

1985

# The Insanity Defense in Fact and Fiction: A Review Essay of Norval Morris's *Madness and the Criminal Law*

Susan Herman

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>

 Part of the [Criminal Law Commons](#), and the [Other Law Commons](#)

---

## Recommended Citation

1985 Am. B. Found. Res. J. 385 (1985)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

Review Essay

**The Insanity Defense in Fact and Fiction:  
On Norval Morris's *Madness and the Criminal Law***

Susan N. Herman

NORVAL MORRIS, *Madness and the Criminal Law*. Chicago: University of Chicago Press, 1982. Pp. 235. \$20.00.

Of all problems concerning mental illness and the criminal law, the insanity defense has become the centerpiece. This is not surprising, as the defense is in many ways the acid test of our attitudes toward the insane and toward the criminal law itself. Our acceptance of the defense has denoted our acceptance of the principle that moral and legal guilt should be, to the greatest extent possible, coextensive. The trial of John Hinckley has also focused attention on the insanity defense, as the debate sparked by the verdict in that case continues to simmer in legislatures around the country. Therefore, although Norval Morris's book *Madness and the Criminal Law* treats a range of topics—proposals for the trial of those now found incompetent to stand trial, a philosophy for the sentencing of the mentally ill, and some general sentencing philosophy by way of background—it is Morris's advocacy of the abolition of the insanity defense that most intrigues me.

Morris comments at one point in his discussion that it is just a matter of time until legislatures abolish the insanity defense (at 67). It is this proposition I would like to examine, for through it the perspective of the entire book is revealed.<sup>1</sup>

There are several different levels on which legislative debate on the insanity defense must be conducted. The foremost level is the theoretical. What is the purpose of the criminal law? Does punishing the insane serve that purpose? Would abolishing the defense be inconsistent with central principles of criminal liability? Second, there is the practical level. What impact does the in-

Susan N. Herman is Associate Professor of Law, Brooklyn Law School. A.B. 1968, Barnard College; J.D. 1974, New York University School of Law.

The author would like to thank Brooklyn Law School for the generous support of its research stipend program.

1. I should promptly reveal my own perspective by noting my previous involvement with this issue—participating in drafting the American Civil Liberties Union policy on the insanity defense (Policy #241) and testifying before the Subcommittee on Criminal Justice of the House Judiciary Committee, as witness for the ACLU, I have opposed abolition of the insanity defense.

sanity defense have on the criminal justice system? What impact would its abolition have? Are the insane better off with the defense or without it? Are we? Finally, there is the inescapable political level, possibly the most powerful influence of all, but not considered with sufficient self-consciousness in many of the current debates. What is the community's reaction to the insanity defense and the problem it addresses? What weight is properly given to the community's reaction?

Morris has much to say on the theoretical level, and also on the practical, where I find his case to be strongest. Although he does not discuss the political level, I find his work particularly provocative on the role of community reaction. After discussing Morris's case for abolition, I will explore the nature and role of community reaction to the insanity defense in fact (centering on the Hinckley verdict) and in fiction (centering on the short stories which form an integral part of Morris's book, and other fictionalized accounts of crimes committed by the mentally ill).

### **The Morris Case for Abolition of the Insanity Defense**

Morris proposes to eliminate the insanity defense and limit the relevance of testimony concerning a defendant's mental state to negating the mental element of the crime charged (e.g., to show the defendant's lack of intent). In other words, insanity would no longer be an excuse.<sup>2</sup> Under Morris's scheme, if the insane defendant were found guilty, the sentencing authority would have the power to take account of that defendant's mental limitations by reducing the sentence if the defendant seemed less culpable, or possibly by increasing the sentence if the defendant's mental state augured future dangerousness (at 128-76).

Morris does not take on the burden of selling this radical notion. Rather, he posits that the burden should be on those who advocate excusing the insane to justify this exception to criminal liability. Putting aside the issue of who has the burden of proof, the best way to examine Morris's proposal is by first looking at the traditional defense of the insanity defense.

Most current theoretical defenses of the insanity defense can be reduced roughly to a simple syllogism, the premises of which are:

- 1) The purpose of the criminal law is to punish the morally blameworthy;  
and
- 2) The insane are not morally blameworthy.<sup>3</sup>

2. As a fall back position, Morris advocates eliminating the insanity defense and relying on a "diminished responsibility" defense to reduce murder convictions to manslaughter (at 53-54, 69).

3. I have stated this second premise in so simplified a fashion that it has become imprecise. A fuller statement might read, "The insane are not blameworthy for otherwise criminal acts if their performance of those acts is causally connected with their mental disease or deficiency." No matter how careful the wording, however, it is impossible to state the requirement of causal connection without taking a position on the hotly contested issue of what the test for insanity should be (whether the act must be a "product," "caused by," etc.). See H. Gross, *A Theory of Criminal Justice* 298-302 (1979), on the issue of the requisite connection between the mental disease or defect and the act.

With Morris, I would like to try insofar as possible to avoid committing myself to a particular test in discussing the problem of insanity. I recognize that it is difficult, arguably even impossible, to discuss insanity

This is, in simplified form, the kernel of the position taken by the ALI Model Penal Code,<sup>4</sup> by various eminent criminal law theoreticians,<sup>5</sup> and by current defenses of the insanity defense in the political arena.<sup>6</sup> Morris's attack on the insanity defense is awkward to parry because he does not necessarily disagree with either of these premises.

I think that Morris, responding to the second premise, would concede that at least some of the mentally ill are not morally blameworthy. Morris's principal theoretical objection to the insanity defense is that categorizing the insane as an excusable class is a gross response to our feeling that some mentally ill individuals are not blameworthy. The category, according to Morris, is both over- and under-inclusive, allowing excuse to some who might be blameworthy and denying excuse to others who might not be. The impetus behind our desire to excuse the insane is, as Morris himself puts it, "a deep-seated moral sense that the mentally ill lack freedom of choice to guide and govern their conduct and that therefore blame should not be imputed to them for their otherwise criminal acts nor should punishment be imposed" (at 59). However, Morris points out, the mentally ill do not all wholly lack this freedom of choice. In fact, he asserts, the current fashion in psychiatry is to treat the mentally ill as responsible for their actions (at 61-62).<sup>7</sup> Because the deficiency in ability to choose varies with the individual, the mentally ill should not as a class be excused from criminal liability. Part of Morris's objection to the insanity defense is that it draws a rough line along a continuum, one, it might be added, that does not necessarily correlate with the rationale for the excuse—the mentally ill found NGRI (Not Guilty by Reason of Insanity) will not necessarily be those with the least free will.

That the insanity defense may be over-inclusive is not, I think, a good argument for its abolition. If, in fact, we excuse defendants who do not suffer the lack of free will that would make them blameless (and I see no reason to believe we are), then perhaps we need to adjust our test for insanity. But so long as there are some mentally ill who are concededly not morally blame-

---

without having defined it. Then again, it has been argued that defining insanity is also impossible. A. Goldstein, *The Insanity Defense* 87 (1967). Morris states in his introduction that he wishes to include in his working concept of madness "all reasonable perceptions of mental illness" from Thomas Szasz to Karl Menninger (at 1). Although I doubt that Szasz and Menninger could agree on any common ground whatever, I will share Morris's attempt.

4. Model Penal Code, Comment to Section 4.01 (American Law Institute 1962).

5. One classic statement of this position is Judge Bazelon's: "Our collective conscience does not allow punishment where it does not allow blame." *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954), quoting *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945). See also H. Fingarette, *The Meaning of Criminal Insanity* 128-34 (1972); A. Goldstein, *The Insanity Defense* 9-10, 15 (1967); H. Packer, *The Limits of the Criminal Sanction* 131-35 (1968); Kadish, *The Decline of Innocence*, 26 *Camb. L.J.* 273, 273-85 (1968).

6. "The irreducible basis for criminal liability and consequent deprivation of liberty in the Anglo-American legal system should be individual responsibility for acts and decisions. Elimination of the insanity defense, or adoption of a guilty but insane verdict in lieu of the insanity defense, would impose criminal responsibility on individuals who, due to their mental state, are not blameworthy." *ACLU Policy* #241.

7. See also Morris, *Psychiatry and the Dangerous Criminal*, 41 *S. Cal. L. Rev.* 514, 536-44 (1968), where Morris proposes an institutional design for treating mentally ill offenders.

worthy, some version of an insanity defense seems required unless we reject the first premise of the syllogism.

Morris, I should point out, does not rely heavily on the argument just discussed. He gives more attention to the argument that the insanity defense is underinclusive, in that we do not attempt to excuse others who lack choice for different reasons. Why single out the insane for special excuse, asks Morris, and not those who commit crimes because they are socially disadvantaged? (At 62) It may be as difficult for a poor person to avoid stealing as it was for Hinckley to avoid shooting at the president. There is, of course, a well-worn explanation for why we do not treat the socially disadvantaged as excusable. A poor person confronted with an opportunity to steal has a difficult choice, but she or he does have a choice. If we do not at least *treat* that individual as having a choice, then we have climbed the slopes of determinism to a point where we can rarely impose criminal liability on anyone. But explaining why the socially disadvantaged may be found culpable does not address Morris's central question—why should the insane *not* be found culpable?

Here, the first premise becomes central. Given that at least some of the insane are not morally blameworthy, such individuals should not be found criminally culpable if the purpose of the criminal law is only to punish the morally blameworthy. I think Morris, again, would not reject this premise but would find it too broad. He certainly would require culpability as a prerequisite to criminal punishment, but would define culpability as simply co-extensive with *mens rea* (or intent). While *mens rea* and the affirmative defense of insanity have been confused, they are, of course, distinct concepts. The distinction between *mens rea* and the greater degree of culpability required by the insanity defense is best pinpointed by using traditional examples. If M'Naghten shoots at the Prime Minister but believes he is squeezing a lemon instead of a trigger, he is not guilty of murder for he lacked the requisite intent. If M'Naghten shoots at the Prime Minister because he has a paranoid belief that his act is necessary to his self-defense or that he is commanded by God, under most versions of an insanity defense he would be found NGRI but under Morris's proposal he would be found guilty of murder (or perhaps only manslaughter) because he had intent.

Why should the insanity defense pose an excuse broader than the concept of *mens rea*? There are two traditional types of answers to this question. The first answer, predominantly utilitarian, argues that the purposes of punishment are not served by punishing the insane and that economy therefore demands that the insane not be made to suffer punishment.<sup>8</sup> The second, a normative argument, posits that we should continue to exculpate those who lack cognitive or volitional capacity, simply because it is not fair to impose

8. See J. Bentham, *Principles of Penal Law*, Pt. II, bk. 1, ch. 3, in *J. Bentham's Works* (J. Bowring ed. 1843). Aspects of this position are reflected best in contemporary criminal law jurisprudence by the ALI Model Penal Code. See Commentary to Section 4.01 (1962). See also H. L. A. Hart, *Punishment and Responsibility* 40–50 (1968) for a discussion of the Benthamite position.

liability on those who could not freely choose their acts.<sup>9</sup> Morris recognizes the insane as different, as his desire to mitigate their punishment evidences. But if the insane are not morally blameworthy because of that difference, then they should not be punished lightly—they should not be punished at all.

Morris's proposal merges the conviction and sentencing decisions into one punishment decision and considers the differentness of the insane relevant only to the limited extent of mitigating punishment. As any line drawn through a continuum, the insanity defense must be imprecise. Given that we cannot read defendants' minds or develop litmus tests for mental illness, we must choose whether to risk exculpating some defendants who might be found insane under our tests but who are culpable nevertheless, or to risk convicting defendants who are insane and not culpable, trusting to the mercy of the sentencing judge to correct this error.

The pre-*M'Naghten* answer, which Morris invokes (at 55), would rely on the wisdom and mercy of the sentencing judge exclusively. This was a traditional solution to the dilemmas posed by other potential affirmative defenses—necessity, for example.<sup>10</sup> Defenses were disallowed; the sentencing authority was expected to be merciful.<sup>11</sup> Many of Morris's arguments would apply not only to insanity but also to other excuses and justifications, like necessity and perhaps even mistake. Like the drafters of the Model Penal Code, who recognize defenses for necessity<sup>12</sup> and mistake<sup>13</sup> as well as insanity, I think that this simplification of the criminal law is a move in the wrong direction. Furthermore, I think that legislatures should be persuaded that this is so.

First of all, this approach directs the criminal law away from individualized justice. It is ironic that this is so, for it would seem that a judge unconstrained by legal doctrine would be able to consider the individual case more closely. However, to posit that conviction of the insane is necessary before the judge can show mercy is to accept a system that is inherently unjust to that insane individual, regardless of how light the sentence. I realize that saying this does not provide Morris with any more articulate or persuasive an explanation of *why* this is unjust than those he has already withstood (see pp. 57–58). This sense of justice is not particularly susceptible to persuasion. Either it seems intuitively correct or it does not. To me, it seems correct.

There is another argument against Morris's proposal that may be more concrete. Focusing attention on the sentencing decision rather than a bifurcated conviction and sentencing process radically alters the balance of power in the criminal justice system, expanding the power of the judge at the ex-

9. See works cited in note 6 *supra*.

10. E.g., *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884) (the famous cannibals in the lifeboat case). See A. W. B. Simpson, *The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise* (1984).

11. The Queen in fact commuted the sentences of Dudley and Stephens to six months' imprisonment. See S. Kadish, S. Schulhofer & M. Paulsen, *Criminal Law and Its Processes* 186 n.2 (4th ed. 1983).

12. See Section 3.02 (justification of choice of evils).

13. See Section 2.04 (ignorance or mistake of fact or law).

pense of both the legislature and, more significantly, the jury. This shift seems to spring from Morris's general philosophy of sentencing.<sup>14</sup> Morris rejects equality as a categorical imperative in criminal sentencing, arguing that mercy should trump equality (at 179–209, 155–58). He confesses himself troubled by the fact that merciful individualized sentencing may have unfortunate consequences. Mercy presupposes discretion, and discretion is a two-sided coin. The power to be merciful is also the power to be vengeful or discriminatory.<sup>15</sup> Morris's system for dealing with the mentally ill vests all power with the sentencing judge. If the judge has the sensitivity of Morris himself, this may be no problem. But as a structural matter, eliminating the excuse of insanity eliminates the roles of the jury and of the legislature as controls on the judge's discretion in treatment of the mentally ill.

The insanity defense represents a legislative judgment that if persons are found insane, they should not be criminally liable. The defense takes the decision out of the hands of the judge and gives the jury, as another representative of the community, an opportunity to express the view that particular mentally impaired defendants are not blameworthy. The jury may express this view free from the pressure that a stark choice between outright acquittal or conviction might create. I think that Morris's guiding principles of mercy and parsimony in punishment should apply to conviction as well as to sentencing decisions. Although juries do not very often feel merciful toward the mentally ill, the insanity defense does provide a safety valve that allows expression of what still seems to be a shared perception that the mentally ill, at least those identified by a careful, legislatively controlled process of definition, are different. My belief in the social utility of the insanity defense, and of other excusing conditions, stems in part from my deep suspicion of allowing large quantities of unchecked discretion in the criminal justice system.

My argument, like Morris's, has quickly drifted from the theoretical level toward the practical. Since it is on the practical level that Morris has what I find to be his strongest arguments, let me now turn to those arguments. First, Morris points to the infrequent use and even more infrequent success of the insanity defense as evidence, first, that there may be something wrong with it and, second, that our defense of a principle we are not willing to implement is hypocritical (at 63–64). The underuse of the insanity defense does seem to suggest that the defense is regarded as extreme. On the other hand, we must remember that in these days of plea bargaining, virtually every precious criminal procedure guaranteed by the Constitution is subject to the same charge of desuetude, and for at least one of the same reasons—expense. We do not abandon the jury trial on the ground that we use it only rarely. The insanity defense should also remain available for those cases perceived as extreme enough to warrant its application.

14. Morris posits that desert, the limiting concept for punishment, refers to a range of punishments, and not to a particular punishment. He invokes Hart for support for the proposition that although desert sets the appropriate range of punishment, utilitarian considerations are then properly applied to select a particular sentence within that range (at 146–52).

15. See K. Davis, *Discretionary Justice* (1969), for the classic discussion of this problem.

Morris is also troubled by what troubled Goldstein and Katz, early proponents of abolition<sup>16</sup>—that the NGRI defendant is being punished, albeit in a civil context.<sup>17</sup> Although the premise of the incarceration is different, the incarceration itself is much the same; although the stigma is different, it is arguably as great. I share this concern. Under the insanity defense, the theoretical purity of the criminal law is bought at the heavy price of casting the mentally ill into a civil system where the murky concept of dangerousness reigns unchallenged. Might not the insane be better off with a simple, defined punishment? Like Morris, I do think that the issue of treatment of the mentally ill may ultimately be more important to those concerned than the issue of whether we call their punishment civil or criminal. Mentally ill offenders may be found in prisons as well as hospitals, even in a system with an insanity defense, and good psychiatric treatment should be available in both places. While it is often available in neither, at least the mentally ill should be allowed to avoid the blame inherent in criminal conviction.

The primary reason why Morris concludes that the insane should be treated within the criminal justice system is his contention that the insanity defense represents an inappropriate merging of the criminal and mental health powers of the state (at 2, 29–32). I do not see how such a merger truly can be avoided. If a mentally impaired person commits a potentially criminal act, that person is subject to both the criminal and mental health powers. Someone must decide which power to invoke in a given case. Who is to make that decision? Often, especially where the offense is minor, the decision is made by the police. At the discretion of the officer on the scene, the knife-wielding person may be taken to a hospital or a jail. Prosecutorial discretion may then account for some additional allocative decisions. But where the act involves serious violence, the insanity defense provides an opportunity to refer the question finally to a jury. The insanity defense, in my view, is a device to sort those defendants who should be treated by the criminal justice system from those who should be treated by the mental health system. Under Morris's scheme, the sorting decision would be made finally before the case came to court, without the involvement of a jury.

It might almost be said that Morris's proposal would effect a more complete merging of the criminal justice and mental health powers, with the criminal justice system treating individuals who are concededly mentally ill. As the role of blame as the determinant of criminal liability is minimized and the role of dangerousness enhanced, the two systems move together. So long as the clientele of the two systems overlap, attempting to eliminate the overlap of the two systems must prove illusory.

Morris is certainly right in declaring the insanity defense to be less than a complete practical success. If the insanity defense is broken, we should try to fix it, not abandon it. As I admitted at the outset, I am simply not persuaded

16. J. Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?* 72 *Yale L.J.* 853 (1963).

17. Goldstein and Katz laid the groundwork for the view of the insanity defense as a basis for incarcerating those who might otherwise be acquitted for lack of *mens rea*, rather than as a basis for exoneration from criminal liability. *Id.* at 865.



that Morris's arguments present a strong case for abolition on theoretical or even practical grounds, and I doubt that a legislature would be. This is not surprising, as the real current battleground for insanity defense abolitionists is the political.

### Public Reaction in Fact and Fiction

Morris's argument against the insanity defense relies in part on a sense that decent community reaction favors abolition. As is generally true, community reaction colors the discussion of the defense without being subjected to close examination. The original and interesting structure of Morris's book offers unusual opportunities to raise ideas that resonate throughout the book without ever being discussed. The book is divided into a number of chapters, two of which are short stories written in the style of Eric Blair (George Orwell to his readers) and set in Burma, where Blair was a colonial official. Each story presents a fictionalized account of a killing committed under circumstances that cast doubt on the criminal responsibility of the actor. In the first story, "The Brothel Boy," a young man who seems clearly mentally impaired works in a brothel, fanning the customers. Having learned to associate sex with money and violence, he offers a young girl money and then rapes her. The girl dies from violent treatment she received during the incident, possibly inspired by her attempted resistance. It seems that the boy did not have the mental capacity to choose to act otherwise, or to appreciate the wrongfulness of what he did. In the second story, "The Planter's Dream," a colonial planter kills his native mistress while he is in what appears to be a somnambulistic state, in response to his dream that she was in bed with another man. These stories are in some ways mirror images. Morris describes the community reaction in each story, and the reactions of Blair and of a character who represents the reasonable, or enlightened, observer. The brothel boy, it seems, is not considered to be morally guilty but should be found legally guilty, according to the community and the reasonable observer, an Indian doctor. The planter is, at some level, to be considered morally culpable, but the community does not expect him to be punished (in part because of the racial difference between him and his victim) and the reasonable observer in this story (a legal expert sent from England to analyze the situation) would find him not legally guilty. The occasional dissonance between legal and moral guilt is a theme Morris explores in the discussion in the surrounding chapters; the reaction he has attributed to the community and the reasonable observer, and the role that reaction should play in the ensuing discussion, is not. Morris simply assumes that "decent community sentiment" is not irrelevant.<sup>18</sup>

Fictionalizing the problem of societal reaction to criminal acts of the insane is a brilliant stroke. In addition to giving Morris an obviously much-

18. From time to time, in a discussion of legal principle, Morris inserts a reference to community sentiment. E.g., in a discussion of the propriety of mitigating the sentences of the mentally ill, he declares: "it is not a sentimental but rather a judicious use of the heavy weapons of punishment to lighten its impact on the less morally guilty to the extent that decent community sentiment allows" (at 168, emphasis added).

relished opportunity to take on a challenging stylistic exercise, these stories, like the law professor's hypothetical, enable the reader to consider issues of culpability in a factual context but without the passions and fears engendered by a sufficiently notorious real crime. Serious debate about the insanity defense has tended to follow upon what may be the most threatening of all crimes—political assassination and assassination attempts. I am thinking not only of Hinckley, with his attempted assassination of President Reagan,<sup>19</sup> but of Daniel White,<sup>20</sup> and of the famed M'Naghten himself.<sup>21</sup> In the wake of such traumatic events, public opinion cannot be measured reliably. Comment on the insanity defense now is not likely to be reaction to the insanity defense in general but rather to its operation in the exceptional case of John Hinckley.<sup>22</sup>

Can we reach more reliable general conclusions from Morris's stories? Although the stories do sidestep our fear of Hinckley, Morris is less than completely successful in presenting us with a fair basis for considering the ultimate questions about the insanity defense. For one thing, setting the stories in Burma leaves the community reaction Morris posits open to doubt. Can these stories be culturally transposed? Would a Western community react in the same way? Would the particularities of the procedures surrounding our insanity defense and our mental health system change the debate? Also, as in all fiction, the author wields the power to control his characters' actions and, through his art, to try to control the reader's reactions. Is Morris stacking the deck with his stories?

In reflecting on Western literature for other examples of fictional crimes committed by the mentally impaired to compare with Morris's I could think of surprisingly few, given the drama inherent in the topic. There are at least two well-known fictional treatments of this subject, however, that may easily serve as paradigms for discussion. One is Lennie in John Steinbeck's *Of Mice and Men*.<sup>23</sup> Lennie, who is generally portrayed in the book as astonishingly dumb rather than crazy, strangles a girl in a panic, apparently without appreciating the nature of his act and without the ability to stop himself. I think that under any current version of the insanity defense, Lennie would have a very strong case. His act seems a product of his mental incapacity, and he certainly seems to lack volitional and probably cognitive capacity as well. While

19. For fascinating accounts of the Hinckley trial, see L. Caplan, *The Insanity Defense and the Trial of John W. Hinckley, Jr.* (1984) and Stone, *The Trial of John Hinckley*, in *Law, Psychiatry and Morality* 77-98 (A. Stone, ed.) (1984).

20. *People v. White*, 117 Cal. App. 3d 270, 172 Cal. Rptr. 612 (1981). The political turmoil surrounding this case culminated in the California legislature's repeal of the diminished capacity defense. See Cal. Penal Code §§ 28, 29 (West Supp. 1983).

21. M'Naghten, in an incident startlingly similar to Hinckley's assassination attempt, attempted to kill Prime Minister Robert Peel but instead shot Peel's secretary, Edward Drummond. The famed House of Lords discussion of his case and the problem of insanity also was preceded by public outrage when M'Naghten was found not guilty by reason of insanity. *M'Naghten's Case*, House of Lords, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

22. In one poll taken shortly after the Hinckley verdict, 75% of those polled opposed the insanity defense at least to some extent. *N.Y. Times*, June 23, 1982, at B6, col. 1.

23. J. Steinbeck, *Of Mice and Men* (1937).

some members of the community—primarily the victim's husband and his friend—wish to lynch Lennie, the reasonable observer Steinbeck creates (Slim) does not seem to blame Lennie. Lennie is put to death by his friend George before we can learn the author's or the characters' opinions about Lennie's legal guilt.

Compare with the hapless Lennie another figure that looms large in fictionalized treatment of crime: Raskolnikov, the thief turned killer in *Crime and Punishment*.<sup>24</sup> I am confident that anyone armed with DSM III<sup>25</sup> could find some appropriate diagnosis for Raskolnikov and present a plausible insanity defense. However, I think we can assume that Raskolnikov would not be likely to be found NGRI and that, if he were, public reaction would resemble the reaction to the Hinckley verdict.

Morris's brothel boy is, I think, another version of Lennie. It was bold of Morris to choose a Lennie for his primary hypothetical setting, because this does seem to be the extreme case, where the insanity defense is least easily attacked. Raskolnikov, at the other end of the continuum, would pose a readier target. Even if there is a diagnosis for him in DSM III, his case takes us to the border of the insane and the criminal, and asks us to draw fine and uncomfortable distinctions. Hinckley seems to be generally perceived as closer to Raskolnikov than to Lennie. Certainly he seems abnormal, but do we not wish to believe all criminals abnormal? If Raskolnikov is not guilty, who is? If Hinckley is not guilty, how do we describe what makes him different from Raskolnikov? But the reaction against the insanity defense that springs from the fear of exculpating Raskolnikov sometimes conveniently forgets about Lennie. A not particularly random sample of those who dislike the insanity defense because they believe Hinckley should have been punished fall silent when asked if they also wish to punish Lennie. That is why debate should not center on Hinckley, who may be toward one end of a continuum whose ends are roughly marked by Lennie and Raskolnikov, but must proceed with the whole continuum in mind.

I have observed, in reading and in conversation, several different themes in criticism of the Hinckley verdict. One major source of public dissatisfaction springs from the combined effect of the nature of the insanity defense and public distrust of psychiatrists. The insanity defense, based on mental processes best known to the defendant, is perceived as easily subject to manipulation. The public recognizes that psychiatrists are not infallible in detecting fakery (witness the recent case of the Hillside Strangler). Some may believe that Hinckley put one over on the psychiatrists, but I think the more common adverse reaction is that Hinckley was not very insane, that the question was close, and that his lawyer may have put one over on the jury. This amounts to a perception that Hinckley is closer to Raskolnikov than to Lennie on the continuum. Would the public reaction to the verdict be the same if, instead of having a mental disorder that surfaced as an inappropriate crush on a movie

24. F. Dostoevsky, *Crime and Punishment* (1866).

25. Diagnostic Statistical Manual III is currently popular with psychiatric diagnosticians.

star, Hinckley had had M'Naghten's paranoid belief that his act was necessary to his self-defense;<sup>26</sup> if Hinckley's psychiatric evaluations had been unchallenged by prosecution expert witnesses testifying that Hinckley was not sufficiently insane to qualify under the defense; if Hinckley were not so articulate and obviously intelligent? If Hinckley seems simply a close case, dismay over the verdict in his case should not be extrapolated or, at most, should surface in an attempt to reconstruct the definition of insanity. The fear of possible deception might be advanced as the basis of a more general argument that we can never be sure who is insane and therefore should not have a defense that depends on diagnostic skills we do not possess. But Lennie does not seem very difficult to diagnose, and could not easily fake a lifetime of subnormal intelligence. If our concern is deception, that concern is better addressed by reworking the test than by abolishing the defense, even in cases where deception is unlikely.

A second obvious source of disaffection with the Hinckley verdict has been its potential consequence: If Hinckley is found no longer dangerous, he is eligible to be released long before he would have been had he been criminally sentenced. I suspect it is as unlikely that a psychiatrist would find Hinckley fit to be released as it is that a jury would find Raskolnikov NGRI. It is also true that those found NGRI do not often walk right out of mental hospitals.<sup>27</sup> However, it is equally unlikely that averages or probabilities would assuage the public's fear of a person whose twisted thoughts have been exposed in alarming detail through newspapers, magazines, and even television. But if the public is concerned about, or possibly even unwilling to bear the risk of the release of Hinckley, does this mean that the public is also unwilling to bear the risk of the release of all those found NGRI, to the extent of willing a restructuring of the criminal law? Does the public in fact wish to make danger, not blame, the focus of the criminal law?

The third major theme in the Hinckley debates is equally ambiguous. How, demand many intelligent nonlawyers, can we say that Hinckley is "not guilty" when we all know with an unusual degree of certainty that he shot at the President? Even if we do not abolish the insanity defense, should we not

26. See M'Naghten's Case, *supra* note 22.

27. Some commentators have concluded that because length of civil commitment is predicated on findings of dangerousness and because findings of dangerousness are commonly based on the nature of the crime with which the NGRI defendant was charged, the length of civil commitment will tend to parallel the length of the criminal sentence. See J. Monahan, *The Clinical Prediction of Violent Behavior* 30-31 (National Institute of Mental Health Monograph 1981); Cooke & Sikorsky, *Factors Affecting Length of Hospitalization in Persons Adjudicated Not Guilty by Reason of Insanity*, 2 *Bull. Am. Acad. Psychiatry & Law* 251, 257-58 (1974).

It does occasionally happen that an individual found NGRI, due to mental state at the time of the offense, is found soon after conviction not to be presently mentally ill and is thereby released. E.g., *In re Torsney*, 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979). The reaction to such cases is, not surprisingly, extreme. The Torsney case provoked a public reaction that resulted in changes in the state law. See Comment, *Reforming Insanity Defense Procedures in New York: Balancing Societal Protection Against Individual Liberty*, 45 *Alb. L. Rev.* 679, 693-96 (1981). To avoid adverse public reaction, many jurisdictions have enacted automatic commitment procedures applicable upon a finding of NGRI, with length of commitment varying. See Note, *Commitment Following an Insanity Acquittal*, 94 *Harv. L. Rev.* 605, 605-6 & nn. 4-6 (1981), for a fairly recent survey of state practices.

say that someone like Hinckley is “guilty but insane”?<sup>28</sup> Is an explanation of the law’s terminology a sufficient response to this question? Is the problem simply a lack of communication, or does this question betoken a fundamental disagreement with the premise that legal guilt must be premised on criminal responsibility and not just on factual guilt?

Although the second and third attacks would apply to all mentally impaired defendants—even Lennie—I am not at all persuaded that current “decent community sentiment” demands abolition of the insanity defense, particularly now that the dust of the Hinckley trial has settled. Congress seems to have concluded that it does not. After an initial flurry of proposals for abolition,<sup>29</sup> Congress settled into a narrower debate about the scope of the insanity defense, focusing on a procedural tightening of it—shifting the burden of proof to the defendant, narrowing the insanity test<sup>30</sup>—that make the defense less likely to succeed than ever before. Under these proposals, there is less chance of a defendant found NGRI being released early because there is less chance of a defendant being found NGRI. Congress’s reaction was anticipated (and partly inspired) by the Reagan Administration’s similar shift in approach, abandoning an abolitionist position<sup>31</sup> for a more moderate, procedurally oriented stance.<sup>32</sup> What might have been interpreted as a demand for abolition seems to have been satisfied by heavy tinkering.<sup>33</sup>

### The Role of Public Reaction

But what if we were to determine, somehow, that public sentiment were clearly opposed to the insanity defense, that the reactions just described cannot properly be confined to the Hinckley case or satisfied by procedural variations? Should this public disaffection lead to legislative abolition of the defense? Morris takes the position that “decent community sentiment” has a significant role to play. I would take a more limited position, and say that the weight accorded public opinion should depend on what the public dislikes about the insanity defense. Of the arguments raised against the insanity defense, some are properly decided by majority reaction, and others, I think, are not.

28. An alternative formulation is “guilty but mentally ill,” the legislative hybrid Morris has rightly criticized as unacceptable (at 83–87).

29. E.g., H.R. 47, 98th Cong., 1st Sess. (1983); H.R. 682, 98th Cong., 1st Sess. (1983); H.R. 1196, 98th Cong., 1st Sess. (1983).

30. See Insanity Defense Reform Act of 1984 §402 (a), 18 U.S.C. §20. American Psychiatric Association, Statement on the Insanity Defense 9–10, 14–15 (1982); American Bar Association, Criminal Justice Mental Health Standards, Standard 7-6.1 (1983); American Bar Association, Policy on the Insanity Defense (approved February 9, 1983).

31. See Smith, Limiting the Insanity Defense: A Rational Approach to Irrational Crimes, 47 Mo. L. Rev. 605 (1982) (based on Attorney General William French Smith’s congressional testimony on the administration’s position).

32. See, e.g., Hearing on H.R. 1280 and Related Bills to Reform the Insanity Defense, before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 98th Cong., 1st Sess. (1983) (statement of D. Lowell Jensen, Assistant Attorney General, Department of Justice, Criminal Division).

33. The outcome was not the same in all states that have considered abolishing the insanity defense. Both Idaho and Montana, e.g., have abolished the defense legislatively. 1982 Idaho Sess. Laws ch. 368; 1979 Mont. Laws ch. 713.

In terms of the syllogism set out above, if the public were to disagree with the second premise (that the insane are not morally blameworthy), the defenders of the insanity defense would be in trouble. If the purpose of the criminal law is to cast blame, how can blameworthiness be determined if not by societal valuation? It would become quite uncomfortable, even for the staunchest defender of the insanity defense, to announce that the insanity defense must be retained because we do not blame the insane if it then turns out that "we" do.

Although this public reaction could properly lead to abolition of the insanity defense, I think it unlikely that the public would conclude that the insane are generally blameworthy. Our difficulty with Hinckley, or even Raskolnikov, should not impede our recognition that Lennie is different and our willingness to excuse him.

If the public is, or were to become, dissatisfied with the insanity defense as a whole, the first premise of the syllogism would more likely be the root of the problem. This dissatisfaction, as described above, would center on a desire to use danger rather than blame and factual rather than moral guilt as the underpinning of criminal liability. Of course, purporting to involve the public in the theoretical debate at all is somewhat unrealistic. Morris points out, quite correctly, that the public is really concerned about incapacitation of persons perceived as dangerous more than about criminal law theory (at 79). But if it is true that there are at least some mentally ill individuals whom the public would not find morally blameworthy, why should the public wish these people to be the subject of the criminal rather than the civil law?

One great source of some of the confusion in debates on the treatment of the mentally ill is the similarity in the treatment of mentally ill civil committees and criminal defendants. If a criminal act is committed by one who is arguably mentally ill, three consequences are possible: the individual might be civilly committed, criminally convicted (if an insanity defense is rejected, or as a result of a plea bargain), or found NGRI. In any of these scenarios, the individual generally will be incarcerated, either in a prison or a mental hospital, to an extent determined at least in part by "dangerousness" as assessed by psychiatrists. Morris finds this proper, with heavy warnings about the care that should be taken given the unreliability of current predictions of dangerousness.<sup>34</sup> The length of incarceration of the person criminally convicted is additionally limited by the concept of desert, according to Morris (at 30). We cannot incarcerate convicts for as long as they are considered dangerous—although we might civilly commit an individual on the basis of dangerousness after the criminal sentence expires.<sup>35</sup>

If "dangerousness" is to be the ultimate determinant of length of incarceration in every context, and if criminal punishment is limited by an additional constraint (desert), why not treat the mentally ill as a civil problem and ad-

34. See Morris, On "Dangerousness" in the Judicial Process, 39 *Rec. A.B. City N.Y.* 102 (1984).

35. See, e.g., *Baxstrom v. Herold*, 383 U.S. 107 (1966).

dress the issue of dangerousness head on? Does the public trust judges more than psychiatrists? Those found *NGRI*, in fact, may spend a longer time incarcerated than the maximum sentence had they been convicted. The Supreme Court has just thrown its weight behind the idea that this disparity is permissible because the guiding concepts of civil and criminal incarceration are different—incapacitation as opposed to punishment.<sup>36</sup>

It may be precisely this distinguishing principle that the public calls into question if punishment of the insane is sought. The debate on the insanity defense is one more battle on a field that includes preventive detention and good faith exceptions to the exclusionary rule. The insanity defense excuses nonblameworthy individuals from criminal liability despite the fact that they may be dangerous; society may not now be willing to do so. Of course, the operation of the insanity defense has taken the teeth out of some potentially antagonistic sentiment by making the result of an *NGRI* finding so similar to that of a conviction, but the incarceration of the *NGRI*, while often lengthy, still poses a danger in particular cases. It is ironic that the same public that does not seem to mind the inaccuracy of predictions of dangerousness when preventive detention is at issue finds our inability to predict intolerable when the release of a defendant found *NGRI* is involved.

If the public does wish the criminal law to punish the dangerous instead of only the blameworthy, I think legislatures should resist. The distinction between criminal and civil law would be hopelessly blurred, and the purposes of punishment other than incapacitation (particularly retribution) would be compromised. A punishment scheme based solely on utilitarian considerations and not requiring desert as a predicate for punishment is simply unjust. Furthermore, it might well be argued that such a scheme is unconstitutional. In his chapter on abolition of the insanity defense, Morris briefly considers the constitutional challenge that might be brought if a legislature were to discontinue the insanity defense (at 74-76). The short shrift he gives the defense is appropriate as a prediction of how the current Supreme Court would probably view these arguments. Nevertheless I think there is more to the constitutional challenge than Morris allows. Under the Eighth Amendment, it could certainly be argued that it is cruel and unusual to convict Lennie of murder if his mental deficiency left him with no capacity to act other than as he did. It could also be argued, under the due process clause, that punishment in the absence of moral blameworthiness is unjust. With the Constitution as a possible trump to public opinion, legislators should not hesitate to resist public pressure for abolition, if it mounts to that point.

Even in the absence of a constitutional challenge, legislatures should retain the insanity defense and attempt to educate the public as to its true meaning and impact. The Constitution should not be the only bulwark against a retreat from our traditional concepts of individualized justice and preference for individual rights. If the public believes, as I think it does, that at least

36. *Jones v. United States*, 463 U.S. 354 (1983).

some of the mentally ill or deficient are not morally blameworthy, the legislatures should take account of that sentiment by providing some form of insanity defense for juries to apply. Like all positions favoring civil liberties, this one is not without risk. The reluctance of juries to find individual defendants NGRI is a more appropriate method of controlling that risk than a general legislative endorsement of convicting the insane.

### Conclusion

It is interesting to note how little the public case against the insanity defense has in common with Morris's. The desired solutions might be as disparate. If the public did wish to make danger and not blame the central premise of the criminal law, Morris's proposal, which equates *mens rea* and blame, might well appear not to go far enough. If Lennie had thought he was squeezing a lemon instead of a neck, would he be any less dangerous? Some mentally impaired individuals would still be removed from the criminal justice system by acquittals for lack of *mens rea*, and we would still have to use the mental health system to deal with these possibly dangerous individuals. How much would we gain by merely lowering the number of individuals whose dangerousness is assessed in a civil context?

Furthermore, I do not believe that abolition of the insanity defense would eliminate some of the worst problems we experience in the operation of the defense. Even if we restrict the mentally ill to trying to negate *mens rea*, we still must allow testimony about criminal defendants' mental processes. Testimony by the defendant may still be deceptive. Testimony by psychiatrists would still be relevant and would still pose many of the same problems of role and control that we face under the insanity defense. *Mens rea* defenses would still leave us in the position of drawing lines between responsibility and exoneration that are equally fuzzy, but even more significant in their consequences. And abolishing the insanity defense would not relieve our lack of financial resources, whether for trial or for treatment.

It does not surprise me that Morris does not share the public's more extreme reactions. It does always surprise me when I disagree with Morris, whose work on many topics I have long admired.<sup>37</sup> I hope that Morris's book, others following it, and others yet to come, will continue to provoke debate on these critical issues.

37. See, e.g., Morris, *The Future of Imprisonment* (1974), for a sensitive view of the problems of role and reform in American prisons.



