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COMMENTARY

What Now For The Insanity Defense?

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The jury's verdict of acquittal by reason of insanity in the case of President Reagan's attempted assassination has stirred vivid debate, both in and out of the U.S. Congress and other public bodies. This article¹ will briefly discuss the history of the insanity defense in the United States, the current status of that defense, and some major problems remaining in its use.

First, what we mean by "the insanity defense" must be made clear, since there are many points at which a defendant's mental condition becomes relevant. We might ask about a person's mental situation in connection with the voluntariness of his confession, the voluntariness of his consent to a search, his ability to make a valid waiver of his right to counsel or appeal, or any of the many other rights associated with a criminal prosecution. Moreover, we might consider a convicted criminal's mental condition even in connection with an execution, it being commonly thought that one should not be executed while insane.² A defendant's mental situation is relevant as well in the determination of his competence to stand trial, an inquiry which focuses on whether he can understand the nature of the proceedings against him and can effectively assist counsel in maintaining a defense.³ Perhaps contrary to popular opinion, the issue of competence to stand trial presents the most common occasion for the assessment of the defendant's mental status. This aspect of mental impairment arises much more frequently than does the actual in-

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1 This article is based on a paper read to a combined meeting of the St. Joseph County, Indiana, Bar and Medical Associations.

2 See *Caritativo v. California*, 357 U.S. 549 (1958); *Solesbee v. Balkcom*, 339 U.S. 9 (1950). See generally S. KADISH, S. SCHULHOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 823-24 (4th ed. 1983).

3 See, e.g., *People v. Burson*, 11 Ill. 2d 360, 143 N.E.2d 239 (1957).

sanity defense.⁴

The insanity defense differs from other inquiries into a defendant's mental condition. The insanity defense explores the responsibility of the defendant at the time of the alleged crime. The inquiry, then, relates to one of the most fundamental questions addressed by the criminal trial—whether this person is to be blamed for what he did. Precisely because a verdict is a legal-moral judgment and not a purely medical one, the issue is put not to a panel of experts on mental illness, but rather to a jury. After all, a defendant may clearly have been suffering from a mental illness at the time of the alleged criminal conduct, and yet not be found legally insane.

In the United States, four different standards for assessing legal insanity have achieved prominence. The first of these, imported from England and dating from an 1843 opinion of the House of Lords, grew out of the attempted assassination of Sir Robert Peel, the Prime Minister of England. As a result of mistaken identity, Edward Drummond, Peel's private secretary, was killed. The accused, M'Naghten, was acquitted. Public indignation at this acquittal, led by the Queen herself, culminated in the Judges of England being summoned to the House of Lords to answer questions concerning the insanity defense.⁵ Their answers, in the form of an advisory opinion now known as the *M'Naghten* Rules,⁶ stated that a defendant is legally irresponsible if he either does not know the nature and quality of his conduct or does not know that it is wrong. This essentially cognitive test was imported into the United States and was often⁷ supplemented by a second, so-called "irresistible impulse," test.⁸ The irresistible impulse, although largely self-explanatory, presents a serious question concerning one's ability to establish whether an impulse was in fact irresistible.⁹

The third major insanity standard to achieve prominence in the

4 See Morris, *The Criminal Responsibility of the Mentally Ill*, 33 SYRACUSE L. REV. 477, 480 (1982). See also J. VORENBERG, *CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS* 163 (2d ed. 1981).

It is estimated that in New York the insanity defense is involved in fewer than 1.5 percent of felony cases, and, in 75 percent of those, fails. Kaufman, *The Insanity Plea on Trial*, N.Y. Times, Aug. 8, 1982, (Magazine) at 16, col. 3.

5 For a fuller account of the *M'Naghten* context, see F. INBAU, J. THOMPSON & A. MOENSSENS, *CASES AND COMMENTS ON CRIMINAL LAW* 685-86 (2d ed. 1979).

6 See Daniel M'Naghten's Case, House of Lords, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

7 See J. VORENBERG, *supra* note 4, at 162.

8 See P. LOW, J. JEFFRIES & R. BONNIE, *CRIMINAL LAW: CASES AND MATERIALS* 658 (1982).

9 See *id.* at 693-97; R. PERKINS & R. BOYCE, *CRIMINAL LAW* 972-73 (3d ed. 1982).

United States was the *Durham* rule,¹⁰ announced by the Court of Appeals for the District of Columbia Circuit in 1954. Although the insanity defense is commonly associated with homicide cases,¹¹ Monte Durham was charged with housebreaking. The rule emanating from his case stated that a defendant was not legally responsible if his act was the "product" of a mental disease or defect. The court felt that its new rule was needed because the *M'Naghten* "right-wrong" standard was erroneously premised on a conception of the human being as guided purely by intellect. To the contrary, the court asserted, "The science of psychiatry now recognizes that a man is an integrated personality, and that reason, which is only one element in that personality, is not the sole determinant of his conduct."¹¹ Nor did the addition of the "irresistible impulse" standard cure the defect since, the court explained, it "carries the misleading implication that 'diseased mental condition[s]' produce only sudden, momentary or spontaneous inclinations to commit unlawful acts."¹² Although the *Durham* rule caused enormous discussion in legal journals and elsewhere, the court acknowledged that the rule was "not unlike that followed by the New Hampshire court since 1870."¹³ The *Durham* rule, however, never gained general acceptance, surely to the great disappointment of Judge David Bazelon, its author and perhaps the jurist who has devoted the most attention to the problem of mental illness and the criminal law. Indeed, there was substantial litigation in the District of Columbia Circuit itself to determine how the rule was to be applied.¹⁴

Ultimately, even the Court of Appeals for the District of Columbia Circuit abandoned the *Durham* test¹⁵ in favor of a fourth test, the American Law Institute—Model Penal Code standard. This standard states that a person is legally irresponsible if, "as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law"¹⁶ at the time of the charged conduct. Although superficially it seems merely to revive a

10 *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

11 *Id.* at 871.

12 *Id.* at 873.

13 *Id.* at 874 (citing *State v. Pike*, 49 N.H. 399 (1870)).

14 *See, e.g.*, *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967); *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962); *Blocker v. United States*, 274 F.2d 592 (D.C. Cir. 1959); *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957).

15 *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

16 MODEL PENAL CODE § 4.01(1) (Official Draft 1962).

combination of the *M'Naghten* and "irresistible impulse" tests, the Model Penal Code test has several advantages. In recognizing the concept of "substantial capacity," the test allows for a degreed assessment, not an all-or-nothing conclusion. Moreover, the word "appreciate," rather than "know," also allows for better calibration. After all, one who knows that killing someone is criminal but thinks it no worse than jaywalking probably does not appreciate the criminality of his conduct.

Some jurisdictions which have accepted the Model Penal Code test have rejected an accompanying paragraph¹⁷ designed to make the insanity defense unavailable to psychopathic personalities or sociopaths.¹⁸ The additional paragraph states that "[t]he terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."¹⁹ Although the Model Penal Code test has represented a clear-cut trend in recent years, it has not been without its critics, especially in light of the verdict of "not guilty by reason of insanity" returned by the jury following the trial involving the attempted assassination of President Reagan. Since that time, many hearings have been held and many discussions conducted concerning the future of the insanity defense.

Both doctors and lawyers are involved in the current controversy. The American Psychiatric Association, issuing its first comprehensive statement on the insanity defense, recently called for a continuation of the defense in some form, but urged that it be limited to cases of serious mental illness.²⁰ The American Bar Association's Standing Committee on Association Standards for Criminal Justice and its Commission on the Mentally Disabled jointly made dramatic recommendations which were accepted by the ABA House of Delegates at its February meeting.²¹ These groups urged "a defense of non-responsibility for crime which focuses solely on whether the defendant, as a result of mental disease or defect, was unable to appre-

17 Brawner, 471 F.2d at 993-94.

18 *Id.* at 993. See also MODEL PENAL CODE § 4.01 comment (Tent. Draft No. 4, 1955).

19 Brawner, 471 F.2d at 993; MODEL PENAL CODE § 4.01(2) (Official Draft 1962).

20 See *ABA Panels, Psychiatry Association Issue Reports on Insanity Defense*, 32 CRIM. L. REP. 2365, 2366 (BNA) (Feb. 2, 1983). The National Commission on the Insanity Defense, established by the National Mental Health Association, urged the continuation of the insanity defense. *Study says Defendants Should Prove Insanity*, Sentinel (Winston-Salem, N.C.), Apr. 6, 1983, at 28, col. 1. To promote public understanding, however, the verdict itself should be "not responsible by reason of insanity" rather than "not guilty by reason of insanity." *Id.* at col. 3.

21 See *ABA Hears Proposals for New Court, Acts on Insanity Defense, Ethics*, 32 CRIM. L. REP. 2410, 2411-12 (BNA) (Feb. 16, 1983).

ciate the wrongfulness of his or her conduct at the time of the offense charged."²² The major result of this standard, for jurisdictions with the Model Penal Code test, is to eliminate that branch of the test allowing a defense for those who are unable to conform their conduct to the requirements of the law. The ABA panels argue that eliminating the volitional part of the test prevents "fabricated" expert testimony concerning impairment of "normal" behavior controls. Such testimony has made the Model Penal Code test vulnerable because of the lack of scientific ability to measure either a defendant's capacity for self-control or its impairment. The suggested test also does away with the Model Penal Code's "overly vague 'substantial capacity' language."²³

Perhaps all the furor over the wording of the defense is misplaced. The American Psychiatric Association has pointed out that whether a defendant is acquitted by reason of insanity depends less on the particular standard employed than on "the [decision of the] individual trial judges to permit or not permit psychiatric testimony concerning the broad range of mental functioning of possible relevance for a jury's deliberation," a matter not handily dealt with by legislation.²⁴ The APA, also unhappy with the Model Penal Code standard, urged an insanity test which focuses on "severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality."²⁵

An additional issue raised in connection with the insanity defense is who should bear the burden of proof. Since legal sanity may not technically be a legal element of the charged offense,²⁶ it is apparently constitutional to put the burden of proving insanity on the defendant,²⁷ as the U.S. Supreme Court has itself recognized.²⁸ Nonetheless, the ABA panels referred to earlier²⁹ urged jurisdictions

22 See *id.* at 2365, 2411.

23 *Id.* at 2366.

24 *Id.* at 2367.

25 *Id.*

26 But see R. PERKINS & R. BOYCE, *supra* note 9, at 985 (stating that the prevailing view is that insanity "negatives an element of the offense charged").

27 Compare *Mullany v. Wilbur*, 421 U.S. 684 (1975) (absence of provocation must be proved by the prosecutor beyond a reasonable doubt since it is an implication of malice aforethought, an element of murder under Maine law) with *Patterson v. New York*, 432 U.S. 197 (1977) (the burden of proof with regard to extreme emotional distress may be placed on the defendant since it does not negate any element of the charged crime). See also Dutille, *The Burden of Proof in Criminal Cases: A Comment on the Mullaney-Patterson Doctrine*, 55 NOTRE DAME LAW. 380 (1980).

28 *Rivera v. Delaware*, 429 U.S. 877 (1976).

29 See note 21 *supra* and accompanying text.

using the test recommended by those panels not to place the burden of proof on the defendant. In jurisdictions using the current Model Penal Code test, however, the panels urged that the defendant bear the burden of proof to a preponderance of the evidence.³⁰

Whatever action legislatures take with regard to these matters,³¹ four important concerns must guide them. First, we must retain, for the foreseeable future, some criminal defense based on mental irresponsibility.³² The insanity defense, in whatever form it takes, reflects the fact that our criminal law is based upon the concept of blameworthiness. Judge Irving Kaufman of the Court of Appeals for the Second Circuit explains that, "Essentially, the law is concerned with establishing fault; it focuses on individual responsibility as a way of controlling behavior and articulating public morality."³³ Any attempt to do away with a suitable insanity standard would substantially undermine the moral mandate of our system. Indeed, it may be unconstitutional to eliminate the insanity defense.³⁴ As Judge Kaufman further noted, "[N]o criminal justice system that finds a defendant guilty while ignoring his mental inability to control his actions can be viewed as fair and just."³⁵

Concepts like absolute liability, used in lower-level offenses, have already diluted the judgmental character of our criminal law. Elimination of the insanity defense, however, would render incredible any insistence that our system is based on the moral judgment of

30 32 CRIM. L. REP. at 2366. The National Commission on the Insanity Defense recently recommended that the burden of proof be put on the defendant. See Sentinel, *supra* note 20, at 28, col. 1.

31 Proposals, to some extent overlapping, have included the creation of panels of independent psychiatrists and psychologists, judicially appointed to testify as court experts, Kaufman, *supra* note 4, at 19, col. 2, abolition of the special defense of insanity, a qualified defense of diminished responsibility, see Morris, *supra* note 4, at 499, and restricting the relevance of mental illness to the specific mens rea requirements of the crime charged or to the sentencing procedure, see P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 8, at 759-61. Congress, in response to the verdict in the case of President Reagan's attempted assassination, is considering limiting the defense of insanity in federal crimes to persons who can prove they were "unable to appreciate the nature or wrongfulness of their acts." Winston-Salem Journal, July 24, 1983, at A6, col. 1.

32 For a strong argument to the contrary, see Morris, *supra* note 4, at 499-512. But see Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 284 (1968). See generally S. KADISH, S. SCHULHOFER & M. PAULSEN, *supra* note 2, at 903-09.

33 Kaufman, *supra* note 4, at 17, col. 1.

34 See *State v. Lange*, 168 La. 958, 123 So. 634 (1929); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931); *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1920).

35 Kaufman, *supra* note 4, at 16, col. 4. Cf. L. FULLER, *THE MORALITY OF LAW* 163 (1964): "Yet if the view is accepted that man is incapable of responsible action, legal morality becomes meaningless. Without this responsibility, we would no longer judge a man, we would simply act upon him."

our juries. Perhaps, due to the enormous influence on conduct provided by genetic and environmental factors, the entire system should be replaced by one which focuses only on whether a person performed an antisocial act and, if so, the best disposition for him. Until that unlikely time, and as long as we insist that the criminal law take a moral perspective, a defense based on legal irresponsibility must be allowed.

Second, we must insist on a clear allocation of authority between medical experts and the jury. In the District of Columbia Circuit, under the *Durham* rule, psychiatrists were often asked whether the defendant's act was the product of a mental disease or defect—the ultimate issue before the jury.³⁶ Although the expert must provide the medical data to inform the jury's legal-moral decision regarding the defendant's responsibility, the jury itself must answer the ultimate legal question.

Third, any legislature must be especially careful before it yields, as several states already have,³⁷ to the seduction of a "guilty but mentally ill" verdict.³⁸ There are serious suggestions that such a verdict merely provides a jury with the opportunity to compromise.³⁹ Moreover, it deludes the jury into thinking that the defendant will get treatment which in fact is unavailable or is already available even to those convicted of crime.⁴⁰ In many jurisdictions, the difference between a "guilty but mentally ill" verdict and a "guilty" verdict is a

36 See *Browner*, 471 F.2d at 978-79. *But see* Rule 704 of the Federal Rules of Evidence which allows the expert to give an opinion on the ultimate legal question. *See also* *Suggs v. La Vallee*, 570 F.2d 1092, 1115, n.58 (2d Cir.), *cert. denied*, 439 U.S. 915 (1978); *United States v. Hearst*, 563 F.2d 1331, 1350-51 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978).

37 See, e.g., ILL. ANN. STAT. ch. 38, § 1005-2-6 (Smith-Hurd Supp. 1982); IND. CODE 35-36-2-5 (1981); MICH. COMP. LAWS ANN. § 768.36 (1982).

38 The Attorney General's Task Force on Violent Crime recommended such a verdict for federal law. Kaufman, *supra* note 4, at 19, col. 3.

39 The compromise results from the fact that the label contains both a blameworthiness ("guilty") component for jurors leaning toward guilt and a mental health component ("mentally ill") for jurors concerned about the defendant's mental impairment. Indeed, an individual juror, torn between the two concerns, may find the verdict attractive. "The danger is that [the jury] may often choose the middle option as a form of compromise verdict rather than as a carefully reasoned decision." Kaufman, *supra* note 4, at 19, col. 4. Judge Kaufman adds, however, that Michigan's experience with the verdict has carried with it no appreciable change in the number of "not guilty by reason of insanity" verdicts. *Id.*

40 The jury will quite naturally feel that since both "guilty" and "guilty but mentally ill" are among the possible verdicts, the latter must be different and the difference must be in the treatment of the defendant and the facilities in which he might be kept. In fact, both the "guilty" and the "guilty but mentally ill" verdicts may subject the convicted to the very same treatment and facilities. See Peters, *'Guilty But Mentally Ill' Verdict Still Controversial*, *Indianapolis Star*, Feb. 28, 1982, § 5, at 1, col. 1. *See also* 32 CRIM. L. REP. at 2366.

formal one only.⁴¹ Indeed, the ABA panels called the “guilty but mentally ill” verdict a “yes, but . . .” verdict, one based on “moral sleight-of-hand.”⁴² The American Psychiatric Association also recommended against such a defense, labeling it “an easy way out” for the jury.⁴³ The defense allows some who might otherwise have been found not guilty by reason of insanity to be “siphoned off.” In any event, the APA’s report continued, such a standard makes sense only where meaningful mental health treatment exists for those found “guilty but mentally ill.” In these days of financial retrenchment, legislative provision for such treatment is highly unlikely.⁴⁴

Fourth, we must scrutinize our post-trial procedures for those institutionalized subsequent to a “not guilty by reason of insanity” verdict. Here, too, the American Psychiatric Association Report may be instructive. Suspicious of a release system based on periodic review of “future dangerousness,” the Report urges the law to recognize both the importance of medication in controlling the conduct of the mentally ill and the possibility that a patient may not necessarily be cured or made non-dangerous. It recommends that release decisions be made by a panel composed of both medical experts and other criminal justice professionals, similar to Oregon’s Psychiatric Security Reform Board.⁴⁵

For centuries, philosophers, doctors, and lawyers have explored and debated issues relating to the enormous complexity of the mind. Accordingly, we cannot hope to settle these matters in any brief discussion. We must, however, resolve to deal with them in a calm, enlightened, and rational manner, with a vigilant eye on our important and traditional values. Otherwise, rushing to unwise legislation, as the result of the verdict in a trial noteworthy primarily for the official status of the intended victim, may itself become an irresistible impulse.

41 See Peters, *supra* note 40. See also 32 CRIM. L. REP. at 2366; Kaufman, *supra* note 4, at 19, col. 4.

42 32 CRIM. L. REP. at 2366.

43 *Id.*

44 *Id.*

45 *Id.* at 2367. See also Kaufman, *supra* note 4, at 20, col. 4.