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Criminal Law - Rehabilitation, A Thesis; Punishment, the Anti-thesis - Insanity Defense in the Balance

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COMMENT

CRIMINAL LAW—REHABILITATION, A THESIS; PUNISHMENT, THE ANTITHESIS—INSANITY DEFENSE IN THE BALANCE

The broad effects which can be obtained by punishment in man and beast are the increase in fear, the sharpening of the sense of cunning, the mastery of the desires; so it is that punishment tames man, but does not make him better.

Nietzsche, *Second Essay from Genealogy of Morals, Aphorism 15*

Although the insanity defense, with its consequent "battle of the experts," is well-publicized, it is not frequently interposed in criminal trials. Most seriously disturbed defendants never reach the trial stage; those who do are reluctant, except where the charge is very serious, to subject themselves to an indeterminate commitment in a mental hospital. Many others are not sufficiently demented to meet the standards required by the criminal law. Nevertheless, the insanity defense is the touchstone for perhaps the greatest controversy existing in the realm of criminal justice.[1] This controversy concerns the extent and relevancy of individual responsibility, and as a corollary thereto, the nature of disposition for each person committing an act proscribed by the law.

The thesis of this comment is that the insanity defense represents a specious and simplistic ethical exercise and should therefore be eliminated. It serves ultimately to emphasize retribution to the detriment of an equally important objective of criminal justice—rehabilitation of the individual offender.

In his *Commentaries*,[2] Blackstone stated:

> [P]reventive Justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to *punishing* justice . . . . [I]f we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes than to expiate the past.[3]

Reality unfortunately falls far short of the ideal. Punishment is so dominant a characteristic of the present system, that it precludes the development of any real foresight with regard to individual responsibility. This is the result of the inextricable association of punishment with an overem-

1. Address by Judge David L. Bazelon, *Crime and Insanity*, A Symposium—The Mentally Ill Offender, Atascadero State Hospital, June 20, 1960.

2. 4 BLACKSTONE, COMMENTARIES (Lewis ed. 1897).

3. *Id.* at 1649-50.

phasized concept of individual responsibility, a situation affected in no small way by the existence of the insanity defense. Its existence subtly accentuates the degree of normality and suitability for punishment of both those who do not use it, and those who do use it but are unsuccessful.

An example would be helpful. Dr. Karl Menninger, in *The Crime of Punishment*,[4] recounted a story told to him which illustrates in hyperbolic fashion what is happening and what is wrong with the present criminal law concepts of individual responsibility and nature of disposition for the offender. The story concerns a man who murdered his wife because of a delusion that she was a Communist agent betraying him and his country. Not only did he murder the woman but he also mutilated the body and then attempted intercourse with the corpse several times. The man next made an attempt to turn himself in; his confession was so incoherent that it was initially dismissed by the police. This same man had five weeks earlier signed a voluntary application for admission to a state hospital because he had felt powerful impulses toward violence.

> He was arraigned and charged, the case was taken to trial, and the man was prosecuted as if he were really a Communist killer who had gone too far! The prosecution urged that he could not possibly have been mentally ill, or not very much so, because he said that he knew what he was doing; he knew it was wrong. To be sure, he was afraid of the Communists, but shouldn't one be? What is abnormal about that? And most incriminating of all, after the deed was done, he had left the hotel clandestinely to avoid capture! Sneaking! Clever! Crazy like a fox! . . .
>
> It was unfortunate that the man's previous hospital record was not studied because the record did show that on *four previous occasions* the patient *had* had to be hospitalized for periods of several months. The picture had always been the same: violent impulses that he could not control, thinking confused and suspicious, actions vehement. He had never done anything violent or seriously criminal, but sometimes this had been prevented only at the last moment. For example, seven years ago he had attempted to strangle his beloved old mother, who recognized immediately that it was a sign of illness and sought hospitalization for him . . . .
>
> [T]he jury found for murder in the second degree. He was sentenced to prison, where he now is. But he is eligible for discharge just about the time when, according to his lifelong pattern, another cycle of attacks is due to appear![5]

As Dr. Menninger said, the story is hard to believe. Why is it that we are so committed to establishing not only that he caused the harm, but that he did so with full knowledge and volition concerning the nature and quality of his act? This comment will explore the underlying principles of individual responsibility and punishment in order to support the above stated conclusions concerning the insanity defense.

The criminal law presently considers individual responsibility in a pri-

4. MENNINGER, THE CRIME OF PUNISHMENT (1968).

5. *Id.* at 101-05.

marily objective sense. The "typical offender" model exists and functions in a manner similar to the "reasonable man" in torts. Certain characteristics are ascribed to him, whether or not they exist in fact.[6] His evil intent is inferred from his overt conduct. If he uses a knife to kill and mutilate his wife, absent other observed circumstances, the inference is that he knowingly and willingly committed murder. Assuming there was no mutilation, and he could show that she was at the time of the occurrence threatening him with the knife, he may be able to show that he acted in self-defense. This approach is justifiably predicated on the assumption that our typical offender-prototype exists and acts in an ordered society—a society whose individuals enjoy free will, and are able to conform their conduct to certain prescribed standards if such individuals so direct their will. Thus, Justice Jackson has stated:

> Whatever doubts [philosophers, theologians, and scientists] have entertained as to the matter [free will], the practical business of government and administration of the law is obliged to proceed on more or less rough and ready judgments based on the assumption that mature and rational persons are in control of their own conduct.[7]

On the other hand, an individual is given one opportunity to show that he does not fit the objective "typical offender" standard—that his situation is different. Although the proscribed harm was the direct result of his act, and although the act was not justified, the defendant is permitted to show that because of a peculiarity, a mental disease or a defect, an evil intent should not be attributed to him.[8] This seems somewhat anomalous when it is considered that the inquiry is otherwise objective; good motive or ignorance of the law would not excuse a finding of criminal intent.

The historical roots of the insanity defense, however, are grounded in a period when the inquiry into individual responsibility was more subjective. Those roots lie in the history of the concept of *mens rea*. *Mens rea*, as it currently exists, has been defined as the "fusion of cognition and volition (or) the mental state expressed in the *voluntary* commission of a proscribed harm."[9] It is a prerequisite to felonious conviction. In addition, it implies the moral culpability of the offender, but is not conclusive in this regard.[10] While *mens rea* sounds subjective, it has been given the

6. *See* GOLDSTEIN, THE INSANITY DEFENSE 16-17 (1967); HOLMES, THE COMMON LAW 41, *et seq.* (Howe ed. 1963).

7. Gregg v. United States, 316 U.S. 74, 79-80 (1942); *accord*, Holloway v. United States, 148 F.2d 665, 666-67 (D.C. Cir. 1945); Steward v. Davis, 301 U.S. 548, 590 (1937).

8. GOLDSTEIN, *supra* note 6, at 18-19.

9. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 104 (2d ed. 1960).

10. *Id.* at 146 *passim*. *But cf.* HART, *Legal Responsibility and Excuses*, in DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 89-90 (2d ed. Hook 1965).

aforementioned objective ethical meaning in order to maximize individual responsibility and to preserve respect for the rules of society.

The meaning of the *mens rea* concept has been modified throughout the years. Its goal was not always objective. The early criminal law rested on a desire for vengeance. Since the purpose was to restrict the blood feud, the offender's mental state was not an important issue.[11] Gradually, however, the mental state of the offender at the time of the act became increasingly important. Vengeance naturally sought a subject who was blameworthy—intent made the offense more provocative.[12]

The shift in emphasis away from the quality of the act to the quality of the offender took place in the thirteenth century, under Bracton's influence.[13] Subject to Roman and canonist influences, he placed high regard on the mental elements of criminality. Criminal justice was to be directed at acts done with evil intent. While intent never supplanted the act, by the second half of the seventeenth century *mens rea* had become as necessary a requirement as *actus reus*.[14] The insanity defense developed concomitantly with *mens rea*. Bracton had identified the insane person as incapable of evil intent.[15]

It is important to note, however, for the purpose of this comment, that the original inquiries into *mens rea* were much more subjective in scope and were more concerned with individual moral culpability than they are today. Our goal today is the protection of society.[16] A finding of moral culpability, while possibly incidental to that goal, is neither a prerequisite for it, nor a goal in itself. Thus, even though the original purpose for the insanity defense no longer exists, the defense survives as the sole means by which a defendant can show he is unlike the "typical offender."

As was stated, the objective view of *mens rea* is supported by a sound rationale. In addition to emphasizing free will and individual responsibility, and the individual's consequent ability to conform his conduct to the standards of the law, this view still permits the broadest freedom for the individual. This is true because the observed facts which give rise to the inference of intent must, by definition, imply voluntariness. Unconscious, accidental or coerced actions do not lead to an inference of intent. In describing *mens rea* as applicable only to voluntary action, H.L.A. Hart states as reasons for such application the desirability of

11. Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 975-77, 1016 (1932).
12. *Id.* at 1016.
13. *Id.* at 987-88.
14. *Id.* at 993.
15. GOLDSTEIN, *supra* note 6, at 10.
16. Sayre, *supra* note 11, at 1017.

enlarging the individual's power to predict the future, of maximizing his ability to make choices, and of causing him not to suffer sanctions "without having obtained any satisfactions."[17]

While the emphasis on individual free will is important to society as a working premise, the reality of individual responsibility is something quite different. Scientists have shown that with respect to behavior control, men are not equally endowed.[18] The area of free will is but one etiological factor in the cause of crime. Complicated psychological and sociological factors, in varying degrees, are also involved.[19] The stresses of life can combine and become so overwhelming for the individual that criminal behavior is precipitated with greatly diminished volition. To maintain his mental balance the individual reacts externally in a destructive manner.[20]

There are, however, other criminals whose conduct was fully appreciated and intended without the presence of the aforementioned complications. Many of the organized crime members and white collar criminals probably fall into this class. Nevertheless, even in these cases it cannot be known with any degree of accuracy what the offender actually intended at the time of the act. *A fortiori*, determinations with regard to the other offenders seem impossible:

> Improved medical knowledge may certainly be expected to give better insight into the origins of mental abnormalities, and better predictions as to the probability that particular types of individuals will in fact "control their physical acts" or make "rational judgments"; but neither medical nor any other science can ever hope to prove whether a man who does not resist his impulses does not do so because he cannot or because he will not. The propositions of science are by definition subject to empirical validation; but since it is not possible to get inside another man's skin, no objective criterion which can distinguish between "he did not" and "he could not" is conceivable.[21]

The experiences with the insanity defense clearly point out this proposition. Attempts to categorically distinguish the sick from the evil have resulted in several legal tests,[22] none of which has avoided deserved criticism.

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17. HART, *supra* note 10, at 99. *See also* HART, PUNISHMENT AND THE ELIMINATION OF RESPONSIBILITY 28 (1962).

18. *See, e.g.*, MENNINGER, *supra* note 4, at 92.

19. *See, e.g.*, Morris and Buckle, *The Humanitarian Theory of Punishment—A Reply to C.S. Lewis*, 6 RES. JUD. 231, 236-37 (1953).

20. *See* HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME (1967); Slovenko, *A History of Criminal Procedures as Related to Mental Disorders*, 71 W. VA. L. REV. 135 (1969).

21. WOOTTON, CRIME AND THE CRIMINAL LAW 74 (1963).

22. *See, e.g.*, M'Naghten's Case, 8 Eng. Rep. 718 (1843); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); MODEL PENAL CODE §4.01 (PROPOSED OFFICIAL DRAFT 1962).

Psychiatrists are called upon by both the prosecution and the defense to testify and thereby illuminate the defendant's mental state at the time of the crime. The courts expect the psychiatrists to include information on the defendant's mental and emotional state, the relationship of any abnormality to the offense for which the defendant has been charged, and the degree of probability to which the abnormality prevented the accused from forming the requisite intent.[23] It is evident that what the courts want is a diagnosis—not the diagnosis which is customary to scientists, relevant to treatment, and subject to empirical validation, but rather a diagnosis relevant to establishing the presence of an ethical category. This diagnosis is, at best, incalculably presumptuous.

> It it not possible, nor is it likely in the near future, for a psychiatrist who first sees the patient some time, often months, after an offense, to give specific information about the mental state of the defendant at the time of the offense. Further, it is believed by some that, aside from the time element, the psychiatrist is not particularly qualified to answer unequivocally questions about the knowledge of right from wrong, or questions about the individual's capacity to control his behavior . . . . The simple reason is because he cannot have scientific answers. Besides, involved in such a determination are legal, philosophical and moral considerations, clearly outside his scope.[24]

Aside from this point, it is not really clear that there is any consistent relationship between crime and mental illness which is relevant in a causal sense to intent. Not only mental disorder, but often criminal conduct, is also a compensation for failure to adapt to stress. Whereas with mental illness the destructiveness is directed at the self; with criminality, the destructiveness is aimed at others.[25] Sometimes both modes of abnormal adaptation coexist. But the mental disease or defect does not cause the commission of the crime—the stress does. Considered in this light, intent becomes even more difficult to discern. The conflict goes deeper than just a difference in basic assumptions between the legal and medical worlds. Many writers have simplified the matter by stating that it is a difference between advocates of free will and proponents of determinism. However, this difference is actually irrelevant to the problem.[26] The dilemma is not only that the facts of each situation are not susceptible to concrete determination but, most essentially, *that no fine line can be drawn to distinguish the sick from the evil.* Free will exists in varying degrees in all individuals. But, at the same time, persons react in predictable ways to

23. Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967).

24. Suarez, *A Critique of the Psychiatrist's Role as Expert Witness*, 12 J. FOR. SCI. 172, 174 (1967). *See also* MENNINGER, THE VITAL BALANCE 25, 33, 332 (1963); ROCHE, THE CRIMINAL MIND 249 (1958).

25. *Supra* note 20.

26. Barbara Wootton makes this point well in CRIME AND THE CRIMINAL LAW, *supra* note 21, at 77-78.

stimuli for reasons not explainable by free will. The problem is therefore that the legal principle cannot be applied because all the relevant facts giving rise to its application cannot be known.

The solution lies in examining what is the objective of our system of criminal justice. Since the present emphasis is on the protection of society's interests, rather than on judging subjective moral culpability, the accountability issue should not concern whether the individual could or could not have acted otherwise. We should assume that he could so act. The issue should be what must be done to prevent future criminal acts by this offender. Judge Weintraub of the New Jersey Supreme Court has stated the conclusion "that insanity should have nothing to do with the adjudication of guilt, but rather should bear only upon the disposition of the offender after conviction."[27] The pre-eminent legal scholar, H.L.A. Hart, has also acknowledged this approach to be preferable. In *The Morality of the Criminal Law*, he stated:

> Under this scheme *mens rea* would continue to be a necessary condition for liability to be investigated and settled before conviction except so far as it relates to mental abnormality. The innovation would be that an accused person no longer be able to adduce any form of mental abnormality as a bar to conviction. The question of his mental abnormality would under this scheme be investigated only after conviction and would be primarily concerned with his present rather than his past mental state. His past mental state at the time of his crime would only be relevant so far as it provided ancillary evidence of the nature of his abnormality and indicated the appropriate treatment.[28]

An immediate benefit of such a scheme would be that the individual offender would no longer need to fit an arbitrary category in order that he be considered more in need of treatment than punishment. Presently, it seems that because punishment affirms the offender's responsibility and the trial has confirmed his responsibility, even though only objectively so, punishment receives an undue emphasis in the correctional system. But, at the dispositional stage, the concept of individual responsibility should assume a therapeutic rather than ethical role. If it did, absent harsh

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27. Weintraub, *Criminal Responsibility: Psychiatry Alone Cannot Determine It*, 49 A.B.A.J. 1075 (1963). Judge John Biggs, Jr., in THE GUILTY MIND (1955), at 192-93 states the following: "We must stop laying so much emphasis on guilt—on the 'guilty mind' of the criminal. We must reappraise our concept of guilt. We look *now* only to the events in connection with the commission of the crime. . . . We must look *now* and in the *future* beneath the surface of the events immediately surrounding the commission of the crime and analyze the social and psychological background of the criminal. . . . We must look to the causes of the criminal's state of mind rather than to the fact that he possessed a guilty mind, as a guide to the disposing of him. The fact that he is guilty and possessed *mens rea* is a superficial fact when it comes to the determination of the kind and nature of the sanction to be imposed upon him. . . ."

28. HART, THE MORALITY OF THE CRIMINAL LAW 24-25 (1964).

treatment,[29] the mentally disturbed offender would fare at least as well as he presently does. Psychiatrists could devote more time to treatment of offenders and a more healthy and realistic understanding of individual responsibility would be fostered in society.[30]

The traditional philosophy with regard to crime has been that the "normal" criminal should be stigmatized with guilt and made to suffer in some way for his transgression.[31] The finding of guilt confirms his culpability[32] and desert of punishment.[33] Concerning the offender who is acquitted by reason of insanity, by definition punishment cannot be imposed, since he was not responsible for his act.[34]

Punishment of the guilty is justified on theories of retribution and deterrence. Retribution calls for punishment to an extent felt to be commensurate with the harm caused. Today this refers primarily to the *length* of confinement. Deterrence is the show-effect that punishment has on other offenders and the reform-effect that it has on the convicted offender.[35]

As a preventive for crime, punishment has been far from successful. For many criminals, particularly those of the non-dangerous type, lengthy incarceration without the normal social relationships is unnecessarily degrading and disruptive of rehabilitative efforts.[36] Because punishment is a response to proscribed conduct for which the offender was adjudicated responsible, it tends to operate without regard to the subjective needs of the individual case. And if it is admitted that in reality we are unable and actually do not adjudge moral culpability, then punishment becomes even more attenuated as a response to crime.

The proper response should include rehabilitative treatment as well as punishment.[37] The issue at disposition should actually be how much punishment and how much rehabilitative treatment should be employed in the disposition of each offender. The concepts of punishment and rehabilitation tend to merge away since "involuntary incarceration is punishment regardless of the kindness of the administrators or the unexceptionable quality of the treatment program."[38] But the emphasis should be

29. Abolition of capital punishment would seem a prerequisite.

30. *See* HALLECK, *supra* note 20, at 340-49.

31. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 481 (1954).

32. HALL, *supra* note 9, at 317.

33. Lewis, *The Humanitarian Theory of Punishment*, 6 RES. JUD. 224 (1953).

34. *See* GOLDSTEIN, *supra* note 6, at 11-15; HALL, *supra* note 9, at 521; WEIHOFEN, *supra* note 31, at 483.

35. *See* HALL, *supra* note 9, at 304-07; WEIHOFEN, *supra* note 31, at 484-85.

36. *See* HALLECK, *supra* note 20; MENNINGER, *supra* note 4.

37. *Id.*

38. HALL, *supra* note 9, at 308.

more tailored to the personality and social situation of each offender. This approach would in no way weaken our "working hypothesis" of free will in the objective ethical sense since at the judgment stage we have held the offender accountable. Yet it would likely be more beneficial to society in terms of crime prevention.

It is in such a framework that psychiatrists could perform their greatest service. Psychiatrists recognize the role of responsibility in regulating human conduct, and they rely on it in treating disturbed individuals.

Dr. Bernard Diamond has stated:

[T]he arbitrary division of the criminal offender into the two classes of the sane and the insane no longer makes any sense . . . . Responsibility as a concept is losing its usefulness as a moral judgment and is acquiring a new, and much more valuable therapeutic meaning. Thus, with many mentally ill persons one may speak of their "extended responsibility." Extended responsibility means that mentally ill persons are to be treated as if they were more responsible for their actions than they really may be, simply because it is therapeutically and socially desirable to do so.[39]

Similarly, Dr. Thomas Szasz noted:

Punishment is, in sum, a corollary of responsibility, based upon the concept of man as capable, within limits, of making free moral choices . . . . If human beings are in any degree free moral agents, then treatment cannot be wholly substituted for punishment; treating all criminals as ipso facto sick persons cannot be justified even on humanitarian grounds. A dogma that equates normal adults with helpless victims of disease is incompatible with respect for personality and distinctive human traits . . . . It seems to me the most dignified, and psychologically and socially most promising, alternative is not to consider mental illness as an excusing condition. Treating offenders as responsible human beings, even though sometimes they may not be individually "blameworthy," offers them the only chance, as I now see it, of remaining human and possibly becoming more so.[40]

In *Psychiatry and the Dilemmas of Crime*, Dr. Seymour Halleck discussed at length the whole relationship of crime, mental illness, the criminal, the goals of society and the role of the psychiatrist. He argued that much of criminal behavior is an adaptation to intense pressures and that considered in this light, we ought to be more concerned with rehabilitating the offender than in judging his culpability. Yet he would negate the existence of individual responsibility.

Psychotherapy requires the patient to adhere to a code of responsibility. Responsibility in this sense may be divorced from the issue of punishment and can be thought of more accurately as personal accountability. The psychiatrist expects each of his patients to be willing to account for his behavior, to try to explain why he acts in a given way, to accept the praise of others when he acts favorably and to accept the censure or disapproval of others when he is offensive. Although the patient is

39. Diamond, *From M'Naghten to Currens, and Beyond*, 50 CALIF. L. REV. 189, 204 (1962).

40. Szasz, *Criminal Responsibility and Psychiatry*, in LEGAL AND CRIMINAL PSYCHOLOGY (Toch ed. 1961).

sometimes reassured by his therapist that he cannot help himself, he is more frequently told that his eventual cure or rehabilitation lies within himself. Psychiatrists regularly remind their patients that getting well is dependent upon how determined they are to change, how willing they are to work on their problems or, ultimately, how much responsibility they assume for their own behavior.[41]

Actually, psychiatric techniques are as equally desirable and effective in the treatment of the normal offender as they are with the mentally ill.[42]

Even among those legal scholars who oppose abrogation of the insanity defense, the need for a more enlightened treatment of the convicted offender is recognized. They too urge treatment resources and varied approaches to disposition within the correctional system.[43] With respect to a species of correctional system, several suggestions have been made. They include disposition tribunals operating distinctly from the trial,[44] indeterminate sentencing for dangerous offenders[45] and treatment of some cases by neighborhood crime prevention centers.[46] In such a correctional setting, the insanity defense has no meaning. Its continued existence, aside from the difficulty of fact determination, would result in the same dispositional procedure used for convicts.

Having stated the reasons for abolishing the insanity defense, revising our conception of individual responsibility and modifying the correlative punishment, the remaining topic for discussion concerns the constitutionality of any attempt to abolish the insanity defense. Thus far, legislative efforts to abolish the insanity defense have been frustrated at the state court level.[47] None of these attempts has been recent. The statutes were held to deny due process of law, the right to trial by jury, and to inflict a cruel and unusual punishment. The issue, however, is not easily dismissed. It is only because the insanity defense is so tied to our conception of *mens rea* that it can be said that elimination of the defense amounts to a deprivation of due process of law. Assuming we redefine *mens rea*, arguments of this import fail.

Moreover, it is important to note that the United States Supreme Court has not actually developed a constitutional doctrine regarding *mens rea*

41. HALLECK, *supra* note 20, at 211.

42. Diamond, *supra* note 39, at 199-203.

43. *See* GOLDSTEIN, *supra* note 6, at 219-20; HALL, *supra* note 9, at 307.

44. WEIHOFEN, *supra* note 31, at 480-82.

45. *See* Committee "A" of the Institute of Crim. L. & Crim., *Report on Insanity And Criminal Responsibility*, 10 J. AM. INST. CRIM. L. & CRIM. 184 (1919); MODEL SENTENCING ACT (1963).

46. MENNINGER, *supra* note 4.

47. *See* Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931); State v. Lange, 168 La. 958, 123 So. 639 (1929); State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910).

and the insanity defense.[48] As Justice Marshall stated recently in *Powell v. Texas*:[49]

> [T]his court has never articulated a general constitutional doctrine of *mens rea*. We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus, mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.[50]

Of those Supreme Court decisions dealing with *mens rea*, none can be said to preclude what has been proposed in this comment. While the decision in *Morissette v. United States*[51] indicated that criminal sanctions should not be imposed where the defendant is not morally blameworthy, the facts are distinguishable in that Morissette was pleading ignorance or mistake of fact. In addition, as was pointed out earlier in this comment, while moral blameworthiness is a sought-for incident to imposition of criminal liability, it is not a prerequisite to it.

In *The Insanity Defense*, Professor Abraham Goldstein seems to have implied that *Robinson v. California*[52] would apply to a situation where an insane man was convicted of a crime, and that such a situation would amount to a cruel and unusual punishment. Again though, the facts of the *Robinson* case are distinguishable from those intended to be covered by this comment. In *Robinson*, the Court held that a state law which made the *status* of narcotics addiction a crime would inflict a cruel and unusual punishment on the defendant. But the Court distinguished the *Robinson* situation from one where a person is punished "for antisocial or disorderly behavior resulting from their [narcotics'] administration."[53] With regard to eliminating the insanity defense, it is not proposed that we convict without there having been commission of a proscribed act.

Finally, a close examination of *Powell v. Texas*[54] indicates that the Court may well be amenable to a proposal of the sort presented herein. Although that case dealt with the conviction of a chronic alcoholic for being intoxicated in public, the rationale seems more compelling in the

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48. *See generally* Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107.

49. 392 U.S. 514 (1968).

50. *Id.* at 535-36.

51. 342 U.S. 246 (1952).

52. 370 U.S. 660 (1962).

53. *Id.* at 666.

54. *Supra* note 49.

insanity situation. The following statement in Justice Black's concurring opinion is particularly noteworthy:

> Almost all of the traditional purposes of the criminal law can be significantly served by punishing the person who in fact committed the proscribed act, without regard to whether his action was "compelled" by some elusive "irresponsible" aspect of his personality. As I have already indicated, punishment of such a defendant can clearly be justified in terms of deterrence, isolation, and treatment. *On the other hand, medical decisions concerning the use of a term such as "disease" or "volition," based as they are on the clinical problems of diagnosis and treatment, bear no necessary correspondence to the legal decision whether the overall objectives of the criminal law can be furthered by imposing punishment.* For these reasons, much as I think that criminal sanctions should in many situations be applied only to those whose conduct is morally blameworthy . . . I cannot think the States should be held constitutionally required to make the inquiry as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was, in some complex, psychological sense, the result of a "compulsion."[55]

It seems therefore that the obstacles to abolition of the insanity defense are not as insurmountable as a cursory consideration of the idea might indicate. As was brought out, the benefits from such a change would seem to flow naturally. We could abandon the unrealistic and delusory concept of individual responsibility which presently prevails. By holding everyone, regardless of mental aberration, to accountability, the necessary underlying assumption of free will as an implement of social control would remain intact. At the same time, we could avoid the absolute and categorical judgment of responsibility in the individual case in favor of a diagnosis more suited to disposition. This would bring consequent benefits to the correctional system. In summary, the insanity defense is opposed because it obfuscates and frustrates preventive justice.

Matthias Lydon

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55. *Supra* note 49, at 540-41 (emphasis supplied).