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The Insanity Defense: A Comparative Analysis

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The Insanity Defense: A Comparative Analysis

Abstract

The topic of my thesis is the insanity defense. The insanity defense is a tactic that is rarely used and rarely successful. Generally states fall into three categories: Those who use the M'Naghten rule of law, those who use the American Law Institute (ALI) Model Penal Code, and those who have abolished the use of the insanity defense. This research compares states from each category to investigate whether or not the type of rule used affects the outcome. In order to determine whether these categories matter, the paper compares similar appellate felony case outcomes in New Jersey and North Carolina, Michigan and Oregon, and Utah and Nevada. The states were chosen based on how representative they were of all of the states in their respective categories. The expectation was that different insanity defense laws will have a marginal impact on the outcome. The expectation was found to be true, even with the limited availability of cases, after analyzing each state's statute and the cases, the conclusion was that the rule of law used to evaluate the insanity of defendants or lack of a law has little or no affect on the outcome each insanity defense cases.

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Abstract

The topic of my thesis is the insanity defense. The insanity defense is a tactic that is rarely used and rarely successful. Generally states fall into three categories: Those who use the M'Naghten rule of law, those who use the American Law Institute (ALI) Model Penal Code, and those who have abolished the use of the insanity defense. This research compares states from each category to investigate whether or not the type of rule used affects the outcome. In order to determine whether these categories matter, the paper compares similar appellate felony case outcomes in New Jersey and North Carolina, Michigan and Oregon, and Utah and Nevada. The states were chosen based on how representative they were of all of the states in their respective categories. The expectation was that different insanity defense laws will have a marginal impact on the outcome. The expectation was found to be true, even with the limited availability of cases, after analyzing each state's statute and the cases, the conclusion was that the rule of law used to evaluate the insanity of defendants or lack of a law has little or no affect on the outcome each insanity defense cases.

Introduction

The insanity defense is a topic that seems to garner a lot of attention even though it is rarely used and only a few cases that invoke are actually successful. So why is this topic so popular considering its rarity? The answer could be a combination of highly publicized cases that use it and the public's misunderstanding of exactly what happens when someone is found "not guilty by reason of insanity". It is because of cases like John Hinckley and Andrea Yates where the defendants are found NGRI coupled with the public's misunderstanding that causes the public to become so outraged with the insanity defense. The public has this common misconception that someone found NGRI is just let go and is not punished for his or her crimes, but in reality a person found NGRI is almost always civilly committed and often for a longer time than if the defendant had gone to prison. Public outcry can have a big affect on a state's insanity defense laws ranging from changing the rule of law used to abolishing the defense altogether.

The focus of this research is to see if the difference in rule of law used or lack of a rule can change the outcome in a case where the insanity defense was used. This information is useful because perhaps if there is a difference then maybe the states should all move to using one rule of law or maybe as some have proposed the defense should be abolished altogether. Very little research has been done on this topic even though the public seems to have quite the opinion on the topic and their opinion can be very influential. The findings are limited as there were only a few cases analyzed. The limited cases came from the lack of information available, because most insanity cases are at the district court level and district courts do not traditionally publish their cases. It is because of the lack of published district cases that appellate court cases were used, but even then

it was difficult to find cases that had to deal directly with the insanity defense and the rule of law used.

The findings, while limited, seemed to show that the rule of law used does not have an impact on the outcome of the case. There is some evidence in the states that abolished the insanity defense that if the case was tried in state that allows the defense the outcome might have been different, but there is no guarantee that would have happened considering how few cases are successful in the using the defense. One model used by Oregon did seem to be promising in potentially addressing some the issues that the public has with the insanity defense, but further research is needed to make definitive conclusions and hopefully that research will take place considering the growing public interest in the insanity defense.

History

The insanity defense has a long history, dating all the way back to Hebrew law, which was further developed by Plato and Aristotle (Stimpson 1994). The beginning tests were mostly focused on mens rea or “guilty mind” as the main component to evaluate whether or not someone meets the requirements of criminal responsibility. In order for someone to be found guilty of a crime they must have actus reus or “guilty act” and mens rea. When dealing with the insanity defense, the guilty act is not usually in question, but it is whether or not the defendant knew wrongfulness of his crime. The first formal insanity defense that was used by a court of law was the wild beast test named by English judge, Judge Tracy 1724. The wild beast standard states “ for someone to be insane he must be totally deprived of his understanding and memory, and not know what he is

doing anymore than an infant, a brute, or a wild beast” (Huss 2009). The wild beast standard was the rule of law in England for about 100 years, until the M’Naghten case.

The M’Naghten rule came from a case where Englishman Daniel M’Naghten killed the secretary of the prime minister because he thought Robert Peel, the prime minister was leading a conspiracy against him. After he couldn’t escape this supposed conspiracy against him he decided to kill Peel, but instead killed his secretary.

(Wrightsmann & al. 2002). M’Naghten was found to be insane by nine expert witnesses because he could not tell right from wrong (Huss 2009). The M’Naghten rule has three prongs, first that there must be a mental illness present, second is the inability to know the nature and the quality of the act, and the last prong is the knowing right from wrong (Huss 2009). It is often pointed out that M’Naghten is too narrow, so several states have included an irresistible impulse test that suggests even if a person knows the nature and quality of the act and that such an action is wrong, he still may not be able to stop himself (Huss 2009).

In 1962 the American Law Institute (ALI), came up with a slightly different standard in its Model Penal Code. The Model Penal Code states:

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 the substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law (Section 4.01) (Huss 2009)

In 1984 Congress passed Insanity Defense Reform Act, which removed the volitional prong of ALI from federal cases and focused on the cognitive and affective components.

Hinckley Trial:

The Hinckley Trial is important because it was one of the catalysts for so many states changing their insanity defense laws. John Hinckley tried to assassinate the President Ronald Regan in order to impress actress Jodie Foster, who he was in love with. On March 30, 1981 he shot the president and wounded and killed others around him. It was not surprising that he would try to use the insanity defense. “All of the government psychiatrists concluded that Hinckley was legally sane—that he appreciated the wrongfulness of his act—at the time of the shooting” (Linder 2008). The three defense psychiatrists said Hinckley was legally insane and further evidence to support his lack of mental stability came when he tried to kill himself twice, once with an overdose of Valium and the other hanging (Linder 2008). Two of the psychiatrists said that he suffered from psychosis and that he thought he was acting out the script from the movie *Taxi Driver*; in fact, a complete showing of the movie closed the defense case (Linder 2008). John W. Hinckley was found “not guilty by reason of insanity on all thirteen counts. After the case Congress shifted the burden of proof of insanity to the defense. “Joining Congress in shifting the burden of proof were a number of states” (Linder 2008). Within three years after the Hinckley verdict, two-thirds of the states placed the burden on the defense to prove insanity, while eight states adopted a separate verdict of "guilty but mentally ill," and one state (Utah) abolished the defense altogether” (Linder 2008).

Throughout the history of civilization there has been some form of an insanity defense, even though the first formal use and naming of it did not occur until 1724. Even though the different rules of law followed for evaluating have not changed since ALL,

various case such as the Hinckley case have caused states from time to time to reevaluate what rule of law they use.

Method

The data collection relied on qualitative research methods in collecting and analyzing data. The methods consisted of library research using various textbooks, the Westlaw database, and various states legislative websites. The textbooks were used to gain information on the history of the insanity defense tests and the parts of each of those tests. Westlaw was used to gain access to the cases needed and to look at various essays and articles in law reviews and journals to gain more in-depth knowledge on some of the states. The state legislative websites allowed for each states statute regarding the insanity defense to be accessed and analyzed along with the cases from each state. Appellate court cases were used because of a lack of availability of the original court cases decisions as most district courts or original jurisdiction courts do not often publish their decisions.

Each state was chosen for various reasons some of the reasons are the same. California and Texas, two of the M’Naghten states were chosen for being states that heavily influences legislative decisions that affect the entire country. New Jersey was chosen because it was a good representation of states that use the M’Naghten rule of law, but unlike California and Texas is not generally considered one that has great influence over legal and political trends in the U.S.

New York was chosen for the same reason as Texas and California. Michigan was chosen as a state to be researched because it not only was representative of states using the ALI rule, but because it is a state like New Jersey, which does not set precedent for other states and does not greatly influence political and legal trends. Oregon was chose as

the last state for ALI because it is unique in how it defines the criminally insane and the procedures of how to handle someone found legally insane.

Idaho was chosen because in 1982, after the public outrage of the Hinckley trial, Idaho decided to not only reform its laws regarding the insanity defense, but to abolish it. Montana was chosen because the insanity defense was abolished as an affirmative defense, but Model Penal Code test for insanity was moved to the sentencing statutes and placed consideration of a defendant's mental defect in the post-conviction phase of the criminal proceedings. The last state chosen was Kansas because it abolished the insanity defense after Idaho, Montana, and Utah did between 1979 and 1983 and it changed in 1995 because there was a national mood of skepticism towards the insanity defense and it was a way for the legislature to soothe public concerns and gain popularity, but it wasn't done as a direct result of the Hinckley trial.

M'Naghten

California:

California has used the M'Naghten rule of law since the Nineteenth century, with some variations to the law over time. In 1978, Justice Tobriner gave the opinion of as to why the state of California should switch from the M'Naghten test to the American Law Institute test. His opinion was as follows:

For over a century California has followed the M'Naghten test to define the defenses of insanity and idiocy. The deficiencies of that test have long been apparent, and judicial attempts to reinterpret or evade the limitations of M'Naghten have proven inadequate...we have concluded that we should discard the M'Naghten language, and update the California test of mental incapacity as a

criminal defense by adopting the test proposed by the American Law Institute and followed by the federal judiciary and the courts of 15 states. (*People v. Drew*).

The test was short lived for in 1982 the people of California including voters and legislators passed Proposition 8, which added section 25 to the California Penal Code and restored M'Naghten as the test for insanity (Lashbrook 2003). The current statute has two prongs the act prong and the wrongfulness prong. California has also tried to tackle the question of voluntary intoxication. While someone who is suffering from a mental disease or defect such as schizophrenia would have no trouble enter a plea of insanity the question is whether or not some who voluntarily uses drugs or alcohol enter a plea of temporary insanity. The case *People v. Robinson* brought forth a change in insanity defense instructions for the jury to read:

A person is legally insane if, by reason of mental disease or mental defect, either temporary or permanent, caused in part by the long continued use of [alcohol] [drugs] [narcotics], even after the effects of recent use of [alcohol] [drugs] [narcotics] have worn off, [he][she] was incapable at the time of the commission of the crime of either:

1. Knowing the nature and quality of [his] [her] act; or
2. Understanding the nature and quality of [his] [her] act; or
3. Distinguishing right from wrong

However, this defense does not apply when the sole or only basis or causative factor for the mental disease or mental defect is an addiction to, or an abuse of, intoxicating substances. (Lashbrook 2003).

There is also the aspect of knowing right from wrong. What is legally wrong may not always be what someone thinks is morally wrong. A common theme that shows how legal wrongs can be different from moral wrongs is when someone kills in the name of God. The person may know that killing is illegal, but the person feels they need to commit the act because it goes against the morals of his or her God. The morality of the defendant must reflect “generally accepted ethical or moral principals derived from an external force” (Lashbrook 2003). But the defendant cannot use just any set of morals to be found legally insane. His or her morals must coincide with the morals generally accepted by society. The morals generally accepted by society are influenced by the Judeo-Christian God, so to be found legally insane a defendant must have committed their acts under the influence of the Christian God and not another god (Lashbrook 2003). An example of this is in *People v. Coddington*, where the defendant was convicted of “first degree murders with multiple murder special circumstance, as to murders of chaperones of two young girls, and forcible rape, oral copulation, and forcible digital penetration of the girls” (People v. Coddington). There was evidence that Coddington had “rejected the Judeo-Christian concept of God and the moral system associated therewith” (Lashbrook 2003). He was found to be legally sane because his idea of what is moral does not match with definition of morality to be found insane under the definition of legal insanity. A defendant’s idea of what is morally right must match the jury’s idea of what is morally right to be found legally insane.

A case that helps to show California’s rule of law is *People v. Severance*, in which the defendant was convicted of four counts of second-degree robbery, with four related weapon enhancements. The case was reversed and remanded for a trial on the

defendant's insanity plea. The defendant appealed his verdict of sanity, but the court of appeal held that:

Defendant failed to offer sufficient evidence to establish reasonable conclusion that, based on mental disease or defect, he was incapable of distinguishing right from wrong when he committed three robberies, as required to support his insanity defense; defendant simply denied having committed first robbery and, as to second two robberies, testified that he became paranoid and schizophrenic and was taken control of by Satan and abducted by aliens as the result of being hit on the head, which failed to support a claim that he was acting under an insane delusion that robbing two stores was morally correct, as required to support legal insanity defense (*People v. Severance*).

This case shows the moral wrong part of the wrongfulness prong of the M'Naghten test being put into action and how a defendant's moral reasoning must match that of the jury or society to be found legally insane. The way moral wrong is interpreted in California and I would suggest in other states as well gives rise to the issue of separation of church and state and freedom to practice any religion. While there has to be a line so that defendants can't just make up a religion and its practices so they can say that their god or devil told them to do something, a defendant should not be made to conform to Judeo-Christian beliefs to plead insanity on moral grounds. The constitutional issues are a topic for another day, but it is something that should be at least mentioned when analyzing whether or not different state practices concerning the insanity defense affects the outcome of cases.

New Jersey:

The New Jersey statute states:

A person is not criminally responsible for conduct if at the time of such conduct he was laboring under such a defect of reason 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, then he did not know what he was doing was wrong. (N.J. Stat. Unann. § 2C:4-1).

The case *State v. Conforti* shows when the standards are applied to test whether or not someone is legally insane and that person is not legally insane, it can still benefit the defendant to be charged with a lesser offense. As stated in the New Jersey statute “evidence of mental disease or defect is admissible whenever relevant to prove that the defendant did not have a state of which is an element of the offense” (N.J. Stat. Unann. § 2C:4-2). In *Conforti*, the defendant was charged with first-degree murder. The jury found the defendant guilty of second-degree murder, but Conforti said it was a compromise verdict because the jury thought he was insane so they made the charge a lesser degree. The Supreme Court of New Jersey held that:

Testimony of the defendant’s psychiatric experts was adequate to support a finding that, although defendant was not insane under M’Naghten Rule at the time of commission of the homicide, he lacked mental capacity to deliberate or premeditate and could be guilty of murder in the second degree rather than murder in the first degree. (*State v. Conforti*).

It is not uncommon for states to use evidence of mental defect to negate an offense element and this case speaks to that point. It is how most states that have abolished the insanity defense as an affirmative defense handles the issue of a defendant having a mental disease or defect. So this goes to the ultimate question of if states who have rules for determining criminal insanity, but still allow mental disease or defect to

negate offense elements and some states allow insanity to affect sentencing after the trial, then is there a real difference between these states and how they affect the outcomes of insanity cases? This question will be addressed in the conclusion of this essay.

Texas:

Texas' insanity defense history is similar in some regards to that of California. Texas uses a slight variation on the original M'Naghten test. The Texas insanity defense is stated in section 8.01 of the Texas Penal Code. Section 8.01 states the following:

Insanity. (a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.

(b) The term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

As was the case in California, Texas briefly changed to the ALI's Model Penal Code in 1973. The ALI test did not last long because "After the public outrage relating to the result of the Hinckley trial, the Texas Legislature in 1983 rushed to narrow the scope of the insanity defense to its present restrictive M'Naghten formulation" (Shannon 2006).

In 2005 the state legislature sought to revamp the procedures that go along with the insanity defense through Senate Bill 837. The Texas Senate Jurisprudence Committee evaluated changing the defense to guilty but mentally ill, but rejected changing it because "the individual found guilty but mentally ill may not receive the caliber of mental health care expected as few get the same level of treatment they would outside of prison" (Shannon 2006). S.B. 837 provides "substantial direction to the court in overseeing the follow up treatment and supervision of an individual found NGRI" (Shannon 2006).

There has been a move to add a narrow volitional prong to Sec. 8.01 and to change the wording from “know” to “appreciate”. Several groups including the National Alliance on Mental Illness supports a two-prong test, which would have the cognitive component and the coalitional component. The reason for the move is because “a defendant rarely prevails on an insanity defense in Texas” because “If a defendant knows that their conduct is prohibited by law, or wrong in a legal sense, then they are sane for the purposes of the Texas insanity defense” even if the person is seriously mentally ill or unable to control his or her behavior (Shannon 2006). The move to “appreciate” over “know” is because as with the volitional prong, someone may be able to know something is wrong but they may not be able to stop the action or appreciate the wrongfulness of the action even though they “know” that it is wrong. There has also been a move to adopt the Oregon approach, which has several interesting aspects, for example, it uses the word guilty instead of not guilty because it appeals more to the jury. A more in depth look at the various aspects of the Oregon approach will be explored later in this essay.

The case that was examined is one of the biggest cases dealing with the insanity defense. The case is that dealing with Andrea Yates. Yates was a mother of five children, who also had a history of mental illness and psychiatric hospitalization consisting of twice attempting suicide, being hospitalized four times for psychiatric care and nursing a psychosis before the drownings (Roche 2002). In March of 2000 she drowned her five children one by one in the bathtub. She was found guilty of first degree murder and was sentenced to life in prison. Yates was awarded a new trial on the basis of an appeal because an expert witness for the prosecution had made an inaccurate statement while testifying. The expert witness, Dr. Park Dietz a nationally known psychiatrist, wrote a

letter to the court stating his error, but when the defense tried to get a mistrial, the judge refused to declare a mistrial. But when reviewed by the appellate court it was decided the trial judge erred and so a new trial ordered (Huss 2009). It was in the second trial that Andrea Yates was found NGRI and is now in a mental institution where she is likely to spend the rest of her life. The question that comes to mind regarding Texas is with so many groups and experts moving for changes in Texas' statutes on insanity why haven't any changes been made? Perhaps Texas is an example of how no matter what rule of law is chosen to evaluate legal insanity there will always be groups and experts who have ways to improve it. Also Texas has changed from M'Naghten to ALI back to M'Naghten with some revisions and it seems that no matter what the state tries to do to help improve insanity statutes there are critics of the changes.

The three M'Naghten states all have statutes that bring up very interesting questions. While New York's interpretation on moral wrongfulness brings up constitutional questions, it is the questions raised by Texas and New Jersey that cause the most intrigue because they help to answer the research question and to support the conclusion that if states that allow the insanity defense allow for mental disease or defect to affect offense elements and states with the insanity defense allow for it to be raised during the sentencing phase then is there any real difference between how those states treat the insanity defense?

American Law Institute Model Penal Code

New York:

According to section 40.15 of the New York penal law:

Mental disease or defect.

In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either:

1. The nature and consequences of such conduct; or
2. That such conduct was wrong. (McKinney's Penal Law § 40.15) New York

also has the defense of extreme emotional disturbance which does not require psychological or psychiatric evidence to prove such defense. To establish the affirmative defense of extreme emotional disturbance, a defendant must prove by a preponderance of the evidence that:

- (a) He acted under the influence of extreme emotional disturbance, and (b) there was a reasonable explanation or excuse for the emotional disturbance, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. (McKinney's Penal Law § 125.25, subd. 1(a)).

In the course of researching insanity cases in New York several of the cases that were briefly analyzed dealt with extreme emotional disturbance (EED) and not directly with the insanity defense and the application of the ALI Model Penal Code. In *People v. Ross*, the defendant tried to use the defense of EED, but did not meet the requirements, which are as follows:

The affirmative defense of extreme emotional distress requires proof of both

subjective and objective elements; the subjective element focuses on the defendant's state of mind at the time of the crime and requires sufficient evidence that the defendant's conduct was actually influenced by an extreme emotional disturbance, generally associated with a loss of self-control, and, the objective element requires proof of a reasonable explanation or excuse for the emotional disturbance to be determined by viewing the subjective mental condition of the defendant and the external circumstances as the defendant perceived them to be at the time. (People v. Leslie)

The defendant, Ross, submitted limited evidence to support his claim of EED for a lesser charge than that of second-degree murder. The evidence submitted consisted of “a ‘love’ letter he wrote a month before incident, history of troubled relationship between him and victim, and victim's involvement with new boyfriend, reflected only basis for presence of anger and jealousy” “The problem is that anger and jealousy do not entitle a defendant to an extreme emotional disturbance charge” (People v. Ross). What was most interesting about the extreme emotional distress defense is that it is similar to other states that have a diminished capacity or states that allow mental disease or defect to negate an offense element. It would appear that EED adds to the issue that was pointed out previously in regards to New Jersey and states who have abolished the insanity defense and how there doesn't seem to be a difference in the outcome even though the statutes are worded differently depending on the state.

Michigan:

The Michigan statute states:

68.21a Persons deemed legally insane; burden of proof.

Sec. 21a.

(1) It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in section 400a of the mental health code, Act No. 258 of the Public Acts of 1974, being section 330.1400a of the Michigan Compiled Laws, or as a result of being mentally retarded as defined in section 500(h) of the mental health code, Act No. 258 of the Public Acts of 1974, being section 330.1500 of the Michigan Compiled Laws, that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.

(2) An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances.

(3) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence. (Mich. Comp. Laws § 768.21a).

Even though Michigan uses the ALI rule of law for its insanity defense it, like several other states has gone to allowing juries to find a defendant “guilty but mentally ill”. The Legislature created GBMI to limit the number of defendants being found “not guilty by reason of insanity” and being relieved of all criminal responsibility (*People v. Kukla*). In the case of *People v. Kukla*, the defendant “did not establish, by a

preponderance of the evidence, that she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of...her conduct or to conform... her conduct to the requirements of the law” (People v. Kukla). Therefore because she was found to be mentally ill, but didn’t meet all of the requirements to be legally insane she was found GBMI. For example, a defendant is found GBMI and is sent to a mental facility to get treatment until they are well enough to serve out the rest of his or her sentence in prison. Another defendant is found guilty in a state that doesn’t allow insanity as an affirmative defense, but because of a mental disease or defect brought up during sentencing also has to go to a mental institution until well enough to serve out the rest of the sentence in prison. This brings up the question: If states are going to use GBMI, then what makes them different from states that don’t allow it insanity at all?

Oregon:

Oregon’s statute sounds like any other ALI state statute, except the term for someone found legally insane is not “not guilty by reason of insanity” but “guilty except for insanity”. The average person is more likely to be willing to find someone “guilty except for insanity” as opposed to “not guilty by reason of insanity”. Finding a defendant guilty helps people to feel that the person is going to get some form of punishment even if it is through spending time in a mental hospital just the same as someone found NGRI. Although people found “not guilty by reason of insanity” are not set free, the public often has that misconception. Another aspect of the Oregon approach that is advocated for is that when someone is found “guilty except for insanity” is not treated as someone who is found “guilty but mentally ill” would be. A defendant found GBMI carries a punishment that includes incarceration as is the case with most criminal convictions, but people found

“guilty except for insanity” fall under the “jurisdiction of the state’s Psychiatric Security Review Board (PSRB) and generally go to the Oregon State Hospital for treatment and a later supervised, conditional release” (Shannon 2006).

The Oregon statute is as follows:

O.R.S 161.295 Mental disease or defect

(1) A person is guilty except for insanity if, as a result of mental disease or defect at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law.

(2) As used in chapter 743, Oregon Laws 1971, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, nor do they include any abnormality constituting solely a personality disorder. (O.R.S. § 161.295)

Oregon is also unique in the way that it handles treatment. There is a Psychiatric Security Review Board (PSRB), which reviews people found GEI and determines whether they are fit for conditional release or if they will have to be committed. The guidelines for a conditional release are as follows:

161.336. Conditional release by Psychiatric Security Review Board

(1) If the Psychiatric Security Review Board determines that the person presents a substantial danger to others but can be adequately controlled with supervision and treatment if conditionally released and that necessary supervision and treatment are available, the board may order the person conditionally released, subject to those supervisory orders of the board as are in the best interests of justice, the

protection of society and the welfare of the person. The board may designate any person or state, county or local agency the board considers capable of supervising the person upon release, subject to those conditions as the board directs in the order for conditional release. Prior to the designation, the board shall notify the person or agency to whom conditional release is contemplated and provide the person or agency an opportunity to be heard before the board. After receiving an order entered under this section, the person or agency designated shall assume supervision of the person pursuant to the direction of the board.

(2) Conditions of release contained in orders entered under this section may be modified from time to time and conditional releases may be terminated by order of the board as provided in ORS 161.351. (O.R.S. § 161.336)

The guidelines for commitment are as follows:

161.341. Commitment; discharge or conditional release

(1) If the Psychiatric Security Review Board finds, upon its initial hearing, that the person presents a substantial danger to others and is not a proper subject for conditional release, the board shall order the person committed to, or retained in, a state hospital designated by the Oregon Health Authority if the person is at least 18 years of age, or to a secure intensive community inpatient facility designated by the authority if the person is under 18 years of age, for custody, care and treatment. The period of commitment ordered by the board may not exceed the maximum sentence provided by statute for the crime for which the person was found guilty except for insanity.

(2) If at any time after the commitment of a person to a state hospital, or to a secure intensive community inpatient facility, designated by the authority under this section, the superintendent of the hospital or the director of the secure intensive community inpatient facility is of the opinion that the person is no longer affected by mental disease or defect, or, if so affected, no longer presents a substantial danger to others or that the person continues to be affected by mental disease or defect and continues to be a danger to others, but that the person can be controlled with proper care, medication, supervision and treatment if conditionally released, the superintendent or director shall apply to the board for an order of discharge or conditional release. The application shall be accompanied by a report setting forth the facts supporting the opinion of the superintendent or director. If the application is for conditional release, the application must also be accompanied by a verified conditional release plan. The board shall hold a hearing on the application within 60 days of its receipt. Not less than 20 days prior to the hearing before the board, copies of the report shall be sent to the Attorney General. (O.R.S. § 161.341).

These guidelines are what help to show how Oregon's approach is slightly different from other states. It has specific guidelines for who will be responsible for the defendant and how the person or peoples left in charge are responsible for evaluating the defendant to see if he or she is fit to be released either because that person is no longer suffering from the mental disease or the disease can be controlled with therapy and medications so the person is no longer a danger to anyone. The state has also built in a provision that the defendant can not be civilly

committed for longer than what the maximum sentence would have been if they were sent to prison.

In the case of *Beiswenger v. Psychiatric Security Review Board*, the defendant filed for conditional release because he no longer suffers from the same disorder that he suffered from during the time of his trial. At the time of trial he suffered from paranoid and chronic residual schizophrenia (*Beiswenger v. Psychiatric Security Review Board*). He no longer suffers from those conditions and now suffers from paraphilia and alcohol and drug dependency. As is stated in the Oregon statute “abnormality manifested only by repeated criminal or otherwise antisocial conduct, nor do they include any abnormality constituting solely a personality disorder” (O.R.S. § 161.295). The case was reversed and remanded for reconsideration. This case is an example of how Oregon’s unique way of handling the legally insane and how if a defendant is committed because he is legally insane, but later is found to not be suffering from insanity can be, with the proper procedures, reevaluated to get the proper treatment. Oregon’s approach of having a psychiatric board that evaluates and reevaluates and has procedures for checking up on people may be what makes it stand out from other states. While it does follow the same standards as other ALI states, how it deals with defendants after sentencing is what helps to separate it from other ALI states and perhaps with further research would show that while the immediate outcome of insanity cases is not different from other states, the treatment results are.

The two of the three states representing those that use the American Legal Institute’s Model Penal Code have statutes that can be compared to states that

have abolished the insanity defense. While there is the obvious difference that one state like Michigan allows insanity to be used as a defense and a state like Montana, does not, but if states that allow it are moving toward GMBI or EED and in the end the person is still sent to prison as if they were found guilty in a state that doesn't allow insanity as an affirmative defense, but does take into account mental diseases and defects, then does it necessarily matter what laws are used to in regards to insane and other mentally ill defendants?

Abolished Insanity Defense

Idaho:

The statute states that:

18-207. Mental condition not a defense--Provision for treatment during incarceration--Reception of evidence--Notice and appointment of expert examiners

- (1) Mental condition shall not be a defense to any charge of criminal conduct.
- (2) If by the provisions of section 19-2523, Idaho Code, the court finds that one convicted of crime suffers from any mental condition requiring treatment, such person shall be committed to the board of correction or such city or county official as provided by law for placement in an appropriate facility for treatment, having regard for such conditions of security as the case may require. In the event a sentence of incarceration has been imposed, the defendant shall receive treatment in a facility, which provides for incarceration or less restrictive

confinement. In the event that a course of treatment thus commenced shall be concluded prior to the expiration of the sentence imposed, the offender shall remain liable for the remainder of such sentence, but shall have credit for time incarcerated for treatment.

(3) Nothing herein is intended to prevent the admission of expert evidence on the issue of any state of mind which is an element of the offense, subject to the rules of evidence. (I.C. § 18-207).

As the statute states, a defendant can still present evidence that he or she lacked a necessary mental element to commit the crime and the prosecution still has to rebut the defense beyond a reasonable doubt, so in the end the result is somewhat the same, “it is just that Idaho does not define how to reach that result” (Elkins 1994). In the case *State v. Tiffany*, the defendant was charged with involuntary manslaughter for killing a child while willfully injuring a child while defendant had the care or custody of child. The jury was not instructed to take into account her mental illness offense did not require intent or purpose to harm child, offense required understanding of the consequences of the volitional conduct, and there was no evidence that defendant's mental illness prevented her from understanding the consequences of her actions. (*State v. Tiffany*). This case shows how there could be a possible discrepancy between the rule of law used because if the insanity defense was allowed then the defendant's mental illness might have been taken into account, but with several states using GMBI, EED, or diminished capacity, it is possible that the defendant would have also been found guilty in those states. The possible difference that could have come about from being tried in another state is that Tiffany could have used her mental illness to receive a lesser degree of punishment.

Montana:

Montana, like so many other states had some form of an insanity test to deal with criminal responsibility. In 1979 the Montana legislature abolished the affirmative defense of mental disease or defect. “The legislature's action resulted from increasing frustration with perceived fraudulent assertions of the insanity defense and the growing role of psychiatrists in criminal trials” (Stimpson 1994).

The current Montana statute states:

46-14-102. Evidence of mental disease or defect or developmental disability admissible to prove state of mind

Evidence that the defendant suffered from a mental disease or defect or developmental disability is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense. (MCA 46-14-102).

46-14-311. Consideration of mental disease or defect or developmental disability in sentencing

(1) Whenever a defendant is convicted on a verdict of guilty or a plea of guilty or nolo contendere and claims at the time of the omnibus hearing held pursuant to 46-13-110 or, if no omnibus hearing is held, at the time of any change of plea by the defendant that at the time of the commission of the offense of which convicted the defendant was suffering from a mental disease or defect or developmental disability that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law, the sentencing court shall consider any relevant evidence presented at the

trial and shall also consider the results of the presentence investigation required pursuant to subsection (2).

(2) Under the circumstances referred to in subsection (1), the sentencing court shall order a presentence investigation and a report on the investigation pursuant to 46-18-111. The investigation must include a mental evaluation by a person appointed by the director of the department of public health and human services or the director's designee. The evaluation must include an opinion as to whether the defendant suffered from a mental disease or defect or developmental disability with the effect as described in subsection

(1). If the opinion concludes that the defendant did suffer from a mental disease or defect or developmental disability with the effect as described in subsection (1), the evaluation must also include a recommendation as to the care, custody, and treatment needs of the defendant. (MCA 46-14-311).

One of the most prominent cases that stuck out in recent Montana history is *State v. Cowan*, where the defendant killed a woman in her cabin after suffering from a psychotic break because of paranoid schizophrenia. Several psychologists and psychiatrists agreed that Cowan did suffer from paranoid schizophrenia, but the court found him guilty of deliberate homicide and aggravated burglary and sentenced him to sixty years in prison. Cowan argued that “considering a defendant’s insanity only for the purpose of reducing the degree of the crime or determining the punishment for the crime qualifies as cruel and unusual punishment and a violation of due process” (Stimpson 1994). The Montana Supreme Court did not find any constitutional or due process violations and the U.S. Supreme Court did not grant his Cowan’s petition for certiorari

(Stimpson 1994). This case goes to the same issue as the case in Idaho, as to whether or not the defendant would have had a different outcome if the state had allowed insanity as a defense, but as is often the case where mental illness plays a role in a crime, the defendant could have been sentenced to civil commitment before serving his or her sentence in prison. Also if “considering a defendant’s insanity only for the purpose of reducing the degree of the crime or determining the punishment for the crime qualifies as cruel and unusual punishment and a violation of due process” (Stimpson 1994), then what is stop a defendant from saying EED is cruel and unusual punishment because while the person may not be insane, they are still suffering from a mental illness? Montana does have a provision that a defendant’s possible mental illness will be evaluated and the evaluation must also include a recommendation as to the care, custody, and treatment needs of the defendant, so if the evaluator feels that the defendant should be civilly committed for treatment then what is the difference from someone found NGRI and civilly committed?

Kansas:

The Kansas Legislature, in 1995, enacted Kan. Stat. Ann. § 22-3220, which states:

It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense. The provisions of this section shall be in force and take effect on and after January 1, 1996.

Kansas follows a sort of mens rea approach. An article on the insanity defense in Kansas said:

In order for a mentally ill offender to be excused under the *mens rea* approach, she must establish mental incapacity, which prevents her from formulating the *mens rea* of the crime. The classic example is the defendant who, because of his mental disease, believed that he was squeezing a lemon when in fact he was strangling his victim. In such a case, the prosecution has the duty of proving intent. However, the prosecution would fail under the *mens rea* approach because evidence of a mental disease or defect would show that the defendant truly believed that he was squeezing a lemon and not strangling a human being. Thus, there is no intent to kill. (Rosen 1999).

In *State v. Van Hoet*, the defendant was found not guilty by lack of mental state, and ordered defendant committed to state security hospital, which is determined by K.S.A. 22-3221:

Same; special jury question

In any case in which the defense has offered substantial evidence of a mental disease or defect excluding the mental state required as an element of the offense charged, and the jury returns a verdict of "not guilty," the jury shall also answer a special question in the following form: "Do you find the defendant not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required criminal intent?" The provisions of this section shall be in force and take effect on and after January 1, 1996.(K.S.A. 22-3221).

When this happens, according the defendant will be evaluated to see if he is a danger to himself or society and should be committed to a mental institution or if he should be released or discharged. This is in accordance to K.S.A. 22-3428:

Persons acquitted or verdict of not guilty and jury answers affirmative to special question; commitment to state security hospital; determination of whether person is a mentally ill person, notice and hearing; procedure for transfer, release or discharge, standards, notice and hearing

(1)(a) When a defendant is acquitted and the jury answers in the affirmative to the special question asked pursuant to K.S.A. 22-3221 and amendments thereto, the defendant shall be committed to the state security hospital for safekeeping and treatment. A finding of not guilty and the jury answering in the affirmative to the special question asked pursuant to K.S.A. 22-3221 and amendments thereto, shall be prima facie evidence that the acquitted defendant is presently likely to cause harm to self or others.

(b) Within 90 days of the defendant's admission, the chief medical officer of the state security hospital shall send to the court a written evaluation report. Upon receipt of the report, the court shall set a hearing to determine whether or not the defendant is currently a mentally ill person. The hearing shall be held within 30 days after the receipt by the court of the chief medical officer's report.

(c) The court shall give notice of the hearing to the chief medical officer of the state security hospital, the district or county attorney, the defendant and the defendant's attorney. The court shall inform the defendant that such defendant is entitled to counsel and that counsel will be appointed to represent the defendant if

the defendant is not financially able to employ an attorney as provided in K.S.A. 22-4503 et seq. and amendments thereto. The defendant shall remain at the state security hospital pending the hearing.

(d) At the hearing, the defendant shall have the right to present evidence and cross-examine witnesses. At the conclusion of the hearing, if the court finds by clear and convincing evidence that the defendant is not currently a mentally ill person, the court shall dismiss the criminal proceeding and discharge the defendant, otherwise the court may commit the defendant to the state security hospital for treatment or may place the defendant on conditional release pursuant to subsection (4). (K.S.A. 22-3428).

Kansas is like Oregon in that its defendants are to be civilly committed and to have a hearing to see if the person is still mentally ill, and if they are not they can be dismissed or conditionally released. The main difference is how the person gets to that stage. In Kansas the defendant is found not guilty with the jury answering in the affirmative to the special question, which is whether or not mental illness was a factor. Then the defendant is civilly committed for 90 days for treatment and evaluation, then there is hearing and the defendant can be found to be suffering from a mental illness or that he or she is no longer suffering from a mental illness and can be released or conditionally released. Kansas has help to show that even if a state abolishes the insanity defense, it does not mean that mentally ill patients will be receive sentences that are cruel and unusual. Most importantly Kansas helps to show even if states statutes are different and how a defendant gets from A to B doesn't matter if the outcome is still the same.

The three states that have abolished the insanity defense illustrate what has been fairly well supported all along, and that is that it doesn't matter what rule of law a state uses or how a statute is worded, because in the end it doesn't matter how many different ways there are to get the outcome if the outcome is still the same.

Analysis

The insanity defense has been around in some form or another for thousands of years, but the focus of this essay is whether or not the current tests for the insanity defense have an impact on the outcome, or if the rule of law used or lack thereof has no affect at all. As the brief overview pointed out, there are a few key differences between the M'Naghten and American Legal Institute Model Penal Code, such as the volitional prong. The volitional prong is key difference because several critics of the M'Naghten rule of law feel it is something that it is lacking, but is necessary. It would appear from the cases evaluated from states that use both M'Naghten and ALI, that there is not a significant difference between the cases. When comparing the cases from the six states that use a test, it is evident that a defendant can be found NGRI, but it is few and far between and for the most part a defendant will either be found "guilty but mentally ill" or charged with a lesser degree of the original charge because the mental defect negates an offense element. As for the states with no insanity laws the argument could be made that perhaps not allowing insanity an affirmative defense has an impact on the defendant because if the defendant is found "not guilty by reason of insanity" or found "guilty but mentally ill", there is more a chance of him or her getting the treatment he or she needs instead of being sent to a prison before receiving treatment at a mental hospital first.

There is no way of knowing until further research is done that goes through several states from each state

After briefly reviewing the state of Oregon and how they deal with the issue of legal insanity, I would recommend Oregon as a good starting place for improving the insanity defense and that getting rid of the insanity defense is not the right direction to go. Where it was evident people like Yates should be held accountable for the action they took, sending them to a regular prison will probably not help them. Psychiatric treatment in prisons is widely criticized and is one of the main reasons the American Bar Association and the American Psychiatric Association are opposed to the “guilty but mentally ill verdict”(Shannon 2006). As was quoted by Dr. Howard Zonona a psychiatrist from Yale who has been the head of the American Academy of Psychiatry and the Law in an article by “GMBI is a farce in that it is no different from a guilty verdict” (Shannon 2006).

It doesn't offer any specific treatment. It doesn't offer anything any different from going to jail and getting whatever any other prisoner would get” (Shannon 2006). Oregon at least from the cases and statues that were analyzed seems to have procedures that really try to get at working with the defendant in a mental facility and to work with that person until they are ready to be conditionally released and if not they are ready to keep them in such a facility so they are not a harm to themselves and to others. One aspect that stuck out was the willingness through formal procedures to keep record of the defendants and to check up on them. Also the willingness to have the board reevaluate the person to see if they should be committed if they were originally conditionally released or to conditionally release them if they were committed after trial. The second part is

significant because it is often brought because some many NGRI defendants are civilly committed for a longer period of time then if they had been sent to prison.

One interesting finding was that two of the most influential states (California and Texas) when it comes to setting legislative precedent, switched from sing M’Naghten to ALI for a short period of time, and then back to M’Naghten. It would be interesting to see what caused this change and how the legislature and courts of those two states felt the need to switch back to M’Naghten when they felt the need to change the ALI test because of flaws in the M’Naghten test? While this is a separate topic for another essay, it might be worth taking a look at.

The recommendations for this issue are that the states should follow one rule of law, with variations allowed to fit the local needs, but as with so many other issues such as the death penalty, it is left up to each to state as to how it should be handled. While the recommendation is that each state should follow the same rule of law or basic set of guidelines as to how to handle insanity, it would appear that differing rules of law do not make a difference in the outcome, so for right now it would appear that the states are fine, but perhaps with further research to investigate and find the best rule of law to use a change will be made.

Conclusion

The insanity defense is a topic that has brought about much outrage and disapproval from the public. This public outcry would appear to be the product of highly publicized insanity cases and the public not understanding what actually happens when someone is found “not guilty by reason of insanity”. The affect the public has had on the rule of law used in insanity cases can be seen as a result of the Hinckley trial. It caused

some states such as Idaho to abolish the defense altogether. Dissatisfaction with a certain rule has also caused states such as California and Texas to go from M’Naghten to ALI back to M’Naghten. The question is whether or not all of these changes in the standards used to test if someone is insane or by not allowing insanity as an affirmative defense altogether has any impact on insanity cases? The answer seems to be that the rule of law used does not appear to have an affect on the outcome of insanity cases. There has been some contention as to whether or not some cases in states who have abolished the insanity defense would have ended up differently if the person was tried in state allowing the insanity defense, but there is no guarantee that the outcome would have been any different. Oregon did seem to have some possible ways to help change how the public views the insanity and to help them with the notion that the person is getting away without being punished. Oregon has accomplished this by changing the verdict from “not guilty by reason of insanity” to “guilty but insane” making the public feel that the person is getting punished even though the actual punishment is that same as someone found NGRI.

The weaknesses of this research are the limited number of states and cases analyzed. The conclusion could be more definitive if more states were researched or if district court cases could be analyzed for a few states representing M’Naghten, American Legal Institute and those who have abolished insanity as an affirmative defense. As was pointed out in *Psychology and the Legal System*, “Few individual states keep complete records on the use of the insanity defense and its relative success” (Wrightsmann and al. 2002) and because this is the case, it would take several years to look at all of the states and several cases to see if all this debate on what test of insanity

works and if it make a difference at all. The strengths of the research are perhaps now that the idea is out there more research will be done on the laws used to define insanity and the insanity defense in general and perhaps with further research one rule of law will surface as being superior to others and the federal government will move to standardize that rule of law for all states as it started to do with the Insanity Defense Reform Act of 1984. Perhaps though it is not the test that should analyzed, but the sentencing and treatment that the defendant receives. As is often the biggest issue stated for the verdict of “guilty but mentally ill”, the problem is that the defendants while they might not be legally insane often still have a mental illness and they do not receive the proper treatment while on the prison system. Further research should be looking at the treatment that defendants receive in each state and maybe changing the law so that defendants found guilty, but who have a mental illness should be civilly committed and after several evaluations if they are found to not be suffering from mental illness can then serve out the rest of their sentence in prison.

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