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# The Insanity Defense

## Guilty by Reason of Hinckley?

Bruce Berner

Anyone who believes that the criminal process is merely a conveyor-belt scheme for dealing with the seamy side, and not a lens for continuous, fierce moral struggle, may well rethink the matter in light of John Hinckley, Jr.'s acquittal and the ensuing reaction. One cannot ordinarily measure the strength of society's collective retributive impulse when a highly visible defendant is convicted; indeed, it is the function of the criminal conviction to channel that impulse in a more-or-less civilized way. "Hinckley's been convicted," we might have said. "Good. Let us get on to Bobby's ballgame." The acquittal, however, uncovered the depth of fear, rage, and moral indignation, now without institutionalized expression, within all of us. Like electricity deprived of its destination, these emotions broke out in all directions seeking new outlets for their energy.

Nor can this reaction be wholly accounted for by the fact that President Reagan was the intended victim. Clearly, Hinckley is viewed in part as a surrogate for all perpetrators of violence, Reagan, Brady and the others as surrogates for the potential victim in all of us, and the acquittal as symptomatic of a system that cannot deal with crime. If the President is not exempt from such violence, can anyone feel safe?

Frustrated by the outcome, many people seemed to say, "If John Hinckley isn't guilty, then someone or something else is." Nothing escaped completely unscathed—the jury, psychiatry, the criminal process in general, and, above all, the insanity defense.

The most immediate attack was on the individual jurors. As I listened to the call-in shows the evening of and day after the verdict, with caller after caller registering outrage and shock at the outcome, it occurred to me that many of the callers' comments presupposed that the jurors in the Hinckley trial had been shipped in from Venus. They did not know that "defendants

just claim to be insane to get off the hook" or that "psychiatrists and lawyers are really streetwalkers in expensive suits" or that "everybody is a little insane, really." (Some of the callers provided persuasive evidence for this last point.) But a case against the jurors could not long be maintained. It became clear (largely because this jury was uncharacteristically vocal) that the jurors were not ingenuos, that they had not brought less to their decision than the callers, but more. Street wisdom was not lacking, but it had been tempered by the solemnity attendant upon making a morally serious judgment. Juror Nathalia Brown stated during deliberations, "The issue is not whether he was a little off, or whether this poem or that one didn't make sense. He shot those people, he shot them on purpose, he planned the whole thing out. He should be punished. What gives here! The man is just a manipulator. Ain't nothing wrong with him." This lady ain't from Venus, either, but she ultimately voted to acquit.

### The Moral Issue of Responsibility

The frustration focused on the insanity defense, aided by the statement of juror Maryland Copelin, who closed the jury's defense by saying: "We felt locked in by the law." The law that locked in Ms. Copelin and the others is the insanity defense. Overnight, movements in scores of forums arose to abolish or weaken the defense. My purpose herein is to examine the fundamental underpinnings of the insanity defense, to evaluate the various proposals being made for its modification, and to suggest one change myself. My thesis is that all current proposals either misunderstand, or are willing for expediency's sake to jettison, the core idea of a criminal law by ignoring or hiding the moral issue of responsibility. The proposal made herein is to implement an old, but untried, approach which presents the moral question with a clarity that cannot be sidestepped.

The most radical proposal, already adopted in two states (Idaho and Montana) is abolition of the insanity defense. This solution is a straightforward instrumental attack on the perceived problem of violent offenders. Although this solution draws great political impetus from the Hinckley case, it is a dangerous solution, negates the basic purpose of the criminal law, and rests

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***The criminal process's value as a technique for deciding highly charged moral issues is weakened, if not destroyed, when used as the all-purpose agency of social control.***

on a tacit premise which is simply not true. If a man had leprosy, surely we would isolate him to prevent contamination of others. While this may not be fair to him in a very strict sense, his confinement as an instrument for the public good is clearly defensible. But, unless we held fast to earlier cultural notions that his disease was a manifestation of some grave personal sin, we would not see as necessary a ritual of moral condemnation. A criminal conviction is, of course, just such a ritual. The eminent scholar Henry Hart helped expose the 1950s myth that the peno-correction process was the rehabilitative technique of a compassionate society by stating "What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition." Of course it is more difficult to diagnose insanity than leprosy, and mistakes will be made, but it is as necessary today as ever before, from a moral standpoint, to distinguish between people who are sick and people who are bad.

None of this proves that the dangerously insane need not be confined, like the leper. Of course he must, but it perverts the criminal process (and thus weakens it for all purposes) to make it do the job. Involuntary commitment procedures are available in all jurisdictions; in most, a criminal acquittal on grounds of insanity automatically triggers such a process.

The criminal process's value as a technique for deciding highly charged moral issues is weakened, if not destroyed, when used as the all-purpose agency of social control. Note that 50 per cent of the police and prosecutorial resources in this country are expended to fight gambling, prostitution, and low-level drug traffic. The main "benefit" from this is the alienation of large groups of people who do not adopt the law's morality as their own. In fact, the abolition of the insanity defense is even worse. Although people may honestly disagree about the morality of gambling, I am aware of no current serious argument that people who act as a result of mental illness are morally culpable. Moreover, if the criminal process were to be used as a wide-ranging body for social control, it could not work with its current rules. The accused is given a professional representative whether he can afford one or not, proof is required "beyond a reasonable doubt," and the decision is made by a jury of twelve. We cannot solve too many social problems with so cumbersome an apparatus as this. As a matter of fact, the rules and trappings of a criminal trial would appear absolutely ridiculous to us were we not persuaded that conviction carried a powerful moral pronouncement about the accused and that such pronouncements are only tragically made to innocent persons.

Another proposal—to remove insanity questions from

the guilt phase of the trial and use it during sentencing to mitigate punishment—is subject to the same objections. Criminal responsibility is a moral question anterior to *any* punishment. It ought to be decided by the jury, the community's representative, and not by a judge. Of course, a judge may choose to reduce the sentence for a defendant who, while suffering some mental illness, is not so ill as to avoid completely any moral condemnation. The proposal, however, makes the criminal process incoherent—the guilt phase, designed to deal with moral questions, now avoids the most fundamental one of all. The criminal process absolutely depends on an image of man free to make choices. Many recognized defenses, such as self-defense, duress, or accident, indicate that we are not interested in punishing conduct which was not the function of choice, or in which choice was restricted among intolerable alternatives. The notion of a separate system for juveniles rests on the understanding that anti-social actions by certain people indicate therapeutic, not retributive, response. To suggest the culpability of those who act wholly from illness, illness which by its nature excludes all socially-tolerable choices, is to suggest that individual fault is foreign to the inquiry. Perhaps even worse, it might suggest that people are ultimately to be blamed for their illnesses.

### ***Burying the Essential Moral Question***

The proposal of a new verdict form—"guilty but mentally ill" (GBMI)—already law in six states, including Indiana, will, I think, become law in most jurisdictions. When GBMI is in force, a jury in a criminal trial in which insanity is interposed, is given four choices of verdict: 1) "not guilty"; 2) "not guilty by reason of insanity"; 3) "guilty"; and 4) "GBMI." The defendant found "GBMI" is, for all purposes, deemed guilty of the offense. He is, however, "evaluated" to determine whether he should begin his term in jail or in a mental institution. If he is sent to the latter, and is at any time prior to the expiration of his term released therefrom, he is returned to the prison population to finish his term. The idea is beguiling—the mentally ill defendant is given treatment for his problem but cannot be released into society any more quickly than if he had been found "guilty." It seems a nice finesse of a very difficult problem.

Closer examination shows that this proposed solution is either entirely meaningless as a response to the perceived problem or, like earlier proposals, buries the moral question. When the jury is asked to decide from among these four outcomes, it is given the legal tests both for "insanity" and for "mental illness." The test for insanity most prevalent today (it is the law of



**It should be noted that "insanity" is not a medical, psychiatric, or clinical term. It is strictly the stating of a legal outcome. The only unmistakable symptom of insanity is acquittal.**

Indiana and also of the Hinckley case) is: "A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform his conduct to the requirements of the law." ("Substantial-capacity" test). The jury refers to this to decide whether or not the defendant is "not guilty by reason of insanity." In determining whether the defendant is "GBMI," the jury is instructed: "mentally ill means having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs a person's ability to function and includes mental retardation." The jury must visualize the class of persons who are "mentally ill" as larger and wholly inclusive of the class of "insane" persons. Definition of the mentally ill class does *not*, however, *expressly exclude* those who are "insane." If the defendant is "mentally ill" but not "insane," the jury's task is clear. If the jury believes the defendant is "insane," however, it is not told the basis for deciding between "not guilty by reason of insanity" and "GBMI." If the jury were told that the proper outcome in such cases was "not guilty by reason of insanity," then GBMI is hardly going to cure Hinckley-like results. On the other hand, if "insane" persons can be found "GBMI," the insanity defense is *de facto* abolished. The jury is appeased into believing the defendant will not really be punished, but treated. As a matter of fact, there is no guarantee that a defendant found GBMI will receive *any* treatment in a mental institution.

One final proposal would shift the burden of proof on the sanity question to the defendant. Indiana, for example, requires the state to prove everything else "beyond a reasonable doubt," but requires the defendant to prove insanity by a "preponderance of the evidence." With all respect, the only purpose for this change, which runs contrary to the notion that criminal punishment ought depend on community judgment "to a moral certainty" and not merely when we are "confused" about moral questions, and which begins to erode the accusatorial style of Anglo-American criminal trials by forcing defendants to "disprove" guilt, is to change outcomes. It is based only on the speculation that "too many" defendants are acquitted.

The often-heard complaint that a defendant need only plead insanity and the jury will become so confused as to acquit simply is not empirically supportable. If one asks experienced criminal defense counsel—the people, after all, most clearly "in the marketplace" for defenses—he will be told that insanity is the defense of last resort. It is such both because juries are traditionally reluctant to accept it, and because, in many cases, the penalty for insanity is less desirable to the

defendant than the penalty for the crime. One way to test this is to search your memory for any case in which the defense was raised to a charge other than murder or its attempt, the crimes carrying the highest penalty. In fact, the Hinckley case is one of only a very few in which the defense was interposed to attempted murder.

### **Moral, Psychiatric, and Legal Aspects**

My proposal is not to discard nor obscure the moral question of responsibility but to make it more clear to the jury that such is precisely what they are supposed to decide. In an insanity-defense case, three components must be managed. First there is a *moral* component, the decision of who is and who is not deserving of punishment. While this judgment may be shared to some extent, it is the jury which answers the question at its core. Second, a clinical, or medical, or *psychiatric* component represented by expert witnesses is needed to inform the moral judgment. The *legal* component has two main tasks, each of which it carries out through the expression of a "test" for insanity and through rules on expert testimony. One task is to provide a *standard* for decision to insure equality across cases, though surely this "test" is itself informed by the moral judgment. The second, and perhaps more important, task is to mediate between the *moral* and the *psychiatric* components so that each operates properly within its sphere but does not impinge on the other. My contention is that the law does not do this very well—that, instead, the *psychiatric* component tends to overpower the *moral* one in many cases.

Note first that "insanity" is not a medical, psychiatric, or clinical term. It is strictly the stating of a legal outcome. The only unmistakable symptom of insanity is acquittal. A psychiatrist has no greater claim, nor do



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most want one, to state a person is sane or insane than anyone else. In his daily work, he does not use the term because it is of no use to him; the range from perfect mental health (picture an Eastern mystic sitting, registering only delta waves for days on end) to complete mental disintegration (watch Gong Show reruns) is a continuum, marked by signposts, to be sure, but containing no bright lines. If you asked a psychiatrist whether or not a particular subject was insane, he would ask you first what you meant by the term and, second, "for what purpose do you ask?" The law must strike a proper balance between community morality (represented by the jury) and clinical data (delivered by expert witnesses). Currently, partly because of the uncertainties of the science of psychiatry and partly because of the law's inattention to the problem, the expert's testimony often drifts away from purely clinical material and begins to intrude on the moral question.

This situation came about only slowly. Until the 1950s, the insanity instruction in most jurisdictions foreclosed almost all useful clinical input. The chief problem was that the "M'Naghten" instruction—which described as insane only those who, because of mental disease or defect, "could not tell right from wrong"—took account only of cognitive impairment, and, even then, only cognitive impairment of an excessive and unusual kind. The defendant who *knew* he was acting wrongfully but could not, because of illness, *control* his actions was convicted. The psychiatric community complained that their testimony was foreclosed by a definition which was foreign to their understanding of the problem. Most defects, they said, were volitional defects. The law, they said in effect, was asking the wrong question. The reaction of individual psychiatrists differed. Some refused to act as expert witnesses from a feeling that they could not, and would not, shed light on the wrong question. Others, surely with the aid of lawyers, began to fudge their testimony. Once they were themselves convinced that the defendant *should not be held responsible*, they began tailoring their testimony to the "right-wrong" test. If the law insisted on asking the "wrong" question, the witness would answer the "right" question to himself and then translate it into "wrong" language.

In this lay a terrible potential which soon came to full flower. The "right" question—should the defendant be held responsible?—is not a clinical question at all, but a moral one. The precise question which the jury was on hand for was being answered by someone else. Under cover of clinical jargon, many psychiatrists smuggled in their own moral outlook on responsibility. And since the psychoanalytic image of man is relatively a more deterministic one, the bias was toward acquittal. The chief problem was that the testimony did not sound like it evidenced a moral outlook; it sounded like cli-

nical fact, it seemed like science. Nor was cross-examination much of a help in uncovering the soft parts. Cross-examining a psychiatrist is like arguing with Alice's Humpty Dumpty—when he uses a word, it means "whatever he wants it to mean, no more, no less." (You will recognize that, coming from a lawyer, this is praise, not condemnation.)

The only cure for psychiatric testimony is more psychiatric testimony. An attorney simply found a psychiatrist who resolved the "responsibility" question differently and who would translate that into the framework of the "right-wrong" instruction. When accounting for the wide disparity of psychiatric opinions, most point to the facts that mental health and mental illness are elusive concepts, that various schools of thought have arisen, that the mind of man is, after all, a complicated thing. After accounting for all this, there is still more disagreement among psychiatrists inside the court room than out. The reason is that outside they pursue answers to clinical and therapeutic questions. Inside, moral judgments are mixed in.

### **The Idea of "Substantial Capacity"**

The call of the psychiatric community and others for a more modern insanity instruction was finally answered in most jurisdictions by the adoption of the "substantial capacity" test which both introduced volitional defect as the basis for insanity and removed the absolutist language of the "right-wrong" test for cognitive defect. Psychiatrists are now free to give a greater range of clinical evidence since evidence tending to show volitional defect is no longer ruled inadmissible as irrelevant. But, and this is an important but, the new test for insanity, while it permits more clinical information, is not itself a clinical question. When one reads it, the word "substantial" jumps off the page. That word, at first blush a term of quantity or quality or both, is ultimately a term of judgment. To illustrate, my five-year-old son Karl, when he wants more milk than usual, asks for "too much milk." I keep trying to explain to him the difference between a term of quantity—like "eight ounces of milk"—and terms of judgment—like "too much milk"—but he persists. (I think he understands it now but likes to hear the lecture.)

Precisely the same mistake is made when a psychiatrist is asked to render an opinion on whether or not a given defendant had the "substantial" capacity to know wrongfulness or to conform conduct. The word substantial only has meaning if there is an external referent. If I asked a psychiatrist whether X has the substantial mental stability to work in a nuclear plant, I would not take "no" as inconsistent with his earlier opinion that X had the substantial mental stability to drive a car.



**When we ask the "substantial-capacity" question, what is at bottom being asked is whether the defendant's capacity was substantial enough to visit on him moral responsibility for his conduct.**

When we ask the "substantial-capacity" question in a criminal trial, what is at bottom being asked is whether the defendant's capacity was substantial enough to visit on him the moral responsibility for his conduct. When the psychiatrist is asked this question, he is being asked to shift from giving clinical data to making a moral judgment. The worst part of this is that the shift is not noticed by the jury. He appears rather to be making a scientific interpretation from facts. Of course it is absolutely necessary, if we are to understand him at all, for a psychiatrist to make interpretive judgments about the clinical data at hand. What must be kept clearly in focus, however, is the distinction between interpretation wholly within the realm of expertise and the moral judgment which is the peculiar province of the jury.

To clarify, consider an expert at accident reconstruction, with a physics background, being asked to estimate, from hard data found at the scene of an automobile accident, the speeds at which the involved vehicles were traveling when they collided. After testifying to the length of skid marks, the type of road surface and tires involved, after a dazzling exposition of the theory of "conservation of momentum," and after some disclaimer based on uncontrollable variables, the expert finally tells us that in his opinion vehicle A was traveling 30 miles an hour and vehicle B was traveling 20 miles per hour. I believe him so far, don't you? But now he is asked if, in his opinion, vehicle A was traveling "too fast." He wouldn't be allowed to testify, but even if he were, why should we do more than feign polite attention? "Too fast" is either a strictly legal question which we can resolve by looking at the posted speed limit, or a prudential (even slightly moral) question about how to drive. The important thing to note is that even if the expert testifies that 30 m.p.h. is or is not "too fast," the jury is not misled into believing that such is a scientific opinion. Rather the jury feels confident in overruling that interpretation if it disagrees with it.

It might be argued that this analogy is unfair because the science of psychiatry does not admit of such precise quantitative or qualitative analysis, that much more depends on interpretation. This, however, suggests that it is even *more* important in connection with psychiatry to restrict the expert to his given field since there is no quantity or quality within the jury's experience against which to measure such interpretation. The jury may believe our accident reconstructionist, but only because it agrees with his interpretation. When the jury agrees with the psychiatrist, it is sometimes because it understood nothing at all of what he said. This is of course compounded by the fact that with the psychiatrist "facts" are often the *product* of interpretation and not the *basis* for it.

A cardinal rule at common law stated that no witness, expert or otherwise, could testify to an "ultimate issue of fact." Thus, while an eyewitness to a collision might state that the driver "was traveling 80 miles per hour," or "swerved across the center line," he could not testify that the driver was "negligent" if such was an ultimate issue in the case. This rule has been largely discarded and I only wish to say that my proposal bears no intention of reviving it. If the ultimate issue is a question of physics, a physicist should be permitted to answer it (though, as always, the jury may choose to answer it differently). If it is a question of psychiatry, a psychiatrist should likewise be permitted to state his opinion. My point is only that the ultimate issue of insanity is a moral question and thus, referable solely to the jury.

Although there appears no ideal solution, I submit that a scheme for managing the insanity defense approaches the currently optimal solution when it satisfies these criteria: 1) it permits the widest possible range of expert psychiatric testimony on matters within such special expertise; 2) it forecloses psychiatric testimony on matters outside such expertise; 3) it assigns the question of moral responsibility exclusively and unproblematically to the jury.

### **The "Justly-Held-Responsible" Test**

To this end, I suggest two changes. First, the judge must not permit any interpretive judgments of an expert without a full prior exposition of the data on which it is based; moreover, the expert may not give an opinion expressed in the language of the insanity definition. Second, the instruction on insanity should read: "A person is 'insane' if, as a result of mental disease or defect, he cannot be justly held responsible for his conduct." The jurors are further instructed that the prosecution must prove sanity beyond a reasonable doubt and that they should consider all the testimony but not leave it untested against their own common sense and life experience. This "justly-held-responsible" test is a century-old idea which never went further than academia. (I wouldn't bet the ranch on its going anywhere else now either.) When put forth in the past, however, the supporting argument was that "insanity" as a clinical matter was not yet well-enough understood to permit a better definition. It was proposed in desperation. I support it, instead, *because* it is not a good clinical definition, *because* it subordinates all clinical interpretation to moral judgment.

Testing "justly-held-responsible" against the above-stated criteria, such scheme offers great latitude to expert testimony. Both cognitive and volitional defects are relevant; the expert may, with proper foundation, give opinions on the quantity or quality of defendant's capac-

ity in each regard. Not only may he testify fully to these matters, but his testimony is not funneled into jargon foreign or incoherent to him. He *may* testify that the defendant “cannot tell right from wrong,” or that defendant “has substantial capacity,” but he is not forced to view the problem in those terms. The second criterion is met because no expert is permitted to render an opinion on whether the defendant may be “justly held responsible” for his conduct. As to the third criterion, the moral question of responsibility is put squarely to the jury.

One objection to such an open-ended instruction, put forth by Abraham Goldstein of the Yale Law School in his book *The Insanity Defense*, is that it gives the jury no guidance, leaves it psychologically naked with no impression that it follows, and thus can draw protection from, a legal standard. The fact is that the “substantial-capacity” test really gives no guidance either, though it may give the false impression of doing so. The effect of that false impression may, in some cases, lead the jury to abdicate its responsibility to expert witnesses or to the meaningless words of a “test” for insanity. Although we would ordinarily prefer a clearer standard to a vague one, the issue is simply not amenable to more clarity without the serious side effects noted earlier.

One other feature of the open-ended instruction is important and sets it apart from all other suggested modifications. Those who argue for new “tests,” new “verdicts,” or new “burdens” begin with the premise, sometimes expressed but often not, that the prevailing rules generate either too many acquittals or too few. The move from “right-wrong” to “substantial capacity” was prompted by a belief that the former, because it excluded the volitionally-incapable, convicted people it should not. The GBMI verdict was clearly a reaction to acquittals of notorious defendants. I do not know whether the “justly-held-responsible” instruction will produce more acquittals than any other scheme or less, and it is not the intention of the proposal to do either. The number of acquittals depends on the community’s sense of morality as expressed through its representative, the jury. The acquittal rate may fluctuate with new insights from psychiatry and as public opinion on the issue ebbs and flows. Such fluctuation is not pathological—it shows that the moral dialogue continues unaffected by artificial determinants.

One cannot even tell whether or not the “justly-held-responsible” test would have changed the Hinckley outcome. Juror Copelin could not so easily claim that the jury was “locked in by the law.” My own guess is that the result would not have been different. I don’t think the jury was “locked in” by the law; prosecution expert witnesses had testified that Hinckley *did* have substantial capacity. Perhaps they were locked in by a belief that conviction in such a case was not morally defensible. Under the open-ended “justly-held-responsible” test, such belief is all that can, or should, ever lock a jury in. ❏

## **Ground Zero**

We are on harbor-watch.  
Our anchor is ephemeral.

Bones surrender,  
and the sun’s radiance  
bursts through our dust.

Words hang to the wind  
like a torn flag,  
and the last light of one  
of many afternoons  
slides  
along ordinary walls.  
This is the final emblem.

We are on harbor-watch  
under a sorrow  
of metaphors.

## **Nun’s Secret**

She offered her Savior  
the laminated circles  
of her winterbreath.  
She offered him  
this counterpoint  
to her darkened spirit.

Her prayer, enigmatic,  
was hidden like an undergrowth  
of bark. She prayed:  
Let me walk with Your shadow.  
Let me know.

And now, late at night,  
her hands dare enfold  
in the presence of the unseen.  
These hands  
that touch the untouched,  
are the essence of her prayer.

**Rudolf Wittenberg**