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A REASSESSMENT OF THE INSANITY DEFENSE

An honors paper submitted to the Department of Classics, Philosophy, and Religion
of the University of Mary Washington
in partial fulfillment of the requirements for Departmental Honors

Cassandra Sciortino

May 2015

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Cassandra Sciortino
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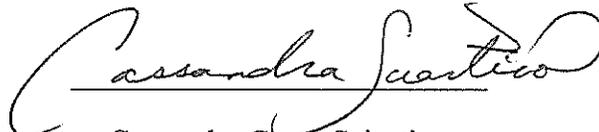
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A Reassessment of the Insanity Defense

A Thesis Presented by
Cassandra Grace Sciortino
In partial fulfillment of the requirements for
Honors in Philosophy

The University of Mary Washington

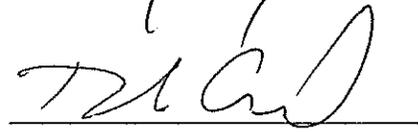
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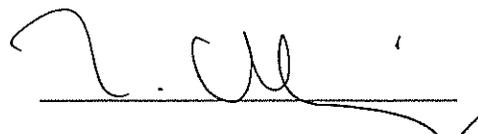
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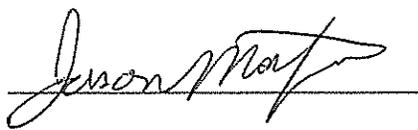
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Dr. David Ambuel



Dr. Nina Mikhalevsky



Dr. Jason Matzke

Cassandra Sciortino
Thesis

A Reassessment of the Insanity Defense

The insanity defense has been subject to criticism concerning its irrelevance, its standards of proof, its administration, and much more. Many thinkers believe it should be abolished due to these concerns. However, to suggest that the insanity defense should be eradicated simply because of imperfections in its administration and practice prematurely rejects reform and jumps straight to elimination. In what follows, I will argue that the insanity defense should not be abolished; rather, it should be reformed in a way that will allow it to function as an effective special defense for the mentally ill, and in turn make criminal law more just.

1. The History of the Insanity Defense

The insanity defense is one of the most controversial elements of criminal law; many arguments have been advanced to abolish, modify, or keep the defense as is. However, in order to have a valuable conversation about the insanity defense, it is imperative to first understand the history of the defense.

David Adams discusses how the insanity defense originated and developed over time. First, Adams notes the two prominent questions regarding the insanity defense: “How is ‘insanity’ to be understood, and why should it be an excuse at all?” (Adams 496). The first question points to one of the main problems: being able to define insanity in an all-encompassing way is virtually impossible. First, there is an inherent ambiguity that embodies the term “insane.” Although there are medical elements that can be used to gain some clarity, Adams notes that “*insanity* is a legal rather than a medical term” (Adams 496). The legal definition, according to *Black’s Law Dictionary*, is as follows: “Any mental disorder severe enough that it prevents a

person from having legal capacity and excuses the person from criminal or civil responsibility” (*Black’s Law Dictionary* 387).

Criminal responsibility is understood as the accountability for one’s actions in accordance with criminal law. Generally, this includes mens rea and actus reus; that is, the state of mind and the action or conduct of the offender at the time of the crime. This explains why insanity is relevant to criminal law. If a person’s state of mind is affected by a mental disorder, he or she might not be criminally responsible for their actions. A mental disorder can be either permanent or temporary and still grant the defendant the right to utilize the insanity defense. This is because the defendant must be found to have been legally insane at the time of the crime, not at the time of the trial.

Adams continues by describing various attempts to develop a workable definition of insanity, beginning with the M’Naghten case, which was decided by the British House of Lords in 1843. The brief facts of the case are as follows: Daniel M’Naghten killed a man named Edward Drummon, whom he believed to be the prime minister of England, Sir Robert Peel. M’Naghten’s lawyer argued that M’Naghten suffered from delusions that disrupted his perception of legal right and wrong. This case resulted in the establishment of the “M’Naghten Rule” (Adams 497), which provides that:

In all cases a man is presumed to be sane and to possess sufficient degree of reason to be responsible for his crimes, until the contrary be proved to the juror’s satisfaction; and to establish a defense on the grounds of insanity it must be clearly proved that, at the time of committing the act, the party accused was laboring from such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. (Adams 497)

The M’Naghten Rule has been adopted by jurisdictions of the common law; many U.S. states use a variant of the rule. However, the M’Naghten Rule has been much criticized. Adams explains

that the criticism comes from the rule asserting that the mental life of a person can be simply divided into cognitive, affective, and volitional components, which fails to recognize the complexity of our psychic lives (Adams 497). In other words, it does not acknowledge “how the ways in which we seek to understand the world and what we believe about it both influence and are influenced by our deepest desires, goals, and feelings” (Adams 497). The primary test for whether someone is insane, under the M’Naghten Rule, is to determine if the defendant knew legal right from wrong at the time he or she was committing the act. The rule is critiqued for this limitation because there is no room to present psychiatric evidence other than what relates to cognition and knowing what is legally right and wrong. Yet there could be a scenario in which a defendant knew his or her conduct was legally wrong but felt forced to commit the act due to his or her mental defect.

An additional test for legal insanity is the “irresistible impulse” test, which Adams states was created to allow seriously disturbed but cognitively normal defendants to be acquitted by the insanity defense (Adams 497). This test was used to exempt the accused from criminal liability if, at the time of the offense, he or she could not control the urge to act as he or she did (Adams 497). Nonetheless, this test was also criticized because of the uncertainty that came with determining whether an impulse was really “irresistible” as well as determining if a person really did not have the strength to resist (Adams 497). The uncertainty between the distinction of an impulse that is irresistible and an impulse that simply was not resisted comes from the fact that we will never be able to know what the defendant was thinking during the time he or she committed the crime. However, this is no different from any other criminal case where intent is required. The irresistible impulse test not only incorporates the cognitive prong of the M’Naghten Rule test that requires the determination of whether a defendant knew legal right

from wrong at the time of committing the crime, but it also includes a volitional test of whether a defendant could have controlled his or her impulse to commit the wrong act.

The 1954 case *Durham v. U.S.* led federal judge David Bazelon to establish the Durham Rule that proposed an alternative test for legal insanity in which the accused would be found not criminally responsible if his or her unlawful act was the “product of mental disease or mental defect” (Adams 497). However, this rule was ultimately rejected by the U.S. Supreme Court because it provided no guidelines for the jury and placed a great amount of weight on the “experts” whose testimonies often conflicted (Adams 497). The goal of this test was to present evidence that was grounded in science by determining whether a defendant suffered a mental disorder by diagnosis of a psychiatrist rather than determining the mental state of a defendant purely based on symptoms. Nevertheless, because the diagnoses of psychiatrists can differ, the jury can easily be confused and indecisive as to whom to believe since they have no other guidance other than the testimonies.

The Model Penal Code (MPC) proposed a different test for insanity that gained a rapid acceptance for remedying the issues present in the M’Naghten, Durham, and irresistible impulse tests (Adams 498). The test in section 4.01 of the Model Penal Code states “a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [legal wrongfulness] of his conduct or to conform his conduct to the requirements of the law” (Adams 498). The MPC test is broken down into two parts. The first test requires a lack of substantial capacity which disables a defendant from understanding the legal wrongfulness of his or her conduct. It is important to note that “wrong,” in this regard, is acknowledged as “against the law.” This portion of the MPC test is representative of the M’Naghten test. The alternative test incorporated into the

MPC test requires that the defendant must be found to have lacked substantial capacity and as a result could not conform to the requirements of the law. This prong of the MPC test is reflective of the irresistible impulse test. The MPC test was rapidly adopted because of its flexible nature that was not present in the previous tests; however, some states reverted back to stricter rules like the M’Naghten Rule, finding that the MPC test was too unrestricted (Adams 498).

The modification of the insanity defense over time illustrates how complex the defense actually is. The proposed rules all attempt to both define and develop a workable test for insanity. None are perfect, and all demonstrate how difficult a task it is; yet, they all capture the importance of relieving a person from responsibility of his or her actions when the person was not aware of them or could not control them. Additionally, the legal definition of insanity is so broad that there is greater room for interpretation. In understanding the history of the insanity defense it is easier to comprehend its criticism and how difficult it is to deal with “insanity”: an issue that is extremely complex and one of the most controversial topics in law both philosophically and politically.

2. Justification and Excuse: The Critical Difference

Critics often scrutinize the insanity defense for being a device that allows guilty criminals to get away with their crimes; however, anyone who would argue such a critique would evidently not understand the fundamental difference between justification and excuse. When discussing the insanity defense, it is imperative to understand that it is neither a justification defense nor an excuse defense. The insanity defense is a special defense¹; however, it functions as an excuse, although the defendant is not relieved of all consequences as would a defendant utilizing an excuse defense. The distinction between an excuse defense and a justification defense is critical

¹ A special defense results in an acquittal.

in understanding and discussing the moral aspect of the insanity defense which is excuse-based. Arguments that claim that the law uses the insanity defense to justify the actions of the mentally ill are incorrect. The insanity defense relinquishes criminal responsibility of the severely insane; it does not condone criminal behavior.

Eugene R. Milhizer discusses the critical distinction between excuse defenses and justification defenses. While both defenses are grounded on the lack of culpability, their foundations are completely different. The main difference between the two is that justification deals with external circumstances that affect the conduct of the defendant; whereas, excuse is concerned with the effect the defendant's individual capacity has on the conduct. Milhizer notes, "justification defenses focus on the act and not the actor" (Milhizer 812). He goes on to explain that justification defenses exculpate conduct that would otherwise be criminal, but under the circumstances, is "socially acceptable and which deserves neither criminal liability nor even censure" (Milhizer 812). This type of conduct is therefore seen to be warranted or justified. For example, if a person's life was being threatened and he or she was to kill a man in self-defense, his or her conduct would be justified.

In contrast, excuse defenses "focus on the actor and not the act" (Milhizer 816). Milhizer asserts "a defendant is excused when he is judged to be not blameworthy for his conduct, even though the conduct itself is improper and harmful" (Milhizer 816). In excuse defenses the defendant admits to the illegal conduct, but the focus is on the actor's capacity to comply with the law. In justification defenses, the focus is on the harmful conduct, but is warranted based on external circumstances that affected the conduct. This distinction is important to remember when discussing the insanity defense since the defense is excuse-based, meaning the focus is on the

actor's individual lack of capacity to comply with the law; it is not concerned with claiming the criminal conduct of insane persons as warranted or justified.

One way an excuse defense works is it requires that there is a disability affecting the defendants who committed the offensive act. Although the disability can vary in type and can be temporary, the disability "can provide a basis for an excuse defense only if it is casually related to the excusing condition" (Milhizer 817). Milhizer asserts that excuse defenses can be categorized into three groups: "involuntary actions, actions related to cognitive deficiencies, and actions related to volitional deficiencies" (Milhizer 817). An involuntary action is an action in which the actor did not will to happen. An example of an involuntary action is a reflex; these actions are "caused by the actor's brain but are not the product of the actor's mind" (Milhizer 817). The second category consists of actions that "[relate] to a cognitive impairment or deficiency" (Milhizer 818). This type of impairment affects an actor's perception or knowledge of certain things, and when focused in the context of a criminal defense, the impairment is "concerned with an actor's knowledge of the nature of his conduct and whether it is right or wrong, and legal or illegal" (Milhizer 818). Lastly, volitional deficiencies are defects concerned with "an actor's ability to make unencumbered choices or to meaningfully control his behavior" (Milhizer 818). In order to have a volitional defect, an actor does not have to be impaired cognitively; therefore, an actor can know his conduct was wrong and illegal and yet still be excused based on the volitional deficiency (Milhizer 818).

The insanity defense is concerned with cognitive impairment and volitional deficiency. In order to be legally insane, the defendant must have suffered from a mental disease or defect that caused a cognitive deficiency at the time the offense was committed that was so severe it

prevented the defendant from having legal capacity². Milhizer notes that whether the disability is permanent or transitory, “the disability must be of a sufficient magnitude so that it impairs an actor’s capacity, to the degree specified by the law, to exercise [freedom of choice]” (Milhizer 881). In other words, the disability must impair the actor so that he or she is not cognitively aware of what is right and wrong both morally and legally; or if he or she is aware, he or she does not have the volitional capacity to comply with what is legally right.

Through further examination of how the insanity defense acts as an excuse, Peter D. W. Heberling states that “an excuse defense entails a judgment not about the applicable legal rules, but about the actor’s ability to conform to them” (Heberling 916). Furthermore, Heberling notes, “when the law excuses a person’s conduct on the ground of insanity, it does not invalidate a particular application of the applicable law; it merely pardons the unlawful conduct as the product of a non-culpable state of mind” (916-917). This demonstrates how the excuse-based insanity defense is not meant to justify criminal conduct, but to recognize when illegal conduct is the result of a deficiency of the mind; a deficiency so severe that it prevents a person from either not knowing legal right from wrong or from being able to control his or her behavior in order to comply with the law.

In contrast to excuse defenses, a defendant using a justification defense would be claiming that his or her conduct was “appropriate under the particular circumstances [that] confront[ed] him” (Heberling 917) and that his or her conduct should therefore be justified. A defendant using an excuse defense would “admit his conduct was inappropriate but [would] seek to be excused because he lacked the requisite mental culpability” at the time he committed the criminal offense (Heberling 917). Heberling notes the importance of this distinction when he

² Having mental capacity sufficient to be held accountable for the crimes you commit.

states, “confusion about [...] the distinction between justification and excuse tends to undermine one of the chief virtues of codification –internal consistency” (Heberling 917). This confusion can lead to ethical and political arguments against the insanity defense if it is not understood what it is that excuse defenses promote. With that said, if the confusion is cleared up critics may be more open-minded to the insanity defense knowing that the actual purpose of the defense is to pardon the conduct of those who are not responsible for their actions, rather than to justify criminal behavior based on a mental disease.

3. Clarifying “Legal Punishment”

In examining the different views on justifying legal punishment, it is evident that it would be unethical to punish a defendant who is found guilty by reason of insanity, under any of the proposed theories. Adams discusses the various justifications for legal punishment. First, Adams asserts that there is a utilitarian theory in which “[c]onsequentialists have argued that legal punishment is necessary to achieve the greatest happiness or to secure the maximum degree of liberty for all citizens” (Adams 529). Adams quotes Richard Brandt who states that the utilitarian principle provides that “punishment ought in no case to be more severe than what is necessary to bring behavior into conformity with law” (Adams 529). In examining the insanity defense, it is evident that the defendants who are found to be not guilty by reason of insanity cannot be punished under this principle since the legally insane suffer from a mental disease that is so severe that they cannot control their behavior to conform to the law. If the insanity defense was abolished and we were to punish the insane under the utilitarian theory, these defendants would be receiving excessive punishment. Brandt recognizes this when he states that under these circumstances “much will depend upon relevant facts about human behavior and motivation, as well as on the broader consequences of seeking to impose excessive punishments” (Adams 529).

Although the utilitarian theory may be acceptable in regard to sane defendants, it is not a valid justification for punishing the legally insane since they cannot be deterred and therefore will not contribute to the achievement of the greatest happiness for all citizens.

Retributivism is an alternate theory of punishment that must be examined in order to understand the various justifications of punishment and how they relate to the acquittal of defendants who plead insanity. Michael Moore defines the theory as “the view that punishment is justified by the desert of the offender” (558). This notion of punishment being justified because an offender deserves it emphasizes the idea that there is some type of cosmic balance that constantly needs to be restored when an offense is committed. Retributivism is not concerned with deterrence of future crimes or whether the majority of citizens feel offenders should be punished; rather, retributivism is only concerned with inflicting punishment on an offender because he or she deserves it for committing an offense (Moore 558). This is not a valid justification to punish the legally insane. How can we recognize a person as deserving of a punishment if he or she was not aware of the nature of his or her conduct, or was not able to control it due to a serious mental defect? It would be unconscionable to suggest that someone should be punished when he or she did not have the legal capacity to understand or control his or her conduct; this is true in regard to the legally insane just as it is to a child who shoots off a gun and kills an adult without knowing what he or she was doing.

Although the utilitarian theory of punishment recognizes the importance of promoting social cohesion and crime prevention, those two goals alone are not enough to validate the punishment of an innocent person or a person who is mentally ill. The retributive theory of punishment acknowledges the ultimate importance that a defendant must deserve the punishment, otherwise the punishment is unjust; yet, this theory is flawed in that it does not

regard the importance of deterrence and social cohesion. Additionally, there is a fundamental problem of what it means to “deserve” punishment. This ambiguity poses a problem because a defendant found legally insane, for example, could be punishable under this theory if deserving punishment simply means committing an offense.

There are many justifications for legal punishment; however, in order to argue for or against any of these justifications, it is important to understand what punishment is so that we do not confuse other forms of treatment with punishment. Additionally, by understanding what it means to legally punish someone, we can better understand why punishment is not inflicted on certain people who commit a criminal offense. For example, justification defenses are established to justify criminal behavior under specific circumstances when usually that criminal conduct would be punished under the law. This restriction of punishment extends into excuse-based defenses such as the insanity defense because the defendant’s conduct in such a situation is excused from punishment. In understanding what it means to legally punish someone, it becomes evident why punishing the mentally ill would be unethical.

There is a significant difference between defining legal punishment and understanding the concept by acknowledging examples of it. For instance, if a mother points at her child in time-out and defines that as punishment, she would not be providing a sufficient definition that could be used to distinguish punishment. The real questions to be asked are why is the child in time-out, what effect does the “time-out” action have on the child, and did the child deserve it? If we seek to morally defend punishment or to excuse offenders from it, we must first understand exactly what it is we are talking about. David Boonin presents punishment in the form of a secure definition that we can rely on when distinguishing punishment from something else, rather than relying on examples to “understand” punishment.

As a starting point, Boonin asserts that punishment can be understood as something that harms an offender. Boonin continues on to explain that “harm,” in this regard, means to make the person being punished “worse off in some way, which includes inflicting something bad on her or depriving her of something good” (Boonin 540). In regard to the previous example, we can now understand that the action of putting the child in “time-out” is performed to inflict something bad on the child. Although this is an essential part of punishment, Boonin states that this harm requirement alone is not a satisfactory definition of what punishment is and urges that there are other components needed in defining punishment accurately.

Boonin reasons that in order for something to be called punishment there not only needs to be harm inflicted on the person being punished but the harm needs to be intentional as well (543). Boonin expresses the importance of the element of intention in a discussion of the insanity defense. He states that when a person is found not guilty by reason of insanity, he or she may be sentenced to incapacitation in a mental facility. Boonin uses this to explain that “in doing so, the state recognizes that its action will seriously harm the person, but harming him is not [the state’s] intention. Its intention is merely to protect the public, and it would lock him up even if [that action] did not harm him” (543). Here, Boonin claims that the incapacitation of a person who is found legally insane is not a punishment because the harm is not intentional but merely foreseeable; that is, the state’s intention is not the harm, but the protection of the public and the harm is merely something that happens as a result of the action. In order for a person to be punished, the state’s intention must be to harm the person. However, Boonin notes that the harm is not inflicted “as an end in itself, but rather for the sake of some further end, such as [...] deterring the [offender] from committing similar infractions in the future” (543). It is evident why it would be unjust to punish a person found not guilty by reason of insanity under this

definition; if the offender could not control his or her conduct or could not perceive the difference between legal right and wrong due to a mental defect, the state should not seek to intentionally harm such individuals. Therefore, the insanity defense is valuable because it allows for the protection of society without intentionally harming a defendant who is not responsible for his or her crime. Most would agree that intentionally inflicting harm on a person, who lacked capacity to reason due to a mental disease, in the same manner as one who is responsible for his or her crime, would be an unjust application of legal punishment.

Although it is imperative to add the element of intent to the definition of punishment, we must still go a bit further in order to fully understand what punishment is. If we defined punishment solely as the intentional harm requirement, a man could punch another man in the face with the intention to harm him and this would be considered punishment under our definition thus far. Yet, this is clearly not punishment, but instead, a gratuitous injury. In other words, one cannot intentionally harm someone and count it as a punishment if it is not induced to be a response to some transgression of his or hers. This problem pushes Boonin to include a “retributive” element to enhance the definition of punishment which he provides as follows: “to be a legal punishment, an act must involve intentionally harming someone because he previously did a legally prohibited act, which means that he is responsible for having done the act and that he had no valid legal excuse for doing so” (544). As previously established, the insanity defense is an excuse-based defense which means that if a defendant is found not guilty by reason of insanity, he or she is found not responsible for having committed a criminal offense; therefore, under this definition of punishment, such a defendant could not be justifiably punished.

The definition for punishment that Boonin has established thus far is still not fully complete, which leads him to add two more requirements to the current retributive intentional

harm requirement. The first addition is the “reprobative requirement” (Boonin 546). This element means that it is not only required that the intentionally inflicted harm is in response to an offense, but it must “express official disapproval of the offender” (Boonin 547). Deterrence is an example of a goal that is achieved through the use of punishment. Punishment is used as an expression of official disapproval of the offender’s conduct by threatening the punished from offending in the future. Lastly, although it is not part of the concept of punishment, it is important to acknowledge the requirement that punishment must be “carried out by an authorized agent of the state acting in his or her official capacity” (Boonin 547) in order for it to qualify as legal punishment. In combining the foregoing requirements we have finally established a definition of punishment that is both satisfactory and accurate, which Boonin calls “authorized reprobative retributive intentional harm” (547). Each requirement ensures that any legal punishment is also morally permissible. In understanding legal punishment, it is evident that it would be morally wrong to legally punish a person found not guilty by reason of insanity. If we did, we would be authorizing an intentional infliction of harm on a person who admittedly committed an offense, but who had no control over his or her conduct, did not know the conduct was legally wrong, or did not know the conduct was morally wrong due to a severe mental defect. Additionally, the mentally ill are incapable of being deterred through punishment.

4. A Proposal to Abolish the Insanity Defense

The insanity defense has proven to be one of the most controversial topics in criminal law. The establishment of the insanity defense and its use has been in discussion amongst a variety of thinkers who answer questions that involve the defense’s ethical stance, its functionality, whether it should be reformed, abolished, and much more. Johnathan Rowe presents his opinion on the insanity defense by arguing that it should be abolished. Those who

argue in favor of abolishing the insanity defense usually argue that the defense is taken advantage of or that it can be substituted with a doctrine that is not as relieving as the insanity defense is.

Throughout his discussion, Rowe makes various empty statements and jumps to conclusions without a stable argument to back them up. For example, at the start of his article Rowe states “others have called for a tighter legal definition of insanity itself. Such changes might be helpful, but they amount to fiddling” (95). At first it appears as though Rowe is presenting a valid point because a stricter definition could be helpful in making it easier to determine if a defendant is legally insane or not, rather than having a broader test such as the Durham Test. However, Rowe asserts that even if the changes might be helpful, reform still does not solve the real problem of justice. Since Rowe is willing to admit that there could potentially be a way to improve the defense, but is set on abolishing the defense altogether, it expresses Rowe’s resistance to any type of reform and suggests that the only way to resolve the injustices is abolishing the defense entirely (95). It is beneficial to break down Rowe’s argument; in doing so, it will illustrate why eliminating the insanity defense entirely is not the correct solution. I propose that the abolishment of the insanity defense altogether would be unconscionable. To legally punish someone who is truly not responsible for his or her actions would be unethical. I do believe, however, that there is room for reform and in examining Rowe’s argument, the fundamental value of the defense and its sustainability can truly be understood.

4.1 The Argument Based on One Case

One of the major flaws in Rowe’s argument is that he focuses on one case in which the insanity defense is utilized, and that is the John Hinckley trial. Although he mentions other cases, Rowe consistently refers back to the Hinckley case as his main example. In 1982, Hinckley

attempted to assassinate President Ronald Regan and was found not guilty by reason of insanity. Many people were upset with the verdict, believed it was unjust, and blamed the legal system for making it too easy to let criminals go by finding them insane (Rowe 95). The Hinckley case was a media-hyped case that portrayed the community's dissatisfaction with the verdict. In arguing around media-hyped cases such as the Hinckley trial, there is no room to observe the results of all of the other insanity defense cases, most of which differ from the Hinckley verdict. Additionally, arguing around one case ultimately leaves the argument open to objection.

4.2 The Retributivism Argument

As Rowe's argument progresses he briefly mentions the case of Robert H. Torsney: a New York police officer who shot a 15-year-old in the head from two feet away (95). Torsney was found not guilty by reason of insanity. After a year of incapacitation, it was recommended that he be released since there was nothing wrong with him at that time (Rowe 95). In analyzing this case, Rowe could have taken into account the mental state of Torsney at the time he committed the crime, as well as his development over the year he was being treated. However, Rowe asserts that it is absurd to have found Torsney legally insane and that the only element that ought to have been examined in determining Rowe's verdict was that "he had shot somebody and deserved to be punished" (Rowe 96). Rowe is trying to advance a retributivist argument but he confuses retributivism for revenge.

If Rowe were to adopt the retributivist approach, he cannot think punishment should be inflicted on the insane. Retributivism is the notion of punishing someone because they deserve it; in contrast, revenge is simply inflicting harm on a person who injured or wronged someone else. Rowe states that when psychiatry is allowed in a courtroom, it only obscures the fact that a crime was committed (96). First of all, in order to plead insanity, the defendant admits to committing

the crime, but asserts that he or she is not responsible for it; there is no “obscurity” in determining whether or not a crime was committed by the defendant. Secondly, if we were to follow Rowe’s suggestion and punish everyone who committed a crime merely because they committed a crime, we would have to reform or abolish many, if not all, justification and excuse defenses. For example, if a man is being attacked by an intruder who is trying to kill him and the man uses self-defense to kill the attacker, self-defense would no longer be justified and he would be charged with first degree murder and sentenced accordingly. Rowe asserts that simply because Torsney shot the boy in the head, he deserved to be punished for that reason alone; again, mistaking retributivism for revenge.

Of course, that type of system would be unjust, which is why we have established excuse defenses. We have found that if a person is not legally responsible for their actions because they were forced, intoxicated, too young, mentally ill, etc., it would be unconscionable to punish them at the same level of an otherwise responsible criminal, if at all. Rowe argues that “[y]ou don’t have to believe that retribution is the whole purpose of the law to acknowledge that something very basic in us requires that when someone causes serious harm to someone else, he should pay” (101). Rowe’s assertion that all humans have a sort of innate requirement in them to punish people who harm others is too vague a statement. It would be more accurate to assert that there may be something basic in humans that require us to feel upset when someone is greatly harmed, but it does not necessarily mean that we are going to punish everyone because there was harm committed. Additionally, humans experience bad feelings that seem natural, but that do not permit punishing someone. For example, if Bob sees his wife cheating on him with Joe, Bob may experience a strong feeling of jealousy; however, that does not give Bob the right to punish them based on that bad feeling. There is much more to punishment than that, as we have

discussed earlier, there needs to be authorized reprobative retributive intentional harm. A punishment must be an authorized intentional harm that is in response to a person legally responsible for committing a crime and is enacted in order to express disapproval of said behavior. Rowe does not acknowledge legal responsibility; all Rowe acknowledges is whether or not a crime was committed, and revenge is not enough to validate a legal punishment. Revenge is a feeling that should be controlled, not answered to.

4.3 The Argument That Criminals Get Away with Their Crimes

Rowe uses cases of the insanity defense that support the idea that such a defense too easily lets criminals get away with their crimes. For example, Rowe discusses the case of Inez Garcia, who was raped by two men and shot one of her assaulters. During the trial in which she was pleading insanity, she shouted “I killed [him] because I was raped and I’d kill him again” (97). Although there are cases in which a defendant pleading insanity admits to killing his or her victim, that factor alone does not mean the defendant is not legally insane. The case of *State v. Cameron* illustrates this scenario. Gary Cameron was charged with the premeditated first degree murder of his stepmother, Marie Cameron, after stabbing her more than 70 times. Three psychiatrists concluded that Cameron suffered from paranoid schizophrenia at both the time of the killing and at the time of the trial (Adams 517). The doctors asserted that “[Cameron] believed God commanded him to kill his stepmother and that he was therefore obligated to kill the ‘evil spirit’” (Adams 517).

In this scenario, Rowe would suggest that we punish Cameron because he committed a criminal act; again, adopting a revenge approach to punishment. However, Cameron’s mental defect must be examined in determining his verdict because it would be unjust to punish someone if his or her mental defect was so severe that it distorted his or her legal capacity to

understand the moral wrongfulness of his or her actions. Cameron admitted that he understood his actions were legally wrong but he did not think they were morally wrong because he genuinely thought he was being “directed by God to kill Satan’s angel” (Adams 517). With that said, some of the doctors asserted that “at the time of the killing, “[Cameron] was unable to appreciate the nature and quality of his acts [and] [n]o doctors contended otherwise” (Adams 517). Cameron suffered from a mental defect that precluded his actual choice and impaired him to the point in which he did not understand moral right from wrong. Certainly we should not think it would be conscionable to punish this man who could not understand what he was doing based on a mental defect, the same way we would punish a criminal responsible for his or her actions. No, we seek to treat such a man through hospitalization. Comparatively, we would not punish the child who shoots and kills a man because he or she does not have the capacity to understand his or her actions.

4.4 A Misunderstanding of “Legal Insanity”

Another flaw in Rowe’s argument is his misunderstanding of what the term “insanity” means. As mentioned previously, it is crucial to understand the meaning of legal insanity before presenting an argument for the abolition of the defense. Again, insanity is a legal rather than a medical term. However, Rowe seems unclear of this when he states,

the trouble is, virtually all criminals have mental problems [...] is there such a thing as a ‘sane’ rape [...] if anyone did such deeds with calm and rational deliberation, would that individual not be the most insane [...] of all? (102)

It is true that anyone who is capable of murdering someone most likely has some type of mental problem; however, this is not what we mean when we talk about legal insanity. As previously explained, to be legally insane one must suffer from a mental defect so severe that either he or she cannot differentiate between what is legally or morally right and wrong, or he or she is not

capable of complying with the law. To answer Rowe, technically there is such a thing as a “sane” rapist; that is, if we are discussing the legal terminology. For instance, if a person commits rape and is aware that his or her action is legally and morally wrong and is capable of complying with the law but chooses not to, that person is not an insane criminal, no matter how “deranged” it may seem to a reasonable person. Rowe’s entire argument is based on the assertion that insane criminals are no different than “sane” criminals and that they deserve the same punishment simply because they committed an act. This is evidently not the case; we have established the insanity defense because we have found that those who are legally insane are not responsible for their actions. Furthermore, we have found that it would be unethical to punish people who are not responsible for their actions. We have implemented justification defenses and excuse defenses for the same reason. It would be unethical to punish someone who was acting in self-defense or someone who does not have the legal capacity to understand he or she committed a crime whether it is because of age, duress, involuntary intoxication, or some other inhibiting factor.

4.5 The Argument of Recidivism

Rowe goes on to propose recidivism as an argument for abolishing the insanity defense: repeating criminal behavior after being convicted and punished once. Rowe states that “there is evidence that criminals released from mental hospitals tend to repeat their crimes with about the same frequency as their counterparts released from prison” (100). Rowe is trying to make the point that since the frequency of relapse is the same between insane criminals and “regular” criminals, there is no point in hospitalizing the insane since putting them in jail would yield the same outcome. Instead of proposing a way in which criminals in prison could be further deterred from relapsing, Rowe simply states that since the probability for relapse is the same in regard to

institutionalized insane criminals we should just abolish the insanity defense and put them in prison to save us the trouble of making a distinction between insane criminals and those who are not. Rowe goes on to state “the purpose of a criminal justice system is not just to punish offenders; it is to protect the rest of us from dangerous people as well” (100). Here, Rowe is referencing specific deterrence³ and advances the idea that imprisonment is more of a deterrent than incapacitation in mental facilities; therefore, punishing offenders by sentencing them to prison will have a greater impact on protecting society.

However, this is where Rowe’s argument breaks down. It is impossible to deter the legally insane. If a defendant is found legally insane it means that he or she, at the time of committing the crime, was either unaware of the legal nature of his or her actions or he or she could not control his or her behavior and was compelled to commit the act. In both of these situations there is a lack of awareness or control; these are two crucial qualities an accused must have in order to be deterred from relapsing and committing a crime. Assume the insanity defense was abolished and someone who was found legally insane at the time he or she committed murder was sentenced to prison. If his or her mental defect was cured and he or she understood the nature of his or her past act, he or she might feel bad and the punishment could potentially make him or her realize that he or she should not commit such an act again. However, assume that same person is released and their mental defect comes back making them incapable of understanding legal right and wrong resulting in them killing another man. All of the “deterrence” work that the previous punishment influenced while the defendant was cured is now completely irrelevant because someone who does not know the difference between legal right and wrong cannot be deterred due to their mental defect. In response to Rowe’s argument it is

³ Deterrence that is directed at the individual in an attempt to persuade the offender from committing further offenses.

not true that putting the mentally ill in prison will have a greater deterrence affect. If anything, it works against the protection of society since there are very few resources for the mentally ill in prison. Additionally, in prison, when time is up, time is up. However, incapacitating the insane in mental facilities can be indefinite or potentially longer than a prison sentence. Incapacitation would protect society more efficiently than imprisonment since the insane would be held longer while receiving the treatment they need.

4.6 The Present Mind-Set Argument

One argument for the abolishment of the insanity defense is that the verdict of a defendant pleading insanity is based on his or her mental state at the time the crime was committed without regard to his or her present mental state. Rowe states that although a defendant may be declared insane,

the problem is, *that* insanity was at the time of the crime, which may have been a year or more before. By the time of the commitment hearing, the old problem may have miraculously cleared up. The commitment authorities are then faced with two bad options. Either they tell the truth and let a dangerous person out or they fill a bed in a crowded mental hospital with someone who will be there not for treatment, but only to be kept off the streets. (101)

Rowe contradicts himself in his argument. First, he expresses concern that the present mental state of a defendant declared insane should be considered because his or her mental illness could be gone. However, he later states that the commitment authorities must choose either to let a dangerous person go out on the streets or to institutionalize a person for the sake of incapacitation and not treatment (101). Yet, if there were a situation in which a defendant was truly cured from his or her illness, he or she would no longer be a danger to society if he or she were to be let out, at least not any more than anyone else who is mentally stable. In other words, if the defendant's present mental state is that he or she is cured of the previous mental defect, we could not predict that he or she will be a danger to society unless his or her mental illness were to

relapse. In that case, declaring the defendant insane at the time of committing the crime and letting a presently stable defendant go would not be a dangerous option. On the other hand, if the defendant still sustained a mental defect by the time of the hearing it would be proper to sentence that defendant to hospitalization so that he or she could be treated accordingly; this would not simply be “fill[ing] a bed in a crowded mental hospital” (Rowe 101). Rowe argues that if a person who is cured of his or her mental illness is sentenced to a mental hospital, it would be unjust. Rowe argues that since the convicting stage of the legally insane does not acknowledge the present mental state of the accused, the only result would be putting sane people in mental facilities. However, this is not the case; even if a defendant is found not guilty by reason of insanity that person’s present mental state should definitely be taken into consideration when determining his or her punishment.

There are indeed mental hospitals that are full of patients who should not be there. Rowe quotes E. Fuller Torrey, a psychiatrist at St. Elizabeth’s mental hospital in Washington, who asserts “neither [Dr. Samuel] Yochelson nor I found that any of the men we evaluated were insane” (100). Rowe is correct in asserting that this is a problem that needs to be addressed; however, he is incorrect when he states that the only way to ensure the safety of society is to place the legally insane in mental hospitals even if they are presently stable. However, if a person’s present mental state is stable, he or she can no longer be seen as a threat to society and therefore should not be placed in a mental facility.

5. Reducing the Conviction to Manslaughter

Norval Morris advances an argument for the abolishment of the insanity defense, but takes a quite different position than Rowe. Morris proposes the insanity defense should be eliminated as a special defense. In return, Morris suggests the legislature should enforce a

qualified defense of diminished responsibility which would reduce the charge from murder to manslaughter. Under Morris's proposed defense, a defendant who would normally be acquitted by reason of insanity would instead be convicted of manslaughter and sentenced accordingly. Morris states the issues with the insanity defense are basically "legal, moral, and political, not medical or psychological" (519). Morris recognizes that the insanity defense is concerned with the legal, rather than the medical which, as previously discussed, is an important distinction that must be acknowledged in any argument regarding the insanity defense. However, Morris's argument weakens when he states that the various rules that have been established to determine legal insanity, such as the Durham and M'Naghten Rules, are irrelevant in discussing the abolition of the insanity defense. Furthermore, Morris states that the variations on where the burden of proof for defining mental illness is placed, as well as the language to capture a causal relationship between legal insanity and the defendant's actions, are also irrelevant topics in the discussion of the abolition of the insanity defense. These factors are certainly not irrelevant; they can potentially be examined and manipulated to reform the insanity defense in order to improve its effectiveness.

Morris questions why we do not simply give mental illness the same exculpatory effect as blindness or deafness, and reasons that the insanity defense is grounded in a moral principle that "when choice to do ill is lacking, it is improper to impute guilt [...] hence there is a pressure for a special defense of insanity, just as there is pressure for a special defense of infancy or duress" (519). Morris expands on this idea when he states that "the special defense is a genuflection to a deep-seated moral sense that the mentally ill lack freedom of choice to guide and govern their conduct and that therefore blame should not be imputed to them for their otherwise criminal acts nor should punishment be imposed" (519). This is why we have established not only special

defenses such as the insanity defense, but also justification and excuse defenses because we acknowledge that there are certain circumstances in which it would be wrong to impute guilt for actions that would otherwise be criminal acts if it were not for the special circumstance. Morris suggests that his proposal of abolishing the insanity defense does not promote “wholesale punishment of the sick” but instead, encourages the position in which “mental illness [is] given the same exculpatory effect as other adversities that bear upon criminal guilt” (519).

Additionally, Morris notes that even with the special defense of insanity there is a widespread conviction and punishment of the mentally ill, and that we promote the insanity defense as a moral position, but then pursue “profoundly different practices” (Morris 519). Morris, like Rowe, found a problem with the insanity defense and believes this is sufficient reason to abolish it altogether. However, I argue that if there is a way in which we can adjust the insanity defense that would fix the presented problems, we should examine that route before abolishing the defense. Morris states that since there is conviction and punishment of the mentally ill with the insanity defense in place, it would not matter if it were abolished. This is a rather weak argument considering there are possibilities of reforming the insanity defense that could prevent or lessen the conviction rates of the mentally ill. Whereas abolishing it altogether would just ensure the conviction and punishment of the mentally ill, although Morris thinks this will not happen.

Morris goes on to illustrate how the special defense is a relatively rare one when he states, “Nationally, in the 1978 census of state and federal facilities, 3,140 persons were being held as not guilty by reason of insanity. In Illinois, at the time of writing 127 are so held. In New York, between 1965 and 1976 inclusive, 278 persons were found not guilty by reason of insanity” (519). In discussion of these statistics, Morris suggests that “no one acquainted with the

work of the criminal courts can think that these numbers remotely approximate the relationship between serious mental illness and criminal conduct” (519). Morris is correct in saying this is a big problem with the special defense of insanity; there are a ton of people who are mentally ill that end up in prison and few who take the insanity route. In contrast, some defendants who are not legally insane are being acquitted of their crimes by the use of the insanity defense and the legally insane defendants are being convicted and punished. However, just because we want to prevent non-insane persons from benefiting from this defense, it does not mean the answer is abolishing the defense altogether. In pursuing the abolition of the insanity defense, we would be acknowledging that the legally insane should not be punished for their actions, whether they are charged with murder or with Morris’s “diminished responsibility” (519) substitution that would lessen the charge to manslaughter. Our goal should not be to lessen the punishment of those who are found to be legally insane, it should be to excuse them of punishment altogether because of their lack of freedom of choice, and to get them the treatment they need so that they can become healthy and will no longer be a threat to society.

In an attempt to explain why special defenses are irrelevant, Morris asserts that the only reason they are implemented and pursued beyond the traditional common-law relationship between the illness and the *actus reus* and the *mens rea* of crime are to promote the expediency of crime control and fairness (520). Morris quotes J. Goldstein and J. Katz who state that “the insanity defense is not a defense; it is a device for triggering indeterminate restraint of those who are mentally ill at the time of the crime but are not civilly committable now” (Morris 520). Morris relates this to the Criminal Lunatics Act of 1800 which provides that the insanity defense “is basically a confinement of those who otherwise could not be confined” (520). Morris argues that the crime control goal is not strong enough to justify the insanity defense. This argument is

similar to that of Rowe's present mental illness argument when Rowe claims that it is inappropriate to confine a defendant to a hospital for an indeterminate period of time when he or she has been cured of the mental illness that he or she had at the time of committing the crime.

However, as previously discussed, I reasoned that the present mental state of the defendant should be factored into the determining of whether or how long the defendant is to be hospitalized. If the accused is truly cured of illness, it would be, as Morris suggests, inappropriate to confine him or her since it would be unjust to confine someone who otherwise could not be confined. However, there are still mentally ill defendants who need to be institutionalized in order to protect the public and get the treatment they need. Having potentially cured defendants that should not be incapacitated is not sufficient reason to abolish the insanity defense. Those who are truly cured could be sentenced to a period of supervision or a reevaluation of their mental state, or something else that would protect them from being wrongly incapacitated in a mental facility; abolishing the insanity defense, however, is not the only solution to protect such individuals.

Moving forward from the expediency of crime control argument, Morris discusses the main principle of the special defense of insanity, which is fairness. Morris explains that there is a moral sense that "it is unjust and unfair to stigmatize the mentally ill as criminals and to punish them for their crimes" (520). As previously discussed, there are multiple reasons for which we choose to punish those who are guilty of committing an offense. Morris reiterates the argument that "the criminal law exists to deter and to punish those who would or who do choose to do wrong. If they cannot exercise choice, they cannot be deterred and it is a moral outrage to punish them" (520). This assertion is correct in that a person who does not have the choice to abide by the law should not be punished. However, Morris thinks that freedom of choice is expressed on a

continuum in which only the hypothetically pathological can lack freedom of choice. Morris agrees that in a situation where there is a complete absence of choice, it is outrageous to inflict punishment; however, he believes that is rarely ever the case.

Morris errs when he states that there is a continuum in which only those who are considered pathological should be acquitted of their crimes. In our discussion of legal insanity, we have already seen that there are multiple situations in which a defendant could fall somewhere on the scale and still be recognized as not responsible for his or her actions, making it unjust to punish him or her. Legal insanity is certainly not black and white; there are many circumstances in which a mental defect can compel a defendant to commit an offense or disable the defendant from being able to distinguish between legal right and wrong, making it impossible to deter such defendants and unjust to punish them.

Morris proposes an establishment of the special defense of dwelling in a black ghetto. Morris states that if we are to allow that all responsibility be relinquished from those who were so impaired that they lacked capacity to choose between crime and no crime, then in compliance with moral fairness, this special defense should be accepted as well (520). Morris starts his argument by stating that “social adversity is grossly more potent in its pressure toward criminality [...] than is any psychotic condition” (520). However, this is not an accurate comparison because there is no correlation between mental illness and a child growing up in a black ghetto. Morris asserts that “as a rational matter it is hard to see why one should be more responsible for what is done to one than for what one is” (520). However, it is not hard at all since in the former case, the person still has freedom of choice, regardless of their family or living condition. In the latter, the person’s freedom of choice is significantly lessened if not completely absent because the mental defect impairs the person’s capacity to understand what he

or she is doing or he or she is not free to choose to abide by the law. In Morris's argument for the special defense of dwelling in a black ghetto, he errs in that he confuses causation with compulsion (Morse 524).

Stephen J. Morse advances this last response to Morris by noting that "[c]ausation is not an excuse [...] for all behavior is caused" (Morse 524). Morse explains that if causation were an excuse no one would be held responsible for anything they did because all behavior is caused by something (524). Morse states that it is compulsion that Morris is mistaking causation for and notes that they are two distinct factors. Morse explains that compulsion "exists when [a] person faces a regrettable hard choice that leaves one with no reasonable alternative to wrongdoing" (525). Morse explains that the true problem is not causation, but nonculpable lack of rationality and compulsion. In addition, Morse illustrates his point by giving an example of two people who both commit murder. The first person commits the murder after involuntarily taking a hallucinogen, while the second person commits murder due to a mental defect that compels him or her to kill. Morse explains that "in both cases, the defendant is excused not because the behavior was caused [...] but because the defendant was sufficiently irrational and was not responsible for the irrationality" (525).

Morse clarifies the distinction between this type of defendant and the defendants presented by Morris who dwell in a black ghetto: "we do not excuse most disadvantaged criminals [...] not because [...] we fail to recognize that social disadvantage is a powerful cause of crime [but rather] most disadvantaged defendants are held responsible because they possess minimal rationality and are not compelled to offend" (525). If a person is raised in a poor living condition, they may very well be inclined to commit a crime; nonetheless, they still have minimal rationality to choose not to commit a crime. If a person suffers from a mental defect,

that person's rationality is impaired and he or she does not have the freedom to choose between committing a crime and not, regardless of how that person was raised. This distinction makes it clear that Morris's proposed special defense of dwelling in a black ghetto should not be established and is not comparable to the special defense of insanity.

One of Morris's main arguments is that the special defense of insanity is only pleaded when advantageous, which depends on sentencing practices and rules related to how to treat those deemed not guilty due to insanity (Morse 519). In other words, if a defendant is found not guilty by reason of insanity, that defendant may be sentenced to life in a mental hospital – a sentence that is far worse than the defendant may have received if he or she did not plead insanity. This influences legally insane defendants to refrain from using the insanity defense. Morris asserts that this is a demonstration of how we pretend to hold a moral position but pursue profoundly different practices since we are convicting and punishing the mentally ill who are not guilty. Yet, what Morris does not take into account is the fact that this is a relatively rare circumstance and that even if some of the accused who are not mentally ill were to utilize the insanity defense as a way to lessen their sentence, they most likely would not prevail. This is due to the fact that it is extremely difficult to prove someone is legally insane, which results in an extremely low success rate of the insanity defense. If anything, Morris's argument illustrates how the sentencing practices involved with those who are found not guilty by reason of insanity should be reformed.

6. Saving the Insanity Defense

It is evident that the insanity defense is a highly controversial topic that has been much debated. I aim to present a solution that will allow for the insanity defense to be upheld while having been reformed in order to resolve some of the main issues that have been presented. I

believe that the insanity defense should not be abolished, but instead, it should be reformed based on the mere fact that there are some defendants that are so impaired by mental defects that it would be unjust to convict and punish them because they do not deserve it. It is true, I admit, that there are some cases in which the insanity defense is used improperly and the verdict is an unjust one; however, I believe that we should take those cases and use them to promote a reformation of the insanity defense, not the abolition of it. It is not sufficient to state that because some people wrongly take advantage of the defense, we should abolish it altogether. This action would only ensure that the mentally ill – those who are truly in need of the special defense – would be left to be unjustly punished for something they do not deserve. I argue that we should keep insanity defense cases in perspective and remember that they are only used in about 1% of felony cases (Barbosa). Many who argue against the insanity defense use media-hyped cases to embellish their argument, when in reality there is not as much difficulty and confusion as is presented by opponents of the defense. We must remember these points because in promoting the existence of the insanity defense we are supporting the idea that we, as a community, believe that it is unjust to punish those who are truly found to be legally insane.

Richard Bonnie's argument in favor of the insanity defense, in part, supports my argument to reform the defense in order to improve its overall functionality. First, Bonnie points out that the much hyped cases such as the Hinckley trial, which Rowe references in his argument, might very well have caused an emotional reaction against the verdict and the criminal law system at the time. However, Bonnie responds by explaining that if we were to abolish the insanity defense altogether, the question of Hinckley's sanity could not even be raised (105). Bonnie's overall argument against the abolition of the insanity defense is as follows: "I am persuaded that the possibility of moral mistakes in the administration of the insanity defense can

be adequately reduced by narrowing the defense and by placing the burden of proof on the defendant” (105). I agree that instead of jumping to abolish the insanity defense, we should aim to reform its administration so that it can be used more effectively. In addition, I agree that establishing the insanity defense as an affirmative defense in which the burden of proof is placed on the defendant is one way in which this reformation can be executed. However, I do not agree with Bonnie that we should tighten the defense. Although this would allow for a stricter determination of who is legally insane, it would exclude certain defendants who morally should be allowed to pursue the defense.

Bonnie asserts that there are three options to pick from when deciding how to handle the insanity defense. First, he states that we can decide to sustain the existing Model Penal Code Law. The test to determine legal insanity, under this approach, is both a cognitive and volitional test to determine whether or not a person’s thinking was so severely impaired by a mental defect that he or she “lacked capacity *either* to understand or appreciate the legal or moral significance of his actions, *or* to conform his conduct to the requirements of the law” (Bonnie 105). Bonnie states that this test is too broad and allows for multiple moral mistakes. He points out that under this law we allow that a person, although aware that his or her actions are legally wrong, can still be found guilty because he or she lacked capacity to control his or her conduct at the time of the crime. Bonnie thinks the volitional prong should be eliminated because it is too flexible since it is impossible to determine if someone were truly unable to resist his or her actions.

Bonnie’s disagreement with the Model Penal Code Law for insanity leads to his suggestion that we return to the M’Naghten Rule and “retain the insanity defense as an independent exculpatory doctrine [...] [and] eliminat[e] the volitional prong” (105). He urges that we should tighten the insanity defense so that “the sole test of legal insanity [is to determine]

whether the defendant, as a result of a mental disease, lacked ‘substantial capacity to appreciate the wrongfulness of his conduct’” (109). The adoption of Bonnie’s proposed tightened defense would lead to the abolition of the volitional prong ⁴and would leave the cognitive prong ⁵as the prominent factor in determining whether or not a defendant is legally insane. Bonnie asserts that the volitional prong should be eliminated because there is no scientific basis for calibrating a person’s capacity for having free will or a lack thereof (109).

Morse provides a reply to Bonnie’s position. In response to a complaint made by the American Medical Association (AMA) in regard to the insanity defense, he states, “the AMA errs by claiming that free will is the basis for responsibility and that mental disorder is somehow necessarily the antithesis of free will” (525). The AMA’s argument is similar to Bonnie’s argument that the volitional prong of the insanity defense should be deleted. Both assert that since there is no way to determine if someone lost his or her free will, the test should solely be the determination of whether or not the accused understood the wrongfulness of his or her actions at the time he or she committed the crime. However, Morse reinforces the point that “free will is not the basis for responsibility [...] irrationality or compulsion negates responsibility” (525). Take, for example, our previous discussion of Gary Cameron who stabbed his stepmother to death because he believed God was compelling him to do so. If we were to eliminate the volitional prong of the insanity defense, Cameron would be convicted and sentenced with first degree murder because he admitted that he was aware of his actions. However, Cameron suffered from paranoid schizophrenia at the time of the crime during which he was under compulsion to stab his stepmother because he “heard” the voice of God compelling him to kill a demon – an act

⁴ A volitional test determines whether or not a defendant could control his or her actions.

⁵ A cognitive test determines whether or not a defendant was aware of the legal or moral wrongness of their actions.

that Cameron believed would not be morally wrong (Adams 517) . If we kept the Model Penal Code Law intact and used the “volitional prong” we would determine that Cameron was legally insane when he killed his stepmother. Nonetheless, Bonnie would argue that Cameron should not be found legally insane because it is impossible to tell if he truly lacked free will in that moment.

Bonnie is correct that it would be impossible to calculate the loss of free will; however, that is irrelevant because the test does not ask for that calculation. Rather, the test is used to find whether or not Cameron lacked rationality or was compelled to do an act which would negate his responsibility. Cameron’s mental defect made him hear what he believed to be the commanding voice of God that persuaded Cameron into believing his mother was a demon and compelled him to murder her. Although Cameron may have been aware that he was committing murder, he should not be held responsible for his actions because his mental defect resulted in compulsion. I agree with Bonnie that the insanity defense should be reformed; however, I do not believe the defense should be remodeled to the former M’Naghten Rule. Such a change would be unjust and would prevent certain legally insane defendants from utilizing the insanity defense, potentially resulting in wrongful imprisonment.

Moving forward, if we were to keep the approach for determining legally insanity under the Model Penal Code Law, we must find a way to reform the defense so that it is more effective, without tightening it. As previously mentioned, Morris briefly argues that defendants that would normally be acquitted of their crime should be convicted with a lessened sentence of manslaughter. This is a popular proposition when it comes to discussing the insanity defense. However, this argument is based on the grounds that a defendant who normally would be acquitted of all responsibility would, under this approach, be found as having diminished responsibility. Diminished responsibility is a defense in which a defendant argues that a mental

defect or some other impairment caused the accused to be disabled in terms of mental responsibility which in turn could negate an element of a charge; for example, it could negate the premeditation requirement for first degree murder, resulting in a lessened charge of manslaughter (Storey 115). Be that as it may, this approach would still find the accused guilty even though his or her mental illness is acknowledged and he or she is receiving a lessened sentence. I do not favor this reformation of the insanity defense. It is not enough to partially relieve the mentally ill of their responsibility and punish them for an action that they either could not understand was legally wrong or that they could not control.

Bonnie presents, but rejects, another argument that is used to promote the abolition of the insanity defense – the *mens rea* approach. This approach advances the position that as long as the accused has the required state of mind for the offense of murder, any “exculpation, based on mental disease” should be eliminated (Bonnie 105). In other words, the mentally ill should be treated the same as a normal person, neither of whom can escape liability by “proving that he did not know or appreciate the fact that his conduct was wrong” (Bonnie 105). Bonnie presents the case of Joy Baker to illustrate why it would be unjust to adopt this approach; I strongly agree with his analysis. Joy Baker was a thirty-one-year-old woman who admitted to killing her aunt. Baker was in an abusive relationship; the night before the shooting, her husband took her on a car ride, keeping a gun in between them the entire time. A few days prior to the murder, Baker had “become increasingly agitated and fearful. Her condition rapidly deteriorated and she began to lose contact with reality [...] She believed her children and neighbors were possessed by the devil” (Bonnie 106). On the day of the shooting, Baker made her kids repeat the Twenty-Third Psalm as she frantically walked around with a gun. Her aunt came by to try and help her, but Baker warned her that she should leave. The aunt refused and went to the back door. Baker

believed that her aunt was her dog who might attack her, so she then shot her aunt. As her aunt was lying on the ground she asked Baker why she shot her and Baker replied ““because you’re the devil and you came to hurt me”” (Bonnie 107). The aunt then replied with “Honey, no, I came to help you” (Bonnie 107). Baker suddenly realized it was her aunt on the ground and saw that she was in pain. This confused Baker, but she did not want to see her aunt in pain so she shot her a second time, killing her (Bonnie 107). Baker was never indicted or brought to trial, but was permitted to leave the state and live with relatives once she was stabilized on anti-psychotic medication. This decision was made with the consent of the prosecution at the preliminary hearing after the examining psychiatrists testified (Bonnie 107). Bonnie explains that if the insanity defense were abolished, Baker could not have been acquitted since she had the required state of mind for criminal homicide (107). Bonnie notes that the states of mind that are required for homicide and other criminal offenses “refer to various aspects of conscious awareness [...] [and] do not have any qualitative dimension” (107). If the regular *mens rea* principles were applied to this case, Baker would probably be charged with some form of homicide. This is because Baker had the intent to kill, even though she mistook her aunt for her dog, and this mistake would be found to be unreasonable. Furthermore, her second shot happened in a moment when she had some clarity that she was shooting her aunt. Bonnie states that “if we look only at her legally relevant ‘state of mind’ [...] and we do not take into account her highly regressed and disorganized emotional condition, she is technically guilty of murder” (108). To abolish the insanity defense and allow for this type of conviction would be unjust. There are circumstances in which a mental defect is so severe that it impairs a person’s legal capacity to formulate the legal state of mind required for a particular crime. If we were to examine the state of mind of a

legally insane person, we would yield an inaccurate conclusion because that person is impaired to the point where he or she cannot formulate the legal state of mind.

It would be insufficient to only examine Baker's legally relevant "state of mind." In congruence with the *mens rea* approach, Baker would be found guilty because she knew on some level that she was shooting her aunt. However, if her mental illness were taken into consideration, it would be evident that there is much more to be considered when determining her conviction and sentencing, as well as other potential defendants like Baker. Baker did shoot her aunt; however, the first time she shot her aunt, she genuinely thought that her aunt was the devil. This mistake shows that her mental illness impaired her so severely that she was compelled to shoot her aunt in order to protect herself. The second time Baker shot her aunt, it is true that she knew it was her aunt lying on the ground and she knew that her action would result in her death; however, she was confused as to why her aunt was hurting in the first place and wanted to put her out of her misery. This does not illustrate a justification, but rather, it shows that Baker's mental illness disabled her ability to fully understand the wrongfulness of her actions. It is imperative to examine these elements of an accused's mental state because his or her responsibility could potentially be negated; therefore, relieving the accused of guilt, resulting in the accused getting treatment which could improve his or her mental state and make the person no longer a threat to society. However, if the insanity defense were abolished and we relied solely on the *mens rea* approach, these factors would never be examined and mentally ill defendants such as Baker would be convicted and punished for crimes for which they should not be held responsible.

I have argued that the solution to sustain the insanity defense is not achieved by the tightening of the defense, the lessening of the conviction to manslaughter, and most certainly not

the abolition of the insanity defense. In contrast, my solution is to keep the established test for insanity which is promoted by the Model Penal Code Law, while maintaining the defense as an affirmative one, and finally, improving the quality of expert testimony – a proposition that Bonnie presents as well. As I have previously argued, both the volitional and cognitive prongs of the test for insanity must be sustained in order for all mentally ill defendants to utilize the insanity defense. It would be unjust to exclude some mentally ill defendants from pursuing the defense simply because it is thought that it would be too confusing to distinguish whether or not someone is legally insane. Secondly, the insanity defense should remain an affirmative defense because if a defendant wants to plead insanity, he or she should have the burden of proof placed on him or her to prove he or she is legally insane. Lastly, there should be a significant improvement in expert testimony. One of the most significant objections to the insanity defense is that there are so many “experts” that testify in insanity cases that the juries get confused because the testimonies contradict each other. Ultimately, it is not enough to abolish the insanity defense because there are “experts” who present confusing testimonies, defendants who fabricate illnesses, and because it can be difficult at times to calibrate the effect of a mental defect on responsibility. As Bonnie states, “problems in sorting valid from invalid defensive claims are best seen as part of the price of a humane and just penal law” (108). Again, nothing about the law is black and white. For this reason, instead of abolishing the insanity defense, we should find a way to reform it so that it is the most effective, which necessarily involves improvements in the use of expert testimony.

Bonnie explains that much doubt arises from the competence of expert witnesses and that even psychiatrists and psychologists have turned to promoting the perpetuation of the insanity defense simply because they feel as though the law forces experts to “take sides” (109). Bonnie

recognizes the validity of these concerns and suggests that “specialized training in forensic evaluation is necessary, and a major aim of such special training must be to assure that the expert is sensitive to the limits of his or her knowledge” (109). By improving the quality of expert testimony, there will be a more effective administration of the insanity defense that will lead to more just verdicts. Bonnie correctly notes that “training in psychiatry or psychology does not, by itself, qualify a person to be an expert witness in criminal cases” (109). If the court appoints experts who are sufficiently trained and knowledgeable, there will be less confusion amongst the jury and it will be harder for defendants to fabricate a mental disease and be acquitted of their crimes. This will improve the insanity defense because it will be more effective in getting the mentally ill the treatment they need, while preventing non-mentally ill defendants from taking advantage of the defense in order to get a less severe sentence. By improving expert testimony, along with sustaining the Model Penal Code Law, and keeping the insanity defense affirmative, we can save the insanity defense from abolition.

It is evident that the abolition of the insanity defense would not only be a departure from our legal tradition, but it would be an unfortunate evasion of the moral integrity of criminal law. The insanity defense will always be one of the most controversial legal issues over which people argue. However, I argue that we should keep in perspective the rarity of the defense when presenting exaggerated cases to propose the abolition of it. We should acknowledge that if an accused person lacked the capacity to either understand the legal nature of his or her action or could not control his or her actions to abide by the law as a result of a mental defect, that it would be wrong to hold that accused person responsible for his or her crimes. Further, we should recognize the injustice that would be done if we were to lessen the conviction of the legally insane to that of manslaughter or to abolish the insanity defense altogether, leaving mentally ill

defendants who are in need of treatment to be convicted and punished for a crime for which they cannot be held responsible. I argue that by reforming the insanity defense to sustain the test for legal insanity as the one promoted by the Model Penal Code Law, to maintain the defense as an affirmative one, and to improve the quality of expert testimony, we can save the insanity defense from abolition, uphold the moral integrity of criminal law, and sustain an effective defense for the mentally ill.

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