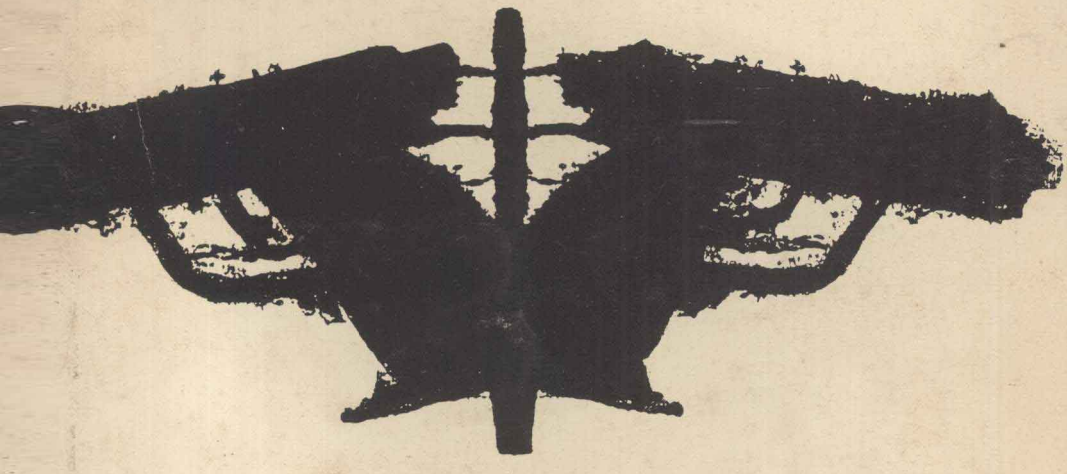
The perspectives of 13 legal and psychiatric authorities on the history, purpose, and problems of the insanity defense



BY REASON OF INSANITY

Essays on Psychiatry and the Law

Lawrence Zelic Freedman, editor

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Edited by
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PUBLISHER'S NOTE

Extensive research has been done regarding the proper spelling of Daniel McNaughtan. The issue has received considerable attention, and more than ten different variations of his last name have appeared over time. Richard Moran in his book *Knowing Right from Wrong: The Insanity Defense of Daniel McNaughtan* (Free Press, 1981) has supplied conclusive evidence of the actual spelling, "McNaughtan," which we have adopted for our use in this volume.

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INTRODUCTION

President Ronald Reagan was shot and wounded by John W. Hinckley, Jr., on 30 March 1981. Press Secretary James Brady, a Secret Service guard, and a District of Columbia policeman were also wounded. Within moments the radio broadcast the news to the nation, and television reenacted the terrible scene. Magazines, newspapers, radio, and television reflected the nation's mood: Are we a sick people? Are we a violent society? For many, the answer emerged from the ever-rising crime of the cities, the after-dark fears of most Americans in their own neighborhoods, and from this assault on the president.

The four presidential assassins have been men whose personalities, motives, and attacks have frightened and angered the citizens of this country because of the symbolic nature of the presidency, a cynosure in a democratic society. The anxiety engendered by widespread assaultive and predatory crimes against persons has become fused, in fear, with attacks on the president, but such assaults differ significantly from predatory crime.

Presidential assassins are not common criminals. John Wilkes Booth, a southern sympathizer, assassinated Abraham Lincoln in 1865. A moderately successful actor, Booth was a psychologically marginal man. He was born a bastard; his father, a talented English immigrant actor, suffered from intermittent attacks of insane impulsivity. Booth was also the younger brother of Edwin Booth, hailed as the leading actor of his time. In 1881, James A. Garfield was killed by Charles Guiteau, an itinerant lawyer and evangelist, a scion from a "good family," who had lived six years in the Christian-communitarian society of Oneida. He was as miserable there as he had been in the larger world and later injected himself into politics, unjustifiably seeking a consular post. In 1901, Leon Czolgosz killed William McKinley. Czolgosz, a laborer who, in the last three years of his life, had become a paranoid recluse, killed for his faith in anarchism, but the anarchists of his time not only refused to accept him but also warned against him as an *agent provocateur*. The last presidential assassination was in 1962, when Lee Harvey Oswald shot John F. Kennedy. Oswald, born two months after the death of his father, had grown up uncertain, truculent, and despairing. Living in the Soviet Union, Oswald, like Guiteau, had experimented with another system of social and political organization. He, too, found that his private miseries persisted there as well and returned to the United States.[1]

Each American presidential assassin politicized his private misery. Each

[1]Guiteau and Czolgosz were tried under the McNaughtan formula, as Oswald would have been in Texas had he lived to stand trial and had he pleaded not guilty by reason of insanity.

appears to have had a combination of personality traits that distinguished him not only from the law-abiding but also from murderers whose motives were personal or predatory. In awesome confrontations, four anonymous, powerless, unhappy men struck down the most powerful political figure in the United States in an attempt to meet their personal needs.[2]

Hinckley appears to have a similar personality, and during his trial, the jury had to determine his mental state at the time of the assault. The jury, instructed by the judge, had to decide whether Hinckley was guilty of assault with intent to murder or not guilty by reason of insanity. If it concluded that, as "the result of mental disease or defect" Hinckley had "either lacked substantial capacity to conform his conduct to the requirements of the law, or . . . to appreciate the wrongfulness of his conduct," he would have to be held neither culpable nor punishable.[3]

The prosecution psychiatrist testified that Hinckley could conform his behavior to the law and appreciate the wrongfulness of his actions. Defense psychiatrists expressed a contrary view. The twelve members of the jury and concerned millions were puzzled and skeptical. Prestigious experts responded to the legal questions with answers that contradicted each other. How scientific could the mental health field be if its clinicians arrived at opposite conclusions from the same set of facts?

The concern over the differences in response by mental health experts to legally phrased questions reflects popular misunderstanding of psychiatric expertise. The study of human behavior, intelligence, feelings, and perceptions is in an earlier stage of development than many other sciences and clinical specialties. The issues are complex; certainty is difficult to attain. Determining Hinckley's mental condition during his attack on the president required the assessment of the signs and symptoms of his mental state and of their intensity as well. Direct examinations were conducted after the event. These were supplemented by the evaluation of writings such as letters and diaries and by hearing and reading descriptions made by other people. With such serious constraints, even conscientious experts differed.

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[2]See Lawrence Zelic Freedman, "Assassins of the Presidents of the United States: Their Motives and Personality Traits," *Assassination and Political Violence: Report to the National Commission on the Causes and Prevention of Violence*, J. F. Kirkham, S. G. Levy, and W. J. Crotty, eds. (Washington: Government Printing Office, 1969), pp. 49–73; "Assassination: Psychopathology and Social Pathology," *Postgraduate Medicine* 37, no. 6 (June 1965): 650–58; "Profile of an Assassin," *Police* 10, no. 4 (March–April 1966): 26–30; "Psychopathology of the Assassin," in *Assassinations and the Political Order*, ed. W. Crotty (New York: Harper & Row, 1972), pp. 143–60; "Assassination: Psychopathology and Social Pathology," in *Social Structure and Assassination Behavior*, ed. D. W. Wilkinson (Cambridge, MA: Schenkman Publishing, 1976), pp. 96–107; "Assassins and Terrorists," *Today in Psychiatry* 5, no. 1 (January 1979): 1–4; "Are We a Sick People?" *New York Times*, 1 April 1981, p. 29; "Presidential Assassins Strike Out More at the Symbol than the Man," *Boston Sunday Globe*, 5 April 1981, p. A3; "The Assassination Syndrome," *Saturday Evening Post* 253, no. 5 (July–August 1981): 66–67, 114.

[3]The federal code for criminal responsibility.

A courtroom decision is a legal and not a clinical one. The mental health professionals are participants in a legal process. They must present their observations in language that the lay jury can understand. They are subjected to cross-examination intended to discredit their testimony and, at times, their competence and integrity. The legal formula for responsibility reflects the threshold of tolerance by the community for harmful or threatening behavior. Judicial decisions and community values that have gained the social weight of common law, and statutes, are the bases for the legal formulas for nonresponsibility. They are not psychiatric in origin, function, or language. The American Law Institute formula for criminal responsibility, for example, reflected legal assessments and social judgment.[4] It was not intended to replace the decisions of judges and juries with the diagnoses of psychiatrists. This misunderstanding and the outrage aroused by Hinckley's insanity defense sprang from the requirement that the experts answer to a *legal* question, which mental health professionals are not competent to answer. When they try to do so, their social and political values must influence their responses.

The function of the jury is to try the facts of the case. The legal requirements for determining responsibility are based on the facts that are derived from evidence presented during a trial according to established legal procedure. In Hinckley's trial, the facts that the jury was instructed to determine concerned his mental state when he attacked the president. The jurors had to choose, or to discriminate between what was often conflicting testimony. This evidence led to their decision concerning Hinckley's responsibility. Psychiatrists, psychologists, and others can contribute to the jury's decision only within the limits of their competency. They can diagnose a person's state at the time of their examinations. They attempt to diagnose the defendant's state at the time of the alleged harmful act that preceded the examination. The judge instructs the jury to distinguish between these clinical opinions and the legal requirements for determining whether the defendant is responsible or not.

On 21 June 1982, Hinckley was found "not guilty by reason of insanity" of the crimes of shooting the president and three other men. The verdict indicated that the government had failed to prove to the jury, beyond a reasonable doubt, that Hinckley was sane when he had attacked the president. Almost immediately there were public protests, and popular confidence in the potential contributions of psychology and psychiatry to the criminal justice process reached a low point. As a consequence of the contradictory opinions voiced by the mental health experts for the defense and the prosecution, the insanity defense was called "insane" and the Hinckley verdict declared to be "mad."[5] The fields of psychology and psychiatry seemingly were without

[4]Lawrence Zelic Freedman, "A Psychosocial Analysis of the Making of the Model Penal Code," in *Crime, Law and Corrections*, ed. Ralph Slovenko (Springfield, IL: Charles C. Thomas, 1966), pp. 213–31.

[5]See, for example, "It's a Mad, Mad Verdict," *The New Republic* 187, no. 2 (12 July 1982): 13–16.

standards or a unified body of knowledge, a condition that allowed their practitioners the widest range of arbitrary opinions; they were useless in the serious and responsible business of conducting the criminal justice system.

Following the Hinckley verdict, twenty-four bills to abolish or amend the insanity plea in federal cases were brought before the U.S. Congress.[6] Powerfully supported senatorial initiatives suggested an additional verdict in criminal cases of "guilty but mentally ill," which three states (Illinois, Indiana, and Michigan) already had adopted. State legislatures also moved swiftly toward substantial modifications. The American Bar Association, which had adopted the criteria of nonresponsibility of the Model Penal Code of the American Law Institute, began reconsidering its position after the assassination attempt and Hinckley's trial.[7] The alternatives that it considered ranged from the abolition of the insanity defense to sharp limitations of exculpatory criteria.

In order to understand the origins of this debate, it is necessary to go back to the middle of the last century. The McNaughtan case of 1843 and the resulting legal formula for legal responsibility has dominated English and American criminal trials. Daniel McNaughtan killed Edward Drummond, the private secretary to Prime Minister Robert Peel, under the delusion that Peel's party, the Tories, had been persecuting him. McNaughtan was found "not guilty by reason of insanity." There had been several previous attacks on Queen Victoria as well as on her prime ministers, and assaults not resulting in death or injury of the intended victim were likely to effect a verdict of "not guilty by reason of insanity." Successful assassins, however, had been found guilty and executed.[8] The outrage of the public, Queen Victoria, and her prince consort after the McNaughtan verdict led to the request that the insanity defense be clarified by the law lords. The lords replied:

> To establish a defense of insanity, it must be proved that at the time of committing 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 that he was doing what was wrong.[9]

The McNaughtan rule became the judicial precedent for statutory law of

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[6]Richard P. Lynch, American Bar Association Standing Committee on Association Standards for Criminal Justice, *Memo to Members, Task Force on Nonresponsibility for Crime*, 28 September 1982, p. 2.

[7]*Model Penal Code*, American Law Institute (Philadelphia, 1962), p. 401.

[8]For example, John Bellingham, who shot and killed Prime Minister Sir Spencer Percival on 11 May 1812, was tried and executed within one week, but James Hadfield, who attacked George III in 1800, and Edward Oxford, who attempted to assassinate Queen Victoria and Prince Albert in 1840, were both acquitted by reason of insanity. Similarly in the United States, Guiteau and Czolgosz were executed, but Richard Lawrence, who attacked Andrew Jackson in 1835, and John Schrank, who attacked Theodore Roosevelt in 1912, were found not guilty by reason of insanity.

[9]Daniel M'Naghten's Case, 8 Eng. Rep. 721 (1843).

twenty-nine states and of all federal jurisdictions, and it served as the basis of numerous judicial decisions.

Beginning in the mid-twentieth century, there was an expansion of the criteria for nonresponsibility for crime. It sprang from the powerful currents of the movement toward liberalism and humanism and produced a vigorous debate, reflected in the articles in Part 1.

In 1954, Dession, a lawyer, Lasswell, a political scientist, and Freedman, a psychiatrist, participated in a symposium[10] that Robitscher has referred to as a precursor to the modern development of the interface of psychiatry and law.[11] Grappling with the dynamic flux of social demands for conformity and individually expressive nonconformity from the perspectives of law, policy science, and psychiatry, they agreed that the cognitions and perceptions of their fields shared common problems that could be appropriately responded to by the interaction of their respective disciplines.

Dession discussed the impact of deviation on those within the community who were empowered to make decisions concerning appropriate sanctions, whether positive or negative. He emphasized the influence of their own experience of events on their judgment concerning the outcome of their sanctions or probable effect on future events and speculated on the roles of psychiatry and law in the infliction of negative sanctions in the name of the community. Dession postulated four preferred values of public order, stated as principles: equality, which places primary value on the individual and holds that no prescription or negative sanction should be favored for the establishing or reinforcing of institutional patterns unless it facilitates full self-realization of all individuals; economy, which holds that punishment is never a good in itself; democracy, which requires that the power of decision in sanctioning should be as widely shared as possible; and the humanitarian principle, which claims that those who benefit by the sanction should be the largest possible identification unit or group consistent with freedom. The psychiatrist's concern for his patient's welfare may clash with the community's concern with danger to its security. The pursuit of just goals is endangered when preventive sanctions are based on predictions of future socially harmful behavior. Practices that may be helpful in therapy may be harmful as socially imposed negative sanctioning.

Lasswell suggested that psychiatrists contribute to the classification of

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[10]George H. Dession, Harold D. Lasswell, and Lawrence Z. Freedman, "Law, Conformity, and Psychiatry: A Symposium" (New Haven: Yale Study Unit in Psychiatry and Law, Yale University, 1955); also published as separate essays in *Psychiatry and the Law*, Paul H. Hoch and Joseph Zubin, eds. (New York: Grune & Stratton, 1955), pp. 1–53. Reprinted in Part I of this volume.

[11]Jonas Robitscher, *The Powers of Psychiatry* (Boston: Houghton Mifflin, 1980), pp. 100–02.

goal values and institutional objectives in legislation by possibly anticipating the psychological impact of suggested changes in social policy. Their empirical data could provide a corrective to idealized versions of social behavior. Psychiatric pragmatism might differentiate between community-imposed stresses that promote either psychopathology or psychological health. Popular outbursts of hostility may create an environment in which the legislators introduce the most absolute bills with drastic negative sanctioning.[12] The psychiatrist could explore the motives for such extreme legislation. Clinical and behavioral science findings might assess psychological predispositions as well as help to estimate, anticipate, and appraise enforcement policy. Case studies by psychiatrists also could provide both substantive data and paradigms to aid legislators in the self-surveying and social-prediction process.

Freedman discussed the underlying phenomenon of the difference between the nonconforming, or deviant, individual and his society. He suggested possible psychiatric contributions to administrative and legislative aspects of government but also emphasized the limitations of clinical contributions to understanding social process. Psychiatrists must be cautious in projecting into the social environment insights gained in the course of treating individuals. They must be conservative in their assessment of the clinician's ability to predict future behavior, even of individuals. In his zeal to be scientific in theory and method, the psychiatrist must subject himself to relentless self-scrutiny lest he unwittingly substitute his own personal and social values for the scientific objectives to which he aspires.

In 1954 the Committee on Psychiatry and the Law of the Group for the Advancement of Psychiatry issued a report urging that criteria for criminal responsibility and psychiatric testimony be changed.[13] It described the limitations that psychiatrists and several of their legal consultants believed were implicit in the McNaughtan formulation, whose criteria were cognitive. However, as Maudsley pointed out in the mid-nineteenth century, powerful conscious and unconscious feelings were barred by such criteria.[14] Even if he is aware of the wrongfulness of the act and wishes to avoid it, a person might nevertheless be unable to restrain himself. He acts harmfully, irresistibly impelled by forces within him that he cannot control. In several states an exculpatory role was given to the so-called "irresistible impulse." However, this defense rarely has been successfully invoked.

The report on the Committee on Psychiatry and the Law also evaluated the competence and the limitations of the psychiatrist as an expert witness:

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[12]A striking example is the torrent of proposed legislation to restrict or eliminate the insanity defense following Hinckley's acquittal.

[13]Committee on Psychiatry and the Law of the Group for the Advancement of Psychiatry, "Criminal Responsibility and Psychiatric Expert Testimony," GAP Report #26 (Topeka, KS, 1954). Reprinted in Part I of this volume.

[14]Sir Henry Maudsley, *Responsibility in Mental Disease* (1874; reprint ed., New York: D. Appleton & Co., 1897).

1) The psychiatrist can predict behavior statistically and determine, with fair accuracy, the classes of undeterrable persons. He can predict the tendency of behavior in the individual and, with fair accuracy, determine his deterrability. 2) He can, with fair accuracy, determine the degree of disorder of the accused relating to the mental state of the accused as it is relevant to his capacity to appreciate the significance of the charge and to cooperate in the preparation of his defense, and the causal connection of the mental state and the act charged. 3) He can make advisory recommendations for suitable disposition of the convicted. The committee pointed out that it was unable to fit any "scientifically validated entity of psychopathology into present legal formulae of insanity" and that the psychiatrist was unable to "determine degrees of legal responsibility calibrated to mental degrees of psychopathology." The report recommended that the psychiatric expert be freed from the necessity of testifying in terms of moral judgment.

Beginning in the mid-1950s, a series of legal developments altered slightly the rules by which responsibility was determined. In 1954 the appellate court in Washington, DC, held in the case of *Monte Durham*, that a man should not be made responsible for an otherwise criminal act when his behavior was the "product of mental disease or deficiency." The *Durham* decision was a judicial reaction to the limitations of the previous legal tests for criminal responsibility.[15] In 1962 the American Law Institute included a formula for legal responsibility in its Model Penal Code, which was prepared by leading American scholars and legal authorities. This would free from responsibility anyone who, because of mental defect or deficiency, had been incapable of appreciating the criminality of his act, or, if he had appreciated its criminality, nevertheless had been unable to control his behavior.[16] However, repetition of harmful antisocial behavior would not by itself free a defendant from responsibility for his crime. The repetitive criminal was then called the psychopathic personality, now known as the antisocial personality. The *Currens* decision[17] freed from responsibility those who were unable to control their behavior, and made that inability the crucial distinguishing factor rather than perceptual, intellectual, or emotional traits.

The decision in *Gorshen* v. *California*[18] resembled the centuries-old partial responsibility clause of the Scots. Mental disability might serve as a mitigating circumstance, affecting the nature and duration of disposition, whether penal incarceration or therapeutic treatment as an outpatient or inpatient. California had two separate trials in criminal cases where the question of mental illness was raised. The first trial sought to ascertain whether the accused person carried out the illegal act. If so, the second trial sought

[15]Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
[16]*Model Penal Code*, American Law Institute (Philadelphia, 1962), p. 401.
[17]United States v. Currens, 290 F.2d 751, 775 (3d Cir. 1961).
[18]People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959).

to determine how his state of mind at the time related to the legal criteria for responsibility. This has since been repealed.

These variations in legal procedures affect, however, only a small fraction of the criminally accused. Federal jurisdictions and most states have followed the legislative example of the Model Penal Code. The impact of the *Durham* and *Gorshen* decisions had been mainly confined to the jurisdictions of the courts that pronounced them. By and large, until 1962 the question of criminal responsibility remained approximately where it was when promulgated by the law lords in the wake of McNaughtan. But coming as they did within a single decade, these defections from the McNaughtan formula reflected widespread dissatisfaction and seemed to presage a legal consensus certain to be more harmoniously adapted to contemporary social values and social sciences than the answer given by the English lords.

This period was a hopeful one, perhaps naive. It widened the range of testimony concerning mental disability allowed in the courtroom so as to be more responsive to the new knowledge of mental health professionals. It also provoked a strong reaction. In 1963, Szasz maintained that there is no such thing as mental illness, and he argued that everyone should be held responsible, that is, punishable for their illegal behavior.[19] In the same year, Wooten urged that criminal law discard the notion of *mens rea*,[20] and Goldstein and Katz proposed the abolition of the insanity defense.[21] And in 1966, Roche made a plea for the abandonment of the insanity defense.[22] Although their rationales varied widely, their recommendations foreshadowed contemporary changes in popular and professional views.[23]

The essays published in Part II of this volume were presented at a symposium held on 12–13 October 1979 entitled "Psychiatry and the Law: Reaching for a Consensus," sponsored by the Institute of Social and Behavioral Pathology at the University of Chicago. As anticipated, our reach exceeded our grasp. No consensus was achieved, nor should any have been anticipated. However, these essays are thoughtful, sometimes provocative, analyses of a contemporary dilemma. In the western democracies there exists no consensus establishing the legal threshold of toleration for harmful behavior inflicted by

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[19]Thomas S. Szasz, *Law, Liberty and Psychiatry: An Inquiry into the Social Uses of Mental Health Practices* (New York: Macmillan, 1963).

[20]Barbara S. Wooten, *Crime and Criminal Law* (London: Stevens & Sons, 1963).

[21]Joseph Goldstein and Jay Katz, "Abolish the 'Insanity Defense?' Why Not?" *Yale Law Journal* 72 (1963): 852–72.

[22]Philip Q. Roche, "A Plea for the Abandonment of the Insanity Defense," in *Crime, Law and Corrections*, ed. Ralph Slovenko (Springfield, IL: Charles C. Thomas, 1966), pp. 146–64.

[23]In 1967, however, Abraham S. Goldstein published a powerful defense of the McNaughtan formula in *The Insanity Defense* (New Haven: Yale University Press, 1967).

persons with impaired intellectual and emotional states. These papers reflect the public policy debate, ranging from classical concern for the welfare of the polis to contemporary preoccupation with the vulnerability of the community. Within this spectrum fall essays that modulate the delicate balance between the need to defend the structure of society and the moral imperative to protect the psychiatrically disabled.

Quen treats the question of responsibility historically, and while doing so, has illuminated the contextual problems of law and medicine as well as the political, social, and economic value systems in which evolution has occurred. He reviews the history of the insanity defense in Anglo-American law. Insanity was originally a medical and not a legal term and describes several modern diagnostic categories. During the nineteenth century the word insanity was applied to "idiocy, senility, mania, melancholy, alcoholism, compulsive theft, and compulsive firesetting." Perhaps, considering its origins, a contemporary definition is unattainable. More importantly, considering its purported legal role, a legal definition is impossible. The McNaughtan jurists had used the precedents and knowledge of law. Hale and Blackstone discussed legal concepts of the psychological capabilities and thus competencies of minors at different ages for legal purposes.[24] Medicine had no direct part in this development until 1843, when physicians played a key function in the McNaughtan trial. That medical intervention initiated the debate concerning the appropriate role of the medical and mental health expert in determining responsibility for an alleged criminal act.

Anastaplo bases his reaction to psychiatric intervention in criminal trials on the Aristotelian argument that both the polis—the community—and man are by nature a unity: "the polis is among those things that are by nature and . . . man is by nature a political animal." Aristotle emphasized the centrality of man's relationship to his community. "A man who is no part of a polis," he wrote, "is either a beast or a god." Anastaplo believes that psychiatry favors those who endanger the decent opinions about good and bad within the community. Psychiatry, unlike medicine, developed at a time when "Nature was under a cloud." Politics is the master art and psychiatry must be subordinate to a decent political order. He decries the modern intellectuals, including psychiatrists, who depreciate nature and misconstrue natural right, and urges a return to the rationality of pre-Enlightenment and classical philosophy. To Anastaplo, Ibsen is the paradigmatic example of modern denigration of the community in favor of personal license.

Morris argues for the abolition of the insanity defense. He distinguishes four areas of concern: triability, responsibility, punishability, and treatability. The consideration of blameworthiness complicates and confuses these issues

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[24]Matthew Hale, *The History of the Pleas of the Crown* (London: E. R. Nutt and R. Gosling, 1736), pp. 40–46; William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–69), 4: 20–26.

when the moral power of the state acts to punish a person who is, in "common" justice, not to blame because of psychological incapacity or pathology.

Carroll examines the range of proposals from those that would eliminate mental disease or defect as relevant to the determination of guilt to those that suggest that the law might rather define more closely the scope of knowledge or intent necessary to sustain a plea of insanity, restricting it to a specific conscious state in a severely delusional person. Another approach would be to limit the criteria to a defendant's lack of knowledge or intent required for the statutorily defined offense. Finally, *mens rea* may be interpreted as a moral category. In other words, was the defendant capable of such evil disposition that he may be held justly responsible and blameworthy for harmful behavior? In emphasizing the importance of moral blameworthiness, Carroll differs from Morris concerning the legal significance of the state of mind as an element in the crime.

The Supreme Court of the United States has held that the prosecution must prove beyond reasonable doubt every element necessary to constitute the crime charged. In the case of murder, this includes "adequate mental capacity as an implied element of the *mens rea* required to constitute the offense of murder."[25] However, Carroll distinguishes sharply between the questions of abolishing the insanity defense as a separate defense and the exclusion of evidence concerning the mental element of the offense charged. He concludes by stating that to abolish the insanity defense or prohibit evidence of mental disability raises the specter of the elimination of a mental element of true crimes and of offending a fundamental principle of justice "rooted in the traditions and conscience of our people."

Studies by Lifton and others have developed the concept of "coercive persuasion," which holds that the prolonged exposure to captors who control and manipulate the environment including food, ideas, and all sensory input may alter the will, belief, and behavior of captives.[26] Arens discusses the defense of coercive persuasion in civilian criminal trials. After the kidnapping of Patricia Hearst by the Symbionese Liberation Army, she announced that she had joined them; she later was tried for the alleged crimes in which she participated with them. Her trial reflected contemporary social and political values. Coercive persuasion may exculpate because the degree of psychopathological incapacitation may inculcate its victims with a perception

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[25]In re Winship, 397 U.S. 358, 361 (1970); Davis v. United States, 160 U.S., 469, 491 (1895).

[26]Robert Lifton, *Thought Reform and the Psychology of Totalism* (New York: Norton, 1961); "'Thought Reform' of Western Civilians in Chinese Communist Prisons," *Psychiatry* 19 (1956): 173–95. See also Edgar Schein, I. Schneier, and C. H. Barker, *Coercive Persuasion* (New York: Norton, 1961). For a recent case see Vanessa Merton and Robert Kinscherff, "Coercive Persuasion and the 'Culpable Mind': The Court-Martial of Bobby Garwood," *The Hastings Center Report* 11, no. 3 (June 1981): 5–8.

of reality or propensity to behave consistent with the psychological conditioning to which they unwillingly had been subjected. Arens argues that the "pathological disorientation" found by the psychiatrists who examined Hearst was consistent with an insanity defense, but "its acceptance hinged exclusively upon judicial recognition of coercive persuasion as a full-fledged defense." In this, the defense was unsuccessful, and Hearst was convicted.

Henning resolves the apparent contradiction between a legal positivist or utilitarian approach, which would abolish the insanity defense, and the moral concern with blameworthiness, which requires that it be maintained. He advocates that different standards of sanity be applied to crimes of different degrees of severity and suggests that only in the more serious crimes should the question of criminal responsibility be invoked. Henning offers a rational set of alternative standards that would be graded according to the seriousness or severity of the alleged offense. The defense of mental incapacity or defect already is invoked most frequently in major crimes.

Stone deals with the legal response to the mentally ill person. Foucault, Szasz, and Laing view the patient as the victim of social and professional values. Lawyers have seen some patients as victims of diagnostic commitment and treatment procedures that violate their civil rights and deprive them of their civil liberties. Civil commitment has been justified by two overlapping principles: the government's role as the protecting parent to the afflicted individual, and its traditional role as the protector of society. Treatment facilities must be vastly improved before abuses of involuntary commitment can be remedied. Stone applauds efforts to limit the powers of the law but cautions against premature attempts at final answers. Psychiatrists must recognize the need for due process restraints, and lawyers reciprocally must recognize the need for appropriate care of the mentally ill. When therapeutic and punitive social actions are not distinguished, the moral concept of blameworthiness is eliminated as an element in criminality.

The rise in the crime rate in the United States, the apparent failure of our jails, and the inadequate reform and inept rehabilitation efforts have been accompanied by the suspicions and resentments of governmental initiatives that became especially intense from the mid-1960s to the mid-1970s. Ironically, this dynamic synergy of political reaction and radical politics resulted in a harsh reversion to simplistic dichotomies and Draconian punishments. Dinitz provides a perspective in developments in penology and criminology from the last quarter of the nineteenth century to the final decades of the twentieth century. His study required that he analyze the changing social environment in which the prisons exist. He demonstrates that the changing patterns of imprisonment reflect, and are illuminated by, the more general alterations in legal and the far wider social, political, and economic pressures and values.

Dinitz reflects on the remarkable fidelity with which the social and

cultural attitudes toward trial and sentencing procedures have been paralleled by variations in our penological approaches. The progressive periods in American history have been associated with increased concern for the mentally ill offender in the courts as well as for the treatment and rehabilitation of all prison inmates. Conversely, periods of conservatism have been reflected in the courts by withholding the protection of responsibility criteria and by denial that rehabilitation is a rationale for imprisonment.

In 1982 the American Bar Association Task Force on Responsibility reassessed the responsibility formula. The task force recommended that the psychiatrist or mental health expert have a contributory, not decisive, role. The American Law Institute's responsibility formula would have been retained. The judge would have instructed the jury that the expert witness should describe his clinical evaluation of the mental health of the prisoner at the bar. He would have no other role in determining guilt or innocence. The ultimate legal question is based on assessment of the facts in the case, and the jury is the trier of facts.

As Quen states, although the term insanity came from medicine, the insanity defense originated in the law. Within the past century, mental health experts have become part of the judicial process; the consequent misunderstandings have led to mutual suspicion and disillusionment. Differences of opinion are likely to emerge when the issues require an understanding of human motive and action. They become inevitable when mental health experts are expected to respond in terms of legal, semantic formulas rather than in terms of their area of clinical and scientific competence.

The relationship between law and psychiatry often produces conflict. In trial, psychiatrists are asked to assess the defendant's state of mind at the time of the examination and also to assess retrospectively the state of mind of the defendant at the time of the alleged commission of the act. With these levels of complexity, there is rarely a case without ambiguities. Conflict on procedural matters reflects conflicts of sociolegal values. When values are in conflict, the inherent difficulties can never be resolved when they are debated in terms of process and procedure. Are the values those of the amelioration of social problems, the alleviation of social anxiety, professional projections of the expert, or are they the values of law confronted by those of medicine? The conflict in values may be inherent in the evolution of common law, which expresses the "common" sense of justice. Justice does not demand that every socially harmful individual be punished, even when that person does not fit the twentieth-century version of the "wild-beast" test.

The phrase "forensic psychiatry" is an old one. It connotes the rhetorical tactics of the courtroom. But the concern of psychiatry with the law is far wider, for whether he realizes it or not, every physician repeatedly deals with patients whose feelings of guilt, shame, dependence, or unresolved conflict