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Is the Insanity Defense "Unconscionable"?

Over the years, much criticism has been directed at the concept of the insanity defense, which at its root reflected the traditional feeling that public policy is not served by imposing blame on those not responsible for their behavior. Though this principle has achieved a global recognition, it has reached its height in the Anglo-Saxon world of demons and devils, which is dominated by its early religious origins and the Augustinian concept of free will. Yet increasingly we have slowly become aware of other issues; for example, the rigid concept of responsibility and its corollary, nonresponsibility, have at various times been utilized to deprive various groups of power and participation in society. Traditionally, one group of disabled and legally incompetent who must be both protected and kept powerless consisted of the unholy triumvirate of the insane, children, and women.

The perception of all three of these subgroups has slowly been changing with corresponding alterations in the law. I might add that there was a fourth totally dehumanized group, similarly disabled under the law whose shackles were partially removed in 1863 by the Emancipation Proclamation. The evolution of woman's freedom has occurred primarily in the last several decades. The period of childhood disability was recently altered as traditional guidelines were scrutinized for their rationality and applicability in a 20th-century world, with changes in voting, drinking, contracts, and so on. Similar events are now taking place in terms of the handling of the so-called insane, with a plethora of lawsuits and statutes dealing with civil rights, due process, right to freedom, right to treatment, and right to reject treatment. Even more primitive in its development is a corresponding scrutiny of the criminal and the sociolegal system used to control him.

The impetus of these remarks is not to deny the reality of reasonable discrimination and differentiation. These preliminary comments are emphasized to indicate that changing social concepts ultimately result in legal changes which are forced upon a resistant heirarchical administrative system, and that hopefully reasonableness and rationality will be applied to new sociolegal systems as they were to some of the issues noted above in their early days of controversy.

In reviewing the concept of exculpability, we have been asked whether or not the use of the insanity defense is, as delineated by President Nixon, an unconscionable act. He referred to "unconscionable abuse" of the defense by criminals. It might be pointed out that the reality is that the strategy and use of a legal defense are products of the lawyer's work and skill and not that of the criminal. The choice of an approved or accepted legal tactic or precedent is a function of the law, but it is doubtful that we are concerned with

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"unconscionable" aspects of the role of the attorney, which is amoral by its very nature in our adversary system.

In any event, if "unconscionable" is to imply a lack of conscience or unscrupulousness, then the word could be better applied to the acts of many government officials or to the manner in which scientific evidence is often used in our courts. I should like to address myself to another definition of the word, namely that of unreasonableness; therefore, my focus will be on this question: Is the use of the insanity defense reasonable or unreasonable?

History, our religious tradition, and our legal heritage all reflect the view that the concept of lack of responsibility due to insanity or lack of mental competence is rational, reasonable, and moral. With its inherent base in concern for the individual and sympathy for the disabled, who would deny the rational antecedents and the moral purity of the rule? But from the standpoint of reasonableness and pragmaticism, a different philosophy of a compelling nature emerges into view.

The concept of blameworthiness is derived from the concept of "free will," a philosophical stance which is meaningful to most of us but whch bears little relevance to the problem of criminal behavior. The very unreasonableness of the application of the concept of free will to behavioral problems has led to the creation of the means to avoid its harshness and subsequent ideologic conflict.

We all can agree that the enhancement of a sense of responsibility is essential to a system of inner controls needed for social conformity. Yet only now are we questioning whether a rigid free will system with its numerous exceptions furthers or lessens such responsibility. It is also assumed that the imposition of blame has a meaningful effect upon behavior—but only upon the mentally responsible and not on those who lack choice and free will. Interestingly, the law has not seriously questioned this view, which is contrary to the approach of most psychiatrists, behavioral scientists, and particularly the rapidly growing group of behavioral therapists.

Without belaboring the philosophy of our handling of those found guilty of crime, the concepts of punishment, deterrence, rehabilitation, and reinforcement of a social value system have a similar applicability to our handling of the mentally ill. The goals of society are to prevent or minimize certain types of behavior, to ensure societal tranquility, and to segregate the disturbing. In order to do this, we imprisoned both the mentally ill and the criminal. As long as the mental hospitals, then called insane asylums, performed their roles as prisons, there was little social anxiety about the distinction between the mad and the bad. Only as psychiatry evolved into a mechanism which took people out of the institutions did we face the problems that concern us today.

Monahan has pointed out an interesting contradiction [*1*]. He emphasizes that the law needs the concept of the insanity defense to punish the insane offender. For if the concept did not exist and if it could be demonstrated that the offender was incapable of forming the cognitive or mental component of a crime, the criminal intent or *mens rea,* then according to legal orthodoxy no crime had been committed, and there would be a complete defense against criminal prosecution. Thus, paradoxically, the plea of not guilty by reason of insanity allows for conviction and punishment, albeit clothed in more benign terms. If there were no defense by reason of insanity, then *mens rea* would become a philosophical battleground, the legal system would become more of a shambles, and the definition of crime would have to change accordingly to allow for some type of sociolegal system to handle the behaviorally aberrant. This would have to be carefully thought out in advance; those "hardliners" who now talk of abuse of the insanity defense will have to confront the simmering Pandora's box of *mens rea* defenses which would certainly evolve if the defense were abolished.

Monahan's second point is that to abolish the defense would result in condemning the blameless. As Bazelon put it in *Durham* [2], "our collective conscience does not allow punishment where it cannot impose blame." Yet generally the reality of the finding of not guilty by reason of insanity is that the individual is blamed, stigmatized, and exposed to very severe sanctions, or as some put it, is subject to "double stigmatization."

His third argument is that should the insanity defense fall, the free will concept will give way to a deterministic assumption which would substitute social dangerousness for moral guilt. It might lead to a rule of strict liability for behavior. This would result in a behavorial philosophy instead of a moral, religious philosophy as the rock upon which the law would stand. Many consider this to be dangerous in that it would lead to a social welfare of "therapeutic state" as Szasz [3] and Kittree [4] so aptly popularized it. But name-calling and multisyllabic pejoratives communicate only a feeling but no more meaning than our use of the word "unconscionable."

To ponder this problem requires a withdrawal from the narrow legal problem exemplified and a look from a more distant vantage point from which related social issues can be explored. What is the real meaning of this intellectual exercise? Is the insanity defense a game that lawyers play? What is its meaning and effect on the ultimate human being involved, the one who is socially deviant? Does the time, money, and professional skill expended result in any desirable end?

Or was Menninger correct when he said [5],

> [the moralists] linked up all behavior, good and bad, with a mystical metaphysical essence called responsibility. According to this solemn theory, it is not God or lack of God or sin or the devil or witches or anything celestial or mundane that makes men saints or sinners. It is a single, solemn imponderable called *responsibility*. Millions of dollars are spent annually to determine who has it or who hasn't it. If one is found to have it, he is locked up; if he is found not to have it, he is also locked up. Thus is demonstrated the pragmatic beauty of a doctrine which is neither fish nor fowl but which is still the shibboleth and the fallacy of the lawyers just as the doctrine of original sin was a fallacy of the clergy.

As we go from philosophy and social ideology to the world of the observable, a different picture emerges. We are confronted with two types of people in the issues at hand. The social miscreant with or without a little madness marches off to prison, suffers through a somewhat fixed term, limited in duration, and leaves to continue his antisocial behavior—or at least a majority do. The nonresponsible mentally ill offender marches off to a very secure prison, usually euphemistically called a hospital for the criminally insane, for an indeterminate term, often lifelong, and if he is discharged, apparently continues in antisocial behavior to a lesser degree than his prison brother. Yet this individual not only has some type of mental disorder, he also is a criminal offender in all but name. If he does commit a subsequent crime, his deeds are broadcast to the world far and wide, unlike his prison brother whose deeds are so common that they barely merit special mention, or his mentally ill noncriminal brother whose antisocial deeds are of a lesser frequency.

Several other matters are relevant to insanity and misbehavior. In the past, the plea was used primarily in capital cases and was literally a matter of life and death. Therefore, courts were more tolerant of the plea, and defense attorneys received gold stars for a successful defense. Today the consequences are not so benign, with the threat of life imprisonment overhanging every criminal charge involving the issue of insanity. Treatment and treatability are of limited relevance to the social institutions, the therapeutic jailkeepers which carry out the orders imposed by the system.

Why all the fuss about those who "abuse" the plea? In a very small number of cases, the defendant may be discharged from custody immediately after the trial if he does not show a continuing mental illness. He is therefore considered to have "gotten away" with

the crime of which he was found not guilty. A significant percentage of these cases probably represents situations where there was a social judgment that the defendant should be excused on other grounds. For example, a defendant charged with mercy killing may be found not guilty by reason of insanity where judge and jury approve the criminal act and do not wish to impose liability and responsibility—a clear misuse of the philosophy of the plea. The peculiar preoccupation with this issue in view of its rarity must reflect other motivations, for example, scapegoating, or drawing the attention of the public to a minor almost irrelevant problem and avoiding scrutiny of other, possibly more important ones.

I have not explored the issue of treatability and the role of the psychiatrist here. Mental health professionals in current circumstances are in a position to promise little and can deliver less. However, they have not been particularly involved in the system, either in prisons or institutions for the criminally insane, and so are symbolic scapegoats for those unhappy with the rampant criminality in this country.

Turning again to the man who is not found blameworthy, in many states such as New Jersey [*2*], he is clearly considered to be guilty and is held incarcerated until he is no longer mentally ill and no longer dangerous. In New Jersey, consequent to the Maik decision, the criteria for release are so stringent that life imprisonment, often in a civil hospital, is the result. Mind you, the criteria for release—a demonstration of lack of dangerousness and an assurance by the holding authorities that there will be no future misbehavior—are required only of those exculpated from responsibility, not from those found guilty—a classic case of unequal protection.

A rarely openly expressed assertion of the relationship of imprisonment, preventive detention, and the insanity defense is the statement of Justice Weintraub in the Maik case [*6*]:

> [In] drawing a line between the sick and the bad, there is no purpose to subject others to harm at the hands of the mentally ill. On the contrary, the aim of the law is to protect the innocent from injury by the sick as well as the bad. The distinction bears only upon whether the stigma of criminal shall be imposed and upon measures to be employed to guard against further transgressions.

What would be some of the consequences if the nonblameworthy were blamed? They would then be placed in a holding institution, held responsible for their behavior, and treated accordingly. Many feel that such a mode of handling would be, to use a currently dirty word, "therapeutic." At least they would be treated more humanely than is presently the case. If they were placed in penal institutions and had a treatable condition, then the holding authorities would have an obligation to provide that treatment within the penal institution. Judges could take into account the psychologic functioning of the individual in terms of sentencing and a flexible system of sentencing would have to be devised to handle this need. If the person did indeed have a chronic mental condition not responsive to treatment, then at the expiration of his maximum sentence he could be civilly committed to a state hospital, as is now done with ordinary prisoners who become mentally ill while in prison [*7*].

The emotion and furor, the waste of public resources and talented people would be no longer necessary. Just think how different the world would be if we had only clung to the old English concept of "guilty but insane," instead of "not guilty by reason of insanity," a social decision which has resulted mostly in cruelty and abuse imposed in the name of kindness and love.

More important than all of this would be a resultant deeper look at the behaviorally aberrant. There is no sharp line between the guilty and the criminally blameless. Deviance and illness abound in variable proportions. Let us not deal with the artificial-

ities of classification but with the problems of deviant people. Let us study the problem of dangerousness with all of its implications. Let us look broadly at crime and our social institutions and avoid the circuses of the past which distract us from meaningful problems.

For these reasons, I believe that the insanity defense is unreasonable and harmful to society and therefore, yes, I do believe that the insanity defense, as currently constituted, is unconscionable.

The insanity plea violates an evolving concept of basic human behavior, one which sees the human as a unitary being with a number of vectors resulting in a final behavioral product. We once viewed deviant behavior as that of the devil; later we saw such acts as the product of mental illness. There is no alien devil within the body. Mental illness does not perform an act; only people do. The law arbitrarily picks some psychological factors, often based on medical diseases, as the base upon which to impose a lack of responsibility, because the acts do not reflect the free choice of the individual. It arbitrarily excludes other behavioral determinants such as heredity, poverty, family environment, and cultural deprivation, all of which are also determinants of behavior. I am not saying that these should be used as a basis for exculpability. I am saying that the differentiation of a group called "insane" no longer is a logical or rational distinction.

Summary

The debate over the meaningfulness and utility of the insanity defense has continued unabated over the years. President Nixon has referred to the "unconscionable abuse" of the defense. This paper, presented as part of a panel on the subject, has propounded the view that the defense is unconscionable, using that aspect of the definition dealing with unreasonableness.

The historical antecedents and the religious and social philosophy of the concept of responsibility and nonresponsibility have been reviewed. In addition to the inapplicability of the concept to current social problems, and the difficulties of applying current psychiatric knowledge to effect a rational delineation between the two legal entities encompassed under the rubric of responsibility and nonresponsibility, the potential problems and the potential opportunities which may result from the abolition of the plea are presented.

With these factors in mind, as well as the obvious failure of the legal-social-penal system in handling the problems of the behaviorally deviant, I believe that the use of the current system has hampered the development of possibly more reasonable alternative systems and that, therefore, the maintenance of the insanity defense is unreasonable and harmful to our society. The insanity defense, as currently constituted and institutionalized, has evolved into a rigid and archaic vestige of the legal system of an earlier era and therefore its use has, in the sense defined, indeed become "unconscionable" and lacking in social meaningfulness.

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