

NORVAL MORRIS

MADNESS
AND THE
CRIMINAL LAW

Chicago

NORVAL MORRIS

THE CRIMINAL LAW

The University of Chicago Press
Chicago and London

Norval Morris is the Julius Kreeger Professor of Law and Criminology at the University of Chicago.

The University of Chicago Press, Chicago 60637
The University of Chicago Press, Ltd., London

© 1982 by The University of Chicago
All rights reserved. Published 1982
Printed in the United States of America
88 87 86 85 84 83 82 5 4 3 2 1

Chapter 1, "The Brothel Boy," appeared as number 18 of *Occasional Papers*, published by the Law School of the University of Chicago (1982). Chapter 3, "The Planter's Dream," appeared in the *University of Chicago Law Review*, volume 49, number 3 (Summer, 1982). Chapters 1 and 3 © 1982 by Norval Morris.

Library of Congress Cataloging in Publication Data

Morris, Norval.

Madness and the criminal law.

(Studies in crime and justice)

Includes bibliographical references and index.

1. Insanity—Jurisprudence. 2. Criminal liability.

3. Competency to stand trial. I. Title. II. Series.

K5077.M67 1983 345'.04 82-13435

ISBN 0-226-53907-5 342.54

608746

MADNESS AND THE CRIMINAL LAW



MADNESS AND

STUDIES IN CRIME AND JUSTICE

Editorial Committee

Sanford H. Kadish

Norval Morris

James Vorenberg

Stanton Wheeler

Marvin E. Wolfgang

Franklin E. Zimring (Chairman)

TO MY WIFE, ELAINE

Acknowledgments

The errors in this book are mine, any insights of value are largely plagiarized—and so they should be since that is how knowledge grows, if it grows at all. Particular burdens of responsibility are born by the Edna McConnell Clark Foundation, who gave me released time to write this book; by the University of Chicago and its Law School for the most hospitable and supportive scholarly environment the world has to offer; by Michael Tonry, Gordon Hawkins, and Franklin Zimring for struggling with my successive drafts; by Richard Friedman, Mark Jenkins, Robert Monk, and Jeffrey Peck for their ready and efficient research assistance; and by Helen Flint and Barrik Van Winkle for their generous assistance with this book as with my everyday work. And, in less committed vein, my thanks go to the National Rifle Association, without whose intervention this book would not have been written.

Contents

	Acknowledgments	ix
	Introduction	1
ONE	The Brothel Boy	6
TWO	The Criminal Responsibility of the Mentally Ill	28
THREE	The Planter's Dream	88
FOUR	Sentencing the Mentally Ill	128
FIVE	Anisonomy, or Treating Like Cases Unlike	178
	Appendix	211
	Index	219

Introduction

Why “madness” as part of the title of this book? Is it not peculiarly imprecise? It is, indeed, but that very imprecision justifies its usage here. I am anxious to avoid any particular view of mental illness as part of the argument and analytic structure of this book. I wish to include all reasonable perceptions of mental illness flowing from, at one extreme, Thomas Szasz’s almost total rejection of the concept of mental illness (unless there be organic brain damage or physiological symptoms correlated to behavioral disorders), to the all-embracing views of psychiatrists like Karl Menninger who see all of us as more or less mentally ill at different times of our lives. It is clear to me that there are genetic, physiological, and sometimes determining sociological influences on the normal patterns of cognitive processes and volitional controls of the human animal; that there are endogenous aberrations within the cranium influencing behavior. Nobody can go to an institution for the retarded without recognizing pathology and sometimes pain; no one of any sensitivity can go to a state mental hospital without recognizing the existence of mental illness and its concomitant, deep suffering.

I am not in this book pretending to any expert knowledge of mental illness, however it be defined; I am considering something quite different, namely, the ways in which mental illness and retardation, no matter how defined, relate to the criminal-law power of the state. It is thus a deliberate choice to select the word "madness" and put aside any pretense to the precision claimed, for example, by the *Diagnostic Statistical Manual III* or any other nosology of mental illness and retardation.

This book is a jurisprudential study in this sense: it deals with the relationship between individual autonomy and the power of the state as exercised under both the mental health power and the criminal-law power. In particular, my concern is with situations where these two powers overlap. And in even closer concentration, the book deals largely with the overlapping of the two powers in situations where the citizen is incarcerated, it being alleged that he is both a criminal and mentally ill.

Here is the structure of the book:

Chapter 1, "The Brothel Boy," deals with the relationship between moral guilt and criminal guilt. Its underlying theme is that there is a cleavage between the two and that governmental capacities to fashion structures of punishment must recognize their relative incompetence in the assessment of moral worth. This is an impressionistic argument, presented in fictional form.

Chapter 2, "The Criminal Responsibility of the Mentally Ill," deals with the proper limits of trying and convicting the mentally ill for criminal conduct. It presents the central thesis that there is an advantage in pursuing questions of criminal guilt of the mentally ill and in not finessing those issues by mechanisms which confuse the mental health power with the criminal-law power of the state. A lengthy chapter, it brings together two considerably canvassed areas of criminal responsibility of the mentally ill: their fitness to plead and the special defense of insanity. Underlying much of the argument in this chapter is the view that too many of the problems of overlap between these two powers have been considered as questions of fitness to stand trial or questions of the application of the defense of insanity and that too few have been handled (as they should be) as questions of sentencing. There is,

however, one relationship between mental illness and criminal guilt that is not considered in this chapter or in the concluding chapters on sentencing: the situation where mental illness does indeed prevent perception of reality and thus should lead both to an acquittal under the criminal law and, in some circumstances, to the accused's not being subject to civil commitment. Chapter 3 is intended to fill this gap.

Chapter 3, "The Planter's Dream," deals with the problem of involuntary conduct—conduct in fugue states—for which it seems clear that there should be no criminal liability unless the danger that such involuntary conduct might create was known beforehand to the accused. This, like the subject of chapter 1, is an impressionistic theme, for which fiction seems the best method of presentation.

The setting of the stories in chapters 1 and 3 in Burma in the mid-1920s, and their focus on imagined events in the life of Eric Blair (later George Orwell) merits comment. Eric Blair was then in Burma as a police officer and magistrate in the Indian Imperial Police; later, of course, he became a celebrated novelist and a superb political polemicist. His life in Burma and some of his later writings combine to provide a fine frame of reference for presentation of moral problems in the criminal law related to mental illness. The form of chapters 1 and 3, discovered "lost" manuscripts, is an ancient literary device which set me free to advance ideas I would otherwise have been hesitant to offer.

Chapter 4, "Sentencing the Mentally Ill," addresses important and largely neglected themes. There is widespread agreement that mental illness is relevant to sentencing convicted criminals, but the analysis rarely proceeds far beyond that proposition. This chapter attempts to state some principles both of aggravation and of mitigation of punishment by reason of mental illness, to state the guiding principles for reconciling that apparent contradiction, and to relate the whole to emerging reforms in sentencing practice.

Chapter 5, the concluding chapter, "Anisonomy, or Treating Like Cases Unlike," deals with an important aspect omitted from the preceding chapter. A precept of justice frequently suggested, particularly in relation to sentencing convicted criminals, is that

like cases should be treated alike and that unlike cases should not be treated alike. In this chapter I seek to controvert those propositions. To a degree the argument harks back to the relationship between moral guilt and criminal guilt illustrated in chapter 1, but an effort is made to develop a defensible position of limited retributivism in relation to punishment under which the clear disadvantages of a rigid adherence to equality in punishment can be avoided.



ONE

The Brothel Boy

A fragment of a manuscript

The piece is handwritten, in Eric Blair's characteristic, cramped, meticulous script. There are frequent crossings out and emendations. There are occasional spelling inversions, such as "gaurd" for "guard," which are surprising, considering the obvious overall attention the document apparently received.

As an essay it is uneven. Parts reveal Blair-Orwell at his most masterful—phrases and sentences that he will use again in his later writings; parts are verbose and pretentious, like the early efforts of one ambitious to be a writer but insecure in the craft, struggling too hard for effect.

The document also foreshadows many of the ideas its author later developed in depth and subtlety, themes that later supported novels and essays. That alone would assure its lasting importance. It is a major find.

I bought it for the equivalent of \$185 while on a holiday pilgrimage retracing Blair's travels during his period in Burma. The vendor was a Parsee; at least he was either a Parsee or a half-caste Anglo-Indian, but I think probably a Parsee since he did not affect an English accent. He had bought the manuscript, he said, from some Dacoits who had

boasted to him of their courage in breaking into a government bungalow. He confessed to having purchased the few sticks of furniture and the few personal effects they had stolen, and he had quickly got rid of everything other than these papers, which he now held in a crumpled, yellow, paper bag. All this was many years ago; he had turned to legitimate business long since of course—on that I could rely. He had heard of my interest in Eric Blair and thought I might like to see these papers.

It is true that Blair once wrote to his mother about a burglary of his quarters—"who should guard this guardian if he can't guard himself"—though he had not, possibly for reasons of embarrassment, reported it to his superiors in Mandalay; but he had made no mention to either of the loss of a manuscript, which is surprising.

So much for my find. The amount I paid for it, annas to the value of \$185, still puzzles me; the sum is a tribute either to the vendor's ignorance or to the purchaser's gullibility.

Here it is, gaps and all.

Moulmein
Upper Burma
1927

I wonder does any other Old Etonian roll his own cigarettes? And I'm not sure why I do. They are cheaper, of course, but the taste is not very different and bits and pieces of tobacco do drift into one's mouth and require picking off the tongue or lips, which seems to disturb some who observe it. In the Club they make no secret of their disapproval—"A frightfully low-bred habit."

"Blair, *do* take one of mine, it's so much easier."

"No thanks, I prefer these," and I watch their foreheads wrinkle in revulsion.

I had carefully rolled a cigarette and was about to moisten the paper, my tongue protruding, mouth agape, when a native boy burst into my office shouting, "Come, Come Sir. Hurry please. They are killing the brothel boy."

I knew, of course, of the local brothel, but not of any "brothel boy." A homosexual prostitute seemed most unlikely in Burma, quite out of character with local values and prevailing behaviour—but I had mistaken his role. At all events, I hurried to where I was led to find several village men standing over the unconscious youth but desisting now from further violence. They were, it seemed immediately obvious, the remainder of a mob of assailants, though how I knew remains unclear to me.

The boy was unconscious, bleeding from the head and face from wounds inflicted by repeated kicks. His shoulder was twisted, obviously broken. His clothes, when whole scarcely adequate, were now gaping, torn, and bloody. He lay in a foetal curve, clutching his groin. The expression on what was left of his features was of anguished surprise, the lips drawn back, mortal fear apparent. The smell of fear and violence, of sweat and vomit, was pervasive.

Resentfully they stood back to allow me to inspect him. Then, not concealing their reluctance, they helped me carry him to the police station, where I telephoned Dr. Veraswami at the nearby hospital. By the time Dr. Veraswami had arrived I knew the outline of the events that led to the brothel boy's beating. Some villagers returning to the fields in the afternoon had heard a girl's screams from a heavily overgrown area near the river customarily used for washing, but not at this time of day. When they reached her the screaming had ceased; she lay, a young girl, naked in the brothel boy's arms. She had been raped. In her struggles she had apparently struck her head violently on a sharp rock. The boy had made no effort to flee.

The girl was taken to her home. More villagers arrived. The boy was attacked. He might or might not have been killed—my arrival may have saved him for the hangman. Or the villagers may have overcome their dislike of the Raj's justice sufficiently to bring him to me. It was, after all, a fairly clear case—a young girl, a virgin, raped and injured by the brothel boy.

And it became an even clearer case when, a few days later, she died from the combined effects of the head wound and sep-