A History of Criminal Procedures As Related to Mental Disorders

Ralph Slovenko
University of Kansas School of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr
Part of the Criminal Procedure Commons, and the Mental and Social Health Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol71/iss2/3

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
People adapt behaviorally in different ways. Depending on their mode of adaption, people are called "normal," "neurotic," "psychotic" or "criminal." The normal person is boring; the neurotic is interesting; the psychotic and the criminal are nuisances.

The psychotic and the criminal are troubled or troublesome in different ways. What effect, if any, should this make on legal procedures?

The psychotic nowadays is given tranquilizing drugs or he is committed to a mental institution until he is no longer psychotic (or until his family will have him back). The criminal, on the other hand, is made to pay a fine, sent to jail for a term of years, or he is executed. Historically, though, the operational distinction between the labels "psychotic" (insane) and "criminal" was more theoretical than practical.

Until the nineteenth century, when the so-called moral treatment of the insane began, there made little difference, except in some cases, whether a person was called crazed or criminal. It was widely assumed that mental illness caused criminal behavior. The Talmud said: "No man commits a crime except when a spirit of madness has entered into him."

Disposition was harsh. In the old book, it is stated, "A man or woman that hath a familiar spirit, or that is a wizard, shall surely be put to death; they shall stone them with stones; their blood shall be upon them." It hardly mattered whether an act that we now call a crime was committed or not. Since it was believed that mental ill-

---

*This article first appeared in 55 Psychoanalytic Review 223 (1968). It is reprinted here in revised form with the permission of the author and the publisher.

**Professor of Law (Joint Appointment), The Menninger Foundation and the University of Kansas School of Law. B.E., LL.B., M.A., and Ph.D. (Tulane University).

1 In a historical survey, in determining who was regarded as "insane," we can only guess if we try to identify mental conditions classified according to modern diagnoses with terms of olden times. Another difficulty in identifying the mental syndromes is that possibly the various forms of mental illness in olden times are not identical with clinical entities known to us in modern times.

2 Leviticus 20:27.
ness was the cause of crime, a person "that hath a familiar spirit or that is a wizard" would sooner or later commit crime, but in any event, he was a nuisance, and preventive action was taken.

In early times, disease or physical illness was considered to come from the outside (e.g., a "heart attack"). This was likewise the explanation of mental disorder. The insane were regarded as possessed by demons, and they were dealt with accordingly ("the devil was beat out of them"). As late as the sixteenth century, Ambroise Paré, the father of modern surgery, believed that the devil caused women to become witches and that witches should be destroyed.3

The Talmud, like much later provisions, made some exceptions saving certain persons from harsh treatment. It provided that the minor, the deaf mute, and the mental defective shall be punished, because their acts are without purpose.4 As the centuries passed, treatment of criminals remained harsh, while a somewhat more sympathetic view was taken toward the insane. Madness was considered its own punishment. Some of the insane were thrown out into the streets (serving as the town clown), but they were locked up if they were too much a nuisance. A criminal offender, on the other hand, was deemed an outlaw upon whom society could inflict banishment or death as revenge.

Various tests have been formulated to exculpate certain persons from the rigors of the penal law. It has for centuries been considered unjust to label a man as a criminal or blameworthy unless his unlawful act was performed with a guilty mind (mens rea). St. Augustine said that insane persons "do not know what they do, their offenses come from necessity and hence they are deprived of freedom of will." By the ninth or tenth century, psychological problems had become fully enmeshed with those of theology. The terms "devil sickness" and "witch disease" gained more and more use.

Man deprived of free will was considered like a beast or an object, and was exempted from suffering, which is the price according to theology that man pays for the exercise of free will. In 1265 Bracton, Chief Justiciary of England, formulated a test which provided that

3 Strange, though, certain disorders (epileptic seizures and hallucinations) in some periods of time were considered sent by the gods as a token of special grace and the afflicted person was worshipped (e.g., Joan of Arc).
4 "With them only the act is of consequence, while the intention is of no consequence." SOTAH 3, 1.
the symptom of an insane person is that he behaves like a wild beast. About 1535, Fitz-Herbert formulated a test which exculpated one who could not “account or number 29 pence, nor tell who was his father or mother, nor how old he is.” A century later, Sir Matthew Hale formulated a test of responsibility which provided that to be held criminally liable the defendant “labouring under melancholy distempers” should have “ordinarily as great understanding as a child of fourteen years hath.”

Although those tests do not mention demons, until and after the revival of scientific learning during the Renaissance, mental illness continued to be regarded mainly as forms of demoniacal manipulation. In the sixteenth century, Jean Bodin protested the exclusion of offenders on this ground, and his protest continues to have merit—“The thieves and robbers might always appeal for mercy by blaming the devils for their deeds; and since the officers of the law have no jurisdiction or power against the devils, one might as well cancel and erase all these divine and human laws which deal with the punishment of crime.”

In the eighteenth century, Descartes’ dictum cogito ergo sum was the prevailing philosophy. In 1800, in the trial of Hadfield, who was charged with shooting at King George III, the attorney-general told the jury that to protect a person from criminal responsibility there must be a total deprivation of memory and understanding, but to this Erskine replied that if these expressions were meant to be taken in the literal sense of the words, “then no such madness ever existed in the world.” In the latter part of the eighteenth century, Franz Gall introduced the theory of phrenology, which related a person’s mental faculties to the conformation of his skull. In the notable trial of the pirate Tardy, his bumps of combativeness and acquisitiveness were adjudged larger than his bump of veneration.5

Today, criminal responsibility is determined in England and the majority of jurisdictions in the United States according to rules formulated in 1843 following the trial in England of a Scotsman named Daniel M’Naghten. In this well-known case, Chief Justice Tindel instructed the jury: “If you should think the prisoner a person capable of distinguishing right from wrong with respect to the

act of which he stands charged, then he is a responsible agent.” M'Naghten, a paranoid schizophrenic (as labelled today), felt persecuted by the Tories, who were then in power. He decided to take action against them by killing Sir Robert Peel, the Prime Minister. He kept a watch on Peel's house, and when he saw a man come out, he shot Edward Drummond under the mistaken belief that he was shooting Peel. The defense, at the trial, relied heavily on the ideas of Isaac Ray, whose work, *A Treatise on the Medical Jurisprudence of Insanity*, had been published only a few years before. Nine physicians testified on behalf of the defense. The jury, as instructed, found the defendant “not guilty on the ground of insanity.” The acquittal, however, was the beginning rather than the end of this celebrated case.

M'Naghten was certified as of unsound mind and detained in a lunatic asylum (where he spent his remaining twenty-two years), but nonetheless the verdict of “not guilty on the ground of insanity” created a furor, and within a few days after the trial the case was debated in the House of Lords. It was speculated that M'Naghten, a Scot, was a political assassin. The times being turbulent, it was feared that the lives of other leaders were in jeopardy. Queen Victoria and other influential persons sought a clarification and tightening of the concept of criminal responsibility. The House of Lords voted “to take the opinion of the judges on the law governing such cases.” Fifteen of the leading judges of England came forth with the so-called M'Naghten Rules. These rules are extensive, but the pronouncement of greatest import provides:

The jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.6

Under the rule, it is necessary to establish a substrate—a disease of the mind. To be deemed “not responsible,” the accused must be judged to be suffering from a “disease of the mind” so severe as to

---

render him incapable of knowing the nature and quality of the act, or of knowing that the act was wrong. In such cases the accused is considered to be unable to entertain a criminal state of mind or intent (*mens rea*).

The ruling was more limiting than the precedent established earlier in the century in the Hadfield case. In addition, in 1857, fourteen years after M'Naghten's trial, England formally enacted an act providing that persons acquitted of insanity "be detained at her Majesty's pleasure."

It has frequently been observed that "nobody is hardly ever mad enough" to be within the legal definition of madness laid down in the M'Naghten rule. Indeed, M'Naghten himself probably would not be exculpated under the rule. In a literal application of the M'Naghten rule, two (and probably only two) classes of law-breakers would be exempted from punishment. For example, in the case of homicide: (1) the person thought that the gun with which he shot somebody was not a deadly weapon but a water pistol, and was therefore unaware of the fact that it would kill (he did not "know the nature and quality of the act he was doing"); or (2) the person labored under the delusion that he was physically attacked and acted in legitimate self-defense ("he did not know he was doing what was wrong"). The M'Naghten rule, incidently, does not ask whether the lawbreaker knew the difference in general between right and wrong; it asks whether he "knew he was doing what was wrong" or, perhaps, thought he was right; that is, whether he was under a delusion to act in legitimate self-defense.

On the other hand, a paranoiac with delusional ideas to the effect that someone is destroying his social position by spreading vicious rumors about him (e.g., that he is a homosexual) would not be exempt from punishment because, if the content of his delusional ideas were true, he still would not have the right to kill his pursuer but would have to seek redress in some other way. This is spelled out in the second M'Naghten rule, which stipulates with reference to what it calls "partial delusions" that the lawbreaker "must be considered in the same situation as to responsibility as if the act in respect to which the delusion exists were real." That is, it must be asked whether a person would be liable to punishment if it were true that his victim had spread vicious rumors about him but he would not be liable to punishment if it were true that he defended his life.
The M'Naghten rule has been mainly criticized because it concerns itself with cognition or intellectual understanding and makes no reference whatsoever to emotion. A person, although not laboring under "a defect of reason," may be incapable of controlling his behavior (e.g., the obsessive compulsive). The judges in M'Naghten were aware that crime, as every human conduct, has multiple etiology, but they decided upon a narrow exculpatory provision. They sought to detain persons unable to control themselves. M'Naghten preceded Freud, but Shakespeare two centuries earlier depicted in a magnanimous way the functioning of the mind. Surely the English judges in M'Naghten read Shakespeare, and, being human, they were aware that people some way or other are affected by emotions, even though at that time cognition was considered to be the essence of man. Under the M'Naghten rule, as formulated, a person is not exempted from criminal responsibility because his choice of action is determined by pathology. He is exempted when he lacks "moral judgment."

How, though, has the M'Naghten rule been applied? From a literal point of view, the rule, while given lip service, has long been dead. It is generally acknowledged that the rule has been interpreted liberally, admitting psychiatric testimony without limit, although the rule presents a moral question. Furthermore, by dint of the considerable writing on the subject, it would appear that the rule is urged in every criminal case, but the fact of the matter is that it is usually raised only in cases involving the death penalty. In murder and rape cases, the main defense is alibi, and only when that is unavailing, the plea of insanity is urged. It is deemed preferable to be sent to the criminal unit of a mental hospital (with the possibility of release) than to be executed. When the choice is between prison or the criminal unit of a mental hospital, it would be an act of sheer insanity to choose the latter.

In the biblical period, the justice of the ancient Hebrews was rigid and harsh. The old talion law called for an eye for an eye. However, in time, exceptions were made. The Talmud, as noted, exempted from punishment the minor, the deaf mute, and the mental defective. Likewise, the M'Naghten rule, broadly interpreted, has served as a way to avoid the death penalty. At the end of the fifteenth century, English law recognized eight capital crimes; by the end of the seventeenth century, there were nearly fifty; but shortly after 1800, the number of capital crimes was estimated at 223. The variety of offenses involved was incredible: crimes of every des-
cription against the state, against the person, against property, against the public peace were made punishable by death. However, the "bloody code," as Arthur Koestler has called it, was considerably mitigated by lax enforcement and liberal interpretation of the M'Naghten rule (and also by benefit of clergy and the Royal prerogative of mercy). Today, with few capital offenses on the books, there is less resort to the plea of insanity. Yet, the discussion about it abounds, mainly because it offers an opportunity to discuss the purposes of the criminal law.  

In England, apparently, there is satisfaction with the M'Naghten rule, in principle as well as in practice. On the other hand, in the United States, the M'Naghten rule has come in for considerable discussion and modification, notwithstanding the infrequent use of the plea in court and notwithstanding the liberal interpretation usually given to it when pleaded. Criticisms of the rule are essentially three in number: the rule is not in accord with psychiatric knowledge; the rule does not permit complete and adequate testimony; the psychiatric expert testifying under the rule does not make a scientific contribution but rather assumes the role of ethical judge.  

In 1954 came Durham v. United States. In that case Judge Bazelon of the Court of Appeals for the District of Columbia, on appeal, ruled that the trial was not adequate, because it had not permitted the expert witness to present his full testimony. In the stead of M'Naghten, Judge Bazelon formulated the "product" rule—did the defendant have a mental disease and did the mental disease cause the criminal act? Like the Talmud, the rule assumes that mental disease or defect causes crime, or, inversely stated, that crime is the product of mental disease or defect. The Durham rule is that "an accused is not criminally responsible if his unlawful act was the

---

7 The role of the behavioral sciences in the criminal law process could equally be discussed around another issue. Husband and wife may quarrel about the morning coffee or newspaper; the content of the argument is irrelevant and replaceable. The fact that they relate in this way and the reasons for that type of interaction are the important issues. Likewise, the type of interrelationship of the behavioral sciences and law is the important issue and not the particular problem of insanity.

8 In regard to the latter criticism, it may be noted that the professional is frequently heard to say, "That question doesn't fall within my province." . . . [He] refuses to extend his thinking beyond the bounds of his own interest. There is no connection with anything else." H. Clurman, Theatre, The Nation, Jan. 23, 1967, at 122-23.

product of mental disease or mental defect.” The Durham decision expressly states that the purpose of the rule is to get good psychiatric testimony, all of the psychiatric testimony. It sought to remove the (theoretical) shackles of M’Naghten. Notwithstanding the good intentions of Judge Bazelon, the rule adds to the mischief of psychiatric testimony in the courtroom, and he probably rues the day that he handed down the decision. It has not served as a bridge between law and psychiatry but rather has resulted in confusion and a plethora of appeals.

Judges and juries in cases employing the Durham rule have been mired in confusion over the term “product” as well as over the terms “disease” and “defect.”

What does “product” mean? Juries wonder, “Is not every criminal act of a mentally abnormal person related to the mental disorder that he has?” “Is all criminal behavior the product of some mental disease?” “Is anyone criminally liable?” Especially when the defense presents psychiatric testimony, it is well-nigh impossible for the prosecutor to establish beyond a reasonable doubt that the unlawful act was not the product of mental disease or defect. Judge Holtzoff remarked, “It is not inconceivable that perhaps the so-called Durham formula would not have been adopted if it had been foreseen at the time that it would lead to the exculpation of sociopaths or psychopaths from criminal liability.”

What does “disease” or “defect” mean? As M’Naghten, Durham is incompatible with the modern-day view of man. The rules adhere to a demoniacal explanation of mental illness. They both require proof of a substrate—a mental disease which is the cause of the difficulty. They continue to regard mental illness as though it were some entity that can be measured or weighed.

Mental disorder is a behavioral expression which compensates for adaptive failure. Mental disorder (psychosis and neurosis) indicates destructiveness turned inwardly; criminality (personality disorder), on the other hand, is destructiveness turned outwardly. Likewise, in the life of nations, when we prepare for war and wage war, we are not bothered by internal affairs (e.g., the Vietnam war detracted from the civil rights movement). Freud pointed out that “the

---


individual sometimes saves his own life by destroying something external to himself.” A person with a so-called “character disorder” deals with problems behaviorally, rather than by an internal, neurotic manner. Crime is not the product of mental disorder, as the M'Naghten and Durham cases and the Talmud have postulated. As Roche12 said, mental illness is a moral prophylaxis. It is a symbolic substitute for criminality. Of course, in some cases, the destructiveness is in both directions, internal as well as external. Criminal fantasy is present in everyone, and there are times when controls break down or the mental disorder does not cancel action.

Under this view of man, concern must not be over whether or not there is “mental disease or defect.” Rather, concern must be with the act or behavior of the accused. His offense is an expression of his mode of adaptation. No one can divine the “intent” of the accused, not even a psychiatrist. In practice, the determination of intent or insanity is tautological. Jurors observe: “A normal person would not commit an abnormal act; he did it, so he must be abnormal.” The proof of the crime provides the data for determining whether the crime was the product of “mental disease” or whether the defendant did or did not know what he was doing. The type of crime, and efforts by the accused to elude detection or to destroy evidence, are used to establish the accused’s state of mind. By evidence of the behavior, the “intent” is discerned.

“Mental disease or defect,” a term used in the various tests of criminal responsibility, does not have independent existence in time and space. Apparently without real regard to their operational value, criminal tests of responsibility continue regularly to be formulated which look upon mental disorders and personality traits as though they were tangible things. It is an example of committing the error, as A. N. Whitehead has put it, of misplaced concreteness. An abstraction is taken as a concrete entity. Concretization has beclouded the main issue—namely, how do we control people who are unable to control themselves? The person who is legally “not responsible” is the person who requires society’s intervention. He is dangerous precisely because he is not a “responsible” person.

We may not wish to label a person at a criminal when he does not know what he is doing or is not capable of controlling his conduct, but we also do not want him roaming the streets. Why should

such people be free? These are the very people in most need of control. The test of criminal responsibility developed in an attempt to be humane, but it ends up in artificial formulations.

The American Law Institute in its Model Penal Code recently has recommended the following alternative to the M'Naghten rules:

1. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law; 2. As used in this article, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

It may be surmised that this rule, whatever its intended purpose, may exclude all casual or first offenders from the scope of criminal responsibility. As regards the repetitive offender, the rule states that repeated criminal or antisocial conduct is not of itself to be taken as “mental disease or defect.” The formulation is an attempt to keep the sociopath—the actor-out—within the scope of criminal responsibility.

Other rules, in the same vein as Durham, have been formulated. While they drop the notion of responsibility based upon cognition in favor of capacity or controllability, they retain the old moral concept of responsibility or blameworthiness that is metaphysical in character. In 1961, the Court of Appeals for the Third Circuit in the case of United States v. Currens came up with a formula drawn in part from a test proposed by the American Law Institute in its Model Penal Code.13 The test set out by Judge Biggs in Currens is that criminal responsibility will be imposed upon the accused where he was not suffering from a “disease of the mind,” or, even though suffering from such mental disease, where he possessed “substantial capacity” to conform his conduct to the requirements of the law at the time of the criminal act. Among other things, the Currens test like the Durham test fails to recognize that, except in the unusual case where a person is directed by hallucination to commit a crime, it is well-nigh impossible to determine whether the “diseased” or “healthy” part of the individual’s mind led him to his crime.

13 290 F.2d 751 (3d Cir. 1961).
In 1963, in *United States v. McDonald*, the Court of Appeals for the District of Columbia added to the Durham definition by asking: Did the abnormal mental condition, by whatever name it is called, seriously and substantially affect and impair the defendant's capacity to control his conduct so that he could not refrain from doing the act?\(^{14}\)

The Missouri Legislature in 1963 enacted a provision\(^{15}\) that incorporates some of the Durham rule and keeps some of the M'Naghten rule, which was the test previously used in the state. It provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct, or was incapable of conforming his conduct to the requirements of the law." One law professor applauds the Missouri statute in the following terms: "This is the soundest American legislation on the topic in a century, for it caters to all the recognitions of solid modern psychiatry while not departing from the sound wisdom of the ages."

All of these tests growing out of Durham have been attacked and defended with equal vigor.

Should legal insanity be defined in terms set out in the official nomenclature of the American Psychiatric Association? Is such an approach desirable or feasible? Which of the "mental disorders" listed in the official nomenclature of the APA should be included within the definition of legal insanity? Psychiatrists do not speak with one voice, and new descriptions are frequently being made in psychiatric nomenclature. Karl Menninger's *The Vital Balance* is a serious criticism of the nomenclature approach. Presently the conventional claims in an insanity plea are, to use psychiatric nomenclature, psychomotor epilepsy caused by organic brain damage, schizophrenia and paranoia. If such an approach were followed, these would be the classes of persons that would be exculpated from criminal liability.

Some critics say that the court should adopt a rule excusing from crime the act of a defendant which is the product of mental disease or defect but leaving the exact definition to the jury, just as in the

\(^{14}\) 312 F.2d 847 (D.C. Cir. 1962).
law of tort where the definition of "reasonable man" is left to the jury based upon its experience and common sense. Critics argue that the writing into law of a rule based on a legal understanding of medical knowledge existing at the time of the establishment of the rule is subject to inevitable and eventual difficulty. Because of the doctrine of stare decisis, a definition in a rule of law will not be able to conform to changes in science and human understanding. Hence, it is argued, the matter ought to be left to the jury upon the broadest possible base of medical and lay testimony. Yet, regardless of the rule, a jural rather than a psychiatric definition is inevitable.

Some critics say that the insanity defense, which portrays crime as a medical problem, should be abandoned for an approach which regards crime as a social problem. Instead of calling experts on medicine, they say, the law should call experts on social problems and social behavior. Criminal behavior, they say, is learned behavior involving group processes; hence, sociologists, criminologists and experimental psychologists ought to be doing the testifying in court as to the reasons people commit crimes.16

Some critics argue that we must get away from the either-or approach of "guilty" or "not guilty" by allowing the jury to return verdicts of various degrees of responsibility. This has been called the partial or diminished responsibility approach. Thus apparently, an accused person might, for example, be found 33 per cent responsible, 67 per cent responsible, or 100 per cent responsible. Perhaps it is envisioned that a table of dispositions will correspond to the degree of responsibility—e.g., the 33 per cent responsible will be fined, the 67 per cent responsible will be imprisoned, and the 100 per cent responsible will be executed. In addition, perhaps no case will be closed until all persons are apprehended that would total 100 per cent responsibility.17

What next?

There have been attempts to separate the insanity issue from other issues by a bifurcated or two-part trial. This procedure has not sought to abolish the insanity defense but rather to change the

16 C. JEFFREY, CRIMINAL RESPONSIBILITY AND MENTAL DISEASE (1967).
17 We have been told in William Manchester's book on the death of President Kennedy that the President lost his life because Marina Oswald was denied the conveniences which are part of the sexual contact. See Slovenko, Are Women More Law-Abiding Than Men?, POLICE, July-Aug. (1964).
time and mode of the trial of the issue. In 1909, the State of Washington took the issue of "insanity, idiocy or imbecility" out of the jury's hands and transferred it to the judge for study and determination within his discretion. In its first test case, the Washington court the next year declared the law unconstitutional: "The sanity of the accused, at the time of committing the act charged against him, has always been regarded as much a substantive fact, going to make up his guilt, as the fact of his physical commission of the act." One justice, however, dissenting, said: "No man, whether sane or insane, has any constitutional right to commit crime, and when the legislature provides that the criminality of an act shall be determined by the act itself, and not by the mental condition of the man who commits it, it violates none of the constitutional rights of the man accused of crime."

Does the Constitution require the insanity, whatever that is, be treated as a defense to a criminal charge? The rulings by the United States Supreme Court on the issue of criminal responsibility are both old and oblique. Judge Biggs once observed: "We think that perhaps the Supreme Court has withheld the granting of certiorari in such cases... and has not laid down a rule for the federal courts in respect to criminal responsibility of the mentally ill because it desires to treat the circuits as it does the States, as laboratories for the development of substantive law." At about the time of the Washington ruling, the juvenile court movement was developing in Illinois. The juvenile court, in all states, has been getting along quite well without a formula of insanity.

What is accomplished by this search—this endless search—for a test of moral responsibility? Is the emphasis in the wrong place? It may not be possible or desirable to abolish the "intent" element of crime or the insanity defense, but we may as well continue to use the M'Naghten rule, designed as it is to provide defense only in the extreme case where the absence of criminal capacity is clear from the defendant's inability to know what he was doing or that his act was wrong. Strict adherence to the M'Naghten rule and a strict

---

18 Wash. Laws of 1909, 892.
construction of it would keep control over law violators, except possibly the blithering idiot, and he could be committed, which he is. It may be desirable to retain the “intent” element in the definition of crime because it serves as a method of loophole by which the judge can (without blushing) excuse a person from criminal liability. It may be difficult to deny the accused’s commission of the act, in view of the evidence, but his “intent” is always open to question.

Be that as it may, attention must be directed to the offender’s danger to society rather than his moral blameworthiness. From a realistic point of view, what difference does it make whether a person who has committed a criminal act was sane or insane (whatever those terms may mean)? In both cases he has shown himself a menace to society who must be taken into custody and control. Why the concern over whether that control is based on criminality or insanity?

On the answer to this question are said to depend the most momentous and vital matters of criminal justice. One of Schulz’ Peanuts strips recently presented the issue in cartoon form. Lucy is much upset on finding the cover torn off of one of her comic magazines. She confronts Charlie Brown, who admits that he did it: “Why do you do such stupid things?” Charlie Brown tries to explain: “I don’t know. I’ve asked myself that very question. Why do I do stupid things? Why don’t I think? What’s the matter with me? Where’s my sense of responsibility? Then I ask myself, am I really responsible? Is it really my fault when I do something wrong? Must I answer for my mistakes? Who is responsible? Who is accountable? Who is . . . .” At this point Lucy is gritting her teeth and rolling up her magazine. So exasperated, she smacks Charlie Brown with the magazine. Coming out of his daze, Charlie Brown observes, “Her kind never worries about these things!” Whatever the theory, Lucy held Charlie Brown accountable for the destruction of her magazine.

Lucy was concerned—her comic magazine was torn, and she did not care whether the offender was sick or bad. However, people at a distance are willing to make a distinction, and are willing to excuse the sick from the criminal law. Consider, for example, the following reply given to a person when he said that his neighbor was tearing up the place and was a terrible nuisance to him. Living

on the other side of town, the friend could easily say, "Oh, he's off his rocker—just forgive him." The public is willing to allow nonenforcement of the criminal law when the offender is "different" from them—when he is "crazy," but when he is no different, nonenforcement of the law is a threat to his control over his own impulses. Everyone derives comfort from external controls; not to enforce the law against someone who is like himself is threatening. 23

In the courtroom a lot of ritual is gone through to determine whether a person who has committed a criminal act was sane or insane. If and when the accused is found insane, we exculpate, but we nevertheless lock him up, and with good reason. Can we imagine more dangerous men on the streets? One way or another, we lock up people who do not know what they are doing or who cannot control their conduct, but we are lost in abstractions. Following the Durham decision, Congress amended the federal law to make it mandatory for the court to commit to a hospital for the mentally ill any person who is acquitted on grounds of insanity (release is available upon a finding that he "has recovered his sanity and will not in the reasonable future be dangerous to himself or others"). Karl Menninger24 aptly says:

[The moralists] linked up all behavior, good and bad, with a mystical metaphysical essence called responsibility. According to this solemn theory, it is not God or lack of God, or sin or the Devil or witches or anything celestial or mundane that makes men saints or sinners. It is a single solemn imponderable called responsibility. Millions of dollars are spent annually to determine who has it or who hasn't it. If one is found to have it, he is locked up; if he is found not to have it, he is also locked up. Thus is demonstrated the pragmatic beauty of the doctrine, which is neither fish nor fowl, but which is still the shibboleth and the fallacy of the lawyers just as the doctrine of original sin was the fallacy of the clergy.

Actually, notwithstanding the nonscientific aspects of the rules or criminal responsibility, we find that commitments to hospitals and jails are most often appropriately made. Designations, considering

23 We also fear being held accountable for something beyond our control (for that matter, we fear being held accountable for anything). St. Augustine expressed thanks that he was not responsible for his dreams.
the system, are amazingly good. It is the result of vague rules, or strained interpretation of rules. By and large, the actors-in are sent to hospitals, and the actors-out to prisons. The people that we now send to hospitals and prisons belong in separate places. This separation began in 1817, four years after Benjamin Rush's death, when a hospital was founded in America expressly for the purpose of providing systematic and responsible care for the mentally ill. At this time, the sane, when there was no room in the almshouses, were put in jails along with criminals. (Prisons developed as a means of criminal punishment following the French Revolution, and superseded the sanctions of banishment and death.) Dorothea Dix in the 1840's worked zealously to get insane persons out of the jails and into mental hospitals, but as a result of her efforts, as laudatory as they were, mental hospitals were inundated with long-standing chronic cases, and the mental hospital movement as a result was set back.

In more recent years, we find a rather clear separation in institutions of the actors-out and the actors-in. Individuals in hospitals are inwardly disturbed, whereas in prison there are protests and riots. One can readily see that they are put together with more "glue" than the hospital patients. Diagnostic centers, which have developed in the twentieth century, in a few places in the country, have aided in the process of separation and classifying, and also in recommending treatment programs, but there are many obstacles, including restrictions on transfer of persons from the prison system to the hospital system, or to institutions in other states. The crucial question is what we do with these people when we send them away.

We do not need to abandon the idea of responsibility, but rather, we must use it in a different sense. Actually, we ought to use the term "responsible" as we ordinarily understand it. In the legal sense, "responsibility" means "accountability," and only "responsible people" (normal people) are accountable. The ordinary meaning of responsibility is more in accord with the behavioristic or therapeutic sense of the word than with the legal or moral sense of the term. We must regard all persons, whether sane or insane, as responsible for their acts in the sense that they are susceptible to legal sanctions in keeping with the aims of deterrence, security, treatment and reformation.

25 A system among the various stages of contracting services might be developed, which would allow for use and development of specialized institutions and work camps.

not about actions. When fantasy is translated into harmful action, there must intervention. A patient, however disordered, must pay attention to, and assume responsibility for, his behavior; otherwise he is controlled. The law must take the same approach. Like the fist to the nose—one man’s right to freedom ends where another’s right to life begins. We must adopt measures that will establish clearly that society cannot, for its own protection, tolerate further criminal acts on the part of this person regardless of the reasons back of them; and rehabilitate him if that is possible.

Illustrations are numerous—a motorist has an epileptic fit and hits a pedestrian; a man squeezes his wife’s throat thinking that he is squeezing a lemon; a man shoots another thinking he is the Devil; a woman, concretely interpreting the scripture that one knows God only by drinking the blood and eating the flesh, cooks and eats her newborn child. Free will or not, and whatever the motives, these persons must be held “responsible” for their acts. They did it, not I. But, responsibility does not necessarily entail a whipping. The court should ask three questions: (1) Is he dangerous (likely to repeat the act)? (2) Is he deterrable? and (3) Is he treatable? Disposition of the offender must depend on these criteria. In the case of the epileptic motorist, medication or denial of a driver’s license may suffice. In the case of the cannibal, indeterminate confinement may be necessary.

Criminal law has traditionally been based on the concepts of moral condemnation and deterrence by punishment. Does the knowledge of the behavioral sciences dictate a modification of these concepts? Those interested in law and behavioral science say that criminal law is concerned with human behavior and should therefore take advantage of understanding gained from the behavioral sciences. Judge Bazelon sought to do this in the Durham case, but his approach, simply refining the rule of criminal (moral) responsibility, ends up as so much quibbling.

Unless an entirely new approach is taken, the area of collaboration between the criminal law and the behavioral sciences is essentially limited to what it is now. For broader collaboration, a basically crime-centered system in which the punishment fits the crime would have to be replaced by an offender-centered system in which disposition would be designed to effect change in or control of antisocial

behavior. In psychotherapy, a patient is helped to recognize his responsibility, which means helping him to see how he must change if he is to achieve his goal in therapy, or he must be given structure or control. Applied to criminal behavior, this approach would mean that the offender (including psychotics, mental defectives and children) must change his behavior—not simply "do his time"—before he can resume his position in society. In this approach, as Sachar says, the law would substitute its traditional imperative, "You must be morally condemned and punished," by the imperative, "You must change or be controlled." Collaboration between the law and the behavioral sciences would require, says Sachar, a decision by judges and legislators that the imperative, "You must change," can be as effective in upholding and solemnizing the moral code as the imperative, "You must be morally condemned and punished." In a concurring opinion in one case, Chief Justice Weintraub of New Jersey points in this direction:

No one will dispute that society must be protected from the insane as well as the sane. . . . If we could think of a conviction simply as a finding that the mortal in question has demonstrated his capacity for anti-social conduct, most of the battle would be decided. What would remain is the employment of such post-conviction techniques as would redeem the offender if he can be redeemed and secure him if he cannot.

The criminal law's approach, as traditionally formulated, of looking to the act rather than to the actor, if literally applied, is mechanical. Some argue we must look at both the act and the actor; others argue we must look only at the actor. Can the "law of the act" and that of the "actor" be compromised by a dual-track approach, by proceeding on the basis of the act at the trial level and on the basis of the actor at the sentencing and post-sentencing level? Traditionalists consider it inconsistent and absurd to convict a man "for what he does" but sentence him "for what he is." The "rule of the law" in criminal justice (and a trial if it is to have any real meaning) allegedly requires uniform sentencing—that when a man is tried and

30 Intent (mens rea) is a requisite for guilt, motive; however, is taken into consideration only when it has a bearing on the probability or improbability of the commission of the act.
judged for his guilt in committing a specific antisocial act, he should also be sentenced for this crime and not for being the type of man he is.\textsuperscript{31} The actual issue raised in the proposal for an offender-centered system, says Professor Hall, is abandonment of the criminal law.\textsuperscript{32}

But the effect of cut-and-dried handling of cases is "supermarket justice." Consider, e.g., cases involving driving without a license. Few drivers who are growing deaf, blind or suffer other physical disabilities are going to appear in court if they can get out of it by mailing in a fine. Uniform fines help clear the court docket, but it would kill the traffic safety program.

In the world as it is, what is the role of the court? In the United States, depending on the jurisdiction, 70 to 90 per cent of all cases are disposed of without trial. The accused usually pleads guilty. This practice has been deplored, mainly because of the coercion involved in plea bargaining, but the positive aspects of a voluntary guilty plea ought to be noted. The law provides for a guilty plea; hence it is not expected that every accused person will be placed on trial. Indeed, when a not guilty plea is frivolously made, judges usually impose a stiffer sentence.

While we must be on the alert in protecting people against false accusations, we must remember that the system developed out of a protection against political and religious accusations, and the problems of mental disorders and crime may not lend themselves to those methods of handling. We ought to consider the merit of a plea of not guilty in a situation where, outside the courtroom, denial of the commission of an act would be considered an outright falsehood. Recall our attitude when parents or teachers say about a boy: "He denies having taken anything. He seems to have no signs of guilt and no sense of responsibility. He does not own up to it. He does not say he is sorry." In such a case, we take a dismal view. As psychiatrists point out, where there is discomfort, when guilt is admitted and felt, where there is frankness, there help has a chance. When confronted with evidence, and after interrogation, the boy may own up to the theft. It is at this point that the boy may begin


\textsuperscript{32} Hall, The Purposes of a System of the Administration of Criminal Justice. Lecture delivered at Georgetown University Law Center, Oct. 9, 1963.
to cooperate with a counsellor. In law, the plea of not guilty—based on alibi or insanity—where the accused in fact committed the act has the effect of reinforcing denial, which is a bad sign from a psychological point of view.\(^3^3\) One will, of course, falsify to save his neck, but where the approach is not punitive, as in the juvenile court process, the offender is usually forthright.

Of the cases that reach trial, two out of three end in conviction. By and large, the American police enforce the law in such a fair manner that we no longer really believe in the "presumption of innocence." Police today, unlike in the past, are organized and employ technical means of investigation. We look askance at anyone who has been arrested. When a defendant enters a not guilty plea, urging innocence, he and his counsel often engage in what might be called a *folie à deux*. Many lawyers say that they are not interested in criminal law practice because compensation is poor, but people do things without much pay when they feel that their work has a worthwhile purpose. Many lawyers shy away from criminal law practice because they are not interested in obtaining freedom for people who show no respect for the rights of others and obedience to the law.

The U.S. Supreme Court not too long ago in *Gideon v. Wainwright*\(^3^4\) ruled that the states are obliged to furnish counsel to indigent defendants in all cases.\(^3^5\) Let us assume there is a trial. Does it

\(^{33}\) Compare, e.g., Alcoholics Anonymous, where a person must admit he is an alcoholic. The purpose is to encourage the addicts to confront their basic "character defects" and to tear away all remnants of self-delusion.

\(^{34}\) 372 U.S. 335 (1963).

\(^{35}\) Anthony Lewis' book, *Gideon's TRUMPET* (1964) tells the story. The U.S. Supreme Court in *In re Gault*, 387 U.S. 1 (1967), recently extended to delinquency hearings a number of procedures of the traditional criminal law. The pretrial and trial stages are emphasized when the posttrial stage is shown to be wanting or cruel. As Professor Paulsen says, "The reformers who drafted the original juvenile court act in 1899 had the notion that they could create an institution that was nonadversary in which children would have everyone on their side and therefore no need for lawyers. That notion turned out to be false, particularly in the great cities, where the overwhelming majority of kids in the courts are from minorities, and feel no confidence in the system." N.Y. Times, May 17, 1967, at C31, col. 2.

Moved (slowly) by pleas for reform, the law in a number of areas has shifted in designating some persons as "sick" rather than "bad" (e.g., sex psychopaths, alcoholics, narcotics addicts), but the law has felt let down by the behavioral sciences. Likewise, Judge Bazelon in the *Durham* decision sought to open the courtroom to psychiatrists so that they might use it as a vehicle to educate the public on behavioral disorders, but the nature of the testimony received has been considered to be highly disappointing. Is psychiatry to blame? A number of prominent psychiatrists fear that psychiatry may have oversold its capacity to handle criminal offenders.
have any purpose in an offender-centered system? Is it a mere ritual? Suppose the accused in fact committed no unlawful act but is "potentially dangerous"? Or suppose he committed an unlawful act but he is now a law-abiding person? Professor Hall and other critics, favoring an act-centered system, condemn the "psychiatrization" of the criminal law. (It is curious to observe that, on the one hand, Professor Hall and other critics say that psychiatry is permissive, and on the other hand, in the same breath, they say that psychiatry is locking everybody up.)

What is the purpose of the trial in an offender-centered system? In a democracy every man like every dog is entitled to one free bite. The trial is the occasion to prevent misconduct. And the judgment of the court, morally condemning the accused, may (without further punishment) serve in deterring crime. Whether or not valid, it is said that a major purpose of the criminal law is to deter others by punishing the accused. Thus, Justice Oliver Wendell Holmes wrote to Harold Laski, "If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, 'I don't doubt that your act was inevitable for you, but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.'" However, be that as it may, the judgment of the court, morally condemning the accused, may (without further punishment) serve in deterring crime. The Biblical report at Cain's crime and punishment offers a classic illustration of the fact that what man is most afraid of is rejection. Moreover, there is the further punishment embodied in the order "you must change."

It seems we are misdirecting our attention when we look only at

---

The making of exaggerated, even fraudulent misrepresentations, which is standard practice and is taken for granted in the mercantile world, is apparently taboo for psychiatry. Slovenko, *The Psychiatric Patient, Liberty, and the Law*, 13 KAN. L. REV. 59 (1964).

The rulings of the U.S. Supreme Court (which apply nationwide and hinder experimenting among the states) on the pretrial and trial stages have stirred interest in law schools in training students on the ins and outs of courtroom maneuvers. (It is rumored that the procedures will soon be extended to hospital commitments.) Yet the posttrial stage is the crucial one. As Judge Young, commenting on the *Gault* case, said: "The thing is that it doesn't matter so much what rights you give the youngster; what really counts is that people aren't giving us means to do anything about correction. Correction is the important thing." N.Y. Times, May 17, 1967, at C31, col. 2.

the trial stage. James V. Bennett,\textsuperscript{37} past Director of the Federal Bureau of Prisons, observed:

\ldots modernizing the criminal law must be founded upon closer cooperation between the courts and the correctional processes. Also, it must be based on broader education and training of the lawyer. A knowledge of psychiatry, for instance, is far more important to the ordinary practitioner than admirality law. Actual clinical training in the criminal courts, visits to prisons, brief reviews of police training school manuals, and sponsorship of some discharged prisoner will do far more toward fitting one for handling the problems of people in the toils of the law than reading M'Naghten's case or common law forms of pleading and practice. An up-to-date criminal law also would seem to assume the necessity for a change in sentencing methods.

The trial stage is an important stage, but not always, and surely not the crucial stage of the criminal process as we know it today. By emphasizing the trial stage, or rather by overemphasizing it, as we are doing, we may be forgetting about the pretrial or the post-trial stage.\textsuperscript{38} Without discounting the importance of a fair and full trial, we might give equal attention to the efforts that are made in the socialization of offenders. Gideon, in the charge that brought his case to the Supreme Court, was wrongly accused, but he had been regularly in brushes with the law.

It is estimated that seventy per cent of all felons discharged from prison have later trouble with the law and that thirty-five per cent are back in prison within three years. The cycle is monotonous: crime, apprehension, trial, imprisonment, discharge, new crime, etc. No other institution operates at such glaring inefficiency. Police soon become discouraged protecting the public when the same old faces, the same habitual offenders, must be apprehended. The community spends thousands of dollars apprehending and trying an offender only to find him back in the neighborhood shortly thereafter. Why is he not kept out on some work camp, living with a woman if he so desires, but out of the mainstream of society? Why not a "peace corps of offenders"? The inadequacy of present methods of handling


\textsuperscript{38} Menninger, \textit{Verdict Guilty—Now What?}, HARPER'S MAGAZINE, Aug. 1959, at 60-64.
the criminal has been pointed out over and over again, but to no avail. Recommendations for change, involving much study, have essentially been ignored.

Over fifty years ago, in 1917, the Wickersham report of the New York States Prison Survey Committee recommended the abolition of jails, the institution of diagnostic clearing houses or reclassification centers, the development of a diversified institutional system and treatment program, and the use of indeterminate sentences. In 1933, thirty-five years ago, the American Psychiatric Association, the American Bar Association, and the American Medical Association jointly recommended psychiatric service for every criminal and juvenile court to assist the court and prison and parole officers with all offenders. Following the judgment of the court, at least during the term of sentence, behavioral science is asked a free hand in dealing with the offender. What has come of these recommendations? Practically nothing. And why not?

No one suggests that these proposals will solve the crime problem. The development of school counseling and child guidance centers, slum clearance, playgrounds and vocational training would be of more value in the long run than changes in the practice of penology. When there are no playgrounds, no jobs, crime grows. Prevention is always better than treatment. However, these proposals would eliminate some of the confusion relative to the concept of criminal responsibility, protect society against further injuries from apprehended offenders, and rehabilitate some individual cases.

To summarize. While the insanity plea is rarely urged, usually only in death penalty cases where it offers an opportunity to escape execution, it is the subject of more discussion than any other issue in criminal law. The discussion, though, is not academic. The issue offers an opportunity to discuss the aims and methods of the criminal law.

The "law of the act" and the "law of the actor" can be combined by looking at the act during the trial stage and at the actor in the posttrial stage. Society is justified in taking action against an individual on the basis of his act. However, we must think less of the act as an abstract thing, and we must think more of the actor. Once the commission of the act is established (the behavior in its total setting), then within the maximum period afforded by
sentence, an individualized handling of the case must be made. The proper role of the psychiatrist is in diagnosis and corrections, not in testifying to metaphysical questions of responsibility. The act of the accused, in its total setting, indicates his mode of adaptation to life.