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# GUEST EDITORIAL

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## The Hinckley Case, the Media, and the Insanity Defense

The story is by now a familiar one. It was the early part of the year during the daylight hours when the assassin lay in wait for his country's leader not too far from the government offices and the official residence. Despite the presence of security personnel, the young man was able to fire multiple shots before he was apprehended. The shooting inflicted serious damage but the leader of the country did not die.

A shocked nation learned through extensive media coverage of the peculiar, single, migratory, unsuccessful young man seemingly without close attachment to others, and from a distant part of the country who had stalked their leader. They were upset when an insanity plea was entered, and even more so when it was successful. The defense was impressive and was probably the most costly of its type in the nation's history. The assailant did not testify, but numerous witnesses testified as to his bizarre behaviors. These included several psychiatrists who testified that he was mentally ill at the time. The prosecution presentation was limited

in comparison with the defense effort. Of interest was a love poem to a young woman with whom he had had no known personal contact.

The media exploded in extensive discussions of the case and the way it was handled. Judges were accused of being softheaded, and "mad doctors" were excoriated for their participation in the proceedings. After the verdict was rendered, various political figures expressed their anger and concern at what the legal system had wrought; they demanded a review of the legal rules and organized commissions to establish possible new guidelines.

A familiar story? Yes, it was and is. As a matter of fact, it was the most famous insanity case in Anglo-American history.

The date of the shooting was 20 Jan. 1843. The target of the assassination was Sir Robert Peel, Prime Minister of England. The victim of the shooting was his private secretary, Edward Drummond, who died five days later. The name of the assailant was Daniel M'Naghten, a vague and shadowy character of 31 whose very name has left a trail of confusion (with at least twelve spellings of his name in common use).

M'Naghten had shot the wrong man. His motivation was obscure. In his only statement, at a preliminary hearing, he said:

> The Tories in my native city have compelled me to do this. They follow, persecute me wherever I go, and have entirely destroyed my peace of mind. They followed me to France, to Scotland, and all over England. In fact, they follow me wherever I go. I cannot sleep nor get no rest from them in consequence of the course they pursue towards me. I believe they have driven me into a consumption. I am sure I shall never be the man I was. I used to have good health and strength but I have not now. They have accused me of crimes of which I am not guilty, they do everything in their power to harass and persecute me; in fact, they wish to murder me. It can be proved by evidence. That's all I have to say.

Richard Moran, in his *Knowing Right from Wrong: The Insanity Defense of Daniel McNaughtan* [*1*], expressed the view that M'Naghten may have been part of a political conspiracy, though the evidence is circumstantial and apparently not too compelling—not very dissimilar from the morass of alleged conspiracies on the recent American scene.

There were some differences from the Hinckley case despite its similarity to the attempted assassination of President Reagan. The introductory remarks have been written in such a way as to illustrate a remarkable coincidence of circumstance, both in the facts and the social reaction to the incident.

Daniel M'Naghten was apparently more frankly paranoid; he was the illegitimate son of a small businessman, not the son of a millionaire capitalist. He had been a wandering actor, an avid reader, a small businessman, and a political dissident purportedly opposed to the Tory administration.

According to Moran, his defense was "probably the best financed defense in the history of old Bailey." Several psychiatrists (or their nineteenth century equivalents) testified for the defense. Interestingly, two psychiatrists who had participated in the examinations for the prosecution were not asked to testify. In the Hinckley case, the government included two psychiatrist witnesses—one a 29-year-old psychiatrist from the institution where he was held and one a 33-year-old assistant professor from Harvard. The prosecution did not call two other senior psychiatrists who had been involved in preparation of the case. The prosecution in the Hinckley case attempted to obtain a conviction; the prosecution in the M'Naghten case did not. In fact, Sir William Follet, the solicitor general handling the case, stated that he would not be properly discharging his duty to the Crown and to the public if he asked for a guilty verdict.

In the M'Naghten case, Judge Tindal stopped the trial and told the jury to reach a verdict. Unlike the Hinckley case where the jury deliberated for three-and-a-half days, the M'Naghten jury met for less than 2 min without leaving the jury box and rendered its famous verdict.

A poem by Thomas Campbell extensively published at the time declared:

Ye people of England: exult and be glad
For ye're now at the will of the merciless mad.

The insane are:

A privileg'd class, whom no statute controls
And their murderous charter exists in their souls.
Do they wish to spill blood—they have only to play
A few pranks—get asylum'd a month and a day
Then heigh! to escape from the mad doctor's keys
And to pistol or stab whomsoever they please.

Queen Victoria, reacting to the trial, wrote, "The law may be perfect, but how is it that wherever a case for its application arises, it proves of no avail?" She also said, in a statement that lends itself to amusing interpretation, that she did not believe anyone could be insane who wanted to murder a conservative prime minister. The Lord Chancellor was concerned that M'Naghten had "escaped with impunity" and that there was a public feeling that "there is some defect in the laws with reference to this subject."

These remarks are reminiscent of the latter-day remarks of Treasury Secretary Donald Reagan who, in referring to the Hinckley case, stated: "Frankly, I'm outraged." Senator Strom Thurmond proclaimed: "It is deeply troubling to me when the criminal justice system exonerates a defendant who obviously planned and knew exactly what he was doing." And Attorney General William French Smith offered, "There must be an end to the doctrine that allows so many persons to commit crimes of violence, to use confusing procedures to their own advantage and then have the door opened for them to return to the society they victimized."

Actually, M'Naghten did not "get away" with anything; he did not return to the society that he victimized. In March 1843 (less than two months after the shooting and unlike the ponderous year and a quarter before the American trial), he was institutionalized at the Bethlehem Hospital for the criminally insane, was transferred to a newer institution in 1864, and died at the age of 52 on 3 May 1865, still incarcerated.

The English reacted to the M'Naghten trial with the comfortable cool with which they are so often characterized. After debate in the House of Lords, the matter was referred to a committee of chief justices for the establishment of legal guidelines. Several questions were posed for the judges to answer. Their conclusion, written by the same Judge Tindal on behalf of the majority (eleven of twelve judges), has become known as the M'Naghten Rule. As such, it became the standard for Anglo-American justice for more than a century.

The essence of the M'Naghten Rule was this:

To establish a defense on the ground of insanity, it must clearly be proved that, at the time of committing the act, the party accused was laboring under such a defect of reasoning, from 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.

The rule became the basis of state and federal law in the United States. New Hampshire did not hold a person responsible if the act was the product or result of mental illness. Despite other variations and elaborations, the M'Naghten Rule has metamorphosed in many jurisdictions with the use of more current and fluid terminology into the American Law Institute Rules which speak of a substantial incapacity to appreciate the wrongfulness or criminality of the act. The latter version was the legal standard under which Hinckley was tried—with one significant exception. In the Washington, DC jurisdiction, the prosecution had the burden of showing that the defendant was not mentally ill (as defined by the rule).

The original M'Naghten rule evolved into one based on two elements—the cognitive aspect (knowing right from wrong) and the volitional aspect (even if the person did know right from wrong, he was unable to control his behavior). Many states have statutes dealing only with the cognitive rule; others include both elements. Sometimes the wording of the latter is

that he was unable to adhere to the right; this has often been referred to as the "irresistible impulse" rule. The District of Columbia in the Hinckley case followed the American Law Institute rule as stated in the Brawner case [2]: "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 of his conduct or to conform his conduct to the requirements of the law." This is now the rule generally in federal jurisdictions as well as in about half the states (with some variation in terminology).

Thus the vagaries of history are such that the 140-year-old case of Daniel M'Naghten, one with so many similarities to later assassinations and attempted assassinations, became the guideline under which John W. Hinckley, Jr. was tried. Despite much public controversy, the unflappable English survived the turmoil and went on to achieve national greatness. Britannia, for a century, ruled the waves; it did not, under great pressure, waive the rules. In this country, the post-trial turmoil has continued.

## The Media in the United States

Three examples of American media response are representative of the harsh reaction to the Hinckley case.

The eminent New York columnist, Russell Baker [3], wrote, "For an exercise in legal absurdity it would be hard to improve on the trial of John W. Hinckley, Jr." He ridiculed both the testimony of the psychiatrists and the decision of the jury, the former for not agreeing and the jury for agreeing. Curiously, he viewed disagreement by expert witnesses as the basis for expressing "wonder" at the state of the art. As all forensic psychiatrists know, such criticism could be equally applied to all such witnesses who testify under the adversary system. Baker expressed sympathy for the victims of crime. He did not question the nuances of the insanity defense but doubted the capacity of the jury to decide such issues.

Tom Wicker [4], in the same newspaper, also expressed concern about expert witnesses who contradict each other. After making reference to the public shock and outrage at the result of the trial, he described the psychiatrists as the biggest "losers" in the whole affair. A typical statement was: "For their own credibility, they at least owe jurors a clear declaration that they offer not certainty but only their best professional opinion." Of course, that is a restatement of what expert opinion is or should be; that does not mean that best professional opinions may not differ. He encouraged consideration of a verdict of "guilty but mentally ill" as the alternative to the "not guilty by reason of insanity" plea. He also felt that the public deserved assurance that Hinckley would not be ruled "sane" in a few months or a few years and then turned loose.

In response to the Baker article, my own letter published in the New York Times [5] stated:

> Russell Baker was unhappy because psychiatrists "almost always" split down the middle ... In most cases, particularly homicides, defense lawyers consider the possibility of an insanity defense but do not use it, among other reasons because there are no data or witnesses to substantiate such a claim.
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> Occasionally, particularly in non-notorious cases, where defense and prosecution psychiatrists agree, charges may be dropped or handled perfunctorily without media frenzy. Where there is room for disagreement, there will be argument, but much less so than in civil litigation such as personal injury suits, where contrary medical opinions are the norm (and where witness dishonesty and prostitution is probably much more likely). Few civil cases involve psychiatry.
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> Disagreement itself is not a sin; lawyers and courts have been known to disagree. Appellate court decisions are often not unanimous, and courts have been known to reverse themselves.
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> One problem in the legal review of psychiatric disorders—as with many chronic medical disorders like arteriosclerosis, diabetes, hypertension—is that they vary in severity and fluctuate in time. This is not comparable to a fracture of a leg, where the physician is in a much better position to say "yes" or "no." The law, of necessity, must make decisions within arbitrary guidelines on an either/or basis; that is not usually appropriate in medicine.

> In the Hinckley case, the jury, after listening to extensive information, psychiatric and otherwise, weighed the evidence of mental disease, its degree and its relation to the requirements of the law. They reached an unpopular decision. In a way, the fact that a jury can do the non-obvious and "shock" or "stun" the world at least reaffirms the independence of the system. Mr. Baker might temper his anger with grudging respect, if not glowing pride.

Even more dramatic was the long article in the Wall Street Journal by Daniel Robinson, a psychologist [*6*]. He criticized appropriately the burden on the government to prove sanity, quoting a judge in an earlier case who said that the government can never establish beyond a reasonable doubt the sanity of anyone. He compared the situation to that of an internist who may find that a patient has a disease but who would be hesitant to declare under oath that anyone is perfectly healthy. He attacked psychologists and psychiatrists for their "wanton" theories and their "self-congratulatory" opinions, their poor predictive powers concerning future events, and their lack of expertise.

More magical were his suggested remedies. Psychiatrists should confine their testimony only to experimental findings and statistical facts, but all opinions based on personal experience would not be admissible. Since there is no reliable, causal connection between personal background and "insanity," such factors would be inadmissible. Expert opinions resulting in the release of those previously committed on the basis of a finding of not guilty by reason of insanity would be a basis for civil and even criminal liability, apparently for future adverse behaviors by those so released.

It is the latter statement that is the most striking. If one does not like the law and is unable to change the law, then the alternative is to conduct an end around play. One can avoid the law by intimidating or eliminating the participants. One way is to declare that there is no field of expertness and, therefore, there can be no expert testimony. That is a not so subtle way of handling the problem of witnesses who may affect the course of events; this is done by a proclamation of nonexistence of expert witnesses (the same suggestion has been recommended for war; the war is ended by a unilateral declaration that war does not exist). Similar thinking has previously been suggested to eliminate the problem of mental illness; we simply announce that it does not exist, that it is a myth. Unfortunately, as Montaigne stated, "Through presumptions they make laws for nature and marvel at the way nature ignores those laws." A rose is still a rose.

More pernicious is the intimidation of psychiatrists in that they will be held responsible for future behavior of people who have been absolved of criminal responsibility. The courts and numerous studies have indicated that future prediction is not particularly reliable. Behavioral scientists have been told that they cannot foretell the future; with this, they do not disagree. On the other hand, if they do not do so in an infallible manner, they will be fined and jailed. Obviously no rational examiners would participate or prognosticate under such circumstances. Thus, even with laws on the books, they would be reduced to a nullity through intimidation and fear.

As physicians well know, accountability should be directed towards the quality of professional practice and its overall application, not specific results. Who can predict behavior or a relapse at a subsequent time (other than on a rough statistical basis) or the effect of unknown future events (ill health, loss of job, rejection by a desired love object, aging, and so forth)? Why limit it? If a patient has a heart attack, is treated, discharged from the hospital, and then at some future time has the audacity to die from cardiac disease, why not hold the cardiologist responsible? The logic is just as compelling (though there is a vast difference between the behavior of a person and the behavior of an organ).

Attempts have been made to hold judges, parole board members, and probation officers responsible for the behavior of discharged criminals. Appropriately, courts have generally immunized such persons from such suits. Decisions, however imperfect, do have to be made. If a parole board member is to be held liable for the action of released criminals (with an anticipated more than 50% recidivism rate), few would be so stupid as to authorize release

other than under conditions completely mandated by law. Inasmuch as release of not guilty by reason of insanity acquittees is determined not by a calendar but by the condition of the individual, the pressure to restrict release would be overwhelming. As it is, few well-trained professionals care to work in public service because of harassment and other adverse work conditions.

The prototype for such a social policy already exists. The Russification of professionals has already been applied in the monolithic Eurasian state where psychiatrists are used to provide the cover for indeterminate imprisonment of all kinds of people, particularly social dissidents, in the name of medical treatment. If the psychiatrist speaks out, he, too, goes to jail or to a "hospital."

The above examples reflect some media comments on the problem of the insanity defense. The clamor for social control is great; the underlying panic about violence and crime in America focuses upon this relatively insignificant but highly publicized problem. A second element is the distrust both of our legal system and the professional persons upon whom reliance must be placed. The current practices of the adversarial system in presenting scientific evidence are certainly no cause for comfort.

## The Extent of the Insanity Defense Problem

A thorough review of the actual statistics regarding the insanity defense would not be feasible in this editorial. Suffice it to say that successful use of the insanity defense is a statistically rare event. In none of the other notorious cases in recent years has the defense been successfully invoked. Sirhan Sirhan, Jack Ruby, "Son of Sam" David Berkowitz, the assassin of John Lennon, and the would-be assassin of George Wallace were all found guilty; the Hinckley case is relatively unique.

Studies in a variety of states show the infrequency of the successful defense. New Jersey has about 15 a year. New York now has about 60 a year.

In New York [7], the insanity defense increased rapidly from 53 in the 1965 to 1971 period to 225 in the 1971 to 1976 period—from about 10 a year to 45 a year. About half of the insanity acquittals occurred in murder cases. New York City has about 1700 to 1800 homicides a year; in recent years, about 10 a year have been found not guilty by reason of insanity (NGRI). Thus, if the defense were eliminated and all such offenders hung or burnt at the stake, the effect on the crime rate by any measure would be infinitesimal. Curiously, a number of NGRI acquittees have committed very minor crimes but are confronted with incarceration under the same rules. A statistically high number of such acquittees reflect such findings in women who have committed homicide. This is not surprising when one considers the occasional cases of postpartum psychosis in which mothers kill their children. Certainly this is a group in which the public outcry about miscarriage of justice has been minimal, if not absent.

Pasewark and Craig [8] demonstrated that attorneys vastly overestimate the use and success of such a plea. For example, in Wyoming, attorneys estimated the use in all criminal actions at about 11%, but the actual utilization was but 0.31% (or 1 in 300 cases). In 114 cases in which the NGRI plea was used, it was successful in 4 (3.5%). Treatment, plea bargaining, delay of trial, allowance for introduction of a broad range of information, and so forth have also been side effects of or motivations for the use of the plea, but these do not seem particularly objectionable. Thus, the protests about the frequency seem more symbolic than realistic. Of course, complaints have also been directed at the cost of such procedures, the delays in criminal proceedings, and the lack of consistency in findings—all typical of our criminal justice system.

## Recommended Statutory Changes

On the basis that there are significant problems of unjust or unmerited court or jury findings and abuse of procedure (a most dubious conclusion), numerous suggestions have been made.

The most dramatic is the abolition of the defense; this has been accomplished in a number of states. This removes the issue, depending on subsequent judicial review and its dictates. In the past, attempted elimination of the insanity defense has failed because of the long legal tradition in this and other countries which have ruled that a person cannot be held blameworthy under certain circumstances. Additionally, elimination of the insanity defense is fraught with the problems inherent in altering the balance of the system that currently exists.

Under traditional law, the crimes that are of most concern require both evidence of the guilty act as well as the guilty intent (mens rea). The latter is not often an issue that is litigated. If the insanity defense is eliminated, then defense attorneys would be likely to explore mens rea defenses. There is no likelihood whatsoever that the courts would allow elimination of the element of mens rea. The difference between the mens rea defense and the not guilty by reason of insanity defense is that in the former, if mens rea is not proved beyond a reasonable doubt, the defendant is entitled to a verdict of not guilty, a total acquittal. In the NGRI plea, the defendant is placed in a special category governed by complex rules of procedure in each jurisdiction that provide for specific control and review. Thus the criminal justice system might find itself severely compromised under abolition, and uncertainty would replace reasonable predictability. One could expect some decades of confusion as new procedures would evolve to handle similar issues. Some aspects of this matter have already been discussed in this journal [*9*] reflecting my role in a debate at the Annual Meeting in which I assumed a posture that the insanity defense was, in ex-President Nixon's word, "unconscionable." At that debate, no other participant (lawyer or psychiatrist) would take the side of abolition.

A second recommended step is the addition of another plea—guilty, but mentally ill (GBMI). The plea was created in Michigan, probably with the intent of lessening successful NGRI pleas. As is not uncommon, the ultimate result was not that which was expected. The number of successful NGRI pleas did not diminish, but another group appeared to which the guilty but mentally ill finding was applied. The second variant is to eliminate the insanity plea of not guilty by reason of insanity with replacement by the GBMI plea. The latter, however, is—as has been recognized—only a euphemistic way of eliminating the NGRI plea in its entirety because it has no practical meaning. It dictates that those who are GBMI would first receive psychiatric treatment and, after successful treatment, would be returned to complete their sentences. Inasmuch as correctional facilities have an obligation to provide treatment for those found guilty and inasmuch as treatment mechanisms now exist for those imprisoned (including transfer to designated treatment facilities), the rule would be of no practical effect. Parenthetically, the treatment facilities currently available under any of the systems generally leave much to be desired.

Some states have a diminished responsibility rule wherein the person is found guilty but of a lesser crime because of the presence of substantial mental impairment not reaching the level of that required for a successful NGRI finding. This is another area of the responsibility dilemma that would have to be reviewed if abolition were accomplished.

Another alternative would be to rewrite the substance of the plea by creating different standards for such a finding. These and related matters have been discussed in recent position statements by the American Psychiatric Association [*10*]. No clearly advantageous substitute currently seems available to replace the variations of the American Law Institute Rules which only recently have been adopted in many jurisdictions.

The most practical of the current suggestions would seem to be the recommendation that the plea be restored to its traditional place as an affirmative defense, one in which the burden of proof remains with the defendant.

## Conclusions

The Hinckley case has been subjected to immense public scrutiny and the role of the insanity defense is once more being reviewed by the public, legislators, legal scholars, and concerned professionals. The media frenzy which characterized the period surrounding the trial

has subsided, leaving a legacy at the federal and state levels of numerous suggested changes. Caution must be directed to the entire matter, as the issues involved are of relatively minor moment when one views the totality of crime and the problems of violence in this country. The true issues are the problems of cultural determinants which seem to be more directly involved in the violence besetting this society and the erratic nature of the criminal justice system which in general seems to operate so slowly and inappropriately without consistency or speedy justice.

If the M'Naghten case is any harbinger of the future, then one can expect that relatively little will eventually occur as a direct result of the Hinckley case. The scrutiny directed at that case, and more broadly, the issue of how to manage criminal behaviors, may well spur a more broadbased and thorough review of the criminal justice system and its relation to crime. The problems involved in release of NGRI acquittees represent another area where modified policy may lessen public discomfort; the type of procedure now used in Oregon which provides a multidisciplinary periodic review and prolonged supervision seems reasonably workable. The role of forensic science experts also merits careful study. We in the forensic sciences have no room for complacency when one views the abuses of the adversarial mode of presentation (this comment in no way is meant to imply that there were any such abuses in the Hinckley case). Such an ongoing review should be a matter of constant concern and input by this Academy which has always directed its energy towards the appropriate use of scientific knowledge and procedure by the legal system for the greater social good.

## References

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