REVIEW


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*Madness and the Criminal Law*† consists of two stories and three essays. The stories—written as if the reminiscences of Eric Blair (George Orwell) about his service in the 1920's as a police magistrate in British-ruled Burma— are about crimes of passion, and they illustrate some difficult issues of moral culpability and social prejudice that the essays discuss in a more conventional manner. Morris has a promising future as a writer of fiction: these stories are both entertaining and thought-provoking. Both stories suggest that outcomes of notorious criminal cases are governed more by community prejudice or political pressure than by theories of culpability. The Brothel Boy was hanged for rape-murder because both the British and the Burmese wanted him dead, although his mental capacity was minimal. The white Planter who killed his native mistress in a trance was acquitted by a colonial government which seemed to be more concerned with the interracial sexual scandal than the killing. Like Eric Blair himself, Norval

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2 Biographer Peter Lewis writes that Blair served from 1922-27 as an assistant superintendent of police in Myaungmya, Upper Burma, where he took charge of a district headquarters with between thirty and fifty men, and later at five other stations including Moulmein in steamy Lower Burma. Between them, these stations gave him the experiences on which he based not only his first and most satisfactory novel, *Burmese Days*, but also the essays, *A Hanging* and *Shooting an Elephant*, two of his most masterly pieces of physical description.

Morris is unsentimental about human nature and the legal process.

The legal essays in the book also take a realistic, unsentimental posture towards the law of mental illness, although their earnest rationalism contrasts oddly with the exotic cynicism of the stories. Morris has stated his opinions in previous books and articles,8 and I detect no change in his position. He proposes that incapacity to stand trial should be no more than grounds for a continuance; if the doctors cannot restore capacity within a reasonable time the criminal trial should proceed anyway with special safeguards for the defendant, because it is more rational to go ahead in this way than to release the accused or to confine him indefinitely for his incompetence. Morris would abolish the defense of legal insanity outright. Psychiatric testimony could still be received, like evidence of intoxication, to the extent that it is relevant to determining mens rea. In addition, he suggests that there should be a special "diminished responsibility" defense in homicide cases, which would permit a jury to reduce a murder charge to manslaughter where mental illness is a factor.4 Otherwise, Morris would have the law specify that mental illness is a relevant factor in sentencing. The sentencing authority should take it into account to reduce the sentence (because the mentally ill are supposedly less culpable than other offenders) or to increase it in those instances where insanity is reliable evidence of dangerousness.5

The importance of Morris's argument lies not in its novelty, but in its timeliness and in the authority of its author. President Reagan's Department of Justice also wants to abolish the insanity defense,6 as did President Nixon's.7 That kind of endorsement is


4 Morris advocates a diminished responsibility defense only as a "fall-back alternative position," but he does seem to consider it a positively good idea. See Morris at 53-54, 69.

5 Hence the conclusion: the range of deserved punishment being otherwise determined, the judge should sentence the mentally ill offender toward the bottom of that range to the extent that his mental illness was causally related to his crime (or to his earlier crimes), unless reliable evidence is adduced that because of his mental illness this offender is substantially more likely than others in that range to be involved in similar or more serious crimes in the future. Id. at 172 (emphasis in original). Because we do not have reliable techniques for predicting behavior, Morris thinks that there will be "very few cases indeed" in which mental illness may be used to increase the sentence. Id. at 171-72.

not likely to attract support from liberals in the legislatures, the judiciary, or the psychiatric profession. Norval Morris, on the other hand, is a man of the liberal center, a former law school dean, a world-renowned scholar, and an influential pragmatic reformer. Intellectuals can hardly dismiss the abolitionist position out of hand if it has the support of an expert of this calibre, and the courts are less likely to find a constitutional requirement for an insanity defense if they believe that there is substantial academic support for its abolition.

The timeliness of the book stems from the public reaction to the verdict of not guilty by reason of insanity in the Hinckley case and, to a lesser extent, to the manslaughter conviction of San Francisco Supervisor Dan White. John Hinckley is the young man who attempted to assassinate President Reagan in order to attract attention to himself and to impress a movie actress whom he admired from a distance. The subsequent proceedings called into question not only the insanity defense but the rationality of our adversarial jury-trial system. After more than a year of expensive pretrial maneuvering and psychiatric examinations, the lawyers jousted for eight weeks of trial, examining and cross-examining expert witnesses who naturally gave conflicting and confusing testimony on whether Hinckley's obviously warped mentality amounted to legal insanity. The judge instructed the jury to return a verdict of not guilty unless they could agree "beyond a reasonable doubt" that Hinckley was sane. If taken literally, the instruction amounted to a directed verdict of not guilty, considering the deadlock of expert opinion and the difficulty of certifying the sanity of a young man who shot the President to impress a movie star. Juries usually ignore such unpopular legal standards, but the Hinckley jury surprised everybody by taking the law seriously and finding him not guilty. Hinckley will now be confined to a mental hospital indefinitely because he is "dangerous," although there is no reliable way to predict what he would do if released and no

administration proposals to abolish the insanity defense).


8 See Taylor, Too Much Justice, Harper's, Sept. 1982, at 56. Taylor estimates the cost of psychiatric and psychological expert testimony for this one trial at over $500,000. A single prosecution expert received $122,742.91 in fees and expenses from the taxpayers.

9 At the time of the trial, federal law placed the burden of proof on the prosecution, but District of Columbia law placed it on the defense. Hinckley was charged with both federal and local crimes, but the trial judge decided to avoid confusion by instructing the jury only on the federal rule.
reliable test to determine if he has been “cured.”

The California case of Dan White is nearly as notorious. White impulsively resigned his elective office as San Francisco Supervisor, but then changed his mind and asked Mayor Moscone to reappoint him to the vacancy. Moscone’s decision to appoint another person so enraged White that he went to the City Hall with a loaded pistol and shot the Mayor dead. After pausing to reload, he crossed the hall and assassinated Supervisor Harvey Milk, a prominent leader of San Francisco’s homosexual community and a political adversary of White.

The psychiatric defense was presented under California’s “diminished capacity” doctrine, which in substance reduced the degree of a homicide from murder to manslaughter if the defendant could not control his conduct or understand his duty to obey the law. A prominent psychiatrist testified for the defense that the violent outburst resulted from White’s political and financial crisis and from his habit of gorging himself on high-sugar “junk food” when under stress. San Francisco juries tend to be eccentric, and a number of factors may have contributed to the lenient manslaughter verdict, but press accounts gave the credit or blame to what came to be called the “Twinkie Defense.” The verdict sparked a public backlash that united liberals and conservatives in opposition to a permissive psychiatric defense that was perceived as a judicial license to kill. In a rare unanimous vote, the California Legislature abolished the diminished capacity defense outright.

The Hinckley and White cases embarrassed the psychiatric profession as well as the courts. The spectacle of highly-paid expert witnesses contradicting each other in court inevitably created the impression that psychiatrists, like lawyers, are essentially paid

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12 Some observers thought that the prosecutor made a weak effort, possibly because of law enforcement sympathy for White (an ex-policeman) and antipathy towards Harvey Milk. Perhaps the verdict was not as lenient as the public supposed. The sentence White initially received (7 2/3 years, the maximum possible) was only four months less than that handed out to Raskolnikov, the protagonist of Dostoyevsky’s Crime and Punishment, for a notorious double murder over a century ago; I had not previously thought of the Tsar’s courts as permissive. F. DOSTOYEVSKY, CRIME AND PUNISHMENT 519 (1950) (1st ed. n.p. 1866). Of course, the differing climates of Siberia and California have to be considered, as well as the food and other amenities. Due to statutory “good time” credits, White was recently released after serving about 4 1/2 years.
advocates for the side that retains them. Psychiatrists like to point out that economists and engineers also often disagree in litigation, but such comparisons, however just, are really beside the point. Granted that there are problems with other forms of expert testimony and granted that many difficulties are caused by incompetent lawyers, the adversary system, or the way we use juries, it remains true that there is good reason to be particularly dissatisfied with the way we have been using psychiatric testimony in criminal cases.

It is said that scholastic theologians debated over how many angels can dance on the head of a pin. I suspect this story is a canard invented by their enemies, but whatever these theologians did was no sillier than asking a jury to decide beyond a reasonable doubt whether a defendant who committed a purposeful act for some bizarre motive could have acted otherwise if he had wished to do so. Of course, psychiatrists give conflicting testimony about a question like that. Free will is a philosophical premise, not an observable medical datum. We might as well ask for expert opinion about why there is something instead of nothing.

Unfavorable publicity generated by recent notorious trials is not the only reason that there is widespread interest in reexamining the insanity defense. It has long been assumed that the insanity defense was relatively harmless because it was invoked mainly as a way of avoiding the death penalty. An insanity acquittal supposedly led to very lengthy confinement in a secure mental institution, and therefore the public did not need to be concerned that the defendant was “getting away with” anything. Leading opinions have even suggested that successful insanity defenses further public safety by ensuring that mentally ill offenders remain confined until “cured” of their dangerous propensities. Whatever may have been the case in the past, such statements are not realistic today. There has been a massive change in public policy towards the mentally ill, and large-scale institutional confine-

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14 The prevailing tests of legal insanity are variations of the American Law Institute’s MODEL PENAL CODE § 4.01(1) (1962), which provides that “[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.”


ment is no longer orthodox. Drug therapy enables many psychotics and disturbed persons to function effectively in the community and, effective or not, in the community is where they are.  

With deinstitutionalization has come an increased awareness among both psychiatrists and lawyers of how limited our ability to predict future conduct really is, as well as much more modest expectations about what we can expect in the way of cure. These developments have enormous importance for the insanity defense because long-term confinement of insanity acquittees can no longer be taken for granted.

One who is as notorious as John Hinckley is held in custody to forestall public outrage, but it would not be easy to prove that he is really more likely to shoot anyone in the future than hundreds of other disturbed persons who have been released or that he is likely to benefit from further institutional treatment. That he may continue to harass the actress Jodie Foster or some substitute ideal figure is another matter, but we do not as a rule confine people to protect celebrities from unwanted attentions. It is difficult to avoid the conclusion that the primary reason Hinckley remains in custody is that most people think he is guilty of attempted murder regardless of the jury verdict. There must be a better solution to the insanity problem than this.

Norval Morris's solution, as we have seen, involves abolishing the insanity defense as such but permitting psychiatric testimony to be used to show lack of mens rea, to reduce the sentence of a defendant convicted of any crime, and to reduce murder to manslaughter where mental illness diminishes responsibility. Morris has a great deal to say on behalf of his proposals, and I sympathize with his objectives, but somehow I find it difficult to believe that such a reshuffling of the legal categories will work any lasting good. As the White case illustrates, psychiatric defenses are every bit as difficult to limit, and every bit as likely to produce bizarre results, when they are litigated as "diminished capacity" rather than as "legal insanity." No matter what legal pigeonhole we select, a criminal trial is still an unsatisfactory forum for evaluating competing theories of the mind.

I am baffled by the logic behind the idea that manslaughter is the proper legal category for psychotic killers. The case Morris has

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See Rhoden, The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory, 31 Emory L.J. 375, 440 (1982). ("Unfortunately, in many areas of the country the humanitarian purpose of deinstitutionalization has been perverted, and the policy has resulted in the abandonment of the mentally ill to their fates on city streets.")
in mind for such treatment is the paranoiac who kills some prominent person because he believes God has ordered him to do so. This type of psychotic can intend or even premeditate a killing if these words are given their ordinary meaning, but Morris thinks that "such cases are . . . better treated and sentenced as manslaughter than as murder."18 No doubt many assassins act from motives which they regard as good, but why should that be an excuse? Manslaughter is a category appropriate to homicides that arise from barroom brawls or lovers' quarrels, where the victim has some responsibility for what happened. Manslaughterers are frequently eligible for probation, and they ordinarily do not receive lengthy prison terms. Should the paranoid who shoots a politician be placed on probation, or be sentenced to two or three years in prison? I would say that either a verdict of guilty of murder or one of not guilty by reason of insanity would make more sense than treating a homicidal maniac as if he were a normal person who has used too much force in a fair fight.

The proposal to consider evidence of mental disturbance in sentencing seems harmless enough if one assumes that no change in existing sentencing practice is contemplated. Judges now receive all sorts of information about defendants, and they generally sentence according to "seat of the pants" criteria that defy logical explanation. Mandatory minimum sentences for serious cases prevent the kind of excessive leniency that public opinion will not tolerate. A political assassin does not receive probation, for example, even if he is a first offender, even if the act was related to some psychological disturbance, and even if he seems unlikely to kill again. But Norval Morris opposes mandatory minimum sentences, even for murder.19 Most judges can no doubt be trusted to punish murder at a level consistent with prevailing community standards, but then most juries can be trusted to disregard psychiatric defenses in cases like Hinckley and White. There are exceptions. I can imagine a judge who takes both psychiatric testimony and due process ideology very seriously—and several names come to mind—placing a psychotic offender on probation regardless of the offense. If mental illness caused the crime, if we lack reliable techniques for predicting further violent acts, and if the legislature has not seen fit to preclude probation, why not?

Unlike some other critics of the insanity defense, Morris is no debunker of psychiatry or psychology as such, nor does he seem at

18 Morris at 69.
19 Id.
all uncomfortable with the "soft" determinism that underlies the "substantial capacity" test of the Model Penal Code. He considers "mental illness" an objective condition, not merely a metaphor or an arbitrary label, and assumes that psychiatrists can give reliable testimony about how much capacity a defendant had to control his or her criminal behavior. What Morris objects to is not that the criminal process gives substantial weight to testimony about difficult concepts like mental illness, degrees of free will and the like, but only that it does so in the either-or, guilty or not guilty categories of the insanity defense. Presumably he would permit the psychiatrists in the Hinckley case, for example, to testify precisely as they did at that trial provided that they did so to support a reduced sentence rather than an insanity defense.

But if psychiatric testimony can establish a substantial diminution of culpability in many cases, why can it not show a complete, or virtually complete, lack of culpability in others? It may be that our current insanity defense is too broad, especially in placing an unreasonable burden of proof on the prosecution, but to say this is in no way to deny that there is a residual category of persons whose mental disorientation is so severe that they are incapable of culpability.

Morris appears to concede the logic of this argument, but then attempts to answer it with a reductio ad absurdum. If we were to eliminate "responsibility in those situations where we thought there had been a substantial impairment of the capacity to choose between crime and no crime" then "as a matter of moral fairness" we should also allow a defense of "gross social adversity." This is said to follow because criminal behavior is less closely correlated with psychosis than with "being born to a one-parent family living on welfare in a black inner-city area." But this comparison is beside the point. We do not excuse psychotics because psychosis is highly correlated with crime, but because they are thought to lack the ability to make morally responsible choices. Six-year-old children hardly ever commit homicide, but when they do they are excused. The most severely disabled psychotics are probably less likely to commit criminal acts than those who are more nearly normal and hence more capable of effective action. The point is not that insanity causes crime, but rather that it prevents morally responsible choice.

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20 Id. at 62.
21 Id.
22 Id.
23 Id. at 63.
Morris goes astray on this issue because he refuses to distinguish between the argument for having some insanity defense and the much less persuasive argument for having the kind of broad insanity defense with which we are currently saddled. A system of law based on a premise of moral responsibility needs to draw a line between those who are responsible and those who are not. It is awkward to do this through the definition of “criminal intent,” not only because there are crimes that do not require intent, but also because intent has a qualitative dimension. For example, we commonly distinguish between a child who spills his milk accidentally and one who “intentionally” pours it on his baby sister. In fact, we punish small children for much the same reasons that we punish criminals, and children frequently know they have done wrong and show remorse. I am not denying that there are enormous differences between children and adults, but these differences are not well captured by the ordinary-language meaning of “intent.”

No one argues that small children have sufficient moral understanding to have criminal responsibility. Whether and to what extent psychotics should be held responsible is more controversial, but I judge that most people would consider that at least some extremely disoriented persons, in addition to the severely mentally retarded, are no more responsible than children. Wherever one thinks the line ought to be drawn, it is a poor solution to ask a jury to determine the defendant’s capacity for responsibility by hearing expert testimony on whether a psychotic “intends” his actions. Inevitably the psychiatrists will want to explain the quality of the defendant’s intention, just as they like to talk about the quality of his understanding of the wrongfulness of his act when testifying under the M’Naghten rule. On the basis of the California experience, I am convinced that psychiatric testimony is even more confusing and more difficult to control when it comes in on the question of intent or mens rea than when it is limited to an insanity defense.24

24 Dr. Bernard Diamond achieved a famous coup for courtroom psychiatry when he persuaded the California courts to allow him to testify about the “medical essence” of malice aforethought. People v. Gorshen, 51 Cal. 2d 716, 723, 336 P.2d 492, 496 (1959). Dr. Diamond himself described this wording as a “sophistry” that was necessary to establish a sound principle. Diamond, Criminal Responsibility of the Mentally Ill, 14 STAN. L. REV. 59, 82-83 (1961). Morris regards the California doctrine that Diamond fathered as unacceptably complex and confusing, Morris at 66-67, but he endorses the Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, which reduces murder to manslaughter where the accused “was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility
Morris makes a curious argument in support of admitting psychiatric evidence on the question of mens rea:

It is unthinkable that mental illness should be given a lesser reach than drunkenness. If a given mental condition (intent, recklessness) is required for the conviction of a criminal offense, then, as a proposition requiring no discussion, in the absence of that mental condition there can be no conviction. This holds true whether the absence of that condition is attributable to blindness, deafness, drunkenness, mental illness or retardation, linguistic difficulties, or, if it could be established, hypnotic control.\(^{25}\)

But it is not at all "unthinkable" that on some issues the law might be more receptive to evidence of drunkenness than to testimony about mental illness. Alcoholic intoxication is a relatively common condition which jurors can understand from personal experience and observation, whereas mental illness is a considerably more elusive phenomenon. In any case, the admissibility of drunkenness to show lack of culpability is itself a complex subject, as every law student learns. Even the Model Penal Code refuses to allow a defendant to show that he was unaware of a risk because of intoxication,\(^{26}\) and some jurisdictions have much more restrictive rules.\(^{27}\) These rules reflect a belief that evidence of intoxication, although logically relevant where intent or awareness of risk is an issue, has a tendency to confuse and mislead a jury. If psychiatric testimony about intent is at least as likely to confuse, or to lead to an unproductive battle of the experts, then a special exclusion may be justified.\(^{28}\)

\(^{25}\) Morris at 66-69. The English statute has the relative merit of accomplishing clearly and directly what the judge-made California doctrine accomplished with tortuous sophistries, but the substance is the same. See supra text accompanying note 11.

\(^{26}\) Morris at 60.

\(^{27}\) MODEL PENAL CODE § 2.08(2) (1962) provides that "[w]hen recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such awareness is immaterial."

\(^{28}\) Morris has written me that he did not intend in the quoted paragraph to imply that drunkenness is always admissible on the mens rea question, or that it should be. "My point was a very small one—if, for example, drunkenness is admissible on recklessness in Illinois (as contrasted to M.P.C.) then mental illness also ought to be." Letter from Norval Morris to the author (March 31, 1983) (on file with The University of Chicago Law Review).
Morris's approach to the insanity problem is squarely in the "neutral principles" tradition of liberal legal scholarship. He considers substantive disagreements about the nature of mental illness or the morality of criminal punishment to be of little importance: all can be well if we just agree on the legal doctrines. He begins the first page by announcing that he means to include in his argument "all reasonable perceptions of mental illness" from Thomas Szasz to Karl Menninger. His subject is how mental illness or retardation "no matter how defined" relates to the criminal law. Morris later writes that "[i]t is the overreaching theme of this book that injustice and inefficiency invariably flow from any blending of the criminal law and mental health powers of the state."

Such an approach is coherent only if one believes that people as far apart ideologically as Thomas Szasz and Karl Menninger nonetheless agree on the meaning of "justice" and on the desirability of having an "efficient" criminal process. But of course they do not. Menninger considered all punishment to be obsolete and vengeful, and he thought that justice means nothing more than power, "the interest of the stronger." Szasz, on the other hand, is famous for arguing that mental illness is a metaphor (and a fraudulent one at that), and he has repeatedly anathematized Menninger and his kind as preachers of an arrogant and totalitarian religion. A Menninger who sees criminal law as institutionalized brutality will not be interested in making brutality efficient, and a Szasz who sees psychiatry as a fraud will not be satisfied if its fraudulent concepts are accepted for the purpose of determining punishment. Doctrines of criminal responsibility are troubled and uncertain because they reflect this ideological battle, and the substantive dispute has to be settled before a procedural solution is possible.

The substantive dispute may be nearer to a settlement than most people imagine. In December, 1982, approximately one month after the publication of Madness and the Criminal Law, the American Psychiatric Association (APA) issued an official Statement on the Insanity Defense. The Statement was pre-
pared by a committee of distinguished psychiatrists with the counsel of Dr. Alan Stone, Professor of Law and Psychiatry at Harvard. The Foreword by the current APA President, Dr. H. Keith H. Brodie, Chancellor of Duke University, describes the Statement as reflecting "the current thought and opinion of the vast majority of psychiatrists who are informed and concerned about the insanity defense issue." Clearly the APA Statement supersedes all previous sources as the essential expression of the psychiatric viewpoint on the insanity defense. It is a remarkable document, and it ought to change the way lawyers think about psychiatry.

After introductory sections about the history of the insanity defense and the public uproar over the Hinckley case, which the APA describes as the catalyst for its preparation of a position paper, the Statement proceeds to answer six important questions:

1. Should the insanity defense be abolished? No, says the APA, because the defense "rests upon one of the fundamental premises of the criminal law, that punishment for wrongful deeds should be predicated upon moral culpability." This premise logically requires an exclusion for defendants "who lack the ability (the capacity) to rationally control their behavior" and who therefore "cannot be said to have 'chosen to do wrong.'&quot; "Retention of the insanity defense is essential to the moral integrity of the criminal law." As we have seen, this is a commonly held position, and it has considerable force if it is limited to justifying the existence of some insanity defense, possibly a very narrow one.

2. Should a guilty but mentally ill verdict be adopted in the law to either supplement or take the place of the traditional insanity defense? The APA opposes the alternative guilty but mentally ill (GBI) verdict, now in use in nine states, because it tempts jurors to "avoid grappling with the difficult moral issues inherent in adjudicating guilt or innocence" and instead to agree on the convenient GBI label, which in practical effect means the same thing as "guilty."
3. Should the legal standards now in use concerning the insanity defense be modified? Although the APA doubts that the exact wording of the test for legal insanity is of crucial importance, it observes that

[m]any psychiatrists . . . believe that psychiatric information relevant to determining whether a defendant understood the nature of his act, and whether he appreciated its wrongfulness, is more reliable and has a stronger scientific basis than, for example, does psychiatric information relevant to whether a defendant was able to control his behavior.37

Because “[t]he concept of volition is the subject of some disagreement among psychiatrists,” testimony on that subject is likely to confuse a jury.38

In other words, the psychiatrists have now decided that they prefer to testify under the classic M’Naghten standard, with its solely cognitive elements, rather than under the ALI test with its more “modern,” volitional approach. This directly contradicts conventional judicial notions of what psychiatrists think.39 The APA also proposes a narrow definition of “mental disorder” to rule out insanity acquittals of persons with mere “personality disorders” that do not involve the severe disorientation from reality characteristic of psychoses.40 In short, official psychiatric opinion now regards the reform and expansion of the insanity defense that has occurred in the past thirty years as fundamentally misguided, although that reform was largely motivated by a desire to accommodate psychiatry.

4. Should the burden of proof in insanity cases always rest with the prosecution? All the federal courts and a number of states currently require the prosecution to prove sanity “beyond a reasonable doubt.” The APA declines to take a position on which side should have the burden of proof, but it does note that “psychiatric evidence is usually not sufficiently clear-cut to prove or disprove [the presence of mental illness and dangerousness] ‘beyond a reasonable doubt,’”41 citing Addington v. Texas.42 I assume it follows

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37 Id. at 14.
38 Id.
39 As recently as 1979, the California Supreme Court replaced the M’Naghten formula with the ALI test, largely because the latter was seen as far more consonant with modern psychiatric opinion. People v. Drew, 22 Cal. 3d 333, 336, 583 P.2d 1318, 1318-19, 149 Cal. Rptr. 275, 275-76 (1978).
40 APA STATEMENT at 15.
41 Id. at 16, 17.
that neither side should be required to meet an impossible standard of proof.

5. Should psychiatric testimony be limited to statements of mental condition? The APA "is not opposed to" evidentiary rules that restrict psychiatrists from testifying to the "ultimate legal issues" of the insanity defense. The APA's motive is to minimize the kind of "battle of the experts" that has done so much to discredit courtroom psychiatry. The Statement notes that in many trials "both prosecution and defense psychiatrists do agree about the nature and even the extent of mental disorder exhibited by the defendant"; what they disagree about is "the probable relationship between medical concepts and legal or moral constructs such as free will." The goal is to have psychiatrists testify about the former, about which they have expert knowledge and tend to agree, and not about the latter.

6. What should be done with defendants following not guilty by reason of insanity verdicts? The APA argues that it is a mistake to treat persons acquitted of violent crimes for insanity as if they were equivalent to mentally ill persons who have not attacked anyone. Those in the former group should be released only if adequate resources are available to provide supervision. If they are confined beyond a reasonable treatment period for public safety reasons, as may frequently be the case, society should acknowledge what it is doing and keep them in a "nontreatment facility that can provide the necessary security," in other words, in a prison. The decision to release would be made "by a group similar in composition to a parole board," a group that is "not naive about the nature of violent behavior committed by mental patients and that allows a quasi-criminal approach for managing such persons."

The specific positions of the APA Statement are important,

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44 APA Statement at 17-19 (emphasis in original).
45 I am skeptical about the enforceability of evidentiary rules that prevent experts from testifying about the "ultimate issue." A better way of dealing with the problem is to redefine the insanity test to incorporate a "justice" element which is plainly beyond psychiatric jurisdiction. Such a test might provide for acquittal when the defendant "was so utterly lacking the ability to understand the wrongfulness of his act that it would be unjust to punish him." See United States v. Brawner, 471 F.2d 969, 1033-34 (D.C. Cir. 1972) (Bazelon, C.J., concurring and dissenting).
46 APA Statement at 19-23. The APA Statement specially endorses the Oregon procedure, whereby a "Psychiatric Security Review Board . . . retains control of the insanity acquitted for a period of time as long as the criminal sentence that might have been awarded were the person to have been found guilty of the act." Id. This sounds a lot like the "guilty but insane" verdict that the APA opposes, but strict logical consistency is not the virtue we need most in this area.
but more significant is the change of attitude that it indicates.\textsuperscript{46} The APA has not adopted the extreme views of Thomas Szasz, but it has definitely repudiated the ideology of Karl Menninger. The psychiatrists no longer want the criminal law to change to conform to deterministic psychiatric concepts; instead, they regard it as vital to the integrity of their own discipline that "legal or moral constructs such as free will" be understood as outside the domain of psychiatry. They emphatically affirm that most people, including those with sociopathic personality disorders, should be held accountable for what they do. They are not washing their hands of the legal problems, and they believe that the law still needs them, but they understand that legal and moral decisions are ultimately to be made by citizens, not experts. I regard this newly found modesty as evidence of the profession's increasing maturity, not as a sign of its failure.

The important thing to know about the law of mental illness is not what Norval Morris thinks about it or what I think about it, but what the important interest groups that lobby the legislatures and the courts think about it. Until recently, liberal intellectuals generally and mental health professionals in particular formed a national constituency to support open-ended psychiatric defenses. That constituency no longer exists, at least not in as solid a form. The most substantial cause of the change has been the deinstitutionalization movement, which has been supported by civil liberties lawyers, numerous psychiatrists and psychologists, and budget-cutting politicians. The ideological side of this movement has attacked the meaning and validity of psychiatric diagnoses which have been used to support civil commitments, and these attacks have also tended to undermine trust in psychiatric testimony in criminal cases. Moreover, the public will tolerate insanity acquittals only if it is convinced that "dangerous" defendants are locked away through a commitment procedure. An insanity defense broad enough to protect our all-too-numerous irrationally motivated political assassins, for example, inevitably encourages legislators to think in terms of a broad commitment process, espe-

\textsuperscript{46} Indeed, the APA Statement may modify the law by its very existence. Prosecutors can cite the Statement in challenging the admissibility of psychiatric testimony that goes to the issue of "free will" or "capacity to control" conduct. If the organization best qualified to speak for the psychiatric profession considers free will to be a legal and moral concept whose existence cannot be proven by psychiatric methods, then no individual psychiatrist should be permitted to mislead a jury by offering "expert" testimony on the subject. Where a witness does so testify, the Statement should provide material for effective cross-examination.
cially if they fear that equality-minded courts will insist that insanity acquittees be treated just like other "innocent" people.

The resulting political realignment is illustrated by the debate at the February, 1983, American Bar Association Convention, where the House of Delegates endorsed a modern wording of the traditional M'Naghten rule with its purely cognitive focus to replace the broader ALI test with its "volitional" component.\(^4\) Among those speaking for the change were Dr. Loren Roth, representing the American Psychiatric Association, and Bruce Ennis, Chairman of the ABA Commission on the Mentally Disabled. Ennis is the former American Civil Liberties Union litigator who has been a leading figure in the movement to protect the liberties of the mentally ill. It seems that there is important support for narrowing the insanity defense from knowledgeable persons who are not usually found in the law-enforcement camp.

Experience has shown that the criminal law, despite all its faults, is preferable to any civil commitment alternative as a means for dealing with unacceptable behavior. Exemptions from criminal responsibility therefore ought to be narrowly confined, and regardless of mental illness we should be careful to distinguish between people who have actually committed violent crimes and those who are merely thought likely to commit them. One way of helping to maintain this distinction is to narrow the insanity defense to the point where it applies only to people who are so mentally disabled that they are incapable of taking care of themselves in society. Such people have to be closely supervised for their own protection in any case. To the extent that we now regard other mentally ill persons as having a right to remain at liberty without supervision, it is not unreasonable to hold them morally responsible for what they do with that liberty.

The result would be an insanity defense that preserves the moral theory of the law, but that would rarely arise in a criminal trial. A pointless controversy could be put behind us, and we could go on to address the real problems that ought to concern us: control of sentencing discretion, improving conditions in prisons, and finding rehabilitative programs that work. Among law professors, no one has done more to address these problems than Norval Morris.

\(^4\) The ABA proceedings are reported in 32 Crim. L. Rev. (BNA) 2411-12 (Feb. 16, 1983).