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The Unpopularity and Improbability of the Insanity Defense

William H. Weaver*

Contrary to popular belief, the insanity defense applies to a very narrow range of mental illnesses, is rarely successful in trial, and will usually land the defendant in an asylum for a longer period of time than he or she would have spent in jail. This article will explore the complexities of the insanity defense.

The insanity defense is arguably one of the most inaccurately portrayed legal topics. The media jumps at every chance to diagnose a questionable suspect as insane. Famous movies ranging from the Jimmy Stewart classic Anatomy of a Murder to the recent thriller Batman Begins depict how the insanity defense troubles prosecutors. Even John Grisham’s first novel revolved around an insanity case. The average person is thus led to believe that the insanity defense is common, requires the testimony of one psychiatrist for the defense, and places the criminal in a comfortable institute for a few months.

However, the insanity defense is actually a complex and rarely used plea. It is successful with few mental illnesses and poses considerable difficulty to defense lawyers who choose to use it outside of an arrangement with the prosecutor.

This article will explain the insanity defense and the difficulty posed to lawyers who choose to use it. The article will (I) explain the term insanity from a legal perspective, (II) show why certain mental illnesses do or do not apply, and (III) illustrate the difficulty and improbability of proving insanity.

1. Insanity

Insanity means (1) a lack of understanding that prevents one from knowing right from wrong or (2) an unsoundness of mind that prevents one from

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being able to control his or her behavior. The word *insane* is a legal term; it is not a medical term. Psychiatrists do not use the word *insane* because it is too simplistic; that is, there are too many different mental illnesses to use such a generic word as insane. The word *insane* is used in the legal system to describe one whose mental illness excuses him from criminal responsibility. This mental illness must either prevent the accused from knowing right from wrong at the time of the act or prevent the accused from being able to control his or her behavior at the time of the act in order to acquit him from criminal responsibility. At the federal level, the Supreme Court offered an official ruling:

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

At this point it will be beneficial to examine the history of the insanity defense and the evolution of its rulings in court. The first relevant case involving mental deficiency occurred in England in 1841. A Scottish man named Daniel M'Naughten believed he was the target of a conspiracy involving the Pope and British Prime Minister, Robert Peel. M'Naughten traveled to 10 Downing Street to ambush Peel, but mistakenly shot and killed Peel's secretary. During trial, several psychiatrists testified that M'Naughten was delusional. The jury

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5. The American Psychiatric Association, The Insanity Defense, http://www.psych.org/public_info/insanity.cfm (last visited May 20, 2005) (these principles will also be explained and examined further throughout the body of the paper).
8. 18 U.S.C., ch 1, §17.
found that M'Naughten was not guilty by reason of insanity. After an appellate ruling—demanded by none other than the Queen herself—it was held that a person could be found criminally excused if he or she was unable to know the difference between right and wrong at the time of the crime. This case formed what is known as the first test of insanity: determining if the defendant knew the difference between right and wrong at the time of the crime.

This ruling was later considered by courts in the United States but was found to be far too narrow. Instead of ruling along the same line as the "M'Naughten Rules," the courts also began to accommodate for uncontrollable impulses. In *Parsons v. Alabama* (1886), the State Supreme Court opined that a person was not guilty by reason of insanity if he or she had lost "free agency" as a result of mental disease. This case marked the beginning of an insanity defense that allowed the accused to know right from wrong but still be found "not guilty" due to the inability to control behavior at the time of the crime. Thus was born the second definition: determining whether or not the defendant was able to control behavior. If the defendant did not know the difference between right and wrong, or was not able to control his behavior, then he or she is excused from criminal responsibility.

**Common Mental Illnesses**

The purpose of this article is not to provide an exhaustive look into the insanity defense, but merely to dispense of the common misconception that every "crazy" person can successfully use the insanity defense. Thus, it is beneficial to point out some of the more common mental illnesses that qualify for the insanity defense, as well as common mental illnesses that do not.

Based on the definition of insanity, certain types of mental illness do not excuse the accused from criminal responsibility, namely, mental illnesses that do not independently and directly cause the action. For this

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8 Norval Morris, "Wrong" in the M'Naughten Rules, 16 Mod. L. Rev., 435–440 (No. 4, 1953).


10 John F. McGirr, Crime and Insanity: The Legal as Opposed to the Medical View, and the Most Commonly Asserted Defenses, 14 J. Crim. L., Criminology, 46–61, at 47 (No. 1, May 1923).
reason, paranoia cannot be effectively employed in an insanity defense. Paranoia does not include hallucinations. Paranoia is merely a tendency of the agent toward excessive or irrational suspiciousness and distrustfulness of others. Thus, paranoia fails the legal definitions of insanity. While the agent may be chronically distrustful, he or she still knows right from wrong and can still control behavior.

Eccentricities of character also fail to excuse the accused from criminal responsibility. For example, a woman with an extremely short temper still knows right from wrong. Although the argument could be made that she was unable to control her behavior because of the inability to act in any other way (thus making her a slave to her mental illness), this defense still does not meet the insanity defense criteria.

Hysteria is another example of an illness that is not classified as insanity. Hysteria is behavior exhibiting overwhelming or unmanageable fear or emotional excess. One could make a good argument that such a condition does fit under the definition of insanity. However, since any criminal could claim an "unmanageable fear" of failure (financial, social, personal, etc.), anyone could be held as irresponsible. Moreover, it has remained impossible to prove a causal relationship between hysteria and the lack of understanding of criminality or the inability to control behavior. Thus, for legal purposes hysteria also fails to qualify as insanity.

Insanity is an incredibly narrow term. If there is any room for argument (as in the examples previously mentioned), then the accused cannot be excused from responsibility. Some of these types of illnesses can, however, lessen the degree of murder. If the illness removes motive, which is necessary for first-degree murder, then the defendant will not be charged with murder in the first degree.

A mental illness that causes delusions will sometimes excuse the accused from responsibility. To do so, it must be a specific type of delusion. Like insanity, delusion—in a legal context—has a very narrow definition. To be considered an act of insanity, a delusion must prevent the accused from seeing the wrongfulness of the act. Almost all delusions of this sort are commonly called hallucinations: a perception of objects with no reality. In the broad sense, a

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12 See People v. Carpenter, 102 N.Y. 238 (1886). See also Willis v. People, 32 N.Y. 715 (1865).

13 Meagher at 57.
delusion is a false belief that cannot be corrected by reason. However, for a mental illness which produces delusions to make an agent legally insane, the delusions must be mental, not merely moral; i.e., they cannot be mere notions or impressions, odd ideas, or hastily formed opinions.

Obsession, under an extremely narrow definition, can also remove the accused from criminal responsibility. To do so, in the obsession there must be no deliberation, no intention, nor passion (e.g., anger, jealousy, or revenge) acting consciously. The obsession cannot be the result of any interior factor (such as lust), only an exterior (and thus, usually unknown) factor. Such obsessions usually lead to compulsions. Thus, since the compulsion (e.g., to kill) is the result of something completely unconscious, the agent cannot act in any other way at all. He cannot, therefore, be held responsible because he is unable to act in any other way. It is important to note that such cases are among the rarest of insanity defenses since most compulsions are not criminal. In fact, they are usually trivial, such as having to flick the light switch five times before leaving a room. Also, obsessions do not hinder the agent from knowing right from wrong, so most people with obsessions do everything they can to prevent themselves from acting upon their obsessions.

The Difficulty of Proving Insanity

So far everything presented may seem easily argued against. That is true—it is. For this very reason, insanity defenses are only very rarely upheld because it is so difficult to prove that the accused’s mental illness classifies him or her as insane. Successful defendants must have very objective and concrete evidence to prove insanity. Justice McLean, of the U.S. Supreme Court, said that the ability to discriminate between right and wrong can best be ascertained from the acts of the individual himself (as showing a sense of guilt, attempts to escape punishment, etc.) and not by any medical theory. As such, the most common evidence of insanity is usually the testimony of

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14 Id. at 51.
15 Regina v. Barton, 3 Cox Cr. Ca. 275. See also Flanagan v. People, 52 N.Y. 467 (1873). See also People v. Carpenter, 102 N.Y. 238 (1886); U.S. v. Holmes, 1 Cliff. 98 (Me. Cir. Ct., 1858).
16 Meagher at 56.
the defendant himself, and not the testimony of an expert psychologist. If the defendant testifies that he cannot recall a single detail of the act, for example, such a lapse could be used as evidence of insanity (although that would not be enough evidence). Expert psychologists can be useful, but it is hard for them to prove that the defendant was insane at the exact time of the act. Defendants must have some other type of evidence to prove insanity such as a brain tumor, a history of mental illness, the fact that the defendant is still acting insane, etc. However, none of these conditions alone is sufficient to prove insanity at the exact time of the act.

This also leads to the question of burden of proof. The dilemma is outlined well by Drs. James F. Hooper and Alex M. McLearen:

Defining the burden of proof presents another issue in the insanity defense. Who has to prove what and how do they prove it? Since the average citizen is presumed to be sane, if they claim insanity, who decides? Does the prosecution have to prove defendants are not insane, or do the people who ask the court to find them not guilty by reason of insanity have to justify themselves? Most states have gone with the latter, but it certainly has not always been that way. In the aftermath of the Hinckley case, many states shifted the burden of proof to the defendant.

There has also been discussion on the amount of proof required. Should insanity be proved only by 51 percent (e.g., a preponderance of evidence), or does it need a standard of "beyond a reasonable doubt"? Generally, laws give the benefit to the accused and logically would not require more than the preponderance standard.  

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James F. Hooper & Alix M. McLearen, Does the Insanity Defense Have a Legitimate Role? 19 Psychiatric Times, Iss. 4, April 2002. See also Commonwealth v. Dole (Pa.), 107 Atl. 743; Homicide, Insanity, Burden of Proof, 6 Va. L. Rev. 218, 218 (Dec. 1919) (the question of burden of proof also raises the question of how to prove insanity, which is not the focus of the paper but will be briefly examined here in regard to expert witnesses (so as to further prove the difficulty of an insanity defense). Experts may give an opinion only as to sanity, not as to responsibility. First, expert opinions may be based on personal examination of the accused and on evidence heard: See Shelling, 11 Ohio, S. and C.P Dec. 1981. Second, experts may give opinion on their observations of the prisoner—without the prisoner’s consent or warning: See Bart v. State, Tex. Ct. App., 40 S.W. Rep. 1000. Third, testimony of an expert witness who has examined the accused cannot be objected to since the accused cannot testify to his own insanity—which also applies to expert witnesses for the prosecution: See People v. Kemmler, 199 N.Y. 580; See also People v. Truck, 170 N.Y. 203 (N.Y. Ct. App, 1902)).
Of course, all of this is relevant only in a theoretical/ideal setting. If the insanity defense seems complicated to define and apply for lawyers and judges, then it is going to be only more difficult for a jury to decide.

In fact, insanity cases are arguably the most likely to produce verdicts that are unfavorable to the public for this very reason: Because of the complexity of instructions, psychiatric testimony, and evidence used in an insanity case, jurors often throw it all out and appeal to nothing more than their own ideas of insanity, morality, and justice. The verdict was so appalling to the public in the infamous Hinckley case, for example, that the jurors were forced to testify to a Senate Subcommittee on their decision. Similar investigations were done by the media in the M'Naughten case and the Jeffrey Dahmer case.

Norman Finkel and Sharon Handel have studied, for some 10 years, how jurors decide in cases of insanity. After looking at every actual case as well as experimenting with several mock-trial scenarios in which jurors were asked how they came to their decision, Finkel and Handel determined that there is no one way to guarantee a verdict in either direction. It does not depend on the instruction the judge gives, which of the two qualifying definitions for insanity is used, nor who receives the burden of proof. Because of the complexity of insanity, at the end of the day most jurors will just appeal to their own definition of insanity:

A legal test that does not adequately capture the essence of insanity, as understood by ordinary citizens, invites disregarding or reconstructing. Jurors are likely to hear such instruction as permission to use their own lights, or, in Lord Cooper's view, to simply retire and ask themselves, "Is this man mad or is he not?" If this happens, construals and verdicts that are perplexing and troubling will likely increase. In response, the public is more likely to disparage the jury, or the law, or both. A law that does not command respect (i.e., because it fails to comport) and does not instruct incites public discontent and jury revolts. Both citizens and jurors need more education and instruction to make their views come closer to the law's, or the law and legal test ought to be changed in the direction of harmonizing legal and lay notions.


See n. 25.

Meagher at 57.
Proving insanity is extremely difficult. Thus, it should be no surprise the only thing rarer than an insanity defense is an insanity defense that is upheld. Even in “celebrity” cases, the legendary John Hinckley’s verdict is unique—the insanity defense failed for “Son of Sam” murder, or David Berkowitz,22 Jack Ruby,23 Unabomber Ted Kaczynski,24 Jeffrey Dahmer,25 and John DuPont.26 The American Psychiatric Association says:

The insanity defense is not often used, and when used is frequently unsuccessful. According to a 1991 eight-state study funded by the National Institute of

22 Berkowitz (who claimed to receive his killing orders from a neighbor’s dog) confessed to the police upon his arrest, thus making it nigh impossible for his lawyers to go back and prove that either he was ignorant of the morality of the situation or that he was compelled to commit the crime. The case is similar to the recent Dyleski case: Dyleski was found to have had sex with his girlfriend immediately after the murder, thus showing that he had felt guilty for the crime and was therefore aware of his choice and its immorality and criminality.

23 See John Kaplan, The Trial of Jack Ruby, The Notable Trials Library, 1992. (Ruby, who shot Lee Harvey Oswald, used the defense that his family had a history of mental illness and that the flashing cameras had triggered a reaction. The defense failed because he had told Dallas policemen that the American people would view him “as a hero,” that he had maintained Dallas’s “good reputation,” and that the murder was proof that “Jews have guts.” From these statements it was proven that Ruby knew the difference between right and wrong and was not acting on compulsion).

24 See Ted Outley, Ted Kaczynski, Crime TV’s Crime Library, http://www.crimelibrary.com/terrorists_spies/terrorists/kaczynski1.html (last visited on Feb. 11 2006) (the court-appointed psychiatrist diagnosed Kaczynski with paranoid schizophrenia, which was insufficient to prove Kaczynski incompetent to stand trial (or gain acquittal), but Kaczynski rejected the plea altogether and plead guilty. He later tried to withdraw the plea and return to the plea of insanity, but was not allowed. This decision was upheld by the 9th Circuit Court of Appeals).

25 See P.T. Staff, I carried it too far, that’s for sure, Psychology Today (May 1992), available at http://www.psychologytoday.com/articles/index.php?term=pto-19920501-000022.xml&print=1 (last visited Feb. 11, 2006) (if there is one case that covered every single aspect of the insanity plea, it would have to be the Dahmer case. Numerous psychiatrists testified for the defense, most giving multiple diagnoses, and yet the psychiatrists who testified for the prosecution all held that Dahmer was sane. Most who have commented on the Dahmer case said that by the end the jury was so baffled, unimpressed, and confused by the psychiatric community that they threw it all out and entered a verdict of guilty).

Mental Health, the insanity defense was used in less than one percent of the cases in a representative sampling of cases before those states' county courts. The study showed that only 26 percent of those insanity defenses were argued successfully. Most studies show that in approximately 80 percent of the cases where a defendant is acquitted on a "not guilty by reason of insanity" finding, it is because the prosecution and defense have agreed on the appropriateness of the defense before trial. 27

Along those same lines, Hooper and McLearen show that "approximately 70 percent of insanity acquittals result from agreements made between opposing attorneys, in which the prosecution agrees that society would be better served by placing the defendant in treatment, rather than in prison." Furthermore, "not guilty by reason of insanity" may not always be what a criminal wants. Studies show that persons found not guilty by reason of insanity, on average, are held in mental institutes as long as—and often longer than—persons found guilty and sent to prison for similar crimes. 28 Since insanity defenses have become more frequent following the Hinckley case, most states have formed formal review boards to handle the determination of insanity and four states (Utah, Idaho, Montana, and Kansas) have legislatively abolished the insanity defense. Many states also rule out the second insanity definition—being able to control behavior—and consider only the first definition—the ability to distinguish right from wrong. New Hampshire's standard is that the criminal act was a direct result of the accuser's mental illness. 29

26. 1997, at A1 (DuPont's insanity plea failed for probably the same reason as Ruby's: after murdering his victim DuPont retreated to his mansion, held the police at bay for two days, and asked for his lawyer over 100 times—all evidence that DuPont was aware that what he had done was wrong. It was proven, however, that DuPont was mentally ill. His sentencing was therefore reduced to third-degree murder).

27 See American Psychiatric Association, supra note 5.


29 See American Psychiatric Association, supra note 5.
Despite the difficulty of using the insanity defense, there are certain benefits. In December 2003, the lawyers for Lee Boyd Malvo decided to use the insanity defense in the Beltway sniper shootings. Legal experts claim that Malvo's lawyers had no intention of getting an acquittal. Instead, the insanity defense was used to allow the defense to introduce otherwise inadmissible evidence about Malvo's upbringing, his relationship with John Allen Muhammad, and his mental state. All this evidence was supposedly intended to gain the jury's sympathy so that it would not invoke the death penalty. The jury found Malvo guilty and sentenced him to life in prison.

Despite whatever advantages a clever lawyer might find, it is clear that the insanity defense is more often avoided, and few defense lawyers wonder why. The insanity defense covers a narrow list of mental illnesses, the illnesses themselves are difficult to prove using either of the two qualifying definitions for insanity, and juries are prone to disregard evidence and instruction when either is complex (which is likely). Furthermore, even if the accused are found not guilty by reason of insanity, he, she, or they will likely spend more time in a mental institute than she would have in jail had they not opted to plead insane. For these reasons, the insanity plea is rarely used, and even more rarely successful.

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