The Evolution of the American Law Institute Test for Insanity in Oregon: Focus on Diagnosis

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In 1962, the American Law Institute published its Model Penal Code, which includes an insanity test later adopted by many states. The second paragraph of the test excludes people with certain psychiatric conditions manifested by repeated criminal or antisocial conduct from using them as a basis for an insanity defense. Oregon adopted this test in 1971. Since then, its legislature and courts have added to the conditions excluded in the second paragraph. In this article, we look at how recent Oregon appellate court decisions have culminated in a narrower and less contentious notion of which psychiatric diagnoses serve as a basis for an insanity defense. Then we discuss Oregon's expansion of the second paragraph of the American Law Institute Insanity Test in a national context.

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In 1962, the American Law Institute published its Model Penal Code.[1] The code replaced the traditional M'Naughten rule and its variants and includes a proposal for what was hoped to be a more modern test for the insanity defense. This proposal, known as the American Law Institute (ALI) Test, now serves as the definition of insanity in many jurisdictions.

The ALI Test is unusual in that it contains two significant and very different paragraphs. The first paragraph links "mental disease or defect" to an individual's capacity to appreciate the wrongfulness of his conduct or conform his or her conduct to the requirements of the law. The second is exclusionary, declaring that "the terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct" (Ref. 1, p 66). This paragraph means that individuals with what is tantamount to an antisocial personality disorder cannot assert an insanity defense based on that particular condition. Though the lack of codification creates ambiguity, the American Law Institute stepped into the area of diagnosis when they generated this statement.

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At the time that the ALI Test was written, there was controversy about whether a person who has an antisocial personality disorder could qualify for an insanity verdict. This is illustrated in the tortuous course of *Blocker v. United States*,[2] and is highlighted in what became known as the "weekend flip-flop case"[3] in the D.C. Circuit Court. In this case a psychiatrist working for St. Elizabeth's Hospital in Washington, D.C., testified on a Friday that a person with a sociopathic personality did not have a mental disease, but by the following Monday the hospital, by administrative decision, stated that the diagnosis did constitute a mental disease. The American Law Institute may have tried to address this controversy by adding the second paragraph of its insanity test.

Oregon adopted the ALI Test in 1971, except for the name of the verdict, which continued to be "not guilty by reason of insanity." Seven years later, in 1978, the Oregon Legislature changed the name of the verdict to "not responsible by reason of mental disease or defect" to reflect the original language of the ALI Test. During the same session, the legislature introduced a unique system of managing and treating insanity acquittees after a judge or jury had rendered an insanity verdict: the Psychiatric Security Review Board (PSRB).[4]

The last Oregon legislative change to the ALI Test occurred in 1983, after the national uproar that followed the *United States v. Hinckley*, 672 F.2d 115,

132 (D.C. Cir. 1982) verdict.[5] In this politically charged climate, the Oregon Legislature was under pressure to reform their system. However, the legislature found general support for the functioning of the PSRB and resisted the pressure to institute major reform in Oregon's insanity law.

They made two changes to the ALI Test. First, the name of the verdict was changed again, this time to "guilty except for insanity" (GEI). This was a change in name only, since the consequences of a verdict of GEI remain the same: commitment to the jurisdiction of the PSRB. The Oregon verdict differs from the "guilty but mentally ill" (GBMI) verdict first adopted by Michigan, which allows the judge or jury to convict a person and place him or her in the criminal justice system while requiring that the convicted person receive medical treatment.[6]

The second change came about mainly due to lobbying by state hospital psychiatrists who testified that some patients had asserted successful insanity defenses with personality or drug abuse disorders that they believed should not have served as a basis for an insanity defense.[7] In response, the Oregon Legislature modified the second paragraph of the ALI Test. In addition to keeping the original exclusion of individuals whose "abnormality was manifested only by repeated criminal or otherwise antisocial conduct," the legislature passed a statute that broadened this paragraph to "include any abnormality constituting solely a personality disorder."[8] The new law did not include a definition of personality disorder, though mental disease was later defined broadly by an Oregon administrative rule that states:

> Mental disease is defined as any diagnosis of mental disorder which is a significant behavioral or psychological syndrome or pattern that is associated with distress or disability causing symptoms or impairment in at least one important area of an individual's functioning and defined in the current Diagnostic and Statistical Manual (DSMIV) of the American Psychiatric Association.[9]

Following are the changes enacted by the Oregon Legislature from the adoption of the ALI Test in 1971 to the present.

The change in the name of the verdict to GEI was designed to portray to the public what actually happens when an insanity verdict is rendered. The insanity acquittee has in essence admitted to having committed a specified act (a crime) but is not convicted of that crime. An alternative disposition is then made, governed by the rules of the PSRB rather than through the Department of Corrections, as would be the case with a verdict of GBMI in other states. This alternative disposition has been termed an insanity sentence because in Oregon insanity acquittees receive an actual term of PSRB jurisdiction.[10]

Controversy regarding the change in the second paragraph of the ALI Test did not end in 1983. By passing the new exclusion without defining "personality disorder" the legislature set the stage for this new law to move for clarification to the Oregon appellate courts. What emerged from the courts was a narrower and perhaps less contentious notion of what diagnoses qualify for an insanity defense. In this article we will discuss these appellate court decisions and the current state of Oregon law in a national context with regard to this second paragraph.

Appellate Court History

The Oregon appellate courts have questioned the definition of personality disorder over the past decade. Their concern is not surprising, since defense attorneys could easily argue that an insanity acquittee who was committed to the jurisdiction of the PSRB and later diagnosed with a personality disorder was illegally detained under the board's jurisdiction and as a result should be discharged. For example, in the 1997 Oregon Supreme Court case, *Meuller v. PSRB*,[11] the court was asked to rule on whether "organic personality syndrome" fit within the revised exclusion criteria. Just one year later, in *Hanson v. PSRB*,[12] the Oregon Court of Appeals was asked to rule on whether alcohol abuse fit within the exclusion criteria. In both cases, the acquittee argued that since the diagnosis was excluded by the 1983 legislation, he could no longer be held under the PSRB's jurisdiction and should be released. The courts looked to the Oregon Administrative Rules and the Diagnostic and Statistical Manual of Mental Disorders (DSM III and DSM IV) of the American Psychiatric Association for guidance and eventually ruled in PSRB's favor, finding that because the DSM does not define these diagnoses as personality disorders, they cannot be excluded.

Judge Jack Landau's dissenting opinion in *Hanson v. PSRB*[12] introduced an important argument that was further developed by the majority opinion in two cases, *Beiswenger v. PSRB*,[13] and *Tharp v. PSRB*.[14] Judge Landau's opinion stated that when the 1983 Legislature intended to exclude specific diagnoses from the definition of mental disease or defect, alcohol abuse was clearly one of them. He cited legislative

hearings where the Executive Director of the PSRB testified that if personality disorder was excluded, it should include the following diagnoses: "antisocial, inadequate, passive-aggressive, sexual conduct disorders, drug dependent, alcohol dependent and paranoid" (Ref. 15, p 2). During the same hearing, the Chair of the PSRB suggested that the term also include "child molestation and other sex offenses, as well as persons suffering from a drug-induced syndrome."[16] After further debate and testimony, the legislative committee approved the bill, declaring that it should exclude personality disorders such as those mentioned by the Executive Director and Chair of the PSRB.[17] Judge Landau's opinion appealed to legal precedent regarding legislative "intent," arguing that the state legislators had specific diagnoses in mind when the bill was signed into law in 1983.

Beiswenger v. PSRB[13] in 2004 and *Tharp v. PSRB*[14] in 2005 refer to this legislative history in the rulings. In 1988, Craig Norman Beiswenger was found GEI of kidnapping, menacing, and unlawful use of a weapon. At trial, his diagnoses were reported as incipient schizophrenia and chronic residual schizophrenia, and after an insanity verdict he was placed under the jurisdiction of the PSRB for a maximum of 16 years.[13] By 2002, the patient's diagnoses had changed. His treating psychiatrist described Beiswenger as suffering from substance abuse, paraphilia, and personality disorder with obsessive-compulsive traits, not schizophrenia. Beiswenger requested conditional release from the state hospital arguing that these diagnoses were not mental diseases or defects as defined by the Oregon 1983 statue.[13] The PSRB did not accept this argument for release, but the Oregon Court of Appeals did. When the court reviewed the case, they looked to the legislative history, as suggested in Judge Landau's earlier dissenting opinion, concluding that the legislature intended to exclude sexual conduct diagnoses and substance dependence diagnoses from diagnoses under mental disease or defect. The court concluded that the PSRB erred in its decision, and the case was reversed and remanded for reconsideration.

In 2005, the Oregon Supreme Court heard *Tharp v. PSRB*.[14] In 1999, Roderick Dolan Tharp was charged with robbery and subsequently found GEI.[14] His diagnosis at trial was paranoid thought disorder, schizophrenia, and substance dependence. Later, in 2001, he requested discharge from the PSRB arguing that his only current diagnosis was marijuana dependence and that, as the court of appeals ruled in *Beiswenger v. PSRB*,[13] substance dependence did not constitute a mental disease or defect. Tharp's request was initially denied by the PSRB, but his case made its way through the court of appeals and eventually to the Oregon Supreme Court. The Supreme Court concluded that the legislature had intended to exclude diagnoses such as substance dependence from the definition of mental disease or defect and that instead, substance dependence is a personality disorder as used in the 1983 legislation. This position was in agreement with the court of appeals ruling in *Beiswenger*. The PSRB's decision was vacated, and the case was remanded to the board for further proceedings. The court's decision to remand was based on a lack of information in the record to assist in determining whether the PSRB was under the impression that the petitioner had substance dependence only, or that he had both substance dependence and a mental disease, in which case he would remain under the board's jurisdiction.

Discussion

Since John Hinckley's insanity acquittal in 1982, a large number of states and all federal circuits have reformed their insanity tests. According to the *American Academy of Psychiatry and the Law Practice Guideline*, published in June 2002, 25 states use a strict or modified M'Naughten rule; 19 states and the federal government use a strict or modified ALI Test; 4 states returned to a traditional *mens rea* defense by abolishing the insanity defense; and 1 state uses the "product" test (Ref. 18, pp S18–20).

It is clear that the ALI Test remains an important cornerstone of the insanity defense law in this country. The Oregon experiment with diagnostic exclusion has national relevance. What the state legislature did not do in 1983 and what the state government did not do by administrative rule, the Oregon appellate courts have now done. Between the statute and subsequent case law, Oregon has succeeded in excluding at least certain of the personality disorders from the meaning of "mental disease or defect" in Oregon's ALI Test. For the purpose of the insanity defense, "personality disorder" now includes those diagnoses discussed by the Executive Director and the Board Chair of the PSRB during the legislative hearings in 1983. These diagnoses are mixed psychiatrically: antisocial, inadequate, passive-aggressive,

and paranoid personality disorders; sexual conduct disorders; drug and alcohol dependency; and child molestation and other sex offenses. With the legislature's having now defined personality disorder, the question remains as to whether this 1983 change to the ALI Test makes sense.

As stated earlier, Oregon state hospital forensic psychiatrists initiated the 1983 exclusion of personality disorder from the insanity test. They claimed that approximately 15 percent of hospitalized PSRB clients had diagnoses of personality disorder without an Axis I diagnosis. These psychiatrists thought that these patients were inappropriate for the insanity defense, were difficult to treat, and caused problems in the hospital environment for the other patients. From this vantage point, the changes made by the legislature and the courts are probably most welcome.

From a larger psychiatric perspective, we have the unusual situation of the courts' using legislative intent to define disorders. Seeking legislative intent is one way statutes are interpreted by courts, but it is not the way in which psychiatric diagnoses are defined. The American Law Institute set this process in motion by creating a second paragraph to the ALI Test. As psychiatrists, we can work to bring legal and psychiatric viewpoints closer together by working within this legal process.

A further point may add some weight to the question of whether these legislative changes are worthwhile. During the early 1980s, empirical data were beginning to accumulate within the PSRB about the characteristics of insanity acquittees.[19] The data suggest that an overwhelming number of insanity acquittees are chronically mentally ill individuals who often have schizophrenia and that specific approaches for treating them apply.[20] Thus, the exclusion of personality disorders from the insanity defense makes sense in establishing a more coherent and consistent group of patients in whom effective treatment approaches for the chronically mentally ill can be used.[21]

From a legal point of view, it is recognized that the insanity defense is a necessary component of the law because there have always been individuals with very serious mental illness who fit any definition of insanity (even the wild beast test). At the same time, attempts to narrow the insanity defense test to focus on the most seriously ill individuals make great sense, so that the test is not abused and is understandable to the public. One step in achieving these goals can come from an expansion of the second paragraph of the ALI Test.

So if there are arguments, both legal and psychiatric, for the exclusion of particular disorders, what are the problems with the Oregon approach? First, there is the controversial process of making diagnostic definitions by statute, by legislative intent, and by court interpretation. There is the possibility that a disorder could be defined in a manner totally at odds with psychiatric tenets.

Second, *Tharp*[14] and *Beiswenger*[13] illustrate a weakness in the Oregon law and in many forensic systems in the country. The insanity acquittees in both these cases had trial court diagnoses of schizophrenia and years later, while under the jurisdiction of the PSRB, were given diagnoses by state hospital psychiatrists of personality disorder, substance abuse, or both. Both cases illustrate that diagnoses change over time. Nowhere is this more apparent than in the forensic setting where, at trial, diagnosis is often dependent on which expert is hired by which side in the adversarial process.

In such a system is it reasonable to hope that diagnoses are as accurate as possible? Some states have tried to deal with this problem by having evaluations performed by recognized experts working in forensic clinics. Other states have established certification procedures for its forensic experts. The legal system itself is supposed to be self-correcting by relying on the adversarial process, on the integrity of experts on both sides of the case and on the fact that over time the worst evaluators are washed out of the system because they have lost credibility.

In the PSRB, Oregon has one of the more recognized systems for the management and treatment of insanity acquittees. However, this system comes into play only after an insanity verdict is rendered, whereas what happens at the trial court is wide open. In Oregon there are no systematic approaches to the psychiatric evaluation of those charged with crimes who eventually raise an insanity defense. There are no court clinics, no certification processes, and no quality controls on reports given to courts.[22]

Could other states benefit from modifying their statutes in this way? The answer is a qualified yes, tempered by the fact that there is a question of whether legal and psychiatric ends can be achieved at the same time. The answer also clearly relates to the quality of work done both at the trial court and at

state-run facilities. If there is a joint psychiatric-legal goal for the insanity defense, then the creation of a relatively homogeneous group of serious mentally ill and treatable insanity acquittees is worthwhile. For such individuals, incarceration is unjust, yet public protection, treatment, and liberty remain critically important. If there are such goals, then the modifications of the ALI Test by the 1983 Legislature and by the courts make sense as worthwhile pursuits.

References

1. American Law Institute: Model Penal Code (proposed official draft). Philadelphia, PA: The Executive Office, The American Law Institute, 1962
2. Blocker v. United States, 288 F.2d 853, 863 (D.C. Cir. 1961)
3. In re Rosenfield, 157 F.Supp. 18 (D. D.C. 1957)
4. Rogers J, Bloom JD, Manson SM: Oregon's reform of the insanity defense system. Hosp Community Psychiatry 33:1022–3, 1982
5. Steadman HJ, McGreevy MA, Morrissey JP, et al: Before and After Hinckley: Evaluating Insanity Defense Reform. New York: The Gilford Press, 1993
6. Mich. Comp. Laws Ann. § 768.36(1) *et. seq*. (1982), enacted in Public Act 1980 (1975)
7. Reichlin SM, Bloom JD, Williams MH: Post Hinckley insanity reform in Oregon. Bull Am Acad Psychiatry Law 18:405–12, 1990
8. Ore. Rev. Stat. § 161.295(2) (2005)
9. Ore. Admin. R. 859-010-0005 (2005)
10. Ore. Rev. Stat. § 161.327(1) (2005)
11. Mueller v. PSRB, 937 P.2d 1028 (Ore. 1997)
12. Hanson v. PSRB, 965 P.2d 1051 (Ore. Ct. App. 1998)
13. Beiswenger v. PSRB, 84 P.3d 180 (Ore. Ct. App. 2004)
14. Tharp v. PSRB, 110 P.3d 103 (Or. Sup. Ct. 2005)
15. Testimony, House Committee on Judiciary, HB 2075, April 27, 1983, Ex D at 2
16. Testimony, House Committee on Judiciary, HB 2075, April 27, 1983, Tape 270, side A at 108
17. Staff Measure Analysis, House Committee on Judiciary, HB 2075, 1983
18. Practice Guidelines, Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense. J Am Acad Psychiatry Law 30(suppl):S31–7, 2002
19. Bloom JD, Williams MH: Management and Treatment of Insanity Acquittees: A Model for the 1990s. Washington, DC: American Psychiatric Press, Inc., 1993
20. Bloom JD, Mueser KT, Muller-Isberner R: Treatment implications of the antecedents of criminality and violence in schizophrenia and major affective disorders, in Violence Among the Mentally Ill: Effective Treatments and Management Strategies. Edited by Hodgins S. Amsterdam: Kluwer Academic Publishers, 2000, pp 145–70
21. Bloom JD, Bradford J, Kofoed L: An overview of the psychiatric treatment of certain offender groups. Hosp Community Psychiatry 39:151–9, 1988
22. Reichlin SM, Bloom JD, Williams MH: Excluding personality disorders from the insanity defense: a follow-up study. Bull Am Acad Psychiatry Law 21:91–100, 1993