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The Insanity Plea: The Uses and Abuses of the Insanity Defense

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THE INSANITY PLEA: THE USES AND ABUSES OF THE INSANITY DEFENSE. By *William J. Winslade and Judith Wilson Ross*. New York: Charles Scribner's Sons. 1983. Pp. xii, 226. $15.75.

America was shocked when John Hinckley was found not guilty by reason of insanity in the shooting of President Reagan. A nation that watched Hinckley pull the trigger on countless television replays recoiled at the prospect of his being released from a psychiatric hospital within as little as six months. As the public vented its outrage, the insanity defense came under renewed attack. In *The Insanity Plea*, William Winslade[1] and Judith Ross[2] offer their contribution to this trend by arguing for the abolition of the insanity defense.

The authors claim that the insanity defense "defeats justice, discredits psychiatry, and enrages the public" (p. 20). The root of the problem is the use of "expert psychiatric testimony" in insanity cases. According to the authors, such testimony is inappropriate for two reasons. First, the public in general and the jurors in particular falsely assume that psychiatry is based on a scientifically tested theory and body of knowledge with definable elements (p. 9). Contrary to the popular assumption, say Winslade and Ross, psychiatric testimony consists of speculation derived from theories that lack a scientific basis. Because these theories are couched in technical jargon presumably created by experts, they carry undue weight with the jury, even though lay persons could often observe and evaluate the behavior in question just as easily as a psychiatrist could (pp. 10-11).

The second reason why psychiatric testimony is inappropriate is the philosophical incompatibility of law and psychiatry (p. 12). Law and psychiatry, the authors contend, are predicated on divergent views about whether humans are free agents. The law proceeds on the premise that one freely chooses to do an act (p. 12). It therefore holds people morally responsible for these acts and punishes them for their commission. Psychiatry does not make the same assumption about free choice. Instead, it assumes that behavior is determined by prior events or psychological or physiological states (pp. 12-13). To the extent that behavior is caused by forces beyond a person's control, it does not have a moral dimension. The authors conclude that these two conflicting assumptions about human freedom and hence about moral responsibility produce the intolerable result that "guilty" defendants are not convicted because jurors are confused about the human mind. According to this analysis, psychi-

1. William Winslade is co-director of the Program in Medicine, Law and Human Values at UCLA, where he is an Adjunct Professor of Law and Adjunct Associate Professor of Psychiatry. He conducts a psychoanalytic practice and is also a consultant to the President's Commission on Medical Ethics.

2. Judith Wilson Ross is a lecturer in the UCLA Department of Psychiatry and also serves as Assistant Director of the UCLA Program in Medicine, Law and Human Values.

atric testimony about mental conditions manipulates jurors attempting to determine the defendant's state of mind when the act was committed.

The authors attempt to support their argument by discussing seven actual trials in which the defendant used the insanity defense. For example, they use the trials of Dan White, Leonard Smith, and John Hinckley to illustrate how psychiatrists manipulate jurors and how jurors manipulate each other (pp. 201-02). In dealing with a defendant with whom they can sympathize, jurors conclude that the basically good defendant must have been crazy to have committed the crime. In essence, "when [jurors can] not understand on a personal level what [the defendant] was doing, or why he was doing it, they are inclined to see the behavior as evidence of mental illness and . . . insanity" (p. 194). Psychiatrists give jurors a pseudo-scientific explanation for their reasoning, allowing them to rationalize an otherwise emotional verdict. Yet, jurors do not even realize what they are doing; those questioned after the Hinckley verdict did not seem to know why they voted not guilty by reason of insanity (p. 202). The insanity defense permits jurors unconsciously to use psychiatric explanations of behavior to replace responsibility for their actions (p. 197).

The authors use the Tex Watson trial to show the disarray, vagueness and confusion of psychiatric testimony (pp. 103-32). In that case, no less than ten mental health "experts" gave conflicting analyses. According to the authors, these conflicts arose because psychiatrists, unlike other scientific experts, do not have a generally accepted, scientifically based standard of knowledge. Psychiatric judgments mislead jurors because they are presented as "scientific fact" even though they are nothing more than untested hypotheses.

The Robert Tornsey trial supposedly illustrates how the legal system errs in using involuntary treatment as an alternative to punishment (pp. 133-58). Tornsey was found not guilty by reason of insanity, committed for treatment, and released shortly thereafter. The authors suggest that because the jurors sympathized with Tornsey and assumed he would be committed for a long time, they opted for a verdict they felt would be less stigmatizing (p. 142). However, the doctors could not hold Tornsey because he had no illness to treat. Thus, Winslade and Ross conclude, involuntary commitment is an inadequate alternative to prison.

Although they concede that the insanity defense is rarely used and seldom succeeds, the authors argue that it must be abolished in order to restore some respectability to the criminal justice system (p. 19). They also advocate the elimination of most psychiatric testimony, including all testimony by psychiatrists regarding mental states (p. 129). They would replace the insanity defense with the ver-

dict of "guilty but mentally ill" for cases where the defendant admits commission of the proscribed act (p. 223). Under this verdict, the defendant would receive the same sentence as any other defendant convicted for the same offense but would be eligible for psychiatric treatment. Finally, the authors propose a change in the structure of criminal trials when the defendant pleads mental illness (p. 201). They would bifurcate the proceeding into a phase in which the jury determined guilt and a phase in which the jury determined the penalty. In the guilt phase of this two-part proceeding, the jurors would not consider the defendant's mental state; such evidence would be admissible only in the penalty phase. The linchpin of these proposals is the abolition of psychiatric testimony regarding the mental state of the defendant. The authors claim that as long as psychiatrists know so little about mental states and as long as jurors cannot distinguish insane conduct from criminal conduct (p. 219), jurors must not be allowed to hear evidence concerning mental states. Without the abolition of testimony regarding mental states, the insanity defense will continue to ensure that the "guilty" are not convicted, because jurors are too sympathetic to certain kinds of violence; too blind to their own hidden and hostile natures; too frightened of madness to face it; and too irresponsible to make their own decision when "experts" are available to do so for them.

In reaching these conclusions, the authors make some provocative assertions. Unfortunately, they offer nothing more than that. The principal defect of the book is the authors' failure to support their claims. This defect is especially troublesome in the face of other writings arguing contrary positions. Four examples of their unsupported assertions follow.

A fundamental difficulty lies in the claim that law and psychiatry are philosophically incompatible, a notion that moves the authors to call for the assignment of guilt for specific criminal acts without consideration of the actor's mental state. This position runs counter to the long-standing basis for criminal responsibility: cognitive and volitional capacity.[3] Indeed, even others who argue for the abolition of the insanity defense would permit consideration of the defendant's mental state.[4] The authors have, perhaps unwittingly, called for a fundamental restructuring of criminal responsibility. To justify such

3. Traditionally, conviction requires that a defendant have reasonably rational, self-directed control over his or her behavior, as well as the mental state required for liability as defined by the offense. Morse, *Failed Explanations and Criminal Responsibility: Experts of the Unconscious*, 68 VA. L. REV. 971, 976 (1982). These requirements arise from the moral notion that guilt should not be imposed where choice is lacking. Morris, *The Criminal Responsibility of the Mentally Ill*, 33 SYRACUSE L. REV. 477, 502 (1982).

4. Morris, for example, would admit evidence of the defendant's mental state just as any other evidence bearing on the elements of the crime. *See* Morris *supra* note 3, at 509-12.

a major change, they should have provided empirical analysis instead of mere anecdotes.

The authors make a second set of assertions about the motives of juries in reaching verdicts. They explain that not guilty by reason of insanity verdicts are the result of either juror sympathy for, or fear of, the defendant (p. 18). Significantly, the authors present no empirical support for these theories. One wonders whether they are judging jurors' mental states with the same sort of *post hoc* psychological analysis that psychiatry supposedly misuses in dealing with criminal defendants. The authors not only fail to offer any support of their own, but they also completely ignore existing research on jury behavior. This research indicates that juries, as rated by trial judges, are remarkably sensitive to the strength of evidence and that the picture of "undisciplined rabble settling cases by prejudice and caprice" is undeserved.[5] However disillusioned the authors may be with a system that permits twelve laypersons to decide which group of expert witnesses is correct, their complaint lies against the jury system as a whole, not just against the insanity plea. But the authors never marshal evidence for such a broad indictment.

The authors would respond to the argument that their criticisms are not unique to the insanity plea by claiming that expert psychiatric testimony, unlike that of economists or engineers, is singularly inappropriate for juries. The authors assert, for a third time without support, that psychiatric testimony is unusually contradictory and that scientific experts in other fields show a much greater degree of consensus. But the mere existence of stables of experts who will testify on either side of an issue in both civil and criminal trials — economists in antitrust cases, for example — casts considerable doubt on this argument.[6] Certainly the fact that psychiatric evaluations are not provable or undisputed does not necessarily mean that they are inadmissible.[7]

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5. Wasserman & Robinson, *Extra-Legal Influences, Group Processes, and Jury Decisionmaking: A Psychological Perspective*, 12 N.C. CENT. L.J. 96, 98 (1980) (footnote omitted). Wasserman and Robinson rely substantially on the research of Kalven and Zeisel, which shows that judges and juries usually agree on verdicts and that disagreements arise mainly from evidentiary factors. Where the defense of insanity was raised, it was almost never a source of disagreement. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY, 56, 329-30 (1966).

6. In Tanay, *Forensic Psychiatry and Justice*, 62 MICH. B. J. 206 (1983), the author argues that forensic psychiatry, like all applied sciences, does not offer certainty. It attempts only to present psychic reality to a legal setting by offering and expounding upon the contradictory opinion of psychiatrists. No testimony possesses absolute reliability and validity. Inconsistencies in psychiatric testimony take on special importance, Tanay contends, only because of the sensationalistic way the news media presents them.

7. On this issue, the book is part of an ongoing debate about the value of psychiatric testimony. Whereas Morse, *supra* note 3, at 973-76, agrees with the authors of this book, Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 461, 488 (1980), argue that such testimony is valuable in helping jurors organize information and in suggesting explanations for puzzling behavior.

Finally, the authors assert that replacement of the insanity defense with the verdict of guilty but mentally ill would be a "workable solution" (p. 219). This substitution would eliminate consideration of the defendant's mental state in the guilt phase of the trial, while supposedly letting jurors show their compassion for the mentally ill in the allocation of punishment, rehabilitation, and treatment (p. 219). But research on the verdict of guilty but mentally ill indicates that defendants so convicted do not receive treatment different from that of other convicted defendants.[8] Though not all opponents of the insanity defense also advocate adoption of the verdict of guilty but mentally ill,[9] the authors cavalierly assume that the verdict would be a marked improvement over the present system. Again, they leave the reader wondering why.

The Insanity Plea presents an interesting theory of how juries function in cases involving the insanity defense. Unfortunately, the book presents little evidence to support that theory. It lacks the empirical data needed to call into question existing studies that are generally favorable to the jury system.[10] Perhaps, then, the main value of the book lies in its suggestion of directions for study in insanity cases. As a vehicle for argument, however, the book fails; it is unpersuasive to anyone not already convinced that the insanity defense should be abolished.

They contend that the risk of jurors giving undue weight to this testimony has been grossly exaggerated. *Id.* at 493.

8. *See* Project, *Evalutating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH J.L. REF. 77, 104-05 (1982). The study indicates that juries used the verdict for defendants whom they would otherwise have found guilty. The availability of the verdict did not reduce the frequency with which defendants raised the insanity defense. *Id.* at 101-02.

9. Morris, *supra* note 3, at 527-31.

10. *See* H. KALVEN & H. ZEIZEL, *supra* note 5, at 56, 329-30; Wasserman & Robinson, *supra* note 5, at 98.