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Christina A. Studebaker

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Evaluating the Insanity Defense: Identifying Empirical and Moral Questions

CHRISTINA A. STUDEBAKER[†]

The Mad, the Bad, and the Innocent: The Criminal Mind on Trial. Barbara R. Kirwin. Little, Brown, 1997. Pp xiv-306.

Insanity is a legal defense that is raised relatively infrequently, and rarely pleaded successfully.¹ Yet it directly implicates the concepts of intent and blameworthiness that are at the foundation of our criminal justice system and that are often at odds with one another when insanity is pleaded. Partly for that reason, it captures the attention of the public, sometimes evoking rages, other times evoking sympathy, and often resulting in an unsettled debate. Insanity pleas force us to question our ability as a society both to detect mental illness and to predict future dangerousness, to consider whether a mentally ill defendant should be forced to stand trial, to comprehend the effect of mental illness on an individual's ability to form intent, to decide whether a mentally ill individual should be held responsible for a crime, and to determine how mentally ill defendants should be treated once a verdict of not guilty by reason of insanity ("NGRI") has been delivered. The many and varied issues raised by an insanity plea contribute to our constantly changing understanding of what it means to be "not guilty by reason of insanity," because they themselves are shaped and reshaped by current social trends and attitudes, as well as by the outcome of the most recently publicized trial in which a defendant has pled insanity. As Kirwin notes early in *The Mad, the Bad, and the Innocent*, "insanity itself is a malleable concept, constantly remade by judges, lawyers, jurors, the media, the public, and the experts according to their own personal agendas, whether they be honest or venal."²

†. Christina A. Studebaker is Post-Doctoral Fellow in the Law/Psychology Program at the University of Nebraska and Assistant Professor at Castleton State College in Castleton, Vermont.

1. Lisa A. Callahan, et al, *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 Bulletin Am Acad Psychiatry & L 331 (1991).

2. Kirwin at 19.

Dr. Kirwin has spent much of her life working in the criminal justice system, first as a probation officer and then as a clinical/forensic psychologist. In her latter role, not only was she responsible for the care of mentally ill inmates, but also she evaluated defendants' psychological condition both to determine competency to stand trial and to provide an expert opinion in insanity plea cases. In addition, Kirwin has maintained a private psychotherapy practice. This background gives her a knowledge and understanding of the intersection of the criminal justice system and the mental health system that few experts in either field have. Kirwin's goal in *The Mad, the Bad, and the Innocent* appears to be to inform and educate the public about the treatment of mentally ill individuals and individuals who feign mental illness, particularly with respect to the evaluation and disposition of defendants who plead insanity.

Kirwin's thorough discussion of the insanity plea includes an overview of the various insanity standards and their evolution over the years. She describes the jury's decision-making task in cases involving the insanity defense, and analyzes the potential influence of the media on trial proceedings and outcomes. Her background enables her to detail the nature of forensic evaluations of defendants, to report on the use of opposing expert testimony at trial, and to provide information about the treatment and disposition of individuals after trial. However, she spends much of the book focusing on specific cases and defendants who have pleaded insanity. The book provides an account of Kirwin's forensic evaluations of defendants such as Joel Rifkin, "the most prolific serial killer in New York State history";³ Ann Green, a registered nurse who suffocated two of her own children and was caught trying to suffocate a third;⁴ Stephanie Wernick, a Long Island college student who concealed her pregnancy and then suffocated her newborn upon giving birth to him in a dormitory bathroom stall;⁵ and Colin Ferguson, the 35-year-old Jamaican-born man who boarded a commuter train in New York City in 1993 and began firing a 9-millimeter handgun, killing seven passengers and injuring eighteen others, and whose defense attorney later argued that his actions were the result of "black rage."⁶ These stories provide the reader with interesting background information on forensic evaluations and the various types of crimes that might give rise to an insanity plea, but at times they seem superfluous or at least misplaced, sidetracking the reader from the more important substantive issues that Kirwin raises.

Among other things, Kirwin wants to describe the monumental task of determining whether a defendant is blameworthy and seeks to explain why juries and experts in the same case come to different conclusions and why similar cases result in different verdicts. She also examines "designer defenses."

3. Id at 37.

4. Id at 33.

5. Id at 65-68.

6. Id at 238.

Thus, the reader learns first that, although all criminal cases involve determinations of blameworthiness, cases involving insanity pleas have the added complexity of requiring a determination of 1) whether the defendant suffered from some mental illness/condition at that the time of the crime, and 2) whether that mental illness interfered with the defendant's ability either to form the intent to commit the criminal act or to know that the action was wrong.

Given the psychological nature of these questions, one might infer that the success or failure of an insanity plea turns on the expert testimony provided by a psychologist who has evaluated the defendant's cognitive abilities and functioning. But Kirwin's anecdotal evidence does not provide an unequivocal answer to this empirical question. Although expert psychological testimony may be quite influential in some insanity cases, there are many insanity cases in which the final jury verdict is at odds with expert psychological testimony provided at trial (even when opposing experts reach similar conclusions about the defendant). Kirwin attributes such results to the shortcomings of juries. Borrowing a quote from Adler, she describes juries, especially those in high-profile insanity cases, as "sincere, serious people who—for a variety of reasons—[miss] key points, [focus] on irrelevant issues, [succumb] to barely recognized prejudices to see through the cheapest appeals to sympathy or hate, and generally [botch] the job."⁷

Problematically, Kirwin believes that the jury system has worked when the final verdict is consistent with her evaluation of a defendant, and concludes that an injustice has occurred when the final verdict does not align with her evaluation. Overall, she seems to prefer a system in which insanity determinations are based solely on forensic evaluation findings, rather than dependent on a jury's evaluation of a forensic evaluation. In such a system, Kirwin would use the clinical nomenclature to determine insanity. A diagnosis of psychosis, for which the narrowest definition "refers to delusions or hallucinations that represent a major impairment in reality testing,"⁸ would establish insanity. A diagnosis of psychopathy, for which the essential feature is "a pervasive pattern of disregard for, and violation of, the rights of others,"⁹ would not. Indeed, Kirwin explicitly states her belief that "psychopaths are not insane,"¹⁰ elaborating on this in writing that they "are not mentally ill. . . . They know the difference between right and wrong; they just don't care."¹¹

Besides making insanity determinations appear overly simple, Kirwin's formulation overlooks the questions of moral responsibility that must be answered when a defendant invokes the insanity defense. It is indisputable that moral standards change with the times and reflect the general ideals and

7. Id at 25, quoting Stephen J. Adler, *The Jury: Trial and Error in the American Courtroom* xiv (Times Books 1994).

8. Kirwin at 25.

9. Id at 23.

10. Id at 31.

11. Id at 32.

attitudes of the public. Jury verdicts are influenced by the current moral standards of the public, and, in fact, they are supposed to be so influenced; a guilty verdict from a jury constitutes society's moral condemnation of the defendant. Forensic psychologists are not representative of the general public and, therefore, should not displace jurors. Kirwin might make the counterargument that judges, who actually decide over 75 percent of all insanity cases,¹² are also not representative of the public. The important issue, however, is whether a defendant has the opportunity to have his or her case decided by a jury if so desired—an opportunity that Kirwin would apparently deny criminal defendants.

Empirical studies that have examined the influence of various insanity standards on verdict decisions provide further evidence that questions of moral responsibility play a substantial role in the legal determination of insanity. As many as eight different insanity standards have been used or proposed since the inception of this defense in 13th century English common law.¹³ Despite differences among the criteria for the various insanity standards, however, research comparing the various standards has shown no effect on jury verdicts.¹⁴ This does not mean that jurors “zone out” when it comes to insanity pleas. Rather, verdicts in insanity cases have been found to be affected by the nature of the defendant's mental illness as well as the verdict options that are available (e.g., whether there is a guilty but mentally ill option).¹⁵

These findings suggest that jury verdicts are influenced by jurors' own naive notions of insanity. This fact would explain why, as Kirwin points out, juries often reach different conclusions than psychological experts, and even similar cases can result in different verdicts. More empirical research is needed to illuminate the specifics of jurors' lay notions of mental illness and insanity, and to study how these notions influence insanity verdicts. An examination of legal experts' (e.g., judges) beliefs of insanity and mental illness, which could

12. Callahan, et al, 19 *Bulletin Am Acad Psychiatry & L* at 336 (cited in note 1).

13. The eight are the wild beast standard, the M'Naghten rule, the irresistible impulse rule, the Durham rule, the ALI standard, the IDRA standard, the disability of mind standard, and diminished capacity. See Norman J. Finkel, et al, *Insanity Defenses: From the Jurors' Perspective*, 9 *L & Psych Rev* 77 (1985); Norman J. Finkel and Christopher Slobogin, *Insanity, Justification, and Culpability: Toward a Unifying Schema*, 19 *L & Human Beh* 447 (1995); James R. P. Ogloff, *A Comparison of Insanity Defense Standards on Juror Decision Making*, 15 *L & Human Beh* 509 (1991).

14. Finkel, et al, 9 *L and Psych Rev* at 77; Finkel and Slobogin, 19 *L & Human Beh* at 447; Ogloff, 15 *L & Human Beh* at 509 (all cited in note 13).

15. Finkel, et al, 9 *L and Psych Rev* at 77 (cited in note 13); Norman J. Finkel and Kevin Duff, *The Insanity Defense: Giving Jurors a Third Option*, 2 *Forensic Reports* 235 (1989); Norman J. Finkel and Sharon F. Handel, *How Jurors Construe "Insanity"*, 13 *L & Human Beh* 41 (1989); Ronald Poulson, *Mock Juror Attribution of Criminal Responsibility: Effects of Race and the Guilty But Mentally Ill (GBMI) Verdict Option*, 20 *J of Applied Soc Psych* 1596 (1990); Caton F. Roberts and Stephen L. Golding, *The Social Construction of Criminal Responsibility and Insanity*, 15 *L & Human Beh* 349 (1991); Jeffrey C. Savitsky and William D. Lindblom, *The Impact of the Guilty But Mentally Ill Verdict on Juror Decisions: An Empirical Analysis*, 16 *J of Applied Soc Psych* 686 (1986).

show whether these beliefs differ either from jurors' notions or from the formal legal standards of insanity, would shed further light on decision-making in insanity cases.

Examining lay people's notions of mental illness and insanity may also provide an understanding of why "designer defenses" sometimes work for defendants. Kirwin defines designer defenses as "instances of 'faux insanity' [in which] new and curious psychological syndromes are concocted complete with the requisite expert testimony to exonerate someone who is definitely sane, frequently psychopathic, and most frequently deserving of punishment."¹⁶ Furthermore, the defense is "carefully fabricated to fit all the pertinent facts of the case, and then tailored to individual characteristics of the defendant that might appeal to a jury—all regardless of whether any bona fide incapacitating mental illness exists."¹⁷

Examples of designer defenses include post-traumatic stress disorder as a result of child abuse, as argued by Lyle and Erik Menendez in their trials for killing their parents;¹⁸ the Twinkie defense, in which a defendant claimed that recent binges on sugar-loaded junk food significantly impaired his ability to distinguish between right and wrong at the time of the crime, as argued in the case of Dan White who shot and killed San Francisco Mayor George Moscone and gay rights activist Harvey Milk in 1979;¹⁹ and "noninsane automatism," in which a defendant claims that he or she committed a violent crime while sleepwalking and should, therefore, not be held responsible.²⁰ Kirwin argues that these defenses "often seem more logical and persuasive to the layperson than responsible psychological science does," and she warns that their proliferation can "warp our moral perspective on guilt, blame, and responsibility."²¹ While Kirwin raises legitimate concerns about designer defenses, I cannot so easily reach her conclusion that they present a reason to have judges rather than jurors decide insanity cases. She does not point to any empirical evidence to support the claim that designer defenses will be less persuasive to judges. Until such evidence is produced, it is hard to justify altering the criminal justice system so fundamentally by prohibiting jurors from deciding insanity cases.

Whether the presentation and consideration of designer defenses affects people's general attitudes about guilt, blameworthiness, and responsibility in insanity cases is another important empirical question that is not addressed significantly in the book. Instead, Kirwin seems to be primarily concerned about the potential these defenses (and, particularly, mass publicity about them) have for perpetuating and even exacerbating stereotypes of and biases against the mentally ill. In addition, she worries that the proliferation of

16. Kirwin at 24.

17. *Id.* at 111.

18. *Id.* at 100.

19. *Id.* at 56.

20. *Id.* at 125.

21. *Id.* at 112.

designer defenses is causing a backlash against all defendants who plead insanity, including those who are truly mentally ill. She anticipates a two-fold effect. First, people may begin to consider all insanity pleas as less valid, thereby increasing the likelihood of guilty verdicts rather than NGRI verdicts. This outcome is unfortunate for the mentally ill defendant, who will be a misfit in prison. Although prisons may be seen as country clubs in comparison to mental hospitals,²² Kirwin argues that the mentally ill inmate is misplaced in a “system that is better suited to the management of antisocial types.”²³ As evidence, she states that mentally ill inmates usually become victims of attacks by other inmates and are more likely to be killed as the result of an attack by other inmates.²⁴ In addition, without proper mental health treatment, mentally ill inmates may sink deeper into psychosis or even attempt suicide. Second, because insanity may be viewed as increasingly prevalent and unpredictable, the general public’s fears of insanity and of the insane may intensify. Kirwin asserts that, as a result of these prejudices, “we are treating the insane worse than we treat criminals.”²⁵

Her analysis of insanity cases leads Kirwin to propose the following three prescriptions for insanity trials: 1) there should be no television cameras in the courtroom, 2) the courts should not allow an adversarial system between defense and prosecution experts, and 3) there should be no jury trials. Although Kirwin’s recommendations are borne of the best intentions both for society as a whole and for mentally ill defendants, I would not advocate implementing them—after all, she would do away with two of the most fundamental aspects of our criminal justice system—without the empirical research and data to support their efficacy. Otherwise, we might just be trading one bad system for an equally bad or worse system. The conclusory arguments Kirwin provides to support these proposals, however, do highlight important and interesting questions in need of controlled and rigorous study.

Kirwin believes that television cameras should not be in the courtroom in insanity cases because their presence “[influences] both the process and the outcome of the trial.”²⁶ In addition, she states that, when television cameras are present, “[e]veryone in the courtroom wittingly or not ends up grandstanding for the lens in ways that reduce even further the lowest common denominator of testimony and unfairly dramatize the case for both public and jury.”²⁷ No empirical data exists to support this claim. Research that has examined the effect of cameras on witness behavior has found that mock witnesses and mock jurors report greater witness nervousness, distraction, and media awareness when video cameras are in the courtroom, but that the presence of cameras does not impair witnesses’ ability either to recall accurate-

22. *Id.* at 257.

23. *Id.* at 258.

24. *Id.* at 257.

25. *Id.* at 252.

26. *Id.* at 279.

27. *Id.*

ly details of a crime or to communicate effectively.²⁸ Importantly, however, this research does not involve cases in which the defendant pleads insanity. Research is needed that examines whether there are special characteristics of insanity cases that would cause the presence of cameras to have an effect on trial processes or outcomes. This research should also include evaluations of judge, attorney, and juror behavior, in addition to witness behavior.

Kirwin's second proposal, to abolish adversarial trials when a case involves the insanity defense, derives from her assertion that "[t]he adversarial system tends to prolong a trial with the testimony of competing and contradicting experts."²⁹ She advocates the organization of three-member advisory panels composed of highly trained and experienced mental health professionals who would serve as independent consultants to the courts. At this time, it is unclear that mental health professionals would be any less likely to compete with or contradict one another when they serve together on a panel than when they testify on opposing sides in court. Additional elements of this proposal include a call for standardization in the format of forensic exams and the structure of the final report, the design of more accurate and reliable tests for psycho-legal competencies, and continued attention to issues concerning the prediction of dangerousness. But again, before adoption of such a radically different system, the viability of each element of the proposal should be addressed empirically.

Kirwin's final recommendation is that specially trained and credentialed judges, rather than juries, try insanity cases. Kirwin believes that judges will be better able to identify the relevant legal issues in a case. While this may be true, this assertion is not supported by evidence that suggests that judges are not affected by the same stereotypes of and prejudices against the mentally ill that Kirwin worries taint juror verdicts in insanity cases. In fact, Kirwin herself manifests some concern about judge bias; as part of this proposal, she calls on mental health advocacy groups to lobby for programs to educate judges about both mental illness and the insanity defense.

The Mad, the Bad, and the Innocent provides a comprehensive picture of the insanity defense, elucidating the web of pretrial, trial, and posttrial issues that are involved. The insanity defense is a complex topic, and it is unlikely that a solution that is satisfactory to all parties will ever be reached. However, moral questions can be separated from empirical ones, and steps can be taken to provide data for the empirical ones. The ways in which this data is then used to improve the operation of the criminal justice and mental health systems in insanity cases will depend on a judgment of what is meant by "improving" the systems, and on the importance that society attaches to addressing these issues.

28. Eugene Borgida, Kenneth G. DeBono, and Lee A. Buckman, *Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions*, 14 L & Human Beh 489 (1990).

29. Kirwin at 281.

