Corrective and Social Psychiatry, 32(4):109
Oct 1986

The Straits of Insanity in Alaska

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In 1884, twenty-seven years after purchase of the Alaska Territory from Russia, the U.S. Congress began codifying law in Alaska in an act providing that "the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." (Alaska Government Act of 1884, Chapter 53, #7, 23, Statute 25-36, 1884). Fifteen years later Congress specifically approved a criminal code for Alaska, again based primarily on Oregon law (Act of March 3, 1889, Chapter 429, 430, Statute 1253). In the subsequent seven decades Alaska Territorial and State Legislatures amended these basic laws in piecemeal fashion responding to momentary needs, with the inevitable result a hodgepodge of out-dated statutes, obsolete terminology, overly vague or overly specific and sometimes unconstitutional provisions, unsuitable for a modern state. Oregon had revised its own criminal code in 1971.

The ninth Alaska Legislature addressed this problem in 1975, funding the Criminal Code Revision Commission with staff support from the Criminal Justice Center, University of Alaska. The Commission relied for reference on the recently revised criminal codes of Oregon (1973), New York (1975), Arizona (1975), Missouri (1979), Hawaii (1975), Arkansas (1975), Illinois (1972), Washington (1976), and Montana (1975). The New Code, effective January 1, 1980, featured five classes of severity of crimes according to the culpable mental state of the defendant, with uniform penalty provisions for each class; Classes A, B and C for felonies and Classes A and B for misdemeanors (A.S. 11.81.250; A.S. 12.55.035; A.S. 12.55.125; A.S. 12.55.135; A.S. 12.55.140). Judicial discretion in sentencing is allowed for misdemeanants and most first-time felons only; judges may refer cases to a three judge panel when the prescribed sentence seems unjust. Four culpable mental states are defined: *intentionally, knowingly, recklessly* and *criminally negligent*, concepts applied consistently in establishing degrees of severity for various offenses. The Commission recommended only one degree of murder, but the legislature retained the more traditional two degrees of murder differentiated essentially by premeditation in first degree murder. "Heat of passion" is retained as a defense when there was serious provocation by the intended victim; such defendants are guilty of manslaughter (A.S. 11.41.115).

The Culpable Mental States (A.S. 11.81.900)

(1) a person acts *intentionally* with respect to a result described by provisions of law defining an offense when his conscious objective is to cause that result;

(2) A person acts *knowingly* with respect to conduct or to a circumstance described by a provision of law defining an offense when he is aware that his conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless he actually believes it does not exist; a person who is unaware of conduct or a circumstance of which he would have been aware had he not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) a person acts *recklessly* with respect to a result or to a circumstance described by a provision of law defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of

it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which he would have been aware had he not been intoxicated acts recklessly with respect to that risk;

(4) a person acts with criminal *negligence* with respect to a result or to a circumstance described by a provision of law defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

The code distinguishes between three elements of offenses to which culpable mental states apply: (1) the nature of the conduct: (2) the circumstances surrounding the conduct; and (3) the result of the conduct.

> The first element, conduct, involves the nature of the proscribed act or the manner in which the defendant acts. Kidnapping, for example, requires that one person restrain another. The conduct might be the locking of the only door to a windowless room. *Knowingly* is the culpable mental state applicable to conduct. The second element, circumstances surrounding the conduct, refers to a situation having a bearing on the actor's culpability. Kidnapping requires that the person inside the room not consent to being restrained. Lack of consent is an example of a circumstance crime. *Knowingly, recklessly,* and *criminal negligence* are the culpable mental states associated with the existence of circumstances. The result of the actor's conduct constitutes the final element. Kidnapping can occur if the victim is exposed to a substantial risk of serious physical injury. *Intentionally, recklessly* and *criminal negligence* are the culpable mental states associated with results.

When a statute in the Code provides that a defendant must *intentionally* cause a result, the state must prove that it was the defendant's conscious objective to cause that result. This culpable mental state is comparable to the existing form of culpability commonly referred to as "specific intent." Bribery, for example, requires that the defendant confer a benefit upon a public servant with intent to influence him; the state must prove that it was the conscious objective of the defendant to cause the public servant to be influenced.

Under the Code, *knowledge* requires an awareness on the part of the defendant that his conduct is of the nature described by the statute defining the offense or that the circumstances described by the statute exist. It is not required that the defendant know that his conduct is prohibited by law (*See* A.S. 11.81.620, *supra*). The definition also covers the situation where a person deliberately avoids acquiring knowledge by closing his eyes (sometimes referred to as "willful blindness") by providing that "when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless he actually believes it does not exist."

Whether *knowing* should be defined subjectively or objectively was one of the issues most debated by the Subcommission. Under the Code, the test for knowledge is a subjective one - the defendant must actually be aware of the fact critical to culpability or of at least a substantial probability of its existence. A defendant who is unaware of the critical fact or of a substantial probability of its existence does not *know,* regardless of whether a reasonable man would have been aware. Note, however, that a person who is not aware because he is voluntarily intoxicated is held, nevertheless, to have acted *knowingly.*

When a statute in the Code provides that a person must *recklessly* cause a result or disregard a circumstance, criminal liability will result if the defendant "is aware of and consciously disregards a substantial and unjustifiable risk that that result will occur or that the circumstance exists." The test for *recklessness* is a subjective one - the defendant must actually be aware of the risk. On the other hand, if *criminal negligence* is the applicable culpable mental state, the defendant will be criminally liable if he "fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." The test for *criminal negligence* is an objective one - the defendant's culpability stems from his failure to perceive the risk.

Both terms require the risk to "be of such a nature and degree" that either the disregard of it (in the case of *recklessness*) or the failure to perceive it (in the case of *criminal negligence*) constitutes a "gross deviation" from the standard of conduct or care that "a reasonable person would observe in the situation." This definition of the applicable risk involved insures that proof of ordinary civil negligence will not give rise to criminal liability. Sen.J. 139-143 (1978) (emphasis added).

Code Provisions Relating To The Mentally Ill Offender - A Complete Emendation

Effective October 1, 1982, nearly every statute pertaining to the way in which the mentally ill offender is treated by the Alaska criminal justice system was revised. The amendments addressed the diminished capacity issue, the insanity defense, the post-insanity verdict commitment procedures and added a new concept, *guilty but mentally ill.*

The result in Alaska during the first year since the law took effect has reduced the amount of successful insanity pleas to zero and has resulted in a sharp decline in the number of defendants who attempt to plead insanity in any of its forms. We shall see some of the reasons why in this article.

The Diminished Capacity Defense

Prior to the 1982 revisions, Alaska's statute regarding diminished capacity was unremarkable, consistent with the Constitutional principle that the prosecutor must prove all elements of a crime beyond a reasonable doubt, including *mens rea,* the fact that the offender acted on his own volition (In Re Winship, 397 U.S. 358, 1970). The only two legislative attempts to abolish this insanity defense were overturned specifically because they did not allow defendants to contest the existence of *mens rea* (State v. Strasbourg, 110 P. 1021, Wash. 1910; Sinclair v. State, 132 So. 581, Miss. 1931). In the 1982 revisions, Alaska lawmakers took pains to clarify that defendants have access to the diminished capacity defense by asserting any mental illness that would negate the presence of the culpable mental states described above.

This section recognizes that notwithstanding the revised definition of insanity in AS 12.45.083, the state must establish every element of the crime charged against the defendant beyond a reasonable doubt. To the extent that a defendant is able to raise a reasonable doubt that a mental disease or defect made it impossible for him to act with the culpable mental state required for the commission of the crime, this section *requires the defendant to be found not guilty by reason of insanity* regardless of whether the defendant could have established by a preponderance of the evidence the affirmative defense of insanity (emphasis added). (House J. Suppl. #63 at p. 7 (June 1, 1982).)

If a defendant is successful at trial in convincing the factfinder that he lacked the culpable mental state because of mental disease or defect, he is to be found not guilty by reason of insanity. This is a major departure from Alaska law as well as the way the issue has been dealt with all over the United States for the past century.

The apparent reasoning for this change relates to developing law on post-insanity acquittal commitment procedures. Following a successful plea of insanity, in many states, including Alaska, the government has had to meet a lesser burden of proof to commit the defendant to its psychiatric institutions as a result of his dangerous propensities. In normal civil commitment, the government must bear its burden by at least clear and convincing evidence. In post-insanity acquittal commitment procedures, however, the courts have reasoned that since the issue of a defendant's insanity in a criminal case is not reached until after a jury has determined beyond a reasonable doubt that the defendant has perpetrated the acts that would constitute a crime, but for the existence of the insanity defense, the burden may be shifted *to the defendant* to establish his non-dangerousness *(State v. Alto,* 589 P. 2d 402, Alaska 1979).

Alaska's diminished capacity statutes logically extend this rule to the diminished capacity defense, prescribing that a verdict of "not guilty by reason of insanity" results, rather than simply a verdict of "not guilty" which would have been the result under former law. Under prior law, this verdict of "not guilty" would result in the immediate discharge of the defendant. Under present law, the automatic verdict of not

guilty by reason of insanity leaves the defendant's future freedom in substantial doubt with defendant subject to Alaska's very tough criminal commitment procedures which are discussed below.

There is one final consequence to the defense of diminished capacity, a carry-over from prior law, that all lesser included offenses which reqire a lesser culpable mental state (e.g., manslaughter as a part of murder) must be considered as possible verdicts. Should the factfinder conclude that the defendant had the culpable mental state for a lesser offense, notwithstanding his mental disease or defect, the defendant can still be convicted of the lesser offense. Thus, it is possible under Alaska law for an NGI verdict to be entered for the original charge of first degree murder (as a result of a successful plea of diminished capacity), and a conviction entered instead for manslaughter. In such a situation the defendant would not be released until he has served the prison term for the lesser offense for which he was convicted *and* has proved himself no longer dangerous under Alaska's criminal commitment procedures.

Motions filed at the trial level in the State of Alaska have yet to raise the question of whether these unusual hazards of the diminished capacity defense violate any constitutional principles.

The Insanity Defense

The Alaska Legislature sharply curtailed the definition of the defense of insanity. It provided in A.S. 12.47.010:

> Insanity Excluding Responsibility
>
> (a) In a prosecution for a crime, it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendent was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct.

This definition is substituted for the prior American Law Institute definition (defendant was unable to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law). The Alaska Legislature narrowed even the old M'Naghten test, discarding its final phrase, that the defendant must know that what he was doing was wrong. Alaska's version of the insanity defense now exculpates only when the defendant did not know what he was doing.

The intent of the legislature to thus limit the insanity defense is clear in its commentary:

> By limiting the defense to cases where the defendent is unable to appreciate the nature and quality of his conduct, this legislation enacts one branch of the *M'Naghten* test of insanity. That portion of the *M'Naghten* test which defines legal insanity as including situations where the defendant did not know the wrongfulness of his conduct is specifically rejected by this legislation and excluded from the revised definition of legal insanity. The fact that the defendant did not appreciate the wrongfulness of his conduct, nevertheless may be relied upon to establish that the defendant was "guilty but mentally ill" under A.A. 12.47.030.
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> An example of a person who could successfully establish the elements of the revised insanity defense is the defendant who, as a result of a mental disease or defect, is unable to realize that he is shooting someone with a gun when he pulls the trigger on what he believes to be a water pistol, or a murder defendant who believes he is attacking the ghost of his mother rather than a living human being. Conversely, this defense would *not* apply to the defendant who contends that he was instructed to kill by a hallucination, since the defendant would still realize the nature and quality of his act, even though he thought it might be justified by a supernatural being. Such a defendant could be determined guilty but mentally ill under A.S. 12.47.030. (House J. Suppl. #68 at p. 6, June 1, 1982).

There is little dispute that the narrowing of the defense to this degree will sharply limit the availability of the defense. Critics might contend that this provision so severely restricts the insanity defense that is it tantamount to abolishment. There are certainly some delusional crimes that would quality for consideration of the insanity defense even as defined by Alaska, but these would be excused because of *mens rea* requirements. The insanity defense in Alaska may be superfluous, as presently defined.

Guilty But Mentally Ill

For the first time in its history, Alaska provided

for the verdict of guilty but mentally ill, which had previously become law in several other states including Michigan, Illinois and Georgia (1972 Mich. Pub. Acts 180, Pl). The term encompasses a largely different concept in Alaska, however.

Alaska reinserted the former test for insanity, the ALI test, as the test for the verdict of guilty but mentally ill (A.S. 12.47.030(a)). Nearly all of the defendents who were formerly successful at pleading the insanity defense will now be found guilty but mentally ill under Alaska law. This verdict makes mental illness heretofore an issue in the adjudication of guilt or innocence, now an issue in the disposition of the defendant at sentencing. This is how the legislature's commentary describes the intended function of this verdict:

> Under this new limited affirmative defense of insanity, many persons who would have been found not guilty by reason of insanity under former A.S. 12.45.083 will now be found guilty and sentenced under the criminal law like any other defendant. A.S. 12.47.050 recognizes, however, that rehabilitation and eventual reintegration of such persons into society must be premised on a program of mental health care. For these people, the new law provides for a jury verdict of "guilty but mentally ill". This verdict is entered when the defendant, although not meeting the new definition of insanity, would meet the ALI test for the former law. Section 12.47.050 makes it mandatory for the Department of Health and Social Services to provide mental health treatment for a person who is "guilty but mentally ill." (House J. Supp. at p. 5; June 1, 1982).

Before this new provision, psychiatric service to prisoners was at the discretion of prison authorities, and minimal at best, a characteristic of U.S. prisoners generally (Parlour & Sperbeck, 1984). A common argument in favor of the GMI verdict nationally is that the required psychiatric treatment of defendants so convicted will make mental health service more available to all prisoners. Conversely, it is argued that all available mental health facilities will be focused on GMI's to the detriment of other prisoners (American Psychiatric Association Statement on the Insanity Defense, Dec. 1982). In Michigan's nine year experience with a GMI statute, there has been no improvement of mental health service for GMI prisoners or the Michigan Correctional System, as a whole.

Almost two years after the new mentally ill offender statute became law in Alaska, the first GMI convicts are presenting themselves for the mandatory treatment at the state hospital. No special program or facility has been designated for this purpose. The already over-utilized maximum security unit at the hospital is expected to serve this new patient population.

Notice also that the new statute specifically forbids work release or furlough modalities during the treatment phase of incarceration for GMI's. While at the hospital, they are limited to the maximum security unit. Those convicts who are simply guilty have options for parole with outpatient treatment and other opportunities specifically denied to GMI's in active treatment.

The GMI verdict may be moved by the prosecution and/or the court itself even when defendants have not raised the mental illness issue in any form. GMI defendants must prove themselves not dangerous before they can be processed in prison like other convicts; the rules of such proof are the same as for NGI's (see below).

Post-Insanity Commitment Procedures

A.S. 12.47.090 prescribes specially stringent commitment procedures following a verdict of not guilty by reason of insanity resulting from either the diminished capacity or insanity defense. The *defendant* bears the burden by clear and convincing evidence to prove he is no longer a danger to the public peace or safety as a result of *any presently existing* mental illness (A.S. 12.47.090(C).) This is an onerous burden since the absence of dangerousness is difficult to prove, and a striking contrast to civil commitment procedures in which the government has the burden of establishing such dangerousness.

Furthermore, when the defendant first raises the insanity defense, a request for hearing for his release from this criminal commitment is not automatically included. In other words, prior to the criminal trial, the defendant must assert that he no longer is suffering from a

mental disease or defect that causes him to be dangerous to the public peace or safety. The statute contemplates that the same trier of fact who hears the evidence surrounding the criminal offense will also hear the post-acquittal commitment case. Thus, the jury or judge will have heard all of the evidence concerning the commission of the alleged crime before deciding whether defendant is still dangerous.

The legislative commentary specifically deletes a number of psychiatric disorders from consideration in the insanity defense as follows:

> The terms used to define "mental disease or defect" in A.S. 12.47.130, are taken from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, 3rd Edition (1980) (D.S.M. III). The term is intended to include those major mental disorders such as schizophrenia, severe mood disorders or profound organic mental disorders which substantially impair a person's ability to perceive reality or adapt to it.
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> There are many mental disorders defined in psychiatry, however, which, though they affect behavior, are not of the severity or magnitude necessary to qualify under this definition. Examples of these disorders would be drug addictions, post-traumatic stress disorders, conduct disorders, dissociative disorders, psychosexual disorders and impulse control disorders. Voluntary intoxication or drug withdrawal states, regardless of their severity, would not qualify as a "mental disease or defect." (House J. Supp. at p. 6, June 1, 1982)

Even if defendant has an acceptable "mental disease or defect", he must affirmatively prove he did not know he was committing the criminal act, the cognitive test previously described for NGI's.

The term mental disease or defect is not used, however, in A.S. 12.47.090 relating to post-insanity acquittal commitment procedures. The term used instead is "mental illness." It is defined as follows:

> (1) "Mental illness" means any mental condition that increases the propensity of the defendant to be dangerous to the public peace or safety; however, it is not required that the mental illness be sufficient to exclude criminal responsibility under A.S. 12.47.010, or that the mental illness presently suffered by the defendant be the same one the defendant suffered at the time of the criminal conduct;

The definition of dangerousness for purposes of post-insanity acquittal commitment proceedings is also specifically prescribed (A.S. 12.47.090 (j) (2)):

> (2) "dangerous" means a determination involving both the magnitude of the risk that the defendant will commit an act threatening the public peace or safety, as well as the magnitude of the harm that could be expected to result from this conduct; a finding that a defendant is "dangerous" may result from a great risk of relatively slight harm to persons or property, or may result from a relatively slight risk of substantial harm to persons or property.

The analysis of "dangerousness" that is contemplated by the statute, reading the statute together with its commentary, is similar to the risk analysis that might be employed in travel planning. The FAA might very well ground a DC-10 even though the probability that the plane will crash is extremely low. The amount of loss of life to passengers in the event of a plane crash is so great that the very low degree of probability is tolerated. Conversely, if one were deciding to take a trip in an automobile and the concern was whether the tire would go flat, a much higher degree of probability that the event would take place would be acceptable. The commentary states:

> Paragraph (j) (2) provides the court with a formula for assessing dangerousness. The court is to consider both the risk that the defendant will commit harmful acts, as well as the magnitude of the harm that could be expected. For example, the court should require a greater risk that the defendant will commit acts involving only harm to property, but can rest a determination of dangerousness upon substantially less likelihood of future acts, if the defendant's future acts can be expected to involve the infliction of serious physical injury.

It is apparent that the definitions used above for "mental disease or defect" include those disorders in the DSM III which are commonly

understood to cause the results described in the diminished capacity and insanity defense statutes. Since dangerousness, however, can result from a much broader category of diagnoses, a vastly expanded definition applies to post-insanity acquittal commitment procedures.

It comes as no surprise that there have been no NGI verdicts under the new law. Any responsible attorney would have to conclude that the standards for release under A.S. 12.47.090 are extremely difficult to meet. Most defendants would be better off taking their chances on a fixed sentence following a criminal conviction rather than facing the prospect of proving their nondangerousness by clear and convincing evidence, given these definitions.

A defendant found simply guilty of violence against persons can hope to leave prison with good conduct long before serving the maximum sentence. He can even demand mental health services in prison mandated by a recent consent decree (Cleary v Alaska, 1983). The NGRI defendant will be confined for the maximum sentence unless he can prove himself no longer dangerous, utilizing these very comprehensive definitions of dangerousness that provide almost no limitation of judicial discretion.

Incompetency To Proceed

The 1982 amendments also address defendants' competency, but in a manner more favorable to defendants. The competency proceedings and defendant's self-incriminating statements therein may not be brought to the attention of juries in the subsequent trial in chief. After 180 days' commitment for incompetency, charges against the incompetent shall be dismissed without prejudice and civil commitment procedures instituted. After five years of incompetency, the charges may not be reinstated unless the original charge was a Class A or unclassified felony. Successfully medicated defendants may not be denied trial because of taking medicine.

Formulating Opinions About Mentally Ill Offenders In Alaska

The following decision-tree has been developed to help psychiatrists provide useful opinions under the new Alaska statute:

A. Diminished Capacity
With respect to the primary charge o charges, at time of the offense did the de fendant have the capacity to form the cul pable mental state (knowledge, intent negligence, recklessness, depending upor the offense charged) required by the charge

1. If the defendant could form the culpabl mental state for the offense he is accused of so state and go on to B.

2. If defendant did not have the culpabl mental state for the offense charged, th examiner should consult counsel abou lesser and included charges possible in th case, and give opinions about existence o culpable mental states for these lesser and included charges.

B. Insanity
The examiner will give opinions abou whether the defendant *generally* knew th nature and quality of his actions at th time of the instant offense or offenses.

C. Guilty but Mentally Ill
The examiner will give opinions abou application of the ALI rules in the case Defendant did not know he was doing wrong and/or could not conform his con duct to the requirements of law.

D. Present Dangerousness
The examiner will give opinions about th defendant's present dangerousness. (De fendants wholly or partially exculpatec under the Alaska Insanity Statute must b adjudicated as to present dangerousnes to complete the trial. The examiner mus use Criminal Commitability criteria here.

E. Competency to Proceed
The usual criteria apply (Dusky v. U.S., 362 U.S. 402, 1960).

F. Recommendations for Dispostion

Discussion

Although the public tends to see the insanity defense as an easy way out, defense lawyers use it reluctantly and only on their most unsympathetic cases. Lawyers know that the definitions of insanity are far less important to

defendants than the consequences of insanity verdicts, the procedural infrastructure behind the insanity concept. The most critical issue, seldom debated in public, is how the acquitted insane regain their freedom. Hardly noticed in the ballyhoo about insanity definitions and psychiatric testimony was the extension of recently adopted civil commitment criteria to NGI's in some states, such as Arkansas, where the state psychiatrists have been running to court every few weeks, trying to prove that their NGI's are still manifesting dangerous behavior day-to-day without reference to their past offenses. Only the most recalcitrant patients fail to achieve passive compliance with hospital routines (taking high doses of antipsychotic medication) long enough to meet civil commitment standards. To hold such dangerous patients, conscientious judges had to stretch the civil commitment law beyond credible limits, risking impeachment, and conscientious psychiatrists spent as much time on legal procedure as clinical work. It is hard to believe that such happenings were the intent of an informed legislature. One must reflect on the inherent pitfalls of legislative procedure and the relative unimportance of criminal matters compared to roads and schools.

Such carelessness is clearly not the case with respect to the 1982 revisions of the Alaska Penal Code, which are unusually thorough, sophisticated, consistent and well explained. They are so stacked against defendants that one can hardly imagine a case where a defendant would make the insanity defense except to avoid execution. There is no death penalty in Alaska and there have been no insanity pleas in the 21-month life of these revisions. The GMI verdict is virtually an instrument of the prosecution in felony cases because of the special burdens it imposes on defendants. No constitutional challenges have yet been raised despite the many unusual features of the new law; the challenges that will surely come whet the appetite of legal scholars.

Meanwhile, in two years, Alaska has made no new provision for the additional mental health services required under this law.

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