COMMENT

The Moral Significance of the Insanity Defence

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It has long been accepted that the defence of insanity, in Anglo-American law, is unsatisfactory and in need of reform. Indeed, over 80 years ago, Glueck wrote, 'not a modern text or compilation begins the discussion of the subject of insanity and its relation to the criminal law without a doleful reference to chaos in this field'.[1] The aim of this comment will be to address the question of whether or not abolition of the defence will remedy the 'chaos' that exists. Indeed, an alternative argument can also be made that the insanity defence is used so infrequently that the question arises as to whether there is a need to retain it in any form. However, it must be emphasised from the outset that, of course, the debate is not a simple question of abolishing or not abolishing the defence.

There are a number of tests that are currently in use in Anglo-American law,[2] although it is apparent that for the most part 'none of the various insanity tests has met with a great deal of approval'.[3] However, the emphasis below will be on the merits of abolishing the defence when compared with reasons why it should be retained. The intention is to assess the arguments of the pro- and anti-abolitionists and follow this with an analysis of each of the viewpoints, while also taking a look at the insanity debate in light of recent case law, and concluding with an assessment of which argument is the stronger. Before this can be attempted, it is necessary to look briefly at three key theoretical issues. First, and simply, 'What is the meaning of criminal insanity?' To ascertain this, it is instructive to turn to Fingarette's seminal work, *The Meaning of Criminal Insanity*. Fingarette defines criminal insanity as 'the

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1 S. Glueck, *Mental Disorder and the Criminal Law* (Little Brown: Boston, 1925) 187–8, cited in C. Slobogin, 'An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases', Olin Working Paper No. 00-3, University of Southern California Law School, 2000, 1.

2 For further discussion of tests such as *M'Naghten*, *Durham*, the American Law Institute—Model Penal Code, the Irresistible Impulse Test and the Justly Responsible Test, see D. H. J. Hermann and Y. S. Sor, 'Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty but Mentally Ill versus New Rules for Release of Insanity Acquittees' [1983] BYUL Rev 499, 508–25; M. S. Moore, *Law and Psychiatry: Rethinking the Relationship* (Cambridge University Press: Cambridge, 1984) 218–20.

3 Hermann and Sor, above n. 2 at 526.

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individual's mental makeup at the time of the offending act was such that, with respect to the criminality of his conduct, he substantially lacked capacity to act rationally'.[4] It is contended that this definition is a suitable starting point with which to commence discussion of the insanity debate.

Secondly, and more specifically, there is the issue of the purpose of the insanity defence. Goldstein and Katz claim that some of the purported problems with the insanity defence stem from the fact that the purpose of the defence within the criminal law has never been properly addressed.[5] With respect, it is submitted that this view is incorrect. While, undoubtedly, some of the language in the judicial decisions and legislative reports that Goldstein and Katz refer to can be construed as fairly elliptical, there *is* nonetheless an accepted rationale for the defence (the argument is whether or not this rationale is correct). For example, Brady states that 'the purpose of the insanity defense is to exempt from the stigma of moral blame accompanying conviction those who, because their conduct is not voluntary, are not proper subjects of moral blame'.[6]

This leads on to the third, and most important, issue, which will form the basis of this comment—the morality of the insanity defence and whether abolition can be justified on moral grounds.

Contrast between England and the USA

In considering the insanity defence from an Anglo-American viewpoint, the first point to stress is the differing approaches towards the defence in England and the USA. There are real similarities in two instances. Both countries agree that the insanity defence forms an insignificant proportion of all criminal law defences in terms of usage. In England, between 1987 and 1991, there was an average of four findings of 'not guilty by reason of insanity' per year. After the enactment of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, this average increased to 8.8 per year between 1992 and 1996:[7] still an inconsequential amount. Likewise, in the USA:

> The defense of insanity is a minute part of the squalor of the American criminal justice system. There are only about 3,500 people held as not guilty by the reason of insanity at the present moment in the United States.[8]

4 H. Fingarette, *The Meaning of Criminal Insanity* (University of California Press: Berkeley, CA, 1972) 211. Unfortunately, space precludes discussion of this definition, but see ibid. at 203–15 for further elucidation. The issue of rationality in the context of insanity is discussed ibid. at 179–94.

5 J. Goldstein and J. Katz, 'Abolish the "Insanity Defense"—Why Not?' (1963) 72 Yale LJ 853 at 859–62.

6 J. Brady, 'Abolish the Insanity Defense?—No!' (1971) 8 Houston LR 629 at 640. Similar pronouncements have been made by other academics. For example, see R. J. Bonnie, 'The Moral Basis of the Insanity Defense' (1983) 69 ABAJ 194 at 194.

7 R. D. Mackay and G. Kearns, 'More Fact(s) about the Insanity Defence' [1999] Crim LR 714 at 716. For the figures from 1975–88, see R. D. Mackay, 'Fact and Fiction about the Insanity Defence' [1990] Crim LR 247 at 248.

8 N. Bonnie and R. Morris, 'Should the Insanity Defense be Abolished? An Introduction to the Debate'(1985–7) 1 *Journal of Law and Health* 113 at 118.

In addition, there is agreement that, while the defence is rarely used, it is still of great legal importance.[9] This is, however, where the agreement appears to end. In England, the issue of abolition of the insanity defence has been given virtually no consideration.[10] Almost all of the debate surrounds reformulation of the *M'Naghten* Rules, with a seemingly accepted starting point that the defence should be retained in some form. This viewpoint can be traced back to the 1953 Royal Commission on Capital Punishment, which described the insanity defence as an 'ancient and humane principle that has long formed part of our common law'. The Report of the Committee on Mentally Abnormal Offenders confirmed this view stating that 'if a person was, at the time of his unlawful act, mentally so disordered that it would be unreasonable to impute guilt to him, he ought not to be held liable to conviction and punishment under the criminal law'.[11]

In contrast, proposals for abolition have been taken seriously and, indeed, adopted in five US states.[12] The significance of the acquittal of the defendant in *United States* v *Hinckley*[13] cannot be understated when assessing US policy towards the insanity defence. The fact that abolition was, unsurprisingly, favoured by the Reagan administration[14] and has been advocated by influential bodies such as the American Medical Association[15] has only served to increase the calls for abolition of the defence.

'Total' or 'partial' abolition

Before consideration is given to the pro- and anti-abolition stances, it must be emphasised that abolition can be 'total' or 'partial'. There is a critical distinction between the two and it is the 'partial' abolition argument that will be addressed fully below. A brief look at 'total' abolition would seem to confirm that it is extremely difficult to justify. Total abolition 'would disallow completely any evidence of an accused's mental abnormality during the guilt phase of the trial . . .'.[16] It must be noted that in the early 20th century attempts to abolish totally the insanity defence were made in the USA, but failed, as they were deemed

9 Above n. 8 at 122. See also R. D. Mackay, *Mental Condition Defences in the Criminal Law,* (Oxford University Press: Oxford, 1995) 74.
10 For one exception, see C. Wells, 'Whither Insanity' [1983] Crim LR 787, which advocates the abolitionist view of Norval Morris.
11 *Report of the Royal Commission on Capital Punishment 1949–53,* Cmd 8932 (1953) and *Report of the Committee on Mentally Abnormal Offenders*, Cmnd 6244 (1975), both cited in Mackay, above n. 9 at 74.
12 Montana, Utah, Idaho, Kansas and Nevada have abolished the defence, while maintaining the *mens rea* alternative (Slobogin, above n. 1 at 1); for discussion, see below. It should be noted that Montana's statute was passed in 1979 which was pre-*Hinckley*.
13 525 F Supp 1342 (DDC 1981).
14 Insanity Defense Reform Act 1984.
15 American Medical Association, 'The Insanity Defense in Criminal Trials and Limitations of Psychiatric Testimony: Report of the Board of Trustees' (1984) 251 JAMA 2967.
16 Mackay, above n. 9 at 124. See also the criticism of total abolition by H. Howard, 'Reform of the Insanity Defence: Theoretical Issues' (2003) 67 JCL 51 at 60.

unconstitutional.[17] It is submitted that support for total abolition is negligible and with good reason. As Mackay has written: '. . . total abolition is unjust and cannot be supported under any circumstances while the doctrine of *mens rea* continues to be regarded as a fundamental tenet of modern criminal jurisprudence'.[18] The issue of 'partial' abolition does, however, merit further analysis.

Abolition of the insanity defence has been suggested in different forms and for different reasons by leading scholars such as Goldstein and Katz,[19] Feinberg,[20] Wootton[21] and Szasz.[22] However, it is the influential work of Morris that will be assessed in more detail below. The central thesis of Morris's argument is that the idea that a mentally ill person who performs a criminal act is less guilty than someone who is not mentally ill is fundamentally wrong.[23] Morris argues that there should be no special defence of insanity and 'the ordinary common law-established principles of *mens rea*, intent, recklessness, and knowledge should apply'.[24] Morris's argument is that the insanity defence is an 'un-principled compromise'[25] which distracts from the real issues. He then proceeds to put forward four reasons why the defence is a false classification—psychological, moral, political and symbolic.[26] It is the moral argument which will form the basis of the following discussion. The generally accepted justification of the insanity defence is that a person should not be punished where he or she cannot be blamed.[27] That is to say:

> People have free choice to do good or ill. If they *choose* to do ill, they may be blamed and punished. But if they do not choose to do ill, it is morally insensitive to punish them.[28]

Morris believes this argument is fundamentally flawed for two reasons. First, it assumes that the issue of responsibility is a yes/no question and, secondly, it assumes that defects in the ability to choose are excused more than all other pressures on human behaviour.[29] Morris contrasts the insanity defence with social adversity and suggests that 'social

17 For further discussion see Mackay, above n. 9 at 124. This is a claim that is still made about partial abolition. For further discussion, see J. Robitscher and A. K. Haynes, 'In Defense of the Insanity Defense' (1982) 31 *Emory Law Journal* 26 at 51–9.
18 Mackay, above n. 9 at 125.
19 Above n. 5.
20 See, e.g., *Doing and Deserving: Essays in the Theory of Responsibility* (University of Princeton Press: Princeton, 1970).
21 See, e.g., *Crime and the Criminal Law: Reflections of a Magistrate and a Social Scientist*, 2nd edn (Stevens: London, 1981).
22 See, e.g., *The Myth of Mental Illness: Foundations of a Theory of Personal Conduct* (Harper & Row: New York, 1974).
23 N. Morris, 'The Criminal Responsibility of the Mentally Ill' (1982) 33 *Syracuse Law Review* 477 at 479–80.
24 Bonnie and Morris, above n. 8 at 117.
25 Ibid. at 119–20.
26 Ibid. at 120.
27 See *Holloway* v *United States* 148 F2d 665 at 666–7 (DC Cir 1945): 'Our collective conscience does not allow punishment where it does not allow blame'. Cited in Fingarette, above n. 4 at 128.
28 Bonnie and Morris, above n. 8 at 121. Italics in original.
29 Ibid.

adversity is grossly more potent in its pressure toward criminality . . . than is any psychotic condition'.[30] The suggestion is that, morally, there should be a defence of gross social adversity if there is a defence of insanity.[31] It must be noted at this juncture that Morris still advocates that mental illness would be relevant and admissible on the issue of *actus reus* and *mens rea*, but there would no longer be a specific insanity defence.[32] As Brooks states, it is perhaps more accurate to describe the above approach as the *mens rea* approach rather than use the term 'abolition': 'though styled as abolition, it continues to use mental illness or insanity as a basis for an offender's being excused from criminal responsibility only in a more narrow and contracted fashion'.[33]

As previously mentioned,[34] partial abolition now exists in five US states. Unfortunately, further consideration of partial abolition in operation is not possible here. However, as Mackay states, with regard to Idaho, Montana and Utah, there has been little appellate consideration of the respective legislative provisions. Possibly one of the reasons for this is the fact that each of these states is sparsely populated.[35]

The leading anti-abolitionist scholars are, arguably, Bonnie[36] and Morse.[37] In addition, from the English viewpoint, Mackay vehemently opposes abolition of the defence. Critically, all three emphasise the importance of retaining the insanity defence for moral reasons. The writings of the anti-abolitionists can generally be divided into two elements: a critique of the abolitionist stance containing the reasons why this approach is flawed followed by an assessment of the preferred solution. Therefore, some of the arguments that follow will naturally concentrate on what is wrong with the abolitionist approach rather than focus on what the solution to the problem is. As Bonnie asserts, the 'whole issue ultimately boils down to one of moral intuition'.[38] Herein lies the crux of the insanity debate. While those, such as Morris, who favour the *mens rea* approach, argue that the insanity defence is based on a moral fallacy, namely that 'it is pretentious in the extreme to think that anyone has the sufficiently sensitive caliber to make . . . delicate moral judgments',[39] anti-abolitionists, such as Bonnie, would argue that this is not a reason to abolish the defence—just because the questions posed

30 Morris, above n. 23 at 508.
31 Ibid. at 507.
32 Ibid. at 510.
33 A. D. Brooks, 'The Merits of Abolishing the Insanity Defense' (1985) 477 *Annals of the American Academy of Political and Social Science* 125 at 126–7.
34 See above n. 12.
35 Mackay, above n. 9 at 128. See also Mackay's consideration of the case of *State of Montana* v *Korell* 690 P 2d 992 (1984) which includes details of the powerful dissent of Justice Sheehy.
36 See, e.g., R. J. Bonnie, 'The Moral Basis of the Insanity Defense' (1983) 69 *American Bar Association Journal* 194.
37 See, e.g., S. J. Morse, 'Excusing the Crazy: The Insanity Defense Reconsidered' [1985] 58 S Cal L Rev 779.
38 Bonnie and Morris, above n. 8 at 121.
39 Ibid.

are hard to answer does not mean we should not ask them.[40] Bonnie, Morse and Mackay all state, in slightly different language, that the 'insanity defense . . . is essential to the moral integrity of the criminal law'.[41] The argument of the anti-abolitionists is that the insanity defence is based on the moral principles of excuse that are accepted in criminal law. The moral basis of the insanity defence is that there can be no just punishment without desert and no desert without responsibility.[42] Responsibility is based on minimal cognitive and volitional competence so an agent who lacks such competence cannot be responsible so does not deserve to be punished.[43] Therefore, Morse argues that it cannot be just to hold responsible a person who was mentally disordered when he committed an offence. From this, it follows that 'those who believe that the insanity defense should be abolished must claim either that no defendant is extremely crazy at the time of the offense or that it is morally proper to convict and punish such people'.[44]

Interestingly, the preferred solutions of the anti-abolitionists seem to differ depending on nationality. For example, although Bonnie is a firm anti-abolitionist, he would still narrow the defence by removing the volitional prong. He believes that issues as to whether the defendant could control himself are those where the risk of 'moral mistake' is the greatest.[45] Morse, while also acknowledging that the volitional part of the test is the area most likely to result in inconsistencies, recommends that the prong is retained providing it is written in a stricter manner. In addition, Morse proposes moving the burden of 'persuasion' onto the defendant and limiting the role of experts.[46] It can be seen, therefore, that even among anti-abolitionists in the USA there is a deep dissatisfaction with the insanity defence and a desire to narrow its scope. By contrast, in England, the discontent seems to stem from the narrowness of the *M'Naghten* test. Indeed, Mackay recommends that *M'Naghten* must be replaced by a wider test of insanity.[47] Thus, it can be demonstrated that even among anti-abolitionists, while all want to retain the defence, there is a wide difference of opinion over how to reform it. Obviously, this is in part due to the differing tests that hold sway within the USA. It would appear that the USA, post-*Hinckley*, has moved to a narrower test (including, of course, the *mens rea*-only approach in five states) whereas academic opinion in England often favours a broader test than *M'Naghten*. Dissatisfaction with the *M'Naghten* Rules and the need for reform of the insanity defence is amply demonstrated by the

40 Above n. 38.
41 Bonnie, above n. 36 at 194. See also R. D. Mackay, 'Post-*Hinckley* Insanity in the USA' [1988] Crim LR 88 at 91; S. J. Morse, 'Retaining a Modified Insanity Defense' (1985) 477 *Annals of the American Academy of Political and Social Science* 137 at 138.
42 Morse, above n. 37 at 782–3.
43 Ibid.
44 Ibid. at 780.
45 Bonnie, above n. 36 at 196.
46 Morse, above n. 41 at 140–7.
47 Mackay, above n. 9 at 143. See pp 131–43 for Mackay's consideration of English revision proposals and alternative approaches.

following case, which had the moral dimension of the defence of insanity as its focal point.

R v *Johnson (Dean)*

The issue of the moral aspect of the insanity defence has been returned to the academic conscience by the case of *R* v *Johnson (Dean)*.[48] Johnson appealed against his original conviction on the basis that, even though he knew that the offence he committed was wrong as a matter of law, he did not consider that his actions were morally wrong. To enable a defendant to plead the insanity defence successfully he must prove, on a balance of probabilities, that he did not know the nature and quality of his act, or that he did not know what he was doing was wrong. Indisputably, following the decisions in *R* v *Codere*[49] and *R* v *Windle*[50] the English courts have held that the sole factor to be taken into account when deciding whether an act was wrong was whether it was illegal.[51]

In short, *Johnson* acknowledges that there are major difficulties with the insanity defence and, despite the fact that the Court of Appeal felt obliged to follow *Windle*, a clear statement was made by the court that there was 'room for reconsideration'[52] of the *M'Naghten* Rules, albeit the court felt that such a debate could not occur within the context of *Johnson* itself. Consequently, the decision in *Windle* was followed, whereby an act could only be wrong in law and not morally wrong, and the appeal was dismissed. Perhaps the major reason why it can be argued that the law as it stands is correct is that it leads to certainty, with the question of illegality being black and white with no shades of grey. However, it is contended that this viewpoint leads to the *M'Naghten* Rules being interpreted too narrowly, an argument propounded by the Butler Report, which stated:

> Knowledge of the law is hardly an appropriate test on which to base ascription of responsibility to the mentally disordered. It is a very narrow ground of exemption since even persons who are grossly disturbed generally know that murder and arson are crimes.[53]

Given that the predominant aim of this comment is to emphasise the moral importance of the insanity defence, it is asserted that there is a strong argument to allow a moral element to be developed within the 'wrongness' limb of the defence to enable this part of the defence to be interpreted more broadly. Certainly, the dicta of Latham LJ in *Johnson*[54] seem to indicate a deal of sympathy for this approach and towards a

48 [2007] EWCA Crim 1978.
49 (1916) 12 Cr App R 21.
50 [1952] 2 QB 826.
51 Notably, the High Court of Australia refused to follow *Windle* in *R* v *Stapleton* (1952) 86 CLR 358.
52 [2007] EWCA Crim 1978 at [24].
53 Home Office and Department of Health and Social Security, *Report of the Committee on Mentally Abnormal Offenders*, Cmnd 6244 (1975) para. 18.8.
54 [2007] EWCA Crim 1978 at [24].

fundamental rethink of the insanity defence—a rethink that is long overdue.

Concluding thoughts

The arguments of the pro-abolitionists would appear weaker than those who wish to retain the insanity defence. First, as Morse shows, Morris's moral argument that there should be a defence of social adversity fails because Morris confuses causation with excuse: 'causation is not the issue: nonculpable lack of rationality and self-control is'.[55] Perhaps, an even stronger argument against the *mens rea* approach comes from Bonnie who states that this approach is 'morally under-inclusive'. He states that the *mens rea* requirements in criminal offences refer mainly to conscious states of awareness and, therefore, have no qualitative dimension. He continues that there must be some criterion 'which is extrinsic to the definition of *mens rea*'.[56]

Put succinctly, it is submitted that the *mens rea* approach, if adopted, would lead to situations where mentally disordered defendants would not be exculpated, even though they are so irrational at the time of committing the offence that they cannot be morally responsible agents. Such persons should be excused—and this can only occur if the insanity defence is retained in its fuller sense.

While acknowledging that there are major problems with the insanity defence and that virtually every leading academic who is in favour of retaining the defence advocates its reformulation, abolition is not the answer.

The moral arguments in favour of retaining the defence far outweigh those for abolishing it. Those defendants who are unable to act rationally at the time of their offence cannot be held responsible and should be excused: only the retention of the insanity defence in its broader sense will enable this to happen and allow the moral integrity of the criminal law to stay intact. As Morse states, 'the insanity defense must be retained because it is fundamentally just'.[57]

55 Morse, above n. 41 at 139.
56 Bonnie and Morris, above n. 8 at 123–4.
57 Morse, above n. 41 at 137.