Law Reform Essay Competition 2023: Runner-up, Graduate Diploma in Law
'Criminally insane or just mentally ill? A case for the reform of the insanity and automatism defences' by Emily Edwards Blair

Introduction

In recent years, there has been a surge in the number of incarcerated individuals with mental health issues.[1] Despite sentencing guidelines emphasising treatment, many individuals with mental illnesses receive custodial sentences. This essay explores the need for reform in the insanity and automatism defences to protect mentally ill individuals from undue harm in custody. By aligning these defences with modern psychiatry, we can redirect mentally ill defendants towards the treatment they require instead of incarceration. This essay focuses on the insanity and automatism defences, excluding discussions of diminished responsibility and intoxication.

Mental illness in the Criminal Justice System (CJS)

A significant proportion of offenders in prison have poor mental health, with little data for the rest of the CJS.[2] The Institute of Psychiatry estimates differently; over 50% of prisoners are thought to have mental health conditions such as anxiety, depression or PTSD; 15% are estimated to have specialist mental health needs and 2% are thought to have serious mental health problems.[3] This is considerably higher than the general population; in 2016 19.7% of the population suffered symptoms of anxiety or

[1] National Audit Office, 'Mental Health in Prisons' (2017) <https://www.nao.org.uk/reports/mental-health-in-prisons/> Accessed 3 December 2022.

[2] National Audit Office, 'Mental Health in Prisons' (2017) <https://www.nao.org.uk/reports/mental-health-in-prisons/> Accessed 3 December 2022.

[3] Mental Health Foundation, 'Jail can be Scary' [2019] <https://www.mentalhealth.org.uk/explore-mental-health/blogs/jail-can-be-scary-mental-health-prison> accessed 2 December 2022.

depression.[4] Given this difference, more needs to be done to provide for mentally ill offenders; mental health conditions routinely worsen on entry into prison, with increased risks of self-harm and suicide.[5]

The Female Offender Strategy highlights 55% of women and 37% of men report feeling depressed on entering prison; 25% of women and 12% of men report feeling suicidal, and 40% of women and 25% of men report other mental health issues.[6] Forrester et al. found that nearly 50% of women surveyed had at least one mental health need, with nearly 10% having psychosis.[7] The Corston Report (TCR) found that 70% of women and 50% of men need detoxification on entry into prison.[8] It must therefore be asked if prison is an appropriate place to treat such complex mental disorders.

Women in the CJS present with specific and complex needs which are often ignored. Women are more likely to have suffered domestic abuse, with many having brain injuries caused by abuse.[9] Trauma from adverse childhood experiences is more prevalent among female offenders, which is linked to increased likelihood of mental health conditions.[10] Trauma and its effects are widely understudied, and a more humane approach to offenders must be developed to prevent further traumatisation of vulnerable individuals. TCR found that strip searching was used excessively, which is

---

[4] J. Evans, I. Macrory, and C. Randall, 'Measuring national wellbeing: Life in the UK' (2016) ONS <https://www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/articles/measuringnationalwellbeing/2016#how-good-is-our-health> accessed 3 December 2022.

[5] K.J.C. Bradley, 'The Bradley Report: Lord Bradley's Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System' [2009] Department of Health 1, 7.

[6] Ministry of Justice, Female Offender Strategy 2018) <https://www.gov.uk/government/publications/female-offender-strategy> accessed 1 December 2022.

[7] A. Forrester and others 'Alternatives to custodial remand for women in the criminal justice system: A multi-sector approach' (2020) 30(2-3) Criminal behaviour and mental health 68 <https://doi.org/10.1002/cbm.2144> accessed 2 December 2022.

[8] Jean Corston, 'The Corston Report: A review of women with particular vulnerabilities in the criminal justice system' (2007) Home Office <https://www.basw.co.uk/system/files/resources/basw_31011-5_0.pdf> accessed 3 December 2022 19.

[9] Ministry of Justice, Female Offender Strategy 2018) <https://www.gov.uk/government/publications/female-offender-strategy> accessed 1 December 2022; and The Disabilities Trust 'Making the link: Female offending and brain injury' (2019) <https://www.thedtgroup.org/media/163444/making-the-link-female-offending-and-brain-injury.pdf> accessed 19 November 2022.

[10] K. Williams, V. Papadopoulou, and Booth, N., 'Prisoners' childhood and family backgrounds: Results from the Surveying Prisoner Crime Reduction (SPCR) longitudinal cohort study of Prisoners' (2012) Ministry of Justice <https://www.gov.uk/government/publications/prisoners-childhood-and-family-backgrounds> accessed 24 November 2022.

degrading and inappropriate.[11] This and other degrading treatments, could be a breach of Article 3 of the European Convention on Human Rights (ECHR) when considering the vulnerability of female offenders.

Men experience mental health problems which are exacerbated by societal expectations of them under the patriarchy, and are less likely to receive mental health support as a result. Ultimately this results in a suicide rate 300% higher than women's, and men from minority communities present higher rates of suicide.[12] In underfunded prisons, men are less likely to receive the help they need, putting courts and prisons at risk of ECHR violations.

Courts must be more attentive to the rights of offenders under the ECHR.[13] Sentencing mentally ill offenders to poorly equipped facilities risks breaching Articles 2 and 3 of the ECHR. *Price* found that UK courts failed to take adequate steps to ensure appropriate facilities to manage severe disabilities.[14] Furthermore, in 2019 the Health and Social Care Committee found the government to be failing to ensure the safety of prisoners and protect their human rights.[15]

In conclusion, there is a high prevalence of mental health needs in the CJS, but only definitive data for incarcerated individuals, necessitating further research, especially among at-risk men. The CJS must recognise the specific needs of offenders and provide an adequate defence for mentally ill offenders which allows an opportunity for rehabilitation.

The Insanity and Automatism Defences

The insanity defence (ID), aimed at protecting mentally ill defendants from unfair prosecution, is in need of reform due to multiple shortcomings. The term "insanity" is outdated and stigmatising, deterring those who need it. Mentally ill defendants are held

---

[11] Jean Corston, 'The Corston Report: A review of women with particular vulnerabilities in the criminal justice system' (2007) Home Office <https://www.basw.co.uk/system/files/resources/basw_31011-5_0.pdf> accessed 3 December 2022 5, 17.

[12] Mental Health Foundation, 'Men and Mental Health' (mentalhealth.org.uk) <https://www.mentalhealth.org.uk/explore-mental-health/a-z-topics/men-and-mental-health> accessed 25 November 2022.

[13] Aibhe O'Loughlin, 'Sentencing mentally disordered offenders in England and Wales: Towards a rights-based approach', (2021) (2) Crim. L. R. 98, 105.

[14] *Price v United Kingdom* (2002) 34 E.H.R.R. 53; [2001] Crim. L.R. 916

[15] House of Commons Health and Social Care Committee, 'Prison Health' (2019) House of Commons, para.9.

to a standard set 180 years ago, under M'Naghten's Case, which creates a gap between the law and modern understandings of psychiatry and psychology.

First, the ID requires a defect of reason, which must affect the cognitive or intellectual faculties of memory, reason and understanding, and specifically excluding the emotional and compulsive issues associated with many mental illnesses.[16] This fails to align with modern psychiatry, making it difficult for doctors to provide evidence.

Second, a disease of the mind must be present, encompassing a range of conditions, many of which present no relation to mental illness such as epilepsy and diabetes.[17] As stated by Hughes LJ, "the key thing to understand is that whether there is or not a "disease of the mind"… has to be, a question of law and not medical usage…".[18] Yet the law calls upon medical professionals to provide expert evidence in cases; how can they give comment on a matter of law which is no longer a credited theory in their field? Reform is clearly necessary to bring theories of medicine and practices of law in line.

Third, the defendant must not have known what they were doing or that it was wrong, further narrowing the defence. The first limb, that the defendant did not know the "nature and quality" of their act results in the prosecution of those who cannot control their compulsions, emotions or actions. Further, under s2 of the Trial of Lunatics Act 1883 and AG's Reference (No. 3 of 1998), the prosecution must only prove that the defendant performed the actus reus of the offence, and not the mens rea (MR).[19] It is unjust that defendants without MR should be prosecuted, and is an unfair criminalisation of mental illness.

The second limb of the nature and quality tests is that of wrongness referring to the defendant's knowledge of legal and moral wrongness.[20] Mackay argues that the wrongness limb is interpreted incorrectly by psychiatrists and they do not understand the questions posed by the M'Naghten rules.[21] It is unfair to ask a question of legal knowledge over moral justification; a delusional defendant may not believe that their actions are wrong but still know they are illegal, as in *Windle*.[22] The Butler Committee criticised this aspect of the ID, stating that "even persons who are grossly disturbed

[16] *Bratty v AG for Northern Ireland* [1963] AC 386.

[17] [1843] 10 Cl. & R 200.

[18] *Coley, McGhee, Harris* [2013] EWCA CRIM 223 at [17]

[19] [1999] 3 WLR 1994.

[20] *Johnson* [2007] EWCA Crim 1978.

[21] R.D. Mackay, "More Facts about the Insanity Defence" [1999] *Crim LR* 715

[22] [1952] 2 QB 826.

generally know that murder and arson are crimes".[23] Where the purpose of the defence is to protect mentally disordered defendants, and prevent them from being sentenced as mentally well, asking a question of their cognitive understanding of legal wrongness is unjust.

Moreover, the burden of proof falls on the defendant to demonstrate their insanity, creating an imbalance with the prosecution especially when the prosecution does not have to prove MR, it should not be the defendant's duty to prove its absence.[24] If successful, defendants receive a special verdict, "Not Guilty by Reason of Insanity," (NGRI) which carries stigma. Mackay argues that defendants who could plead insanity plead guilty to avoid this stigma, further arguing that successful NGRI verdicts remain low, and that a new defence is needed to create a fairer system for mentally ill defendants.[25]

The second defence available to a mentally ill defendant is automatism, defined as not being conscious of their actions when performing the illegal act or omission.[26] This must result in a total loss of control, or the defence will not be allowed.[27] The defendant cannot be at fault, demonstrated in *Kay v Butterworth* where D fell asleep while driving.[28] Reflex actions such as a sneeze, spasm or reflex all fall under automatism.[29] However, automatism only applies where the source is external; if the source of the action is internal, this falls under insanity. Therefore sleepwalking, diabetes and epilepsy, fall under insanity.[30] Self-induced automatism eliminates the defence. A successful plea of automatism results in complete acquittal, unlike insanity, which results in the special verdict NGRI.

Ebrahim has noted that dividing automatisms into sane and insane are nonsensical medically; "[a] blow to the head (external) only produces automatism because it disrupts the functioning of the neurons in the brain (internal)", resulting in a very

---

[23] Butler Committee, *The Report of the Committee on Mentally Abnormal Offenders*. (1975, Cmnd 6244), para 18.8.

[24] Janet Loveless, Mischa Allen and Caroline Derr, 'Complete Criminal Law: Text, Cases and Materials' (7th ed, Oxford University Press, 2020), 327.

[25] Ronnie Mackay, BJ Mitchell and Leomie Howe, 'Yet More Facts about the Insanity Defence' (2006) 5 Crim LR 399; Ronnie Mackay, 'Ten More Years of the Insanity Defence' (2012) 12 Crim LR 946.

[26] *Bratty* [1963] AC 386.

[27] *Attorney-General's Reference No 2 of 1992* [1993] 3 WLR 982

[28] (1945) 173 LT 191.

[29] *Hill v Baxter* [1958] 1 All ER 193.

[30] *R v Burgess* [1991] 2 QB 92.

narrow defence.[31] The internal/external divide therefore results in more defendants being forced to use the ID when they should have access to automatism. If found guilty, or NGRI, they will be sentenced when they should not have been found criminally liable.

In conclusion, both defences need reform. They are not based on medical fact, resulting in confusing guidelines. The internal / external divide needs to be abolished, and an aspect within the ID to account for irresistible impulse would create a fairer defence.

Case law

Recent case law demonstrates the failings of the insanity and automatism defences. *Coley, McGhee, Harris*, illustrates the challenges of using these defences. Coley was a young cannabis-addicted individual who experienced a psychotic episode and stabbed his neighbour. He claimed to have experienced a 'black out', with no memory of the attack.[32] However, due to D's voluntary consumption of cannabis, both insanity and automatism were unavailable as defences to D.[33] This illustrates a failure to recognize addiction as a symptom of mental illness and the need for rehabilitation rather than criminalization.

R v Keal demonstrates medical evidence of serious mental illness being overlooked due to an outdated law. The appellant, who had complex mental health needs, appealed against three counts of attempted murder after attacking his mother, father and grandmother. He was denied the defence despite being in psychosis at the time of the attack.[34] Wortley argues this demonstrates a need for an irresistible impulse defence; further noting that the "rejection of his insanity plea exemplifies the limited scope of the defence.. [demonstrating] the continuing need for reform".[35] Mackay argues that *Keal* demonstrates the failure of the defence and that the criteria is impossible to satisfy.[36] Thomas and Ball argue that *Keal* sets a precedent that defendants must prove that they did not know their actions were both legally and morally wrong.[37]

---

[31] I Ebrahim and others, 'Violence, Sleepwalking and the Criminal Law: (1) The Medical Aspects' (2005) 8 Crim LR 601.

[32] [2013] EWCA CRIM 223.

[33] [1977] AC 433.

[34] [2022] EWCA Crim 341.

[35] Natalie Wortley, 'M'Naghten rules: R v Keal' (2022) 9 Crim LR 773.

[36] Ronnie Mackay, 'M'Naghten Rules (Letter to the Editor)' (2022) 12 Crim LR 1012.

[37] Mark Thomas and James Ball, 'Morality and command delusions: reviewing the requirement of wrongdoing in the M'Naghten Rules' (2022) 86(2) J. Crim. L. 130.

In conclusion, these cases underscore the defence's failure to protect mentally ill individuals and prevent their unjust criminalization. There is a need for reform to ensure fair treatment and more research in this area. Additionally, the internal/external divide forces some to plead insanity when automatism should apply, resulting in further injustices within the criminal justice system. The case law demonstrates the failure of the insanity and automatism defences to safeguard vulnerable individuals and prevent unfair criminalisation.

Reform

Reforming the insanity and automatism defences is vital to providing a fairer system of criminal justice. Hogg argues that it is dangerous to trust one defence to account for all incapacities on the grounds of mental illness.[38] Calls for reform have persisted over seven decades. The 1953 Royal Commission on Capital Punishment classed the term "disease of the mind" as outdated, inaccurate and superficial, further than the term "insanity" was a disincentive to those who may otherwise have used the defence.[39] The Royal Commission noted the absence of an irresistible impulse defence was greatly limiting on the types of mental illness which were permissible under the defence. It recommended that the jury should be left to decide whether the defendant was suffering from "disease of the mind".[40]

In 1975, the Butler Committee proposed modernising the M'Naghten Rules, modernising the language and shifting the burden of proof to the prosecution. [41][42] The committee recommended an alternative to the insanity defence "not guilty on evidence of mental disorder", however this largely focused on psychosis.[43] Broader reforms are needed to cover all mental illnesses. More recently, the Law Commission's 2013 discussion paper recommended replacing common law defences with a "statutory defence of not criminally responsible by reason of recognised medical condition" (RMC).[44] This defence would allow those with uncontrollable impulses to seek

[38] Claire Hogg, 'The insanity defence: an argument for abolition' (2015) 79(4) Crim LR 250, 254.

[39] Royal Commission, *Report of the Royal Commission on Capital Punishment* (Cmd 8932, 1953).

[40] John Kaplan, Robert Weisberg and Guyora Binder, 'Criminal Law - Cases and Materials' (7th ed, Wolters Kluwer Law & Business, 2012), 623-3.

[41] Nicola Monaghan, 'Criminal Law Directions' (6th ed, Oxford University Press, 2020), 359.

[42] Timothy Jones, 'Insanity, automatism, and the burden of proof on the accused' (1995) 111(3) Law Quarterly Review, 475.

[43] Nicola Monaghan, 'Criminal Law Directions' (6th ed, Oxford University Press, 2020), 359; Law Commission, *Insanity and Automatism Supplementary Material to the Scoping Paper* (2012), 178-183.

[44] Law Commission, *Criminal Liability: Insanity and Automatism* (2013), para 4.159.

protection and eliminate the divide between "internal" and "external" causes of mental illnesses.[45]

However, the discussion paper's proposals have been criticised. Stanton-Ife has criticised the emphasis the paper places on the defendant "wholly lack[ing] capacity" as "absurdly stringent".[46] Not all mental illnesses cause complete loss of control; in *Keal*, the prosecution noted that the defendant apologised to his family as he attacked them, indicating that he was still in control of some of his actions.[47] Mackay has also criticised the proposals for excluding "acute intoxication" from the RMC defence.[48] Mackay argues that the RMC defence should include "fault-free" insanity, instead providing help and support for mentally ill defendants with strengthening of supervision orders and ancillary orders to prevent RMC being used for driving offences. Furthermore, Mackay notes that it would be more appropriate to penalise mentally ill defendants who have not taken medication, with a special verdict for these cases.[49]

Hogg argues that the ID should be abolished, and is in favour of altering pre-existing defences such as duress.[50] The current test for duress, established in *Graham*, and reiterated in *Howe* asks the jury:

1. Was the defendant impelled to act as he did because, as the result of what he reasonably believed the person issuing the threat had said or done, he had good cause to fear that if he did not act, that person would kill him or cause him serious injury?
2. If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded in the way the defendant did?[51]

Hogg argues that a "reasonableness" element should be added to the defence, which would allow for person-to-person analysis and would make the defence available to mentally disordered defendants. Instead of comparing the defendant's behaviour to

---

[45] ibid, para 4.160.

[46] John Stanton-Ife, 'Total Incapacity' in Ben Livings, Alan Reed and Nicola Wake (eds), *Mental Condition Defences and the Criminal Justice System* (Cambridge Scholars Publishing, 2015), 155.

[47] [2022] EWCA Crim 341 at [3].

[48] Law Commission, *Criminal Liability: Insanity and Automatism* (2013), para 4.161.

[49] Ronnie Mackay and David Hughes, 'Insanity and blaming the mentally ill - a critique of the prior fault principle in the Law Commission's discussion paper' (2022) 1 Crim LR 2022 21.

[50] Claire Hogg, 'The insanity defence: an argument for abolition' (2015) 79(4) Crim LR 250, 256.

[51] Paraphrased from *R v Howe* [1987] 1 AC 417, cited in Michael Allen and Ian Edwards, Criminal Law' (16th ed, Oxford University Press, 2021), 201.

that of the "sober person of reasonable firmness", the jury could consider the defendant's mental state at the time of the act, with supporting medical evidence.[52] This would be a significant step towards the decriminalisation of mental illness, preventing mentally ill defendants from being unfairly convicted and sentenced.

It seems unlikely, however, that Parliament will move towards creating such a defence. The proposals of the 1953 Royal Commission, the 1975 Butler Committee and the 2013 Discussion Paper have all been ignored by Parliament. Mackay has called on the courts to update the M'Naghten Rules, stating "comprehensive statutory reform… seems unlikely in the near future".[53] However, this would involve a case being taken to the House of Lords, resulting in costly legal proceedings. The feasibility of this seems unlikely, as defendants with mental illness are often from low income backgrounds, and consistent cuts to legal aid have resulted in fewer barristers willing to take on this kind of work.

There have also been calls for reform to the automatism defence, notably to include those who are victims of coercive control. Elkington argues that abused women who commit crimes under coercion have no defence available to them, especially since the repeal of the marital coercion defence in 2014.[54] In theory, they could plead duress, however duress requires threat of death or serious injury, and is not available when the defendant has voluntarily associated with a violent criminal. Elkington notes that coercive control is not about violence, it is about psychological control and threat, thus, as there is rarely an immediate threat of death or violence. This means that duress is not available as a defence to the majority of women who are coerced into crime. Automatism could be altered to provide a defence, if instead of being a "complete" loss of control, it was an "effective" loss of control. Elkington argues that this could reduce criminalisation of victims of domestic abuse.[55]

Overall, the laws surrounding insanity and automatism need complete overhaul. Providing multiple defences for those who are suffering from mental illness will prevent unfair criminalisation of mental illness. In addition, sentencing guidelines need to prioritise rehabilitation over punishment, and allow more mentally ill defendants to seek medical treatment. This requires significant reform to mental health services,

---

[52] Claire Hogg, 'The insanity defence: an argument for abolition' (2015) 79(4) Crim LR 250, 256.

[53] Ronnie Mackay, '"Nature", "quality" and mens rea - some observations on "defect of reason" and the first limb of the M'Naghten rules' (2020) 7 Crim LR 588, 596.

[54] Antisocial Behaviour, Crime and Policing Act 2014 s 177 cited in Amy Elkington, 'Allowing a defence to those who commit crime under coercive control' (2022) 86(5) J. Crim. L. 295, 301.

[55] Amy Elkington, 'Allowing a defence to those who commit crime under coercive control' (2022) 86(5) J. Crim. L. 295, 298-302.

which have suffered under austerity measures. Prisons need registered psychiatrists on their staff, and to provide more counselling and therapy to prisoners, thus reducing reoffending. Forrester et al. have argued that the North American system of mental health courts could be implemented in England and Wales, allowing the needs of mentally ill defendants to be considered directly in sentencing.[56]

Reforms would require upheaval of the criminal justice system; to provide defendants with comprehensive screening for mental illness. However, current Liaison and Diversion Services do provide some remit for mentally ill defendants. Improving the scope of these services, standardising them nationwide, providing more staff, funding and psychiatrists would allow sentencing courts to fairly sentence mentally ill defendants, giving them the chance at treatment instead of criminalisation and punishment.[57] In addition, providing more beds in secure psychiatric facilities would prevent transfer delays and allow sentencing courts to use hospital orders more frequently.

Conclusion

In conclusion, the insanity and automatism defences fail to protect mentally ill individuals. While sentencing guidelines emphasise treatment, there is a criminalisation of mental illness which results from a failure to provide mentally ill defendants with adequate defences.

The ID relies on outdated terminology, creating a gap between the law and modern medicine. In addition, it fails those who suffer from emotional or compulsive symptoms of mental illness, and the verdict NGRI results in stigma, deterring use of the defence. Automatism is also problematic, primarily due to the internal/external divide and resulting narrow application of the law. This forces defendants to use insanity instead of automatism, creating further injustices. Recent case law highlights failings of both defences, demonstrating a need for reform.

Reform efforts are ongoing, and are vital to protect the rights and well-being of mentally ill offenders. These changes would necessitate an upheaval of the criminal justice system, requiring comprehensive screening for mental illness, improved

---

[56] A Forrester and others 'Alternatives to custodial remand for women in the criminal justice system: A multi-sector approach' (2020) 30(2-3) Criminal behaviour and mental health 68 <https://doi.org/10.1002/cbm.2144> accessed 2 December 2022.

[57] A Forrester and others, 'Alternatives to custodial remand for women in the criminal justice system: A multi-sector approach' (2022) 30(2-3) Criminal behaviour and mental health 68 <https://doi.org/10.1002/cbm.2144> Accessed 2 December 2022.

services, and additional secure psychiatric facilities. Ultimately, this requires significant funding which is currently unavailable. Reforms prioritising rehabilitation and treatment, promoting a deeper understanding of mental illness, could protect the rights of mentally ill offenders under the ECHR.

Word Count: 2980