

## LAW AND PSYCHIATRY MUST JOIN IN DEFENDING MENTALLY ILL CRIMINALS

*Mr. Justice Brennan suggests that we may be at the threshold of a major re-examination of the premises which underlie our system for the administration of criminal law. In the area of criminal responsibility and mental illness, whether the M'Naghten test or another is used, the accused's right to a defense may require psychiatrists to extend their Hippocratic oath to include forensic services. This article is adapted from an address before the National Association of Defense Lawyers in Criminal Cases.*

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I SHARE WITH MANY the concern that so many of our profession are reluctant to represent people accused of crime. There was a time in our history when lawyers generally could be counted upon to present a militant front, however unpopular, against any invasion or undermining of individual, human or constitutional rights.

A first office of a lawyer in our society is to protect individual rights, especially those secured to people accused of trespassing society's laws. American lawyers cannot be mere private practitioners of the law. They have a public responsibility to maintain a system of government by law. That phrase—"government by law"—is no empty platitude. It is the essence of a free society. No nation possesses a code better designed to assure the civilized and decent administration of justice which is a free society's hallmark. But that code will provide only paper protection of our people are more concerned with prosecutions that are overturned than with fundamental principles that are upheld. Because it is only in upholding fundamental principles, even at the expense of freeing some not-very-nice people, that the protections for nice people are maintained.

### Challenge to M'Naghten Rules Arouses Fears

Probably no more provocative subject exists in the criminal law today than that of criminal responsibility and mental illness. That is because the stir created by the widespread examination being made into the continuing validity of the M'Naghten Rules<sup>1</sup> has seem to some to have challenged the very foundations of society's method of dealing with offenders against its laws. Despite a flood of literature from both legal and behavioral disciplines inveighing against the retention of the M'Naghten Rules as they have been traditionally interpreted, their discard is opposed from fear that any other test would produce a system "soft on criminals" and destructive of principles of morality and good order.

Now I am not going even to survey the different so-called "insanity tests" which have been the matter of such furor and debate, nor shall I by the slightest intimation suggest which I think may be preferable to the M'Naghten Rules, if indeed it has yet been proved that any one of them is better. I'm going to confine myself to some observations upon some arguments made for retention of the M'Naghten Rules, and then discuss some practical problems which must be worked out if those Rules are to be replaced by any of the alternative tests now being discussed.

M'Naghten, it is held, must be retained because public safety and morality require it. More liberal rules, it is said, might result in too many acquittals by reason of insanity and a relaxation of concepts of public responsibility and order.

<sup>1</sup> Daniel M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

How valid is the assumption that morality and safety require punishment by imprisonment or execution of mentally ill people? Of course, I don't know just **how many** mentally ill offenders are convicted. But a glance at the transcripts in more than a handful of cases is enough to convince me that though the accused may be "legally sane" — though he may "know right from wrong" — he was nevertheless seriously disordered at the time of the crime. When one has this experience, he can appreciate why those who would replace the M'Naghten Rules ask: Can a true moral judgment be made about responsibility for any act without delving deeply enough into the actor's background—his biological, psychological and social circumstances—to attempt to explain the whole man? These opponents of M'Naghten insist that without such an explanation, there can be only the illusion of a moral judgment. They go on to ask, if mental illness is indicated as a cause, should we not attempt to treat the disease, rather than wreak vengeance on its medium? They summon to their support my colleague Justice Frankfurter who said (in an opinion urging a humane procedural approach to the insanity defense). Man "is not a deodand to be forfeited like a thing in medieval law". They insist it is hypocrisy that nowadays most of us reject retribution as an element in punishment for, they argue, retribution **must** be a factor in punishing these people, for the evidence suggests that the mentally ill are not reformed, rather they are made worse, by prison. Nor is their punishment calculated to deter other mentally ill people from engaging in crime.

### Prisons Do Not Provide Adequate Psychiatric Service

These proponents of a change press on us that perhaps imprisonment as a means of reforming the mentally ill would have a better case if our prison systems provided the wherewithal to treat their condition. But speaking in June, 1960, James V. Bennett, Director of the Federal Bureau of Prisons, noted: "It has been my experience that the courts are often overgenerous in their estimates of what correctional institutions can accomplish. The availability of psychiatric service, for example, has been exaggerated. To a very large extent it is simply not available."

The latest available figures indicate that there are only forty-nine full-time psychiatrists on the staffs of institutions for adult offenders in this country. Even these are not evenly dispersed: thirty-six states had no full-time psychiatrists on their staffs. But perhaps a better day is on the horizon. It must be reason for encouragement that the distinguished Drs. Karl Menninger and Joseph Sotten have caused the Menninger Foundation at Topeka, Kansas, to undertake a program of research and training of psychiatrists, psychologists and psychiatric social workers for work in penal institutions. A useful by-product of that kind of program should be some much needed information bearing on the related problems of determining criminal responsibility.

The dearth of treatment facilities is the more distressing to these proponents of change since we in the United States apparently place greater reliance on imprisonment than does any other country in the world. Mr. Bennett is authority that we have "178 persons behind bars for every 100,000 of the civilian population. In contrast, England and Wales have only sixty-five persons under lock and key for every 100,000 citizens. Japan has eighty-nine." Ironically, Mr. Bennett pointed out, the only country which comes close to our rate is Guatemala—and, Mr. Bennett found, 60 per cent of these prisoners were unsentenced and were being detained only temporarily.

#### Does Imprisonment Solve the Crime Problem?

In short, ask these pleaders for change, must not our society face up to the question: Don't we place an undue amount of reliance on prisons to solve our crime problem? How is a solution achieved—or how are morality and public order preserved—by incarcerating people who need psychiatric treatment in institutions which do not provide it—perhaps because, as some of them insist, the prison milieu is inherently opposed to the therapeutic process.

And a hospital which is a hospital in name only, but for these people a prison in fact, is no better case. The Superintendent of Galesburg State Research Hospital in Illinois wrote last year:

It is important to recognize also that commitment can be a form of incarceration, and prosecutors, judges and hospital officials are not immune to this expectation of society. Such patients usually are segregated in maximum security units, and arbitrarily are denied all privileges. Often this is quite anti-therapeutic, but prejudice prevails over reason, and individual "civil rights" are conveniently overlooked.

I come now to the concern for public safety, also urged as a reason against insanity-defense reform. Many apparently assume that a verdict of not guilty by reason of insanity necessarily results in a mentally ill and dangerous person being turned loose onto the streets. Here one is on perfectly safe ground in saying that this just should not be so, for only one of the fifty states, Tennessee, makes no provision for possible confinement in such cases. The argument should really be, then, whether society is better protected by having its mentally ill offenders sent to a hospital for treatment, and kept there until the courts determine on the advice of the medical experts that the offenders are no longer dangerous; or whether we are better protected by imprisoning these people for a certain number of years. Even under the indeterminate sentence, the key to release is whether the offender has been a well-behaved prisoner. But the good behavior of a mentally ill offender in the highly structured prison society provides no assurance that he will so behave in the unstructured free society. We must acknowledge that in the case of the determinate and indeterminate sentences release is not predicated on any medical assessment of a change in mental condition. In sum, then, is there really competition between the principle that we should secure fair and decent processes to those accused of crime and the principle that morality and public order must be preserved?

#### Psychiatrists Disagree on Their Role

I turn then to some of the practical difficulties which will have to be overcome if the M'Naghten Rules are replaced with a test which would seek more accurately to separate mentally ill offenders for the purpose of hospital confinement treatment. We lawyers know that that is a process for experts, both legal and behavioral. And we can't overlook the controversy among psychiatrists as to the proper role of the practitioners of that profession in the process. Some contend that the question of mental condition has no place in the determination of guilt or innocence but belongs only at the sentencing stages as bearing on the determination what disposition of the offender would offer

the best protection for society and best possibilities for rehabilitation. Other psychiatrists agree that they have a proper role in the determination of the insanity defense itself but only if the mental illness is one which psychiatrists are equipped to treat.<sup>2</sup> But these are questions which we must lay aside now.

When we talk of employing experts, we lawyers must look at our problem in context. Who are our criminal defendants? What is their background? Do they have relatives and resources capable of helping in their defense once they have landed in trouble? By and large, the so-called "white-collar" criminals probably have the resources and friends to aid them in their defense. If mental condition is called into question, they basically have the wherewithal and the knowledge to get help. This is as it should be.

About a year ago, I read an article in the *Washington Post* reporting the testimony of a psychiatrist called by the defense. The article might not have been written but for the fact that the case had achieved some local notoriety because it involved a hold-up by a wealthy young man. However, the reporter made the point of his article the fact that the testimony was of a far higher caliber than was usual in cases where the insanity defense was raised. In fact, the evidence proved to be so clear, comprehensive and persuasive that the trial judge directed a verdict of not guilty by reason of insanity. The psychiatrist testified that he had had about twenty-five lengthy interviews with the defendant and that he expected to charge about \$2,000 for his services. (With some asperity, he also pointed out on cross-examination that he believed the prosecution had spent more than this in having the boy examined by government psychiatrists.)

Justice is well served when the resources of prosecution and defense are fairly evenly matched as they were in the case to which I have just referred. But is this the situation for the vast majority of our "blue-collar" criminals who commit crimes of violence—or who steal without the refinements of embezzlement? Judges seem to agree that about 90 per cent of these people are indigent. To put it another way, these offenders come from that section of society whose conditions result in the largest crime rate and, if the study by Yale's Hollingshead and Redlich is correct, in mental illness too. It is here, also, that the bulk of the mentally retarded are found. The experts make the provocative suggestion that deprived socio-economic upbringing causes considerably more retardation than springs from organic or hereditary factors.

How many defendants from this sector of our society raise the insanity defense—and how many of them would raise it, or how much more adequately would it be raised, if the resources in the form of able defense attorneys and behavioral scientists were available? The problem of obtaining dedicated and capable defense attorneys, of course, extends beyond the particular defense we are discussing. That problem is tied up with the constitutional problem whether defense counsel must be provided every accused. It relates partly to the status of criminal lawyers in the Bar of this country. You do not need me to tell you that this is inadequate. Perhaps a glance at why it is so low will suggest lines for reform.

In the first place, I suspect that the criminal law is not given as central a position as it should have in law school curricula. And I have the uneasy feeling there is little serious effort to acquaint students with the role of the behavioral sciences in determining the issue of criminal responsibility. Certainly the law schools do not turn out droves of bright young men anxious to carve out a career in criminal law—at least, for the defense. Estates, corporate, tax, commercial law—all of these arouse far more interest.

Nor is this particularly surprising. It is not only that these are the fields which are likely to yield greater financial rewards;

<sup>2</sup> See *Forensic Psychiatry: Uses and Limitations — A Symposium*, 57 Nw. U. L. Rev. 1 (1962).

I have the uneasy feeling that there is a tendency in the community and at the bar to disapprove of lawyers who undertake the defense of people charged with crime. If, however, the reason went no deeper than the uninformed prejudice which taints the defense attorney with the defendant's crime, we would not need to be unduly concerned. But if we are to be honest, we must recognize that other factors are involved. The practicing attorney too must live. If an impecunious accused and his family cannot compensate him, the lawyer may be forced to spend more time on the problems of the clients who can. I understand that the problem of compensation for legal services in defense of the criminally accused is under consideration by one of the great foundations. I can think of no better subject for its prayerful consideration.

#### **Legal Aid and Defenders Have Inadequate Resources**

Is the problem rendered less serious by the existence of public defender and legal aid systems? To the extent that these have adequate resources, they do alleviate the problem. But I am afraid that a comparison of numbers of lawyers and investigators for these organizations, with their counterparts in district and United States attorneys' offices, would dash any hopes that the complete answer lies here. Without these organizations, I suspect that the adversary system in criminal law would tend to break down altogether. With them, the more serious deficiencies are to some extent counteracted.

Is our practice of court appointment of private attorneys an adequate fillin? You know better than I about that. From my observation, the system seems on the whole to work pretty well at the appellate level. But it is a poor stop-gap to appoint a good lawyer to raise on appeal the errors of a young, inexperienced and hard-pressed defense trial lawyer. Nor is it to be expected that the Bar could fulfill, on a voluntary, unpaid basis, the need for a body of experienced criminal trial lawyers. Nobody blames the lawyer, who may well be a successful corporate practitioner, for a certain reluctance to make one of his rare court appearances as a defense trial attorney for a man charged with a serious felony. His reluctance is justified.

What is the solution? All I can do is to feel some encouragement as I look at certain pointers in the wind: that the Congress is considering a solution for the federal courts, and some states have adopted or are thinking of adopting one in their courts; that the foundation mentioned has become involved with it; that there are a few programs similar to that at Georgetown University where under the leadership of Dean Pye a handful of excellent law graduates come to take a further degree in criminal law: they spend a considerable part of their time as defense attorneys in court, at the trial and even the juvenile court level. The experiment at Georgetown seems to have worked admirably and is to be continued. Its real success, however, will depend on whether the young men who have completed the program are able to undertake in the next several years, the kind of work which they want and have proved to have an ability to do.

#### **Defense Lawyer Must Have Aid from Psychiatrists**

But expert legal help is only half a loaf. Assume that our indigent defendant has able counsel, anxious to raise the insanity issue at trial. How does he go about obtaining experts to examine the accused with a view to providing him with information and eventually to testifying at trial? Many of you know the problems far better than I do. I suppose that often the practice is to request the court to commit the accused to a public mental hospital for observation. Where there is a question of competency to stand trial, this may well be granted. But I believe that other serious problems are encountered where the more debatable issue is the accused's state of mind at the time of the offense. If this is the principal question, even the most knowledgeable and experienced defense counsel may face troublesome obstacles in the preparation of the defense. Judge

Bazelon dealt with this practical difficulty in words which merit repetition here. He observed:

The preparation of the psychiatric evidence which is required to prove an individual's mental condition at some past date is a very difficult task. It is a task for which the accused generally lacks both financial and intellectual capacity. The facts required by way of psychiatric testimony are a "description and explanation of the origin, development and manifestations of the alleged disease . . . how it occurred, developed and affected the mental and emotional processes of the defendant . . ." *Carter v. U.S.*, 252 F. 2d 608 (1957). The examinations conducted by the psychiatrists must be of a character they deem sufficient for the purpose of determining the facts required. If brief jail interviews with the defendant are inadequate for the purpose, the defendant should be committed to a mental hospital where he can be examined under clinical conditions and for a long enough time to satisfy the psychiatrists. If the psychiatrists require more information about the defendant's background and history than they can obtain from him, an investigation should be conducted to obtain such information. If there is reason to doubt the accuracy of information supplied by the defendant or his family or friends, the information should be checked by investigators. If physical tests can help to determine the existence or character of illness, such tests should be made.

Indigent defendants of questionable mental capacity are obviously in no position to conduct these inquiries and whatever others may prove necessary. Their court-appointed attorneys are given no funds for the purpose. If the relevant facts are to be presented to the court, therefore, it must ordinarily be as a result of inquiries instituted by the Government. If, because the Government fails to sustain its proper burden, a case is left to be decided on less than the best possible psychiatric evidence, the inadequacy of the evidence is not a point in favor of the prosecution.

#### **Shortage of Psychiatrists Creates Problems**

Even if an adequate mental examination is available in a public mental hospital, what if counsel should consider that the examination is perfunctory and unhelpful? What if the experts choose to testify on behalf of the prosecution? Must counsel throw up his hands in despair? In many, many counties throughout our country there will simply be no one else on whom he can call for help. With fewer than 12,000 psychiatrists in the United States, there is quite simply a manpower shortage.

What of more populous centers, such as New York and California? Here there is no dearth of psychiatrists. But are they willing to testify? A few months ago, Judge Bazelon, speaking to the New York branch of the American Psychiatric Association, suggested that just as the legal profession recognizes a duty to defend indigents without charge, so might the psychiatric profession undertake an analogous obligation. When counsel for an indigent believes that the accused's state of mind at the time of the offense is seriously in question, he should be able to seek the services of a psychiatrist who would undertake an examination free of charge. If, having weighed the psychiatrist's report, counsel wishes to call him as an expert witness for the defense, he might again serve without charge.

The germ of this idea was seized upon with enthusiasm by the editor of the New York society's professional bulletin. He believed that many of the organization's younger members, at least, would welcome the opportunity to serve in this way. If a system could be worked out on a roster or panel basis, it would require only an occasional donation of time and effort by each psychiatrist. The New York experiment is still in preparation. But I believe that the idea behind it is most valuable—in a way it is just an extension of the Hippocratic oath.

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If psychiatrists really knew what happens to mentally ill people who get into trouble with the criminal law, I suspect that many of them could not help offering their services in a way which would make a significant difference to the operation of the insanity defense. In many parts of the country there may not be enough private psychiatrists to undertake this sort of work without—or even with—charge. But we shall never know just how serious the manpower problem is until we start making the best use of what is available. The seeds of the idea have already been sown in New York. What about the national level? What might come of an approach between the American Bar Association and the American Psychiatric Association, and perhaps the American Psychological Association—or between the Bar and these groups at the local level?

I do not know what the outcome would be, but I suspect it is worth trying. Once an increasing number of psychiatrists, and perhaps other behavioral scientists, such as clinical psychologists, become interested in adding the indigent accused, then other difficult problems—such as improving the quality and depth of their testimony—can be tackled. But that is another story.

#### **Re-examining Administration of Criminal Justice**

Plainly enough I have asked many questions and answered

absolutely none. This is not just the natural reluctance of an appellate judge to comment upon problems which one day may get to him for decision. It is rather that we may be at the threshold of a major re-examination of the premises which underlie our system for the administration of criminal justice. If this is indeed so, I can only have added confirmation to a conclusion that there is much more to be done—in today's popular vernacular, more dialogue, more exploration, more trial and error. There are on and off the bench and among laymen closed minds to any re-examination of the long-standing basic fundamentals of criminal justice. But those minds may find that they must inevitably open. The march of events, the expanding scientific horizons promising greater knowledge of the reasons of human behavior, may prove irresistible.

President Kennedy pinpointed its complexity in his recent call for a national plan to combat mental retardation. His observations that "there are difficult issues involving not only our social responsibility for adequate care of the retarded, but the extent of the responsibility of the retarded individual himself, as, for example, when he gets into trouble with the law", and that "for a long time we chose to turn away from these problems", were preceded by this: "In addition to research the current problems are those of diagnosis, evaluation, care . . . a lack of public understanding and a dearth of private and public facilities."