

Madness and the Criminal Law. By Norval Morris. Chicago and London: The University of Chicago Press, 1983. Pp. ix, 235, appendix, index. \$20.00.

*Reviewed by Edwin M. Lemert**

This short book, while designated as an analysis on the cover jacket, is also contentious, arguing the merits of proposals to clarify the law at its interface between crime and mental illness. The author asserts that in this area confusion abounds largely from unsuccessful efforts to integrate criminal with civil jurisdiction over mentally ill offenders. At the risk of seeming to be dogmatic, he tells us that he will rise above specific revisions or reforms of the law to formulate principles which, once established, will allow lesser issues to be sorted out and questions about sentencing and treatment more readily given answers or solutions. It is in this vein that the author starts discussion with the "two great powers of the state": the power to imprison persons found guilty of criminal acts on grounds that incarceration is both deserved and socially desirable, and the power to commit to mental hospitals persons deemed dangerous to self and others or incapable of caring for themselves (p. 30).

These two dominant powers of the state differ in the conditions under which they are invoked: commission of a crime versus presence of a pathological mental state. The powers also differ with respect to their implicit limits: the concept of a maximum deserved punishment for the offense and a concept of continuing dangerousness of the patient which limits the power to treat. "Desert," so-called, limits the punitive power of the state but not the mental health power, which is obfuscated by the uncertainties of psychiatry and the unwillingness of its practitioners to predict dangerousness.

The theme of the book is that injustice and inefficiency are the likely result of efforts to blend the two powers of the state, criminal jurisdiction and jurisdiction over mental health. The remedy or remedies for this regrettable state of affairs are twofold: (1) abolish special pleas based on unfitness or incompetency to stand trial; and (2) abolish the special defense of insanity for persons charged with crime.

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After a brief introduction, the book begins with a somewhat exotic account of the rape and murder of a village girl by a mentally retarded boy reared in a Burma brothel. Here the author, through the device of a chance purchased manuscript, steps into the role of a colonial magistrate beset by moral complexities and pressures, not unlike the white man compelled by native opinion to shoot an elephant. The point of all of this, demonstrated in freestyle fiction, is that moral guilt and criminal guilt do not mix well and that official formulations of punishment must necessarily take this fact into account.

Chapter two deals with the criminal responsibility of the mentally ill and the merits of bringing them to trial and possible conviction. It moves through such topics as political conflicts and compromises, trial of the mentally ill, abolishing the insanity defense and incarcerating the "not innocent." Allowing partial defenses to the incompetent (as in Massachusetts), "innocent only" trials, judicial control over discretion by hospital administrators, and the "guilty but mentally ill" verdict adopted by Michigan, Illinois, and Indiana are all rejected as unsatisfactory compromises (p. 83). In their place the author would allow an incompetence plea for six months only, after which trial should proceed under modified rules or a nolle prosequi entered.

The author's sensitivity to the gap left by the United States Supreme Court ruling in *Jackson v. Indiana*¹ (it does not cover cases of obvious dangerousness) along with his dissatisfaction over California's tinkering with civil commitment laws (pp. 45, 144-46) are among the salient reasons he cites for rejecting the incompetence plea as it applies to the "unrestorable incompetent." Whether intent can be ascertained in trials of persons otherwise held to be incompetent does not perplex the author, who cites the Butler Committee on this point, namely that "intention is proved as it almost always is in court: by inference from evidence of what the defendant did" (p. 50).

However, Morris stops short of complete acquiescence with his confreres in England and Wales, where the judge after trying and convicting a defendant with mental problems can change hats (or wigs) and play the hospital administrator by issuing a variety of treatments, restrictions, and discharge orders. This, of course, runs athwart the author's insistence on separation of the two powers of the state in the criminal and civil spheres of the law.

If tampering with the incompetency plea perturbs readers, even more so will the author's alliance with those who would abolish the special

¹ 406 U.S. 715, 720 (1971).

defense of insanity. Yet he firmly takes a pre-*M'Naghten*² stand, urging that the clock be turned back to the epoch when mental problems were subsumed under those of ascertaining the mens rea. Then, we are told, evidence of mental illness was no more and no less than submissions of the question of intent. And so it should be now.

Although law and psychiatry have conflicting epistemologies and vocabularies — free will, choice, guilt, and innocence versus determinism, degrees of rationality, and disease classification — there is, the argument runs, no reason why the psychiatric concepts cannot be considered in determining whether the guilty mind exists and more particularly as they bear on subsequent sentencing. Although not stated, this also has the merit of keeping decisions on guilt and innocence firmly in the hands of the jury or judge.

The arguments marshalled on behalf of abolition of the insanity plea are general contentions that it will serve both justice and social protection, showings of its adverse consequences, and repudiations of anticipated criticisms. Actually it is not easy to decipher the general affirmative arguments because most of them quickly turn into rebuttals of opposing views. Thus the author reacts forcefully to the charge that what he advocates is unfair because it stigmatizes the mentally ill as criminals, that is, people who do no wrong because they cannot make choices. His rejoinder to this claim, and indeed his main burden, is that in most cases in which the insanity plea is made, there is no clear evidence of categorical difference from the normal but rather a continuum between pure rationality and pathologically determined behavior. The issue is always how much of the mens rea can be shown, except in a few very extreme cases. Leaving these cases aside, it is best to keep other defendants within the orbit of the criminal law. To do otherwise actually results in double stigma, as criminal and as insane.

Another unfair consequence of the special insanity defense for murder is that it deprives other types of offenders of the defense and also of possible psychiatric treatment. By allowing evidence of mental abnormalities in showing mens rea, psychological factors thus receive at least equal consideration with drunkenness, visual impairment, hearing defects, mutism, and epilepsy as sources of inadvertent, oblivious, and other non-intended harmful consequences of human acts. These would come into play primarily in sentencing rather than in findings of guilt or innocence.

When the author urges that "social adversities," such as ghetto back-

² *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

ground, be placed on a par with mental aberrations in arriving at the *mens rea*, new misgivings may stir in the reader. Would this mean that pleas of diminished responsibility would proliferate for nonviolent crimes? It has been said that defense attorneys seldom plead insanity for lesser offenses such as burglary because chances were greater that the defendant would be confined for a longer period than if other defenses were used. But with incarceration for incompetence limited to six months, and the reluctance of psychiatrists to predict dangerousness after commitment, what effect would the author's proposals have on strategies of prosecution and defense? There is only silence on these contingencies, to say nothing of what all of this might do to our sorry jail situations.

The proposal to collapse mentally disturbed defendants into the general body of offenders necessarily shifts the burden of analysis from administering justice to narrower issues of sentencing. Here the author moves into broader jurisprudential concerns and outlines a "modified just deserts" model of penology. In this there are to be ranges of punishment with upper and lower limits of just desert, based on the "rough sentiment of the community" but expressed through its agencies of punishment. The classical insistence on equality is abandoned to allow judges discretionary powers within the limits. Utilitarian considerations and parsimony will shape the judge's decisions along with some help from the Minnesota Guidelines on sentencing (p. 146).

Judges ordinarily will take heed of mental perturbations by fixing sentences for those so affected at the lower reach of the desert limits. Since utility and parsimony are not likely to be applicable in sentencing these cases the author enriches his jurisprudence by citing a 1980 papal encyclical enjoining mercy and love to mitigate harsh justice (p. 156). At this point the discussion begins to have overtones of eighteenth century English legal ideology by which the gentry sought to gain respect for law by administering punishments to criminals with majesty, formal justice, and mercy. But American judges are not majestic; they are more concerned with logistics of cases than niceties of procedure, and mercy was a feature integrated into an English patronage system having no counterpart in America.

While the author begins his discourse by trying to separate morality and law, he wends his way back to it in a quaint and curious way. Beyond this he plainly reposes more faith in the ability of psychiatrists to supply judgment on degrees of rationality or on choice making by criminal defendants than many social scientists and others would. Whether the abolition of the special defense of insanity would change criminal justice procedures significantly or in what way remains un-

clear. In this connection the author makes only a limited effort to assess the practical aspects and consequences of changing law. There is little that can be called sociology in his discussion, nor politics, despite the fact that laws on madness have been greatly affected by assassinations and assassination attempts on lives of highly placed persons.

The writing style of this book is less than flowing. Apart from condensing a great deal of material in three substantive chapters, the author, in places, gives the reader pause with paragraph length sentences replete with parenthetical qualifications, asides, and verbal flourishes. Double negatives complicate some of the lines, as well as fine distinctions such as, "[i]t is an awkward as well as a difficult argument to meet," and some of the mentally ill are "protractedly incarcerated." Yet with all of this, it is obvious that the author has immersed himself deeply in his subject and canvassed important issues.

