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THE INSANITY DEFENSE: HISTORY AND PROBLEMS

JAMES F. HOOPER, M.D.*

The insanity defense has stirred more emotions than almost anything in criminal law except the death penalty, and yet it is very rare. Most studies have found that less than 0.5% of trials lead to insanity acquittals.¹ Why has this happened?

One part of the answer is that many people have little knowledge of mental illness. If they cannot see it, then they doubt its existence. No one argues that there is a difference in a planned action and an accident; indeed, the statement, "It was an accident!" is a statement that every parent has spontaneously heard from their children. If a person is ill in such a way that they misunderstand events and act not out of malice but rather from incorrect information, they are generally seen as being either not responsible or responsible at a much lower level.

The confusion around insanity grows from the very culture of Judeo-Christian Western Civilization. All of our legal history has dealt with issues of responsibility. The Christian *Bible* discusses from the very beginning Adam and Eve's ability or inability to know right from wrong.² How this would be determined is unknown, except that presumably God could not make an error.

In *Exodus*, the issue is intent, with lack thereof being an exception. "Anyone who strikes a man and kills him shall surely be put to death. However, if he does not do it intentionally, but God lets it happen, he is to flee to a place I will designate."³ Intentionality is not defined, but is left up to the courts.

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1. See, e.g., Ira Mickenberg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 968 (1987).

2. *Genesis* 3:22 (New Int'l).

3. *Exodus* 21:12-13 (New Int'l).

Even in *First Samuel* the story speaks of lack of responsibility:

The next day an evil spirit from God came forcefully upon Saul. He was prophesying in his house, while David was playing the harp, as he usually did. Saul had a spear in his hand and he hurled it, saying to himself, "I'll pin David to the wall." But David eluded him twice. Saul was afraid of David, because the LORD was with David but had left Saul.⁴

Here, God apparently sends evil spirits to cause insanity, but modern theology would more likely attribute the evil to the work of the Devil.

In the same book of *First Samuel* the issue of feigned insanity is discussed:

David took these words to heart and was very much afraid of Achish king of Gath. So he feigned insanity in their presence; and while he was in their hands he acted like a madman, making marks on the doors of the gate and letting saliva run down his beard.⁵

In this context, insanity is therefore defined as drooling and writing incoherently.

But insanity is also discussed as a punishment from God:

However, if you do not obey the LORD your God and do not carefully follow all his commands and decrees I am giving you today, all these curses will come upon you and overtake you

. . . .

. . . The LORD will afflict you with the boils of Egypt and with tumors, festering sores and the itch, from which you cannot be cured. The LORD will afflict you with madness, blindness and confusion of the mind. At midday you will grope about like a blind man in the dark. You will be unsuccessful in everything you do; day after day you will be oppressed and robbed, with no one to rescue you.

You will be pledged to be married to a woman, but another will take her and ravish her. You will build a house, but you will not live in it. You will plant a vineyard, but you will not even begin to enjoy its fruit.⁶

Therefore, the operational definition of insanity used in *Deuteronomy* equated mental illness with blindness, ineffectiveness, and lack of consortium.

In summary, it is easy to see why persons brought up on the Old Testament can be confused about insanity and responsibility; the *Bible* not only includes statements that a murderer must be executed, but also that mental illness can be malingered, sent as a punishment from God, and seen as both a cause and excuse for evil deeds.

4. 1 *Samuel* 18:10-12 (New Int'l).

5. 1 *Samuel* 21:12-13 (New Int'l).

6. *Deuteronomy* 28:15, 27-30 (New Int'l).

By the time of Aristotle, the definition of insanity could be operationalized but only in terms of morality. “A person is morally responsible if, with knowledge of the circumstances and in the absence of external compulsion, he deliberately chooses to commit a specific act.”⁷ This encompasses most of modern law in one sentence: needs “knowledge of circumstances” plus no external force, plus choosing to commit an act known to be forbidden.⁸ How one tells that a person has deliberately chosen a forbidden act is unknown.⁹

Plato’s Laws also dealt with Insanity:

[I]n a state of madness[,] . . . or of extreme old age, or in a fit of childish wantonness, . . . [I]f this be made evident to the judges, . . . [the defendant] shall simply pay for the hurt . . . but he shall be exempt from the other penalties, unless he have slain some one, . . . And [then] he shall go to another . . . country . . . for a year . . .¹⁰

Of Course, madness and wantonness are not defined.¹¹

One of the most often quoted passages from the *Bible* comes from the New Testament and involves knowledge of right and wrong: “Father forgive them, for they do not know what they are doing.”¹² Spoken by Christ in reference to the Roman soldiers who were killing Him. Strictly speaking, however, they lacked the capacity to appreciate the magnitude of their crime. If they had truly known they were killing the Son of God, they would be culpable. This is a mistake of fact. If they did not know what they did due to mental illness, that would be an insanity defense.

In a diseased state well known to both attorneys and physicians, Paul was accused of being insane: “At this point Festus interrupted Paul’s defense. ‘You are out of your mind, Paul!’ he shouted. ‘Your great learning is driving you insane.’ ‘I am not insane, most excellent Festus,’ Paul replied. ‘What I am saying is true and reasonable.’”¹³ Here, we have insanity based on disagreement with the statements of another and a presumption that great learning caused the condition.

Judaism shares the Old Testament with Christianity, but also has the *Talmud*. Here, among others, insanity is defined as being out of touch with God’s reality. “No person sins until a spirit of insanity enters him.”¹⁴

7. George Seiden, *Psychiatric Testimony and the Insanity Defense: One Psychiatrist’s Perspective*, LA. B. J. 258, 258 (Oct. 1997).

8. *Id.*

9. *Id.*

10. Plato, LAWS, Book IX (Benjamin Jowett trans.) (360 B.C.), available at <http://classics.mit.edu/Plato/laws.9.ix.html> (last visited May 27, 2006).

11. *Id.*

12. *Luke* 23:34 (New Int’l).

13. *Acts* 26:24-26 (New Int’l).

14. *Talmud* (Sota 3a).

It is therefore easy to understand why the lay people of the United States are confused about insanity and its role in the law.

The average layperson objects to the insanity defense because he or she perceives that it allows violent criminals to escape justice. When polling graduate students, I often hear guesses that 25-30% of all criminal proceedings lead to the insanity defense. The truth, as mentioned above, is less than half of 1% of trials actually lead to insanity as exculpation.¹⁵ Paradoxically, a highly publicized murder (for example, Andrea Yates who drowned all her children in Texas) will almost certainly go to trial and also present a steep, up-hill battle for an insanity defense. Addicts with a history of mental illness and a minor crime are almost a de facto not guilty by reason of insanity (“NGRI”) acquittal.

One great argument *against* the insanity defense comes from psychiatrists who feel that the State has an obligation to treat mentally ill offenders who are in prison and that by separating out those who are NGRI allows the various prisons to ignore those inmates who were deemed by the courts to not be all that ill. Most recent studies have shown prisons to have between half and three-fourths of their inmates with some level of mental illness¹⁶ and are woefully under funded in the area of mental health care.¹⁷ Therefore, the issues that spurred the *Wyatt v. Aderholt*¹⁸ litigation of three decades ago have been moved to the criminal justice system, and the patients now live under bridges and in the streets.

District attorneys make decisions about winning a case and agree to a plea when they feel it is a viable alternative to a trial, with all its uncertainties and effort. Clearly, defense attorneys want to win, and evidence of prior mental health treatment is often presented as proof of mental illness. Especially when the crime is minor, the evidence for conviction is weak, and the entire court is overburdened. The attorneys agree that an NGRI finding is a possibility and, therefore, agree to a plea.

Mental health professionals work to identify the presence or absence of a mental illness; if they do not see a mental illness then how can a defendant be found insane? In their minds, if they say no illness exists, then the court should at least listen, and an insanity ruling should at least be tested before a jury. This situation becomes extremely frustrating for all concerned. While the court certainly does not let a psychiatrist decide the ultimate question, for

15. See, e.g., Mickenberg, *supra* note 1, at 968.

16. Lori A. Marschke, Comment, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. 487, 493-94 (2004).

17. See, e.g., Chron.com, *State Study Finds Reasons Not to Close Mental Hospitals*, (Feb. 8, 2005), <http://www.chron.com/disp/story.mpl/special/05/legislature/3029771.html> (last visited May 27, 2006).

18. 503 F.2d 1305, 1306, 1314-15 (5th Cir. 1974) (holding that federal district courts have the power to order state institutions to provide minimum levels of psychiatric care and treatment).

those in forensics, the above situation equates to completely ignoring their professional work.

Forensic training helps teach health professionals about giving an opinion that can be disputed; it is usually only disputed if it would release a prisoner, not if it simply changes the location of incarceration unless lots of political pay dirt is connected.

A crime that makes headlines also makes careers for elected officials. A high profile murder is less likely to have an NGRI finding than an equally probable robbery.

Many citizens would not be able to answer the simple question, “Why do we have an NGRI defense?” Obviously, in some states the legislature has decided there is no reason and has abolished insanity.¹⁹ I remain confident that anyone who actually knows the situation will agree with the Mississippi Supreme Court, who opined in *Sinclair v. State of Mississippi* that blameworthiness and sanity are essential elements of mens rea, whatever the language used to try to get around this, and that malice aforethought cannot be ignored.²⁰ However, my issue is not the mens rea, but rather the need for treatment of the chronically mentally ill. The courts are not focused on treatment, but they are impacted by the events. Essentially one-third of the population, in a recent study, met criteria for mental disorders, and only one-third of those received treatment.²¹ This leaves millions of mentally ill persons clogging the criminal justice system because they operate on a different set of rules from the ordinary population. The mentally ill are not as a class more violent than the rest of the populace, but they are highly likely to cross the legal boundaries due to their illnesses. For example, public nudity is generally prohibited, but it is not uncommon for a psychotic person to remove his or her clothing. With an absence of treatment readily available, they wind up with the police and, therefore, the jails. Within the framework of violence, or behaviors that are dangerous to others, persons with chronic and severe mental illness are much less common offenders than are substance abusers. Unfortunately, the two can, and often do, occur as co-morbid conditions.

One alternative that is often proposed is the guilty but mentally ill (“GBMI”) option. On the surface, this seems to be a win-win situation, with persons who commit crimes punished but still treated. This is folly, for some simple reasons. First, it assumes that treatment in the prisons is optimal, or at least meets some minimal standard. This is simply not true. Psychiatrists are a

19. See, e.g., *Montana v. Cowan*, 861 P.2d 884, 888 (Mont. 1993) (finding that abolition of an insanity affirmative defense does not violate due process when the defendant may still offer evidence of mental capacity to prove that he or she lacked the required state of mind for the offense committed).

20. 132 So. 581, 584 (Miss. 1931).

21. Ronald C. Kessler et al., *Prevalence and Treatment of Mental Disorders, 1990 to 2003*, 352 NEW ENG. J. MED. 2515, 2515 (June 16, 2005).

vastly understaffed specialty,²² and newer anti-psychotics are some of the most expensive medications on the market;²³ therefore, prisoners get short-shrifted.

When a jury is faced with an issue of insanity, they have difficult choices. To offer an option that reduces the effort gets enthusiastic support from those jurors. However, instead of having a guilty/not guilty dichotomy, with a third remote choice of NGRI, in those jurisdictions that have moved to GBMI, the selection becomes guilty/guilty/not guilty. This stacks the deck in a way that a prosecutor can do a poor job, and the defendant can still be found guilty. The jurors go home thinking they have split the Gordian Knot, when instead they have sent a mentally ill person to Hell.

The greatest barrier to improvement is lack of education. Lawyers and judges do not understand psychiatrists and psychologists (or even that they are different).

Psychiatrists are physicians who specialize in the treatment of mental illnesses. A standard training program would include four years of college, four years of medical school, a one-year internship, and at least three years of advanced training in psychiatry.²⁴ This leads to certification in general psychiatry by the American Board of Psychiatry & Neurology ("ABPN"), and one is then known as board certified.²⁵ Subspecialties such as child psychiatry or forensic psychiatry require further training after basic certification.²⁶ Therefore, a board-certified forensic psychiatrist has had at least eight years of post-graduate training, has passed a multi-day exam, including interviews of live patients under observation, and has repeated the final exam at least once every ten years.²⁷

A psychologist generally obtains a Ph.D. or Psy.D. degree which is at least three years of post graduate training.²⁸ To have a license, almost everywhere requires at least a one-year internship.²⁹ Psychologists who wish to specialize

22. Sidney W. Weissman, *America's Psychiatric Work Force*, 17 *PSYCHIATRIC TIMES* (Nov. 2000).

23. See Rosie Mestel, *Old Antipsychotic Drugs Comparable to New Drugs, Study Finds*, *SEATTLE TIMES*, Sept. 20, 2005, at A6.

24. MindDisorders.com, *Encyclopedia of Mental Disorders, Psychiatrist*, <http://www.minddisorders.com/Ob-Ps/Psychiatrist.html> (last visited May 27, 2006).

25. *Id.*

26. *Id.*

27. *Id.*

28. Psychology Information Online, *Frequently Asked Questions* 173, <http://psychologyinfo.com/faq/psychologists/173.html> (last visited May 27, 2006).

29. Psychology Information Online, *Training and Licensing in Psychology*, <http://psychologyinfo.com/license.html> (last visited May 27, 2006).

may be certified by the American Board of Professional Psychologists (ABPP).³⁰ This in turn designates areas such as forensics.

In both cases, mental health professionals may not be what they seem. A general practice physician can hold himself or herself as a psychiatrist and no law prohibits that, though most hospitals would not grant privileges unless they were desperate.³¹ Similarly, persons with only a bachelor of science degree are sometimes referred to as “psychologists.”³² Knowing the minimum training required for licensure in the jurisdiction can prevent embarrassment.

Mental health professionals do not understand the courts. The plain fact that specialties exist in forensics amplifies the idea that just any old doctor will not do. The only answer seems to be that we need more mental health and legal cross-training.

Insanity and the Death Penalty: Both the American Psychiatric Association and the American Academy of Psychiatry & the Law firmly state that participation in executions is unethical.³³ Testifying in the guilt phase of a capital trial is an appropriate use of skills to assist the criminal justice system, but if the death penalty ensues, the psychiatrist can not offer treatment to assist in execution.³⁴ The reasons are complex but are briefly outlined here. Some states cling to the idea that the death penalty must exist. No European Union countries have the death penalty.³⁵ The U.S. aligns itself with China, Iran, and Vietnam in utilizing a civilized barbarianism.³⁶

30. American Board of Professional Psychology, *Specialty Board Certification in Professional Psychology*, http://www.abpp.org/brochures/general_brochure.htm (last visited May 27, 2006).

31. See, e.g., Leila Abboud, *Should Family Doctors Treat Serious Mental Illness*, WALL ST. J., Mar. 24, 2004, at D1.

32. See U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, PSYCHOLOGISTS, <http://stats.bls.gov/oco/ocos056.htm> (last visited June 4, 2006).

33. American Psychiatric Association, *Medical Participation in Capital Punishment, Position Statement* (June 1980), http://www.psych.org/edu/other_res/lib_archives/archives/198002.pdf (last visited May 27, 2006); see American Academy of Psychiatry & Law, *Death Penalty, Position Statement of AAPL* (September 2001), <http://www.aapl.org/positions.htm> (last visited June 4, 2006).

34. See Abraham L. Halpern, *When Physicians Participate in Capital Punishment*, PSYCHIATRIC NEWS (May 7, 1999), available at <http://www.psych.org/pnews/99-05-07/halpern.html> (last visited May 27, 2006); *Debaters Clash Over Ethics of Death-Row Competency Exams*, PSYCHIATRIC NEWS (June 20, 1997), available at <http://www.psych.org/pnews/97-06-20/death.html> (last visited May 27, 2006).

35. European Union: Delegation of the European Commission to the USA, EU Memorandum on the Death Penalty, <http://www.eurunion.org/legislat/deathpenalty/eumemorandum.htm> (last visited May 27, 2006).

36. Amnesty Int'l, Facts and Figures on the Death Penalty, <http://web.amnesty.org/pages/deathpenalty-facts-eng> (last visited May 27, 2006).

If execution must exist, then it must be fairly applied.

While white victims account for approximately one-half of all murder victims, 80% of all Capital cases involve white victims. Furthermore, as of October 2002, [twelve] people have been executed where the defendant was white and the murder victim black, compared with 178 black defendants executed for murders with white victims.³⁷

The following jurisdictions have the highest percentage of minority prisoners on death row:

U.S. Military (86%); Colorado (80%); U.S. Government (77%); Louisiana (72%); and Pennsylvania (70%).³⁸

Atkins v. Virginia held that the Eighth Amendment prohibits the execution of the mentally retarded because they, by definition, have diminished capacity, and the same factors that make them less morally culpable make it less likely they can understand the possibility of punishment and, therefore, control their behaviors.³⁹

Ake v. Oklahoma held that courts must make a psychiatric exam available to defendants to access their potential illness.⁴⁰ *Louisiana v. Perry* held that you cannot execute the mentally ill if they are determined to be mentally ill after conviction.⁴¹ *Roper v. Simmons* held that you cannot execute juveniles.⁴²

The district attorney in O.J. Simpson's case said he would not pursue the death penalty, presumably because Simpson was too popular.⁴³

With all this data, and the capricious manner in which the death penalty is meted out, the United States would do well to listen to the experts on human behavior and change our laws so that we would clearly be on the side of the Christian ethics which are so often quoted as the underpinning of our country.

37. ACLU, *Race and the Death Penalty* (Feb. 26, 2003), <http://www.aclu.org/capital/unequal/10389pub20030226.html> (last visited May 27, 2006).

38. *Id.*

39. 536 U.S. 304, 321 (2002).

40. 470 U.S. 68, 74 (1985).

41. 610 So. 2d 746, 750 (1992).

42. 543 U.S. 551, 578 (2005).

43. Peter H. King, *O.J. Simpson and the ABCs of Justice*, L.A. TIMES, Sept. 14, 1994, at A3.