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Introduction to Debate (between N. Morris and R. Bonnie): Should the Insanity Defense be Abolished?

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SHOULD THE INSANITY DEFENSE BE ABOLISHED?*

AN INTRODUCTION TO THE DEBATE

Professor Norval Morris** vs. Professor Richard Bonnie***
Introduction by Professor Joel J. Finer****
Cleveland-Marshall College of Law

In the spring of 1984 I proposed that the law school initiate a Great Debate series on topics of interest to the law school, the outside legal community and law-concerned members of the public.¹ The idea of the debate probably in part resulted from the "vividness effect" of the Hinckley verdict.² Not only were politicians calling for drastic reforms or abolition of the insanity defense,³ but prestigious professional organizations⁴ and study groups⁵ were committing their time and talents to rethinking the notion that an actor's mental illness should have significance for the nature of the legally imposed consequences of harming an interest protected by the criminal law.⁶

Two of the leading figures in the renewed national debate over the insanity defense were Professor Richard Bonnie of the University of

* This debate took place in the two-tiered Moot Court auditorium on the evening of April 11, 1985, to an audience that at times was standing room only. With the post-debate questioning period, the speakers gave of themselves, on stage for almost two hours.

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¹ The proposal became reality, supported by a grant from the Cleveland-Marshall Fund and by the enthusiastic approval of Dean Robert Bogomolny.

² The "vividness effect" is the statistically undue prominence given to the characteristics of a particular instance of a regularly occurring phenomena because of the concreteness and immediacy of the present example. See Rosenhan, *Psychological Realities and Judicial Policy*, 19 STAN. LAW. 10 (1984). Cf. *Myths and Realities*, NATIONAL COMMISSION ON THE INSANITY DEFENSE (1983).

³ See, e.g., Wall St. J., June 23, 1982, at 7, *Hinckley's Acquittal Spurs Calls to Curb Insanity Defense; Senate Might Act Soon*.

⁴ E.g., the American Psychiatric Association, the American Medical Association, the American Bar Association. The American Bar Association had begun its project, "Criminal Justice Mental Health Standards," prior to the Hinckley verdict but that verdict played "a substantial role in shaping the ultimate content of the ABA's standards." Wexler, *Redefining the Insanity Problem*, in *Symposium on the Criminal Justice Mental Health Standards*, 53 GEO. WASH. L. REV. 528, 529 (1985).

⁵ E.g., the National Commission on the Insanity Defense of the National Mental Health Association, which produced the report *Myths and Realities* (1983).

⁶ See Bayer, *The Insanity Defense in Retreat*, 13 HASTINGS CENTER REP. 13 (1983); Applebaum, *The Insanity Defense: New Calls for Reform*, 33 HOSP. & COMMUNITY PSYCHIATRY (1982).

Virginia School of Law, and Professor (former Dean) Norval Morris of the University of Chicago School of Law. Professor Bonnie drafted the formulation adopted in the proposal of the American Psychiatric Association⁷ designed to retain the defense of those defendants whose acts, given the defined mental state (severely impaired reality testing) seemed most morally deserving of exculpation.⁸ He also contributed significantly⁹ to Congress' promulgation of a new federal insanity defense¹⁰ and to the American Bar Association's proposal on this subject.¹¹ Professor Morris' ideas about the defense,¹² which had provoked considerable discussion in the literature of the law,¹³ also found their

⁷ *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681 (1983).

⁸ For the basis of the thesis, see Bonnie, *The Moral Basis of the Insanity Defense*, A.B.A. J., Feb. 1983, at 194. It is also found in the APA Report, (explicitly adopting Professor Bonnie's recommendations) *supra* note 7, at 685.

The APA's recommendation is that the insanity defense be retained primarily because of its moral significance; that the test for insanity be an exclusively cognitive one (the defendant must have been unable, because of mental disease or retardation, "to appreciate the wrongfulness of his conduct at the time of the offense." *Id.* at 685. In the recommendation, mental disease is defined as including "only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception and understanding of reality and that are not attributable to the voluntary ingestion of alcohol or other psychoactive substances." *Id.* Regarding violent insanity acquittees, it is recommended that a special disposition system be set up to protect the public. *Id.* at 686-87.

See also other publications by Richard Bonnie: Bonnie, Book Review, A.B.A. J., Dec. 1984, at 100 (reviewing L. CAPLAN, *THE INSANITY DEFENSE ON THE TRIAL OF JOHN W. HINCKLEY* (1984)); *Morality, Equality and Expertise: Renegotiating the Relationship Between Psychiatry and the Criminal Law*, 12 BULL. AMER. ACAD. OF PSYCHIATRY AND THE LAW 5 (1984); *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980).

⁹ *Bills to Amend Title 18 to Limit the Insanity Defense: Hearings Before the Comm. on the Judiciary, United States Senate, 97th Cong., 2d Sess. 255 (1982)* (statement of Richard J. Bonnie).

¹⁰ Insanity Defense, 18 U.S.C.S. § 20 (Law. Co-op. Supp. 1985).

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

Id.

¹¹ American Bar Association Criminal Justice Mental Health Standards. Sta. 7-6.1 (approved by The House of Delegates in 1984).

¹² Particularly a thesis of his book: N. MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982) (advocating abolition of the special defense of insanity).

¹³ See, e.g., Herman, Book Review, A.B.F. RES. J. 385 (1985) (reviewing N. MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982)). Among the more than thirty book reviews of *MADNESS AND THE CRIMINAL LAW*, the following make a particularly special contribution: Johnson, Book Review, 50 U. CHI. L. REV. 1534 (1983); Richards, Book Review, 61 TEX. L. REV. 1557 (1983); von Hirsch, Book Review, 82 MICH. L. REV. 1093 (1984);

way prominently into the proposal of the American Medical Association¹⁴ to abolish the insanity defense as such.¹⁵

As the plans for the debate began to unfold I was concerned about the possibility that the subject matter might already be jaded, or in any event no longer would be a "hot topic" for our potential audience. Being quite familiar with the writings of our Advocates and therefore particularly susceptible to the reader-listener rehash syndrome, I was nonetheless hopeful that what had the potential for being old-hat would instead be new and interesting to those members of the audience not professionally committed to intimate familiarity with the subject matter. While I had expected that these issues, aired in the setting of a debate, would be more exciting and immediate than even the extraordinary written scholarship of both erudite visitors, I hadn't expected the remarkable level of intensity, originality and profundity to which all of us were treated.

The Advocates addressed many aspects of the problem; and indeed disagreed (in emphasis at least) over the significance of the insanity defense

and Morse, Book Review, 36 STAN. L. REV. 1485 (1984). The interesting reviews in the more philosophical journals are Moore, Book Review, 95 ETHICS 909 (1985) and Adelsstein, Book Review, 92 ETHICS 579 (1982). See also Jerome, Book Review, 3 CRIM. JUST. ETHICS 62 (1984).

¹⁴ On December 6, 1983, the American Medical Association's House of Delegates approved and adopted the Report of the American Medical Ass'n Board of Trustees: *The Insanity Defense in Criminal Trials and Limitations of Psychiatric Testimony* (1983). See Holden, *Insanity Defense Reexamined: The AMA Recommends Its Abolition But Lawyers and Psychiatrists Say That Would Undermine the Moral Basis of Criminal Law*, SCIENCE, December 2, 1983, at 994A.

¹⁵ The proposal would eliminate "insanity" as a separate and special defense, but would admit proof of aberrational mental condition where relevant to the existence or nonexistence of mens rea.

Recently the American Medical Association and the American Psychiatric Association issued a joint report reconciling their earlier differences as best they could. *Joint Statement of the American Medical Association and The American Psychiatric Association Regarding The Insanity Defense*, 142 AM. J. PSYCHIATRY 1135 (1985). While each group retained its basic position of the operation of mental illness in the courtroom process of guilt consideration, the report emphasized fundamental agreement on the following propositions: 1) application of the different proposals might generate important data that might require modification of the AMA's and APA's views (e.g., data on how the defense is administered, the type of offenders who have succeeded and who have failed in their assertion of the defense, and "the degree to which human consideration and effective psychiatric treatment have been afforded to mentally disordered offenders, whether acquitted or not"); 2) that more humane treatment be given to mentally ill criminals; 3) that it is unfortunate that our adversary system highlights differences among psychiatrists where there may also be large areas of agreement; and 4) that it is deplorable when forensic psychiatrists misuse their medical expertise at trials, stretching "their medical opinion beyond legitimate, established, scientific and medical knowledge." *Id.* at 1135-36. Some of these issues were also addressed in the more broadly ranging Debate which follows.

problem itself. Although the speakers treated their audience to a feast of fresh relevancies, no subject was touched on lightly; each of the many relevant observations and assertions were so expressed as to address the deepest thought processes of the many attentive listeners.

Like a rare wine, this event met the test of aftertaste — in the corridors and offices and some classrooms (and even in the library). Indeed, for many days after the event the Cleveland-Marshall community actively savored the ideas put forth. If I contributed to the success of the debate at all, it may have been through an emphasis on the continued opportunity for the debaters to reformulate the question. The format, including cross-questioning between the Advocates, seemed to elicit the best of both scholars as they engaged, and re-engaged each other, in the finest tradition of our profession — learned argument. Rather than risk spoiling it for the reader by advance substantive disclosures, I'll now let the rich intellectual content of the great debate speak for itself.

Joel J. Finer

DEBATE
SHOULD THE INSANITY DEFENSE BE ABOLISHED?

* Richard Bonnie - Advocate Against Abolition

** Norval Morris - Advocate For Abolition

Professor Morris:

For purposes of this debate, it is necessary to clarify what is meant by "the abolition of the insanity defense." What I am advocating, and what the American Medical Association has proposed, is that there should be no *special* defense of insanity to a criminal charge. In other words, the ordinary common law-established principles of mens rea, intent, recklessness, and knowledge should apply. Mental illness would be, as an evidentiary matter, relevant to the question of guilt and of course relevant to the question of punishment, but there would be no special rules concerning a defense of insanity such as the *M'Naghten* Rule,¹ the *Durham* Rule,² the rule proposed by the American Law Institute, or the variations on them as advanced by Professor Bonnie.

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¹ The *M'Naghten* Rule has been the traditional test applied for the insanity defense and was first formulated in *M'Naghten's Case*, 8 Eng. Rep. 718 (1843). Under the *M'Naghten* Rule the accused is not criminally culpable if at the time of committing the act he was laboring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing was wrong.

² The *Durham* Rule derives from *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). Under this approach if there is some evidence that the accused suffered from a diseased or defective mental condition at the time the unlawful act was committed the accused is not criminally responsible if it is found beyond a reasonable doubt that the act was the product of such abnormality.

With this distant audience stretching way up to the far and vaulted ceiling, theological comment seems appropriate. St. Augustine provides the text: "Oh, to distinguish the reality of things from the tyranny of words." That passage crystalizes the problem that has beset the special defense of insanity since its inception. It is surrounded in a flood of words, and some of them are very nice words. Many are good sounding words but, I think, largely misleading words. My task is to persuade you of that.

Let me say first of all that the question is not of much importance to crime rates. The defense of insanity is a minute part of the squalor of the American criminal justice system. There are only about 3,500 people held as not guilty by the reason of insanity at the present moment in the United States. In Illinois there are about 120. Virtually all of them would, in any event, be locked up somewhere. The numbers involved are small, though the cases in which the defense is raised are sensational. Ultimately, Professor Bonnie and I agree that whatever happens to the special insanity defense it will have very little effect on the incidence of crime in the United States.

My position on this issue is not based on theoretical speculation, though I hope I've done my share of that. Rather, it is based on observing the operation of the special insanity defense in many states and in many countries. If you want to see the relationship between mental illness and criminality, go to the city courts of first instance; go to the jails; go to the prisons, particularly, the psychiatric divisions of the prisons. There you will see a large amount of psychopathology amongst convicted and about-to-be-convicted criminals. In an important sense, we don't really have a defense of insanity. What we have is a rarely pleaded defense that is pleaded in sensational cases, or in particularly ornate homicide cases where the lawyers, the psychiatrists, and the community seem to enjoy their plunge into the moral debate. Though the insanity defense is not raised for minor crimes, there is certainly a great deal of psychopathology amongst those who commit such crimes. The special defense of insanity is a rare genuflection to values we neither achieve nor seek elsewhere in the criminal justice system. And when we do find the accused person not guilty by reason of insanity, it is my experience that we lock him up in a prison within a mental hospital which is often quite like the prison in which he would have been locked up had he been convicted. I have found this to be true in many other countries. In the summer of 1984, I worked at the Max Planck Institute in Freiburg. Nearby I found a state mental hospital that was better than any state mental hospital in the United States. Built inside the mental hospital was a little prison for those who had been found not guilty by reason of insanity.

Underlying my position on the insanity defense as a special defense, is a suspicion that we are dealing with a process that is used for purposes other than crime control; it is certainly not ordinary common law-developed doctrine. The more I have studied this topic, the more my suspicion has been confirmed. I see the special defense of insanity as a somewhat hypocritical tribute to a feeling that we had better preserve

some rhetorical elements of the moral infrastructure of the criminal law. In that regard it is a tribute to hypocrisy, not an operating doctrine.

The special defense now attracts great interest in this country mainly for one reason: John Hinckley's affection for Jodie Foster, and his somewhat extraordinary way of expressing that affection. Doctrine that had its genesis 140 years ago and had reached a reasonable degree of status in this country after the *Durham-Browner*³ excursion, followed by widespread acceptance of the American Law Institute tests, was applied in the Hinckley case. The doctrine led, entirely appropriately, to a verdict of not guilty by reason of insanity.⁴ I say "entirely appropriately" since it seems quite clear to me that the trial judge in the *Hinckley* case, an excellently trained product of the University of Chicago Law School, accurately instructed the jury on the then relevant law, and that the jury, if they were to follow that direction, had no choice but to find Hinckley not guilty by reason of insanity. In the ensuing political turmoil, the federal law regarding the special defense of insanity was amended to its present state of unprincipled compromise. And for this Richard Bonnie bears some responsibility since his views were expressly accepted by the American Bar Association and the American Psychiatric Association, with both organizations then being influential in the Congressional decision. By contrast, my views were expressly accepted by the American Medical Association and proved wonderfully unsuccessful in Congress. The audience tonight, you see, is being harangued by a poor loser.

It is my contention that the special defense of insanity is an unprincipled compromise for the reason that it distracts from the real issues. The real issues concern the organization and allocation of such psychiatric resources as we are prepared to bring to bear on the very serious and practical problems of the relationship between mental illness and crime. Instead of addressing those issues, however, we spill much ink, and waste much typescript on an irrelevancy. We turn from difficult practical issues to interminable moral posturing, pretending that we are in fact acquitting those who fall within the special defense. But those, like John Hinckley, who are found not guilty by reason of insanity are not in any sense acquitted, for they are not free of the stigma of guilt, nor are they physically freed. In my view, they have been doubly stigmatized as both mad and criminal, and it has been my observation that their treatment follows these assumptions. The new Federal Criminal Code does not treat them as innocent; it does not treat them as susceptible to the ordinary

³ The *Browner* Rule was the result of *United States v. Browner*, 471 F.2d 969 (D.C. Cir. 1972), which overruled *Durham*, holding that the accused is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law.

⁴ See *United States v. Hinckley*, 525 F.Supp. 1342 (D.D.C.) *op. clarified, reconsideration denied*, 529 F.Supp. 520 (D.D.C.), *aff'd.*, 672 F.2d 115 (D.C. Cir. 1982).

civil commitment rules, and it does not treat them as being susceptible to the ordinary punishment rules.

The special defense of insanity was more sensible when it was used primarily as a means to avoid the capital punishment of those who suffered serious psychological disturbances at the time of the crime. But that is not its role today. Not many of us are in favor of the execution of mentally ill murderers, and so, putting the issue of capital punishment aside, we are left with a situation in which we pretend to acquit, pretend to give full moral force to a doctrine, but then don't give it. So again, I am a little suspicious.

Likewise, I do not consider the special defense to be of great assistance to those found not guilty by reason of insanity. There is some emerging evidence, and there is certainly an emerging practice, that all psychiatric treatments are based on an effort to manipulate the patient's sense of responsibility for his own conduct. Like it or not, the mentally ill must remain, in a personal sense, responsible for their past conduct if they are ever to wrench some satisfaction from their lives.

I stated earlier that the special defense is a false classification; I think it is false in four respects. It is false psychologically, false morally, false politically, and false symbolically. Though I am quite confident with respect to the first three, I am genuinely in doubt about the fourth, the symbolic role of the special defense.

First, the psychological fallacy: if it were possible to identify those criminals who are most psychologically disturbed, I seriously doubt they would be the same 3,500 now held as not guilty by reason of insanity (NGRI). I have studied the cases of fifty-eight people who were found not guilty by reason of insanity and who are now being held in the Manteno Mental Hospital, the major institution in Illinois for holding this group. In Manteno, a small prison was built within the mental hospital. NGRI patients held there are subject to different grounds privileges, different working arrangements, and different security privileges than other mentally ill patients. The reason for that structure is more than the fear of escape; NGRI patients are more manipulative, more criminal, and less psychologically disturbed than other patients.

By contrast, when one looks at non-NGRI cases confined within the psychiatric divisions of prisons, one finds many prisoners who are much more seriously psychologically disturbed than NGRI's. Often, the psychological disturbances of the non-NGRI's are closely related to the criminal conduct, yet these convicts have never been the subject of the special defense of insanity. The special defense simply does not embrace those who are most in need of psychiatric treatment nor those who are the least morally culpable.

The prison I know best in the Federal system is located in Butner, North Carolina. This institution has applied some of the plans I developed in

The Future of Imprisonment.⁵ The Butner facility has a section for 150 psychotic prisoners, *i.e.*, those who have recently had a serious psychotic episode. Though most of these prisoners never asserted the special defense, they are clearly a more disturbed group than those I find at the Manteno Mental Hospital in Illinois. The point I am making is that by the extraordinary language of a special defense, we have not selected those who commit criminal acts and are most psychologically disturbed, nor do many people think we have. The special defense of insanity is, therefore, false psychologically.

Second, the moral fallacy: the standard justification given for the special defense of insanity is that it is unjust to punish where we cannot blame. The argument goes like this: People have free choice to do good or ill. If they *choose* to do ill, they may be blamed and punished. But if they do not choose to do ill, it is morally insensitive to punish them. I think that is a fair statement of the position.

That line of argument, I think, makes several erroneous assumptions. First, it makes the assumption that whether or not someone is responsible for his acts is a yes/no question, when obviously it is on a continuum and poses a difficult problem of linedrawing. Second, it makes the assumption that defects in a person's ability to choose are to be given a larger exculpatory effect than all other pressures on human behavior. It assumes that the psychotic is more morally innocent than the person gravely sociologically deprived and pressed towards criminality. The validity of that assumption is questionable.

If you were going to select those people who were most likely to commit serious crimes you would not take a psychiatrist with you; rather, you would take a policeman or at least someone who knew the town well. You would search for your future serious criminals in the inner-city deprived areas. My point is that social adversity, with its generations of destroyed families, is much more criminogenic than psychosis, and is even more unavoidable for the child born to an impoverished inheritance.

The special defense of insanity is therefore a morally false classification. It is pretentious in the extreme to think that anyone has the sufficiently sensitive caliber to make these delicate moral judgments. It is pretending to do St. Peter's job, and not one of us is any good at it. It surpasses human competence.

Professor Bonnie:

Professor Morris said that it would be pretentious to make the moral judgments that need to be made. His understandable reluctance emphasizes one of the main points that I want to make, namely, that this whole issue ultimately boils down to one of moral intuition. I believe that we ought to submit some of these cases to juries in order to express

⁵ N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974).

the moral intuitions of the community. The fact that the questions are hard to answer does not mean that we should not ask them.

Professor Morris and I are debating the insanity defense because we are supposedly experts on the subject, but I am not sure that resolution of this issue requires expertise at all. In fact, it reminds me of a statement made by a Fairfax County police officer who, upon thoughtfully surveying a crime scene, concluded: "This crime was definitely committed by criminals." Though I believe the insanity defense is morally required, I cannot prove that my moral judgment is correct.

At the outset, before turning to the matters in dispute, let me note a few points on which Professor Morris and I agree. First, it's clear that the insanity defense has nothing to do with the crime rate. Abolishing the insanity defense should not be viewed as an instrument of crime control. I might note in passing, however, that during his tenure as Attorney General of the United States, William French Smith testified in support of the Reagan Administration's initial proposal (which endorsed Professor Morris' view), arguing that abolition of the insanity defense was necessary "to restore effective law enforcement." (Even in a "gentle" debate, I couldn't resist making this observation.)

The second point we agree upon is that the insanity defense is an empirically insignificant feature of the penal law. There is no question about that. The defense is rarely raised and less often successful, but that does not mean it is unimportant. In the case in which mental disorder seems morally relevant to the assessment of responsibility, I think it is important to get it right, or at least to try to get it right. The fact that insanity claims are not raised very often should not dissuade us from struggling to formulate morally sound criteria. We recognize the defense of duress, for example, yet this defense is probably raised no more than five times per year. The insanity defense is raised significantly more than that—in at least hundreds, perhaps thousands, of cases.

I also agree with Professor Morris that persons acquitted by reason of insanity represent only a very small fraction of mentally disordered offenders, and that mental health services in the prisons and jails, where most of these people are confined, are typically appalling. This tradition of neglect should be reversed, but I do not see how abolishing the insanity defense is going to contribute to that goal. I also agree that services provided in forensic units for the "criminally insane"—that is, for people acquitted by reason of insanity—are also inadequate virtually everywhere and should be improved. But I do not see how abolishing the insanity defense and sending these patients to the same facilities that confine convicted prisoners would improve their treatment. In fact, I have no doubt that conditions would deteriorate if that course were taken. If we retain the insanity defense, the state assumes a constitutional duty, whether or not it is now fulfilled, to provide treatment, and to avoid punitive conditions. Without the insanity defense, the provision of these services would be a matter of grace. Therefore, the insanity defense at

least provides pressure for the improvement of these conditions to which Professor Morris and I both object.

We also agree that the insanity defense is not an efficient device for identifying those mentally ill offenders who are most in need of psychiatric hospitalization. As Professor Morris put it, the insanity defense is not an efficient device for identifying the most psychologically disturbed offenders or those who need the most intense psychiatric treatment. But that is not the purpose of the defense. Its purpose, I believe, is to affirm and implement that fundamental principle of our penal law to which Professor Morris alluded — the principle that criminal punishment should not be imposed on people who cannot be fairly blamed for their conduct.

I do not believe that debate about the insanity defense distracts from the plight of mentally disordered offenders in our prisons and jails. Indeed, if this is an empirical proposition rather than a rhetorical ploy, my suspicion is that the debate catalyzed from time to time by the insanity defense actually tends to focus public attention on precisely the problems that most trouble Professor Morris. Indeed, the placement and treatment of mentally disordered offenders would not be likely to get any attention at all if there were no debate about the insanity defense.

Finally, Professor Morris argues that successful treatment requires efforts to promote the patient's sense of personal responsibility for his conduct. I agree, but this observation has little to do with the issue before us. The issue is the assessment of *criminal* responsibility and the determination whether *criminal punishment* ought to be imposed on someone who violated the penal law while mentally ill and severely disturbed. Successful therapy does not require criminal condemnation.

Professor Morris does not question the proposition that criminal punishment should be predicated upon blameworthiness. His argument, rather, is that an independent insanity defense is not necessary to avoid unjust punishment. He also argues that proof of *mens rea* — the purpose, knowledge, recklessness, or negligence that may be required in the definition of any given penal offense — is enough to establish a proper moral basis for punishment.

I do not agree. The fundamental flaw in the *mens rea* approach is that it is morally underinclusive. *Mens rea* requirements in the definition of criminal offenses refer, for the most part, to conscious states of awareness. They have no qualitative dimension. Thus, the technical effect of the *mens rea* approach, if it were taken seriously, would be to limit the exculpatory significance of even a severe mental disorder to gross perceptual incapacities. It would cover only, or primarily, cases that never arise. Proponents of the *mens rea* approach point out that it would exculpate someone who squeezes a person's neck believing that he is squeezing lemons; or, as the Attorney General testified, someone who believes he is shooting a tree when he is shooting a person. But we all know that these cases do not exist.

In short, I believe that Professor Morris' approach fails to take adequate account of the morally significant effects of severe mental illness.

Specifically, it does not encompass claims of delusional motivation, or the severe impairment of insight or judgment so manifestly evident in cases of gross psychotic deterioration. In order to encompass what I believe to be the range of claims which ought to have exculpatory significance in the penal law, there must be some criterion (and we can debate about what kind of criterion that would be) which is extrinsic to the definition of *mens rea*. My own view is that the criterion should be whether the defendant was unable, as a result of mental disease, to appreciate the wrongfulness of his conduct at the time of the offense. This formulation is both necessary and sufficient to encompass what I believe to be the claims that ought to have exculpatory significance. That, in a nutshell, is the core of our disagreement.

I want to emphasize again that the disagreement turns on differences in moral intuition. Each of us has had a great deal of experience in mental hospitals, prisons, and in criminal courts. Our moral intuitions obviously differ. I do not think that our disagreement has anything to do with differences of opinion about the state of scientific knowledge or medical expertise, even though that issue is frequently raised in connection with the insanity defense today.

Though I have made this moral assertion, I do not believe that you are in a position to judge it in the absence of some clinical context. Therefore, I would like to describe two cases to illustrate what I believe to be the moral difficulty with the *mens rea* approach.

The first case involved a thirty-one year old woman — I will call her Joy Baker — who shot and killed her aunt.⁶ Let me say that this is a real case, a case that was actually evaluated at our Institute's forensic clinic in about 1974, as I recall. Joy Baker grew up in a fundamentalist area in central Virginia. According to her account, which no one has ever doubted, she became increasingly agitated and fearful during the days before the shooting. This was due in large part to some considerable psychological provocation by her husband who claimed that she was an adulteress and that he was going to kill her. She was very worried. She became increasingly agitated and fearful that her dogs, her children (aged eight and eleven), and her neighbors were becoming possessed by the devil and that she was going to be "annihilated," as she put it.

On the morning of the shooting, after a sleepless night, she ran frantically around the house clutching a gun to her breast. She was worried about what the children might do to her if they became demonically possessed and what she might do to them if she had to defend herself. She made the children read and reread the Twenty-third Psalm as a means of protecting them from her. Suddenly, and quite unexpectedly, her aunt arrived and drove into the driveway. Unable to open the locked front

⁶ See P. Low, J. JEFFRIES & R. BONNIE, *CRIMINAL LAW: CASES AND MATERIALS* 664-73 (1986) for the facts of this case and Mrs. Baker's description of the offense.

door, and ignoring Joy Baker's frantic pleas to go away, her aunt came to the back door. Mrs. Baker was standing there with a gun clutched to her breast yelling to her aunt not to come in. As her aunt suddenly reached into the broken screening to unlock the door, Mrs. Baker shot her. The aunt then fell backward into the mud behind the porch, bleeding profusely. "Why, Joy?" she asked. "Because you're the devil and you came to hurt me," Joy answered. Her aunt said, "Honey, no, I came here to help you." And at this point Mrs. Baker said she became very confused: "I took the gun and shot her again just to relieve the pain she was having because she said she was hurt."

The psychiatrists who examined Mrs. Baker concluded that she was acutely psychotic at the time she killed her aunt. The arresting police officer and others in the small rural Virginia community likewise felt that she must have been crazy at the time of the shooting. Mrs. Baker asserted the insanity defense and was acquitted. Clearly, had there been no special insanity defense she could have been acquitted only in defiance of the law. Although she was clearly out of touch with reality and unable to understand the wrongfulness of her conduct, she had the criminal intent, or *mens rea*, required for some form of homicide. If we look only at her conscious motivation for the second shot and do not take into account her highly regressed and disorganized emotional condition, then she was technically guilty of murder, since euthanasia, which was her conscious motivation for the second shot, is no justification for homicide. Moreover, even if the first shot had been fatal, she probably would have been guilty of manslaughter since her delusional belief that she was in imminent danger of demonic annihilation at her aunt's hands was, by definition, an "unreasonable" belief. Under Virginia law, and according to the law of many jurisdictions, a defendant is not entitled to acquittal on grounds of self defense if his or her belief in the necessity for defensive action is unreasonable.

It is conceivable, of course, that, if there were no insanity defense, evidence concerning Joy Baker's mental condition might be introduced to negate *mens rea* despite the fact, as I have shown, that her claim does not establish a legal basis for exculpation. Moreover, a jury instructed only on *mens rea* might choose to ignore the law and decide, very bluntly, whether such a defendant was simply too crazy to be convicted. In my judgment, however, the cause of rational criminal law reform is not well served by designing legal rules in the expectation that they will be ignored or nullified when they appear to be unjust in individual cases.

I think Joy Baker's case demonstrates why the law would be unjust if it failed to take into account delusional motivation and impairment of insight and judgment associated with psychotic deterioration. The *mens rea* approach draws a distinction between crazy perceptions and crazy beliefs. In my view, that distinction is both morally and clinically arbitrary.

Another case also illustrates my point. It is one of the few reported cases I have seen in which the defendant may actually have had a valid

mens rea defense. The case was decided in England in 1979.⁷ In this case, the defendant Stephenson went to a large straw stack in a field and made a hollow in the side of the stack because he was cold and he wanted a place to sleep. Having hollowed out the stack, he still felt cold, so he lit a fire of twigs and some additional straw inside the hollowed area in the straw stack. The stack caught fire, of course, and damage of about \$7,000 occurred. He was charged with arson.

The mens rea for arson in England, as in most American jurisdictions, is recklessness. The defendant is guilty if he was consciously aware of the risk that his conduct could result in the burning of this particular piece of property. The expert testimony in the case was that Stephenson had a long history of schizophrenia. The expert testified that Stephenson's condition made him quite capable "of lighting a fire to keep himself warm in dangerous proximity to a straw stack without having taken that danger into account." In other words, Stephenson "may not have had the same ability to foresee or appreciate the risk as a mentally normal person."

Stephenson was not floridly psychotic. Although chronically schizophrenic, he appears to have been able to function at a fairly significant level most of the time. He was not acutely decompensated when this offense occurred. But suppose he had been. Suppose he had been actively delusional, believing, for example, that demons were pursuing him and that one of the demons was hiding in the stack of straw. Suppose he acted on this belief, burning the straw stack to destroy the demons. I would say that a legal system that exculpates Stephenson because he failed to "appreciate the risk" that lighting a fire would burn down a stack of straw, but that refuses to exculpate him when he burns it down to kill a demon he believes to be hiding inside, draws an arbitrary distinction and fails to take adequate account of the clinical realities of severe mental illness. That is my case.

Dean Bogomolny:

Under our debate format we will now have a period of time for cross-questioning or conversations.

Professor Bonnie:

Professor Morris, do you really believe that punishment would be just in a case like Joy Baker's?

Professor Morris:

It depends on what you mean by "punishment." Though I sympathize with her greatly, I do think her conviction of crime could well conform to the basic values of the criminal law. I think we must recognize that we sometimes have to define rules of criminal law that tend to include people with whom we are particularly sympathetic and of whom we

⁷ Regina v. Stephenson, [1979] 1. Q.B. 695.

should be particularly understanding. Your remark about euthanasia illustrates that this is such a case.

I recall being involved in a case in which an elderly man killed his wife who was terminally ill and in great pain. She begged him to end her suffering. He complied with her wishes and, afterward, called the police and called his family. I became involved as a lawyer. I think we reached the right result: we convicted him of murder and put him on probation, his family being willing to care for and "supervise" him. I know of no other way to go about it. I do not know how to deal with euthanasia so as to avoid those sorts of problems without getting into too many others. You can well produce "possessed-of-devil" cases, extreme cases, where I find great sympathy for the person I have to convict. Indeed, I genuinely sympathize with many people with whose convictions I am involved. And so plucking at my heart strings does not push me to believe that you have a morally compelling case.

Professor Bonnie:

I would like to follow up with three comments and then another question. First, part of what I detect in your response is the notion that an occasional injustice, if you will, is the price that we need to pay in order to avoid mistakes.

Professor Morris:

No, I did not say injustice.

Professor Bonnie:

You do not think it is unjust?

Professor Morris:

I think it is right to convict both the husband who killed his wife in the case I mentioned, and Joy Baker in your case.

Professor Bonnie:

Well, as I say, I think we have a difference in moral intuition about the case. The second point I would make is that obviously the community felt as I did, and it strikes me that it does not make sense for those of us who formulate and apply the penal law to require conviction when we know that it will offend the community's moral sentiments to do so. I think that claims of insanity and some of these other claims, which ultimately turn on moral judgment, are precisely the kinds of cases for which we ought to rely on the community's moral intuitions, realizing, of course, that there will be some close cases.

Professor Morris:

You want to rely on the community's moral intuitions, but the history of the defense of insanity is that the community thinks it is a mechanism for letting people off; that it is characterized historically by leniency, fraud, and all sorts of complexities. The "community" is not instructed about nor informed on the moral subtleties here. It is perhaps a mercy that they are not because the subtleties are very difficult indeed.

We have before us two cases—mine of the aged killer and yours of Joy Baker—in which we wish we could devise systems, functioning systems, that did not punish people whose criminal behavior we deeply understand. As I see it, your Joy Baker is simply a person heavily pressed towards crime. I do not know whether she was possessed, or even what that means, or whether she thought she was killing a person. If she did, I see no way to avoid convicting her.

Professor Bonnie:

You do not see any way to avoid it *if* you adopt your approach. Now with regard to the question of euthanasia, I would be willing to make a similar argument. Obviously, the law cannot recognize mercy killing as a *justification* for killing in terms of trying to shape the way people behave. However, I do believe that a case might be made for recognizing a general defense of "situational excuse" or "situational compulsion" under circumstances where people are so overwhelmed by the pressures of a particular situation that they cannot fairly be blamed for having behaved as they did. I think that cases such as the one you referred to raise such claims, and I would favor adopting a rule which would put to the jury the question whether an ordinary person in the defendant's situation might have responded as this defendant did. I would take a consistent position on this.

Professor Morris:

I respect your search for consistency, but I doubt that in either euthanasia or insanity cases a workable moral consistency is achievable. Values like this led the English in the Homicide Act of 1957, to introduce a "diminished responsibility" doctrine which would most certainly cover your lady, allowing her to be convicted for manslaughter rather than murder.

Professor Bonnie:

But I do not want to convict her.

Professor Morris:

I understand that, but I am suggesting that the audience consider another path which has rendered the special defense of insanity almost moribund in England. It is now an extremely rare plea there since, in homicide cases, it is the jury's role to decide whether there was a causal relationship between the mental illness and the killing and, consequently, to declare the offense to be manslaughter rather than murder. This gives the judge a much wider range of punishment, including hospital orders and treatment orders. This approach has practically removed the special defense of insanity from discussion in the United Kingdom. Recently, a delegation from the Home Office was in this country on another matter, and I asked them why they will not abolish the special insanity defense. They said, "Oh, we have enough troubles. It really doesn't exist

operationally. Do we really want to talk in Parliament about things like that?" To which I responded, "I suppose not."

So you can take a modulated position if you wish. If the law were to include a general doctrine of exculpation for deeply understood pressures leading to criminal tendencies, and did it not only for euthanasia, but for mental illness and any other powerfully criminogenic adversities, I would not oppose it; but then it would no longer be a special defense of insanity.

Professor Bonnie:

You have raised two issues: the first involves blameworthiness and the second, criminogenesis. Suppose that a legislature were persuaded by your arguments against the special defense of insanity but wanted to go a step further and exclude evidence of mental abnormality on *mens rea* issues as well — or at least on those *mens rea* issues, such as recklessness, that establish the minimum predicate for penal liability. Suppose, for example, that the lawmakers concluded that they did not want to acquit Stephenson in the case that I gave you earlier, even though, assuming the psychiatrist was correct, he was not consciously aware of the risk that the stack of straw would be burned. I take it that you would not find that acceptable. My question to you, therefore, is why do you feel that Stephenson's claim should have exculpatory significance but not Joy Baker's claim?

Professor Morris:

I think that mental illness should be on the same footing, for purposes of criminal responsibility, as blindness, deafness, or being a foreigner not speaking the language—all of which are not infrequently relevant to what we have called criminal guilt. Suppose that you point a gun at me and say, "Believe me, I mean you no harm; I'm an FBI agent." Suppose further that I am deaf and cannot hear the words, and I shoot you. There is no doubt that my deafness is admissible evidence on the question of self-defense. I think mental illness should be treated similarly.

The best criminal law doctrine that we have been able to devise says that guilt exists when you do a prohibited act with a defined *mens rea*, *i.e.*, intent, recklessness, or negligence. Once we have established that standard, it is desirable to hold all adults, for their sakes as well as our own, responsible before the law. That is why the treatment question is so important. We have a long history of attempts to treat people differently and be kind to them for their sakes, but we usually fail to do so. We do not treat them gently. We tend to lock them up for longer periods of time than if we had held them legally responsible for their conduct.

Professor Bonnie:

I would have to agree with you, of course, if the assertion that withholding blame was nothing more than a way of disguising punishment. I think it needs to be emphasized that I would not be supportive

of the insanity defense if I felt that way. But I do want to explore the question of blameworthiness at the outset because it seems to me that that is at the core of our disagreement. You say that you would recognize the exculpatory significance of evidence of mental disorder if it negated mens rea because the mentally ill should be treated like everyone else, and because they should be exculpated on the same terms as people who might be deaf or blind.

It seems to me that the moral flaw in that reasoning is, as I suggested earlier, that the mentally ill are not like people who have other types of disabilities. It seems to me that, depending on one's moral intuitions, recognition of this difference could lead in either of two directions. To take a harsh view, we could refuse to take into account evidence of mental illness in assessing mens rea for the same reason we do not take defective temperament and intelligence into account. If you think this would be too harsh, it must be because mental illness is relevant to blameworthiness in a way that a quick temper is not. If that is so, why is there any reason *a priori* to believe that the moral significance of mental illness is exhausted by criteria of mens rea? What I need to understand is why the criteria of mens rea are so sacrosanct as to be *exclusive* measures of blameworthiness.

Professor Morris:

Not sacrosanct, Professor Bonnie. I am prepared to try to work on the mens rea doctrine and to develop its general principles, but it is the best we now have. I think we have now reached the heart of the matter and this is what I want to explore with you. You are the first person who has raised in public with me what I think is the central question.

The mentally ill *are* different. They are different particularly for our present purposes because there are defects in their *choosing mechanism*. They are not different in that their ears are not like ours, nor their eyes, nor their language. For our present purposes, they are different only in this one quality: their *choosing instrument* is different from ours. The thrust of Professor Bonnie's point, as I understand it, is that defects in the choosing mechanism of man are to be given different effect than pressures on the choosing process of man.

I think this position embraces a fundamental error. It assumes that there is something called "mind" which itself *does* the choosing. My observation of behavior, and my reading, lead me to accept Hume's theory rather than Descartes'. The duality between body and mind has to be abandoned if we are to think rationally about human behavior. We have to recognize that man's behavior is a product both of his endogenous capacities (which may not only be mind, but may be blood pressure, electrical stimuli, and the chemical speed of the synapses) and of all exogenous pressures on that behavior.

This all sounds fancy, I know, but I do not apologize for it. It is a difficult question. I believe that the understanding of human behavior, the understanding of man, demands that we try to measure the widest

variety of exogenous pressures on endogenous capacities. It is a mistake to attribute any behavior simply to "mind."

To summarize, behavior cannot be understood in terms of pressures on an individual, followed by a choice. It is not like that. Behavior is a product of a constant interaction of the totality of endogenous and exogenous pressures, and the only way to understand behavior is to include both. When you do take both into account you begin to understand why people do the things they do, and when you begin to understand that, you have gone as far as moral intuition can go. Beyond that it is mere guesswork. This is where the defense of insanity has not been properly explored. I would like people to do much more work on whether a different effect should be given to mind processes than to other pressures on people in relation to choice.

Let me return to the other differences between Professor Bonnie's position and mine. I am not sure how far apart we are on a variety of things. I am not sure how far apart we are, for example, on the point I made earlier that the special defense of insanity detracts from the real issues. The law books are full of defense of insanity cases, and whenever psychiatrists talk about law they talk about the defense of insanity. I believe these discussions divert attention away from the major issues of mental illness and crime. I am told, however, and I think Professor Bonnie believes, that we protect the moral infrastructure of the criminal law by allowing a special defense of insanity; at least this is the language often used. But what little protection it really is. In fact, his proposals for reforming the defense would limit the number of those cases even more, leaving it very, very rarely applicable indeed.

Let me give you an example of a case where the defense should never have been applied but was nonetheless invoked. In *Jones v. United States*,⁸ the defendant attempted to steal a jacket from a store in the District of Columbia. The maximum punishment for this offense was one year's imprisonment. Counsel of astonishing incompetence pleaded him not guilty by the reason of insanity. Jones was thereafter committed to St. Elizabeth's, a hospital for the mentally ill. After some time he realized, in his disturbed state, that he had been poorly defended, so he obtained new counsel to work on the matter. Counsel took the matter to the Supreme Court of the United States which decided, as a matter of law, that Jones could be held *longer* on the insanity plea than he could have been held had he been convicted for the attempted shoplifting. The maximum penalty for shoplifting was one year, though he probably would have served only two or three months. Now, instead, he could be confined indeterminately and need not be released under the same procedures and standards as a civilly committed person. Assumptions both of continuity of mental illness and continuity of dangerousness flowed from his conviction.

⁸ 463 U.S. 354 (1983).

Professor Bonnie:

I began by taking note of the fact that the insanity defense, as I propose it, would be narrow. That is precisely the point. I believe that there ought to be an insanity defense, an independent defense of insanity, but it ought to be narrow in scope. And I believe that the kinds of cases that it should be designed for are those involving the gross psychotic deterioration that I think Joy Baker was experiencing. I do not want a lot of people to be acquitted by reason of insanity, only those for whom a criminal conviction would be unjust. From what I know of the record in the *Jones* case, I do not think that was an appropriate insanity case to begin with. I also agree with you that Jones' attorney should not have raised the defense in light of its dispositional consequences.

Professor Morris:

Even if he were very crazy, you would not plead the insanity defense?

Professor Bonnie:

Not in the *Jones* case, because strategic considerations are relevant in the litigation of any criminal case. In particular, the *Jones* case raises a dispositional question. Let me sketch my position on the disposition of insanity acquittees and see whether you find it acceptable. A person who has committed a violent crime, who has behaved dangerously, and who is subsequently acquitted by reason of insanity based on a determination that his dangerous behavior was related to mental disorder, is not on the same legal or moral footing as you or I or anyone else who is subject to ordinary involuntary civil commitment. The reason is that our civil commitment laws, as they have been reformed, have a decidedly libertarian cast, and for good reason. They reflect the view that we ought to err on the side of liberty, and that we ought to intervene in someone's life on the ground that he or she needs treatment only in extreme cases and for a short period of time. The civil commitment law rests on a paternalistic premise, and paternalistic interventions should be limited in scope and duration. Specifically, society ought to bear the risk of error in making predictions about whether a person is imminently dangerous to himself or, whether upon release, he will be dangerous to himself in the future.

The person acquitted by reason of insanity, in my opinion, stands on a different footing. If that person has in fact behaved violently and endangered the life or safety of another person, he has manifested his dangerousness. Under those circumstances, it seems to me, a theoretically sound and morally proper scheme of therapeutic restraint—which is what it ought to be, and not punishment—can be based on the view that the acquittee, not society, should bear the risk of erroneous predictions concerning the need for and duration of hospitalization.

The hard question, again, is by what criteria we should decide how long the acquittee should bear the risk of error. While this is not the time to struggle with that question, it is enough to note that the time

period for civil commitment (six months in Virginia, thirty days in California) does *not* provide a proper marker. In short, I think there is a way to design a special dispositional system for insanity acquittees without making it a disguised form of punishment or an indefensible scheme of preventive confinement. The Supreme Court went much further than this in *Jones*, and I disagree with that aspect of the decision. However, to the extent that you argue that *any* scheme that differs from the ordinary civil commitment scheme is a disguised punishment or an indefensible form of preventive confinement, I respectfully disagree.

Professor Morris:

There are so many things I want to pursue. Let me pursue this one, because I feel I ought to at this point. The others I do not find quite as interesting. Professor Bonnie does not include control of volitional defects as meriting exculpatory effect. He only gives exculpatory effect to cognitive defects, to the incapacity to appreciate wrongness. For him, cognitive defects should have exculpatory effect and volitional defects should not. As a moral matter, not as a prudential matter, surely defects of control capacity should be given the same moral and exculpatory reach as defects of cognitive capacity. Why not?

Professor Bonnie:

Because it *is* a moral matter. My observations and experience have not revealed cases involving morally compelling claims of volitional impairment. The classic cases are the compulsions. The example always given in the debates on the insanity defense, back when the Model Penal Code was being drafted, was kleptomania. Quite frankly, I have never seen a kleptomaniac, but I have seen pyromaniacs. Based on my observations of cases involving pyromaniacs and relying upon my own moral intuition, I am convinced that these offenders are blameworthy and that their punishment is just. For purposes of argument, however, I am willing to concede that there might be a case in which a jury would find the special insanity defense morally compelling due solely to volitional impairment. I would still oppose the volitional inquiry on, as you put it, "prudential" grounds.

The dangers of the volitional inquiry are too great because it is so unstructured. In contrast, I believe that the cognitive/affective inquiry that I mean to encompass by the appreciation formula is manageable. It is possible to structure the expert opinion and to structure the jury's inquiry. It is impossible, however, to structure the volitional inquiry. Essentially, what you are asking the expert is: "Please explain, if you can, why this person did this." Then you are asking the jury to decide whether the defendant's capacity to choose to do otherwise than he did was so impaired that he should not be exculpated. That is simply a moral guess. Moreover, if you do not have a narrow definition of mental disease — and most courts that apply the volitional prong of the Model Penal Code test appear to regard any "mental disorder" as legally sufficient to raise the defense — then a verdict of acquittal is legally permissible

anytime an expert witness can be found to testify that the defendant had an identifiable mental abnormality. The expert could then develop a psychodynamic formulation explaining why the defendant did what he did. The result is a completely unstructured inquiry about the causes of every defendant's criminal behavior.

If the law is willing to open the door to open-ended claims about the determinants of the defendant's behavior, then I come to your side. I do not know why mental illness is special. Perhaps, as Judge Bazelon ultimately proposed, we should put before the jury all that can be said about the forces that predisposed the defendant to behave as he did. Of course, since I do not think that is what we should be asking in a criminal trial, I reject the whole thing.

Professor Morris:

It is interesting how we come together. I think that the cognitive inquiry is almost as speculative as the volitional inquiry, and that probably explains much of the difference between us. But I want to be nasty now and caricature your position so that you can respond to it.

Professor Bonnie:

You called it an unprincipled compromise, or something like that.

Professor Morris:

That was not being nasty — that was being generous. As I listened to you I recalled an article I wrote, decades ago, in which I observed that the special defense of insanity reminded me of a piece of visual art — a painting by Freud. It was a scene of massive violence; a sort of a drunken, naked, "Rape of the Sabine Women" on a huge canvas, full of impropriety. In a little corner of the canvas there was a bluebird fleeing from the scene of unclothed horror. A lady of uncertain age sat in front of this picture with a little easel, painfully copying the bluebird and worrying over the color of its beak. I suggested in my article that the bluebird represented the defense of insanity and the lady, those who wrote about it. When I sent it off to a law review, I said I did not know whether Freud's painting appeared in the Grove Press Edition of Freud's *Wit in Relation to the Subconscious*, or in some other edition. I also mentioned as possible another publisher of pornography. And in technical law review fashion, the editor wrote back to me asking, "Which?" Of course, as far as I know, Freud never ventured into visual arts.

Isn't painting bluebirds what we are doing tonight? We have been discussing an extraordinarily rare "possessed-of-devil" case in which Professor Bonnie aspires to a moral basis from a mass of other problems. I think Professor Bonnie is the painter sitting in front of Freud's picture.

Professor Bonnie:

I would be perfectly happy to be elsewhere tonight, and I would be perfectly happy not to talk about the insanity defense and not to have anyone else talk about it, as long as the defense continues to be written

into the fabric of the law, permitting exculpation in morally compelling cases. I do not know why you keep arguing about arguing about it.

Professor Morris:

It is not arguing about arguing. My point is that the fact that you and others insist on having a special defense of insanity is precisely what distracts lawyers and psychiatrists from a more thoughtful, substantive consideration of the relation between mental illness and crime.

Professor Bonnie:

I want to get it right.

Professor Morris:

You want to get euthanasia right too.

Professor Bonnie:

I do want to get that right, but I want to get this right more. Earlier, you raised the issue of criminogenesis. I think that your argument is off the point. I reject the notion that the distinction between mental illness and gross social adversity is morally indefensible. It may very well be that poverty or, as one member of the Court of Appeals for the D.C. Circuit characterized it, a "rotten social background," is significantly more criminogenic than psychosis. But, I do not think this observation calls into doubt the moral basis for the insanity defense. The insanity defense is not based on the claim that mental illness is criminogenic. Nor, as I indicated earlier in my comments on the volitional prong, do I think the inquiry should focus on whether mental illness caused the defendant's behavior, or whether the defendant was strongly predisposed by mental illness to behave as he did.

The operative concept underlying the insanity defense is that an acute impairment of mental functioning at the time of the offense is morally relevant to blameworthiness. After all, the entire culpability structure of the penal law, including *mens rea*, focuses on the defendant's mental functioning at the time of the offense rather than on how the person got to be the way he is. The moral basis of the insanity defense rests on the judgment that acute impairments of mental or emotional functioning which may have affected the defendant's perceptions, beliefs and motivations at the time of the offense, ought to have exculpatory significance under certain circumstances. This leads me to conclude that the distinction between mental illness, which may be directly relevant to mental functioning, and social adversity, which never is, is *not* a morally false classification.

CLOSING STATEMENT: PROFESSOR BONNIE

I would like to organize my remarks around the following theme. I think Professor Morris and other people who endorse the *mens rea* approach, or as we have characterized it, "abolition of the insanity defense," make at least five different types of arguments. Professor Morris has

touched on most of them tonight. I would like to use my closing remarks to respond to each of these arguments.

The first is the charge of hypocrisy. As I indicated earlier, if the real consequence of this supposed exculpation is the imposition of punishment in a different key—C minor instead of C major—then perhaps the defense is, as Professor Morris has written, a tribute more to our hypocrisy than to our morality. If we were imposing punishment on those whom we proclaim to be blameless, this would be as much an affront to the moral integrity of the penal law as I believe it is to convict Joy Baker. But if one believes, as I do, that punishment is not morally appropriate in such cases, the correct answer is surely to avoid a covert punitive disposition, not to erase the defense and substitute an overtly punitive one. Therefore, the answer to the argument from hypocrisy is *not* abolition of the insanity defense.

Another point about the charge of hypocrisy also needs to be raised. I indicated earlier that I believe it is not hypocritical to take the position that the insanity acquittee should be subject to hospitalization under somewhat more restrictive circumstances than would be possible under the libertarian civil commitment statutes that we now have. Indeed, the problem of designing a civil commitment scheme—a special dispositional statute, if you will—must be addressed even under the mens rea approach. That is, even under Professor Morris' proposal, it is still necessary to decide what to do with a person who is acquitted because he lacked the mens rea due to mental disease. This person is different from the "normal" person who lacked mens rea, and there is correspondingly greater reason to be concerned about the social danger presented by such a person. In this regard, it is noteworthy that the American Medical Association, which has endorsed Professor Morris' approach, was willing to endorse a specific dispositional statute for mens rea-acquittes that is much more restrictive than normal civil commitment statutes. Under the AMA proposal, a presumption of continuing dangerousness would arise, and the release decision would lie exclusively with a court rather than the facility. I have no doubt that legislatures would be inclined to do the same thing. Viewed from this angle, the mens rea approach fails to erase the hypocrisy, if that is what it is; it merely reduces it.

The second line of abolitionist argument is that the insanity defense is an aberration, a departure from what has been a settled reliance on mens rea to define the class of blameworthy offenders in the penal law. Professor Morris has argued that the independent defense of insanity originated in the 19th century and that adoption of the mens rea approach would return the law to the earlier and wiser state of affairs. I believe that this view is historically unsound and is not an accurate description of the culpability structure of the penal law or the origins of the insanity defense.

I do not have time for anything more than a few conclusory observations at this point, but I ask your indulgence. First, there are a variety of contexts in which the law recognizes claims of excuse that are

extrinsic to the definition of the offense. Duress is one of them. A person who engages in criminal behavior because someone is threatening him or holding a gun to his head and who succumbs to that coercive pressure because he is not a hero is entitled to put that claim before the jury even though he had the mens rea for the offense. Again, that is a rare case. There are other cases. A closer one to the present topic is involuntary intoxication. The commentators from the earliest days recognize that involuntary intoxication ought to be a defense even though the individual might have had the mens rea for the offense; in fact, the exculpatory criterion is typically tied to the insanity defense in these cases.

As for the origins of the insanity defense, this is too large a topic to cover in the thirty seconds that I am going to devote to it. The central point is this: The insanity defense emerged as an independent defense because the culpability structure of the common law was essentially objective in character. Through use of a variety of evidentiary presumptions, a defendant who caused harm was liable if he failed to perceive or foresee what an ordinary reasonable person would have perceived or foreseen. At the root of the common law was the presumption that every person was capable of behaving like an ordinary reasonable person, and was therefore capable of having a "guilty mind" or mens rea. The only way to evade that presumption was to invoke the insanity defense or the defense of infancy, claiming in essence: "I am not an ordinary person." The common law took such claims into account through the use of these independent defenses of insanity and infancy. It was only through these devices that an entirely subjective assessment of blameworthiness was possible.

The issue that became disputed in the 19th century centered around the criteria to be used for defining the category of offenders to whom the presumption (conclusive as to everyone else) would not be applied. Accordingly, it was often said that "insane" offenders were those that lacked the capacity to have mens rea or "criminal intent." It is important to emphasize what was meant by "mens rea" in this context. The term did not have the technical meaning, in terms of elements of the offense, that it has today. Rather, it referred to a general notion of blameworthiness. To the common-law mind, the insanity criteria were designed to identify persons who were not capable of making blameworthy choices. Thus, it is emphatically *not* the case that the "mens rea" approach prevailed at common law; not, at least, if "mens rea" is understood to have the technical meaning it now has. To the contrary, an independent defense of insanity (independent of the elements of the crime) is deeply rooted in the historical tradition of the common law.

A third line of argument made by some critics of the insanity defense relates to the role of expert testimony in the administration of the defense. It is argued that the slippery judgments that we know are difficult to make are being handed over to the clinicians who ought not be making them, and that the adjudication of insanity claims inevitably deteriorates into a battle of experts. In essence, this argument against the insanity

defense is an argument against expert testimony and against psychiatry. (I should add that Professor Morris does not object to the defense on this ground.) As I have already emphasized, the underlying question in an insanity case is a moral one, not a clinical one, and if there are problems in the administration of the defense, in my judgment they can be remedied by improving the quality of forensic evaluations, and by restricting the scope of expert testimony, and so on.

Another line of argument calls attention to the slippery slope. Professor Morris has indicated that he does not want to give special exculpatory significance to mental illness. Moreover, he does not want special rules but wants to treat the mentally ill like everyone else. It is my position that the mentally ill *are* different, that psychotic persons are not like everyone else, and, therefore, that it is appropriate to have a special rule. To this Professor Morris responds that if you open the door to an exculpatory doctrine for mental illness, how can you justify closing it on others who in some sense lack free will or whose capacity to make blameworthy choices is in some sense compromised? I commented earlier on one dimension of this line of argument—the alleged equivalence between mental illness and social adversity.

Professor Morris has also asked whether it is possible to defend a moral distinction between mental illness and religious or political fanaticism. This is a much more troublesome problem and one that merits further discussion—even though we are only focusing on a corner of the canvas. Consider, for example, the fundamentalist Christian who believes with great stridency and intensity that abortion is wrong, and constitutes murder in the eyes of God, and that every good Christian has a moral duty to take preventive action. To take the example a step further, assume a particular person believes that God has revealed His will directly to him or her, and is lead by this divine inspiration to bomb an abortion clinic in order to stop the carnage. Should compulsion of conscience, or the intensity of one's beliefs have exculpatory significance? The answer, I believe, must be "no;" recognition of such a defense would make mishmash of the criminal law, opening the door to exculpation based on passionate religious or political beliefs. I would concede, however, that in some cases it is difficult to draw the moral line between a passionately held, aberrant, and indeed irrational belief derived from religious or political premises, and a delusion symptomatic of mental illness. The slope does indeed become slippery at that point, but I believe that mental illness provides a defensible moral foothold.

The final line of argument raised in our earlier discussion is that the administration of the insanity defense involves an unacceptable risk of fabrication and of mistake and, as Professor Morris would emphasize, of ad hoc decisionmaking. He likens the administration of the insanity defense to a lottery. I would concede that the 1,500 defendants acquitted by reason of insanity in any given year across the country very well may not be the 1,500 defendants least deserving of punishment, but moral unevenness is characteristic of the administration of criminal justice as

a whole. The argument that we should abandon the effort to get it right, on the grounds that we will sometimes get it wrong, or that the decisions will appear to be arbitrary in the aggregate, is an argument with no boundaries. It is essentially an argument that the content of the penal law does not matter. The outcome in all criminal cases too often depends upon the wisdom and skill of counsel, and the success of insanity claims too often depends upon the competence of the clinicians who conduct forensic evaluations and, ultimately, upon their persuasive skills.

The system does indeed have many of the characteristics of a lottery. However, those imperfections should not dissuade us from aiming for moral coherence in the substantive content and shape of the penal law. We ought to try to get it right. We ought to try to design a system which draws the right moral lines. Criteria should be formulated so as to identify the range of cases for which exculpation seems morally appropriate while minimizing the risk that the defense will be invoked successfully in cases for which it is not morally appropriate. That is the challenge. The *mens rea* approach fails. It surely would reduce the risk of morally mistaken acquittals, but it also requires what I believe to be morally mistaken convictions. A person should be exculpated if the trier of fact determines that the person was unable to appreciate the wrongfulness of his or her behavior at the time of the offense as a result of mental disease. While I recognize that this formula involves a marginal risk of mistake, its virtue is that it preserves the jury's prerogative to bring its moral judgment to bear on the few cases that matter.

CLOSING STATEMENT: PROFESSOR MORRIS

First I must say that in many things I work in, I often find myself more emotionally attuned to those whom I oppose than to my "allies." I agree with most of what Professor Bonnie offers, and I find distasteful in the extreme many of the reasons people give for abolishing the special defense of insanity. That was the symbolic point I was going to come to.

Think of the bomb in the abortion clinic, or the bomb in the Beirut barracks. I think one must yield *as a moral matter* that those acts are indistinguishable from criminal acts committed by the psychotic. Though I assume that if St. Peter does the judging he will treat those three cases roughly as equals in moral terms, it is pretty clear that a criminal law system cannot do that. I think most people view the conscientious, civilly disobedient objector, as represented by Martin Luther King's "Letter from Birmingham Jail," as about as morally innocent as you can get. But King did recognize the need for the criminal law that convicted him. I guess it is along that line of analysis that my pattern of thought flows differently from that of Professor Bonnie. I believe that human processes are modest in their capacity to make these moral distinctions. It is significant that for more than a century and a half there has been a failure to achieve anything resembling a consensus on the scope of the defense of insanity.

Through my work for the state, I am involved in the building of prisons in mental hospitals in Illinois. But I dislike it. I would prefer building and improving psychiatric facilities in prisons. That seems more sensible to me.

I want to say just a word or two more about my submission that serious social adversity is as morally relevant, and as equally impacting on freedom of choice, as mental illness. A system of criminal law cannot accept a simple deterministic world. You cannot create a criminal justice system without making assumptions of some free will. How would you test the extreme cases involving necessary departures from those assumptions? I submit that you would not do it by moral intuition; but, rather, by observation, counting, and measuring. That is how I would do it. I certainly would not trust St. Peter's intuition because he may think other people are like himself, and they may not be. I would want to count, and if I counted, I would surely find that the freedom of choice to be criminal or not criminal is clearly more influenced by social adversity than by mental illness. But we have not given an exculpatory effect to social adversities, criminogenic though they may be, nor should we.

The same is true of mental illness. If we unpack the reality of things from the tyranny of words, as St. Augustine said, we find this: Mental illness should preclude guilt if it disproves either the *actus reus* or the *mens rea* of crime; otherwise it should be relevant only to the appropriate treatment of the convicted criminal. To make a special exception for impairments of the mind, as being peculiarly determinative of human behavior, is a classificatory error from which even-handed justice is unlikely to flow.