and then sent to prison for the remainder of his term.

There are two fallacies here. One is that present state laws generally provide that anyone convicted and sentenced must receive a psychological evaluation and medical care if appropriate. Thus those found guilty but mentally ill would receive no special treatment in this regard. The actuality, of course, is that rarely did state legislatures appropriate any funds to implement the new verdict. Thus the same psychiatric facilities which were woefully inadequate before were expected to provide medical care to this new class of prisoners as well.

The second fallacy of the guilty but mentally ill verdict is more basic. It makes no sense for commitment procedures to be triggered by a jury verdict which does not even relate to the defendant's present mental condition. The jury just confront the issue of the defendant's criminal responsibility. A compromise verdict in these circumstances is illogical.

Decisions on placement of convicted offenders should be made after, and independent of, the decision on conviction, and be based solely on the offender's need for therapeutic restraint.

Published studies of Michigan's guilty but mentally ill verdict, and preliminary statistics from Illinois, indicate that those being found guilty under this verdict would have been found guilty in any case, and are not people who would have been found not guilty by reason of insanity.[22]

For the jurisdictions in which guilty but mentally ill is the law, there may be ways to improve it. Michigan has established procedures to insure that psychiatric evaluations of convicted defendants are not merely meaningless rituals, but are binding on judges, who must transfer defendants found guilty but mentally ill to the Michigan State Mental Health Department. Michigan also requires the state to commit necessary resources to house and treat those recommended for psychiatric supervision.

Uses of Expert Testimony

Another series of proposals for reform focuses on not allowing psychiatrists to testify for ultimate legal conclusions.[23] This approach is theoretically correct but perhaps practically impossible. The law has always contemplated that psychiatric experts would explain the origin, development and manifestations of mental disorders, in terms meaningful and coherent to the jury. The jury would then apply the law, and its own ethical and moral sense.

However, it may be a difficult line to draw, where questions such as whether the defendant possessed substantial capacity to appreciate the criminality of his conduct are raised. It may be difficult for the expert to give his opinion of the defendant's behavior and how it manifests itself, yet stop short of concluding whether it impaired his capacity to control himself. There may, though, be safeguards courts can employ, such as better instructing juries on how to appraise psychiatric testimony, and on the fact that the expert is only giving an opinion. The jury might also be instructed on the precise judgment the court expects concerning the defendant's mental capacity. The jury must not ignore the increased knowledge of the workings of the mind psychiatry provides, but must not abdicate its responsibility to decide whether the defendant should be held legally and morally accountable for his acts.

Abolition of the Insanity Defense

The most radical proposal for reform is the abolition of the insanity defense. Two states, Idaho and Montana, have adopted this approach. It provides that a psychotic person cannot escape liability by proving that he did not know or appreciate the fact that his conduct was wrong. Only if he lacks the narrow intent to commit the crime can he be exculpated.

A similar proposal has been advanced by President Reagan on the federal level. It is part of the Criminal Justice Reform Act of 1982. It virtually eliminates the insanity defense. It was explained by an assistant to Attorney General Smith as follows:

> Under the proposed legislation a person could be found not guilty by reason of insanity only if he had the mental age of a two-year-old or were so paranoid that he believed he was shooting at a house instead of a human being.[24]

This would put the law of criminal responsibility somewhere between 1582 and 1724, back into the age of "[h]e doth not know what he is doing no more than a wild beast."

Under these proposals the law would be unable, for lack of an independent insanity defense, to take adequate account of the incapacitating effects of severe mental illness. Some psychotics may have intended to

do what they did, but were so severely disturbed that they could not do otherwise, or could not appreciate the significance of their acts.

Professor Bonnie gives the example of a woman, acutely psychotic and out of touch with reality, who shot her aunt thinking her possessed by the devil.[25] She knew she was shooting a human being. Although she was delusional and thought she was defending herself against imminent annihilation at the hands of the devil, this was certainly not a reasonable fear. Thus, she possessed the required intent for homicide. Without the insanity defense she would be found guilty under the law. The legal issue of intent relies on equal application of minimum standards of acceptable conduct in society. It takes no account of incapacities, such as this woman's.

Yet to convict her would signify a societal judgment that she deserved to be punished. This would offend the basic moral sense of the community: thus the verdict of not guilty by reason of insanity exists. It is an individualized exception to equal application of the law, a safety valve for claims of severe mental impairment.

Conclusion

The evolution of the insanity defense represents a continuing struggle to incorporate expanding medical knowledge into our system of laws. Some argue that this is an impossible task: that the legal premise of focusing on individual responsibility to establish fault is incompatible with the psychiatric goal of understanding and threating mental disorders. Such difficulties should not be used to undercut or abolish the insanity defense, which reaffirms society's unwillingness to punish those who need treatment, not punishment.

Footnotes

1. OLIVER WENDELL HOLMES, THE COMMON LAW, 1881, cited in testimony of Professor Richard J. Bonnie to the National Conference of State Legislatures, July 28, 1982, at 2.
2. *Id.*
3. Kaufman, *The Insanity Plea on Trial,* N.Y. Times, Aug. 8, 1982, (Magazine), at 17.
4. W. GAYLIN, THE KILLING OF BONNIE GARLAND, New York: Simon & Schuster, Inc. (1982).
5. Kaufman, *supra* note 3.
6. *Id.*
7. *Id.*
8. 10 Clark F. 200, 2 Eng. Rep. 718 (H.L. 1843).
9. Kaufman, *supra* note 3.
10. Bonnie, *supra* note 1, at 13.
11. *Id.* at 14.
12. Smith v. United States, 36 F.2d 548 (D.C. Cir. 1929).
13. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
14. United States v. Brawner, 471 F.2d 969, 976 (D.C. Cir. 1972).
15. *Id.* at 978, citing *In re Rosenfield,* 157 F. Supp. 15 (D. D.C. 1957).
16. GAYLIN, *supra* note 4.
17. *See supra* note 14.
18. *Id.*
19. The House of Delegates of the American Bar Association, in its February 1983 meeting, endorsed shifting the burden to the defendant to prove insanity by a preponderance of the evidence, 51 U.S.L.W. 2476, Feb. 15, 1983.
20. The following states place the burden on the defense to rebut the presumption of sanity by a preponderance of the evidence: Alabama, Arkansas, California, Delaware, Georgia, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, Nevada, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Virginia, Washington, West Virginia, and District of Columbia. *See,* Burger, *Due Process and the Insanity Defense: The Supreme Court's Retreat from* Winship *and* Mullaney, INDIANA L.J. at 97-98 (1978).
21. Michigan, Indiana, Illinois, Alaska, Georgia, New Mexico, Delaware and Kentucky.
22. Grostic, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict,* MICH. J.L. REFORM, Fall at 197-98, (1978).
23. The American Psychiatric Association, Statement on the Insanity Defense, published January 1983, position paper, endorsed this approach, reasoning that "determining whether a criminal defendant was legally insane is a matter for legal fact finders, not for experts."
24. *Reagan Offers Reform Bill to Tighten Rules on Criminal Defendants,* N.Y. Times, Sept. 14, 1982, at ____.
25. Bonnie, *supra* note 1, at 10.

GET INVOLVED
PURSUE YOUR INTERESTS

DIVISION SPECIAL COMMITTEES

Further your professional goals by becoming a member of a Young Lawyers Division committee. To be appointed to at least one of the committees of your choice for the coming bar year, just complete this form and return it by August 19, 1983 to ABA Headquarters.

5007 Alternate Dispute Resolution
1030 Animals and the Law
1040 Antitrust Committee
1045 Arson Project
1050 Associate Training Program
1055 Attorney Impairment Project
1085 Career Dissatisfaction*
1090 Career Planning and Placement
2000 Child Advocacy and Protection
2010 Citizenship Education
2040 Corporation, Banking and Business Law
2042 Crime Victim Services*
2045 Criminal Justice Project
2075 Delivery of Legal Services to the Disabled
2070 Delivery of Legal Services to the Elderly
2060 Delivery of Legal Services to the Hearing Impaired
2080 Delivery of Legal Services to Women
2090 Disaster Legal Services
2095 Enivironmental Law
3000 Explorer Law
3010 Federal Practice
3020 Health Care Law
3030 Housing, Codes and Urban Affairs
3025 Human Rights
3043 Inmate Grievance
3044 Interest on Lawyers Trust Accounts*
3045 International Lawyers
3060 Issues Affecting the Legal Profession
3070 Judicial Improvement
3090 Juvenile Justice
4000 Labor Law
4020 Law and Media
4040 Lawyers and the Arts
4050 Legislative Action Program
4080 Membership
4090 Military Service Lawyers
5000 Minorities in the Profession
5005 National Community Law Week
5010 Patent, Trademark and Copyright Law
5012 Pre-Law Counselling*
5014 Private Attorney Involvement*
5015 Pro Bono and Delivery Projects
5025 Public Utility Law
3040 Refugee Legal Assistance Project
5030 Securities Law
2020 Sentencing Alternatives
5050 Tax Law
5060 Town Hall Programs
5080 Young Lawyer Economics*

*Denotes new committees for the 1983-84 bar year.

COMMITTEE PREFERENCE FORM

NAME _____
(Please type or print legibly)

ADDRESS _____

_____

DATE OF BIRTH _____

Office Telephone ☐☐☐-☐☐☐-☐☐☐☐

ABA Enrollment Date _____

ABA Membership Number _____
(If known)

Date _____

Return completed form to:
ABA Young Lawyers Division
1155 E. 60th Street, Chicago, IL 60637

1. What are your first, second, and third choices for committee membership? ENTER 4-DIGIT COMMITTEE CODE.

first	second	third
☐☐☐☐	☐☐☐☐	☐☐☐☐
61/64	65/68	69/72

2. Which of the following best describes your current primary position? INDICATE ONE ANSWER.

Private Practice ☐ 11/1
Corporate Counsel ☐ 2
Government ☐ 3
Military ☐ 4
Professor ☐ 5
Judge ☐ 6
Other: Please Specify

_____ ☐ 7

_____

3. If in private practice, how large is the firm?

Solo practice ☐ 12/1
2-3 lawyers ☐ 2
4-9 lawyers ☐ 3
10-30 lawyers ☐ 4
More than 30 ☐ 5
Not Applicable ☐ 6

4. What experience have you had in state or local bar association work? CHECK MOST APPLICABLE CODE.

Leader/Committee Chair of state or local bar ☐ 13/1
Active member ☐ 2
Inactive member ☐ 3
Not a member ☐ 4

5. Do you belong to any other ABA sections?
Yes ☐ 14/1 No ☐ 14/2

6. What projects would you like to see the committee(s) you have selected undertake?

a. _____ ☐ 15/1

b. _____

c. _____

d. no response ☐ 15/2

7. How much time are you willing to spend on committee work?

16+ hours per month ☐ 16/1
6-15 hours per month ☐ 2
5 hours per month ☐ 3
Occasional contribution ☐ 4
No time, Inactive membership ☐ 5