1-1-1968

Psychiatric Testimony, Trial Gamesmanship and the Defense of Insanity

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I. INTRODUCTION

The uneasiness of psychiatrists in discussing their use as expert witnesses in criminal trials is often apparent. Indeed, most psychiatrists are loath to be called as expert witnesses in criminal trials. Their interest in the preservation of human life and their social concern about the process of justice tend to be overbalanced by their reluctance to be used as mere pawns in a complex "game," to be manipulated by the use of arbitrary concepts and semantic nuances. This reluctance is intensified when they suspect that the aim of criminal procedure may not be the betterment of society or the evolution of criminal justice, but the winning of an adversarial "game." However helpful psychiatrists would like to be toward achieving the aims of society and the individual, many of them are a little wary of having their personal and professional esteem placed in potential jeopardy by untempered trial tactics. It takes not only great interest in the social issues at stake in the trial, but also great confidence to submit to what may become a badgering.

Psychiatric testimony would be less vulnerable to the pressure of trial tactics if it were like physical laws that are expressible in mathematical form. Mathematical form lends itself to an aura of charismatic certainty which minimizes doubt about being "right." But alas, the complex phenomena of the pertinent transactional processes in human interpersonal relationships can rarely be reduced to one or two simple critical issues. Nor can dynamic psychiatrists' and psychoanalysts' observations of these processes be reduced to mathematical terms without dangerous oversimplification or generalization.

When the psychiatrist attempts to play the "game" according to prevalent trial rules, he is forced to generalize and oversimplify. The generalizations tend to establish an inference of constancy as to the...
observed facts. It seems common to presume that this inferred constancy continues to exist even over a variety of conditions and at differing times. This is casuistry. The individual's transactional processes may not remain constant as the conditions vary. We are actually taking notice of that fact when we recognize the concept of temporary insanity. Yet the trial tactics often tend to force psychiatrists to try to apply this presumption of constancy in their testimony about a defendant's "knowledge." This application might be possible if "knowledge," as it is used in the M'Naghten case, were capable of mathematical measurement and calculation and the degree of deficiency established by an accepted convention. Unfortunately, measurement of the defendant's capacity to know right from wrong is not as easy as "common sense" at first may seem to suggest. It may even be impossible under pretrial circumstances. In order to make more than an arbitrary and taxonomic exercise out of his study of the criminal defendant, the psychiatrist must know enough about him to be able to draw reasonable inferences and make reasonable predictions as to his past as well as present state of mind. However, extrinsic factors often preclude the possibility of drawing reasonable inferences and predictions. The absence of available time in which to overcome the defendant's conscious and unconscious resistance to candid and uninhibited discussion, combined with the partisan nature of those disclosures which do become available, prejudices the quality of the psychiatric examination. These factors may tend to make the psychiatric testimony either a mere ritual to be performed for the sake of completeness, thereby avoiding reversal by the appellate courts or, what is even worse, a part of the armament in the "gamesmanship" of the opposing advocates.

This is not to imply that psychiatric study has no place in the administration of criminal justice. However, it is questionable whether psychiatry has as much a place in the determination of guilt or innocence as it is presently afforded; it can boomerang on the defense.

II. THESIS

It is the thesis of this article that the insanity defense with its use of psychiatric testimony is often prejudicial to the criminal defendant. The issue of the defendant's sanity puts antagonistic propositions

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1 M'Naghten's Case, 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843). ("To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. (emphasis added)."")
into motion which require proof by evidence. If the defendant's purported insanity were not put in issue by the defense counsel then the prosecutor's negative assertions that the defendant was sane would not be permissible. Numerous elements are automatically assumed as mitigating factors in many trials (e.g., passionate response to produced anger and desperation or despair), and operate subliminally to influence the judge and the jury. The jurors are more likely to identify with the defendant in these factors than they are on an insanity plea. And, in the latter, they are bound by the judge's instructions which perforce must focus on the narrow point of knowledge of right and wrong. When the total fact pattern is subordinated to a subfact—sane or insane—which is arbitrarily held out to be the critical point, as it is under M'Naghten, an entirely different result must inevitably ensue.

Is knowledge of right and wrong really such a critical determinant in society's reaction to an offense? While society may be offended by a person's reckless disregard for consequences or his failure to exercise due care, it does not demand capital punishment for the offense just because the offender could answer subsequent to the act that he knew it was wrong. A different reaction is evoked from society when a harm was motivated by malice, hatred, or a vicious will. In this instance, society looks to the circumstances of the offense and the capacity of the offender under those circumstances to premeditate and then plan the offending action.

Likewise, society generally recognizes the incapacity of infants to form criminal intent. It does so under a presumption either that knowledge of right and wrong has not yet been inculcated into the child's social value system, or that the child is incapable of effecting a truly malicious act.

Presumably, a child's attitudes and subsequent behavior are shaped by parental condonation and reward of approved behavior and by discouragement, condemnation and punishment of the contrary. Society extends the operation of this presumption in the criminal law as it comes to stand in loco parentis to an emancipated adult.

2 To overcome the presumption of sanity in a criminal case, the burden is on the defendant to prove his insanity by a preponderance of the evidence. Cal. Evid. Code § 522 (West 1966); People v. Daugherty, 40 Cal. 2d 876, 256 P.2d 911 (1953).

3 For example, California specifically recognizes the criminal incapacity of children under the age of fourteen "in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." Cal. Pen. Code § 26 (West 1955).
Standing in that capacity, society now imposes sanctions for violations of its rules\(^4\) by presuming that compliant or conforming behavior can be coerced by punishment. Punishing means inflicting some kind of privation or pain on the offender.\(^5\)

This presumption, whether made by parents or society, is far from being a conclusive one. It fails to heed two observations commonly made by social scientists and readily validated by the experience of any thoughtful person. The first of these is that many people are simply not deterred by pain or privation. In fact, many people seek pain or punishment,\(^6\) often for psychological reasons which are the result of their particular experiential set. Martyrs, masochists, and the chronic collectors of injustice are, like the poor, always present, and it would be absurd to believe that they are not occasionally defendants in the processes of criminal justice.

Secondly, children like games. There is some residual child in everyone, but in most people the ratio of child to adult is relatively low. Nonetheless, there are many adults whose capacity for integrating their individual needs with societal norms, moderating their impulses, or binding their emotional tensions is no better than it was when they were children. Children of all ages often test the limits set by authority or challenge the capacity of the authority to control or to coerce conforming behavior. The state, in a criminal action against

\(^4\) See Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U. CHI. L. Rev. 320, 321 (1954):

The evolution of criminal law has been a chronicle of how conflicts of motivation of both the wrongdoer and the triers have been rationalized in the guilt-fastening process. Motivation is tied up with the notions of knowledge, intent, willfulness and freedom of choice which have never been nor probably ever will be reduced to rational definitions. The *M’Naghten* test is a creature of such notions and might be better understood if examined in the light of traditional child-rearing. Misbehavior in a child is regarded as a willful attack. The willful child acts contrary to what he is assumed to “know” of our two-value, either-or system of right and wrong. If he “knows” better he is responsible in the sense that he is punishable; the parental counterattack is aimed at the vicious will. If the child does not “know” better, he is not responsible and there is no parental counterattack. In this reflection it would appear that traditional child-rearing is a continuous informal application of the *M’Naghten* rule. It is clear that this is a process of abstraction going on exclusively inside the parent, and it is the operational prototype of Anglo-American legal procedures for determining responsibility, i.e., punishability, the parental authority and power having been extended to the court.

\(^5\) See Hart, *Prolegomenon to the Principles of Punishment*, 60 ARISTOTELLAN SOC. Proc. 1, 4 (1959). See also Andenes, *General Prevention—Illusion or Reality*, 43 J. CRIM. L. C. & P.S. 176, 180 (1952), where the effects ascribed to punishment are threefold: (1) a deterrent; (2) a moral inhibitor; and (3) a stimulant of habitual law-abiding conduct.

an adult offender, attempts to continue the process of control or socialization begun by parents or parental surrogates.

The means by which the state accomplishes its purposes depend on public policy and the knowledgeability and sophistication of the persons charged with executing this policy. Generally, pain or deprivation is inflicted by the state for violation of its rules under the presumption that the offender will be coerced into future conformity. For this presumption to be valid, the offender's capacity to conform his behavior must be a function of his free will and entirely within the control of his conscious mind. Furthermore, it must be presumed that the children's defiance mentioned above is not a significant factor in the motivation for the criminal act. Both presumptions are rebuttable, and punishment often fails to effect reform or correction. Nonetheless, punishment and pain continue to be major elements in sentencing for crime.

One of the rules of the punishing process is that the degree of pain or privation is proportionate to the gravity of the offense. As Professor Jerome Hall has said:

The extent, or type of punishment is in some defended [sic] way related to the commission of a harm; e.g., proportionately to the gravity of the harm, and aggravated or mitigated by reference to the personality of the offender, his motives, and temptations.

Of course, Hall's statement applies only to criminal punishment, and according to Dr. Seymour Halleck, criminality is "a form of social deviation which society defines as punishable in the hope of protecting its institutions." It is apparent that some forms of social deviation not only are criminal, but, on the basis of social and biological data, may also be the product of mental illness. When it is recognized that the personality and actions of an offender are often bizarre, his motives confused, and the quantity or quality of his emotional response to his provocation grossly inappropriate, I am led to an assumption that there is some disease, defect, or derangement affecting both the offender's mind and emotional control system, i.e., he is mentally ill.

8 See generally Swartz, Punishment and Treatment of Offenders, 16 BUFF. L. REV. 368 (1967).
9 J. HALL, supra note 7, at 310.
III. Mental Illness

"Mental illness" to me, as a psychiatrist, implies some degree of impairment of a person's intellectual, mental, or emotional capacity to control, modify, or integrate his behavior with real circumstances. To be classified as mentally ill, a person's inability to relate his behavior with real circumstances must fall outside the range of behavioral norms for people who are similarly situated. Mental illness also exists in degrees. In mild states, the person's constructions of his sense impressions do not greatly differ from real circumstances. Hence, he is able to remain ambulatory in society. In such states there is generally little or no interference with his capacity to form intent or to regulate his conduct, to premeditate or plan, or to integrate the mens rea with the actus reus. In contrast to these mild forms of mental illness there may be a serious interference with these capacities. In severe mental illness, regardless of whether the person is classified as being psychotic or psychoneurotic, the individual's mind and integrative capacities are so severely disturbed that he is capable of exercising neither the capacity to make decisions free from distortion by his egocentric perceptions nor the capacity to control his behavior. Hence, the distinction between psychotic and psychoneurotic is merely academic. One of the complaints that has been made of M'Naghten is that even where a person has a severe mental illness and is clearly psychotic by medical standards, he may not be considered legally insane unless he commits the crime while suffering from active hallucinations that are operative in a grossly delusional system.11

Dr. Seymour Halleck has a different interpretation of mental illness and defines it as "a hypothetical construct justified by social and biological data . . . which has social value insofar as it serves humanistic treatment for disturbed persons."12 From this definition it can be inferred that humanistic treatment is the principal goal of the psychiatrist in classifying the person as mentally ill. Thus, if humanistic treatment is not forthcoming, or has proved to be impossible or ineffective, or the affected individual was resistant, unwilling, or in any other way inaccessible, then the classification of the person as mentally ill would be another useless academic exercise.

12 S. Halleck, supra note 10, at 36.
In fact, some authorities hold the classification of persons as mentally ill nonhumanitarian because it results in more hardship to those persons than a prison sentence which is carefully determined by rules of evidence, imposed for a definite period of time, and closely regulated.\textsuperscript{13} Concededly, many commitments for mental illness have been made without the benefit of these protections.\textsuperscript{14}

Dr. Bernard Diamond has pointed out that "[t]here is no doubt that good psychiatric treatment can be given within a department of correction,"\textsuperscript{15} and that hospitals for the insane may often be "only prisons in disguise . . . ."\textsuperscript{16} Diamond's observations present the paradox that the "humanistic" efforts of the court in categorizing one group of defendants as mentally ill may turn out to be more sterile and punitive than categorizing another group as criminals, the latter group alone to be sent along the correctional route. If the mental hospital is mainly custodial it may be little more than a prison and hence a "sentence" may be less humane than a sentence to a well regulated corrective institution. It is possible to become lost in a mental hospital system. It is relatively difficult to become lost in a state correctional institute, if only because of the stringent application of rules which govern the custodians. It can only be surmised that "becoming lost" will depend not on the classification process but on the good will, integrity, humanity, and social concern of the persons charged with the ultimate responsibility for treatment or rehabilitation.

\textsuperscript{13} C. S. Lewis' comment illustrates the point:

To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of "normality" hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I grown wise enough to cheat them with apparent success—who cares whether this is called punishment or not? That it includes most of the elements for which any punishment if feared—shame, exile, bondage, and years eaten by the locust—is obvious.


\textsuperscript{14} Legislative cognizance of the abuses possible in California's involuntary commitments procedures prompted the California Mental Health Act of 1967. The pertinent provisions of the Act, codified in the California Welfare and Institutions Code Sections 5000-5706 (West, Supp. 1967) will bring about several desirable reforms by eliminating coercive powers and imposing time limits in connection with involuntary commitment proceedings. See also \textit{Morse & Howard, Studies in Criminal Law,} 167-68 (1964); and T. Szasz, \textit{Law, Liberty, & Psychiatry} 57-70 (1965).


\textsuperscript{16} \textit{Id.}
IV. Psychiatrists, Lawyers, and the Law

Aside from these considerations of rehabilitation, another crucial problem is reconciling the psychiatrist's view of mental illness with the lawyer's need to assess mental capacity to determine the degree of criminal responsibility which may be assigned to the offender. Hopefully, the lawyer, as a very purposeful member of society concerned with the long-term interests of social institutions, will want to make this reconciliation more than an exercise in taxonomy. His purpose should be aimed at more than the immediate regulation of the particular offense, which is a police function and already accomplished (at least in the case of this particular offender), and should transcend the aim of simply making some disposition of the offender at the time of trial. The problem of the offender, whether mentally ill or not, does not stop with the trial. If the law is concerned with the stability of society's institutions, it cannot sacrifice the long-range interests of society to the short-term goal of classification merely to permit an orderly trial and a predictable disposition of the criminal offender.

Likewise, the law must face critical scrutiny in respect to the effectiveness of punishment whether as a form of rehabilitation for the individual offender, or as a deterrent to other potential offenders. The law, or those who make or enforce it, ought to be concerned with the effectiveness of treatment and rehabilitation, since either punishment or treatment may be effective to insure future conformity. Since either may also be misapplied, to the detriment of both the individual and society, a proper assessment of the factors affecting the defendant's criminal action becomes a practical necessity at some time prior to constructive sentencing.

There may be some persons who believe that the questions of criminal responsibility are inconsequential, that, in the absence of the death penalty, it does not actually matter whether the convicted criminal is placed in a hospital for the criminally insane or in a penitentiary. Such a view challenges one to inquire whether there is any validity to the idea of a "sick" criminal as distinguished from a "well" criminal, and, if so, what are the distinguishing attributes. Both may intend their crime; both may know right from wrong. When examined by the psychiatrist, he may find that both have suffered from some mental disease, defect, or derangement which resulted in the specific criminal act.
For those persons who think that the factors affecting criminal responsibility are consequential, relevant questions include: Are the criteria used by the law in determining who is legally insane the same as the criteria used by the psychiatrist in determining who is mentally ill? Can psychiatrists derive specific and uniform criteria—by which individuals can be determined to be mentally ill—which will ever be satisfactory to an adversarial proceeding in which the guilt or innocence of the accused turns on whether he was legally sane or insane at some point of time already past? The state of being mentally ill can be either static or dynamic. Can an examination made at one point in time, for instance, after the arrest but before the trial, prove anything about the state of mind of the defendant at the time of the offense, or is this a “finding” which can only be arrived at by inference?

Anyone attempting to answer these questions must bear in mind the conceptual basis for the terms “mental illness” and “criminality.” Neither term exists without qualification; neither denotes absolutes. Undoubtedly, both terms require a social value judgment and this is a function of the particular culture or subculture which is seeking to protect its institutions. A group of jurymen should not be asked to decide whether a given assault on a social convention shall be classified as a crime or as a mental illness. It can be both, i.e., a crime which is the product of a mental illness. When pressed to decide whether it is either one or the other, they are likely to reach a finding that the behavior in question is a crime—which seems most consistent with preserving the social institutions. This is one reason the insanity defense is such a dangerous “game.” Once the “game” of proving the insanity defense begins, the odds are fairly certain that the collective subconscious of the jury will be prejudiced against a finding that may seem to threaten established norms of behavior.

V. THE RUBY TRIAL

Both mental illness and crime are conceptual categories constructed to deal with socially deviant forms of behavior. To state it differently, both crime and mental illness are maladaptive responses, on the part of the affected individual, to the stresses and pressures of life in his particular culture. An inquiry should be made, then, as to what extent mental illness should ever be part of a trial to establish the guilt or innocence of the accused.
In the opinion of the author, most of the problems in such trials occur not because of the existing legal rules \textit{per se}, but because elements of "gamesmanship" are introduced into the adversary proceedings and the legal rules are manipulated through opinion testimony by one side or the other in order to win the trial "game."

The record of the Jack Ruby trial\textsuperscript{17} is a most revealing example of the variety of problems encountered where mental capacity and criminal responsibility are at issue. In that trial, the attention of the nation was focused on Ruby's mental capacity, his criminal responsibility and the insanity defense. His mental state at the time he fatally shot Lee Harvey Oswald was really the critical issue in determining the nature of the homicide committed. However, in the battle between the opposing advocates, the jury was obliged to decide whether the defendant was legally insane and therefore not guilty of a crime. They decided that the proof of his purported insanity was not convincing, this despite evidence which to many indicated that Ruby had a substantially diminished capacity to integrate and conform his behavior because he was a mentally ill person, and was acting in the grip of passionate arousal and under the misguided conviction that his act was heroic revenge for the murder of the President.

The Ruby trial is often referred to as a classic of courtroom strategy.\textsuperscript{18} In the heated crucible of the adversary system, the American public, indeed, the world, observed all the vagaries, foibles, and seeming inconsistencies involved in the "game" of introducing expert psychiatric testimony into criminal trials. In an excellent demonstration of the type of cross-examination which makes most doctors reluctant to be called as witnesses, the mental states—legal insanity, temporary insanity, mental illness, epilepsy and epileptic variants, as well as episodic dyscontrol—were all brought into focus at one stage or another in the proceedings.

All the testimony about Ruby's mental state was relevant to the contest because, historically, society has been willing to concede that the person who commits a crime under certain mental states is not responsible for his act. Implementation of this social concession has

\textsuperscript{17} The Ruby trial is an unreported case, thus, the author has drawn heavily from J. \textsc{Kaplan} \& J. \textsc{Waltz}, \textit{The Trial of Jack Ruby} (1965).

\textsuperscript{18} The fact that the trial has been referred to as a farce and fiasco by some critics in no way detracts from the ingenious strategies employed by both sides to win the verdict.
centered chiefly on the selection of criteria for determining these particular mental states. However, a literal application of any of the various tests for determining criminal responsibility, whether M'Naghten's,\textsuperscript{19} or Durham's,\textsuperscript{20} or Currens',\textsuperscript{21} has seldom proved entirely sufficient to serve the long-term interests of society. Such application may serve the law in its need for regulation through stability, formalism, and security from disorder in the trial process, but so would automatic "trial by ordeal." It is contended here that the application of these various rules is nothing more than a taxonomic exercise by which the anticipated results are rationalized after the adversary "game" has already begun, so as to win the contest by manipulating the concepts.

The Ruby trial is again illustrative. There, despite an attorney of great skill and excellent reputation, despite recourse to an impressive array of expert witnesses of national prominence, despite an unstinting budget for psychiatric, neurological, electroencephalographic, and psychological tests, once the proof of the insanity "game" was begun under Texas law the issue had to turn on the defendant's "knowledge." In the opinion of the jurors, if "knowledge" of the rightness or wrongness of the act existed in the mind of the defendant, then they had to return a first degree murder verdict. Despite all the armamentia of the adversary system which produced evidence of diminished responsibility and might have insured a fair trial, at least according to legal standards for second degree murder, Jack Leon Ruby had to be found sane once the insanity defense was put in issue. \textit{Quaere}, but for the insanity defense, whether he would ever have been sentenced to death.

As John Kaplan and Jon R. Waltz point out in the epilogue to their book on the Ruby trial:

\begin{quote}
Fair trial is a complicated concept which involves, at least to some, a sporting theory that even where the defendant's guilt can easily be demonstrated, he is entitled to a chance for acquittal. At minimum, however, fair trial implies two notions—that of equality (has the accused been given the same protection and chance of acquittal as others similarly situated?) and that of rational procedure (has
\end{quote}

\textsuperscript{19} See note 1 \textit{supra}, for a statement of the M'Naghten rule.

\textsuperscript{20} Durham v. United States, 214 F.2d 862, 875-76 (D.C. Cir. 1954). (accused not criminally responsible if his unlawful act is the product of mental disease or mental defect).

\textsuperscript{21} United States v. Currens, 290 F.2d 751, 774 (3rd Cir. 1961). (defendant not criminally responsible if by reason of mental disease or defect he lacked substantial capacity to conform to the requirements of the law which he is alleged to have violated).
there been adherence to procedures rationally adapted to determine the guilt or innocence of the accused?\textsuperscript{22}

They further admit that "in this sense of the term it is difficult to isolate blatant sources of unfairness in the trial of Jack Ruby."\textsuperscript{23}

Kaplan and Waltz suggest that publicity and the excitement of national interest were the principal factors accounting for the death sentence in the Ruby trial. The processes of justice were alleged to have been disrupted as the atmosphere of relative quiet and tranquility, in which the American trial system functions best, was disturbed. They conclude their colorful analysis as follows:

The crowded corridors thronging with newsmen, microphones and television cameras, the countless interviews, and the realization that all concerned were enacting history influenced the participants in many obvious ways. It is not extreme to assume that there were also more subtle effects. The difficult and fundamental problem which these facts raise is that it may be impossible for the United States ever to afford in a state case a fair trial if by this we mean a trial not basically different from the usual unpublicized one.

We cannot, of course, be completely certain that the pressures of publicity in a state case affect the results. . . .\textsuperscript{24}

These statements would appear to reflect upon the current fair trial-free speech controversy that arose, in part, from the events in Dallas.\textsuperscript{25}

The authors contrast the Ruby case with an unpublicized killing which was not so very different from the one committed by Jack Ruby. One hour and thirty-two minutes after Jack Ruby had shot and killed Lee Oswald, Vaschia Michael Bohan called the Sioux City, Iowa, Police Department to report that he had killed his stepfather.\textsuperscript{26}

He had stabbed his victim six times, once in the mouth and five times in the chest. Bohan, a forty-seven-year-old dental technician, had been seated in the living room of his mother's and stepfather's home watching on television the funeral arrangement for President Kennedy when

\begin{footnotes}
\item J. Kaplan & J. Waltz, The Trial of Jack Ruby, 370 (1965).
\item Id. at 371.
\item Id. at 372.
\item See generally Reardon, The Fair Trial-Free Press Controversy—Where We Have Been and Where We Should Be Going, 4 San Diego L. Rev. 255, 257 (1967). The controversy, which has grown large and heated since President Kennedy's assassination, centers on the "proper balance between the right of the public to be kept informed and the right of an individual to a fair and impartial trial." Report of the President's Commission on the Assassination of President Kennedy, 242 (1964).
\item Bohan, an unreported case, is discussed in J. Kaplan & J. Waltz, supra note 22, at 372-73.
\end{footnotes}
his stepfather entered the room and angrily vilified the slain President. Bohan rose from his seat, grabbed a pair of scissors from his mother's sewing equipment, and stabbed his stepfather to death.\(^\text{27}\) Bohan was arraigned the next day, November 25, 1963, and pleaded not guilty to the charge of murder. Bail was set, promptly posted, and the defendant was released from custody. In December, he changed his plea to guilty. When he appeared before Judge George M. Paradise for sentencing, the judge commented on the assassination of President Kennedy and its effect on the entire nation. He remarked upon the atmosphere of troubled emotions, and that "'the entire nation was under stress and strain from the tragedy'"\(^\text{28}\) and went on to say, "'but that is not a reason for a citizen of the nation to release his emotions to the extent of causing another tragedy.'"\(^\text{29}\) Ending with the cliché that the deed would weigh forever on Bohan's conscience, the judge sentenced him to eight years in prison and fined him a thousand dollars. He then proceeded to suspend the prison sentence. Bohan paid his fine and went home with the judge's best wishes for a merry Christmas.

It seems very likely that Ruby, as Judge Paradise suggested was the case with Bohan, was caught up in an emotional response which was national, and was reacting with excessive passion to "the stress and strain from the tragedy." Both men had lost their fathers, and both appeared to have vested an extraordinary significance in the President as a surrogate father figure. In slaying the father figure, Oswald had, in effect, started a blood feud. Ruby, in a burst of infantile heroics, avenged the slaying of the head of his clan, thereby discharging the passionate frustrations and resentments attendant to the removal, by death, of his own father from his life. Bohan's stepfather, in vilifying the slain President, was vicariously identified with the real assailant. It may be that Bohan's reaction was even more highly charged because of long-standing suppressed hostilities toward the man who had replaced his real father. Like Hamlet, perhaps he needed some dramatic incident symbolizing a reenactment of his father's death to bring to the surface his submerged hostilities toward his stepfather.

Whatever the psychodynamic speculations, the fact remains that the results of the two trials were entirely different. Mike Bohan went

\(^{27}\) It may be of more than casual interest to the psychoanalytically oriented reader that the first blow was struck at the offending mouth.

\(^{28}\) J. Kaplan & J. Waltz, supra note 22, at 373.

\(^{29}\) Id.
home to eat his Christmas dinner; Jack Ruby went to jail to await execution. It is of more than passing significance that the medical experts, who testified that Ruby was suffering from organic brain disease and that the disease had an adverse effect on his capacity to control and integrate his behavior, were completely vindicated by the post-mortem discovery of organic pathology in Ruby's brain.

It is the thesis of Kaplan and Waltz that the Bohan result—vastly different from that obtained in the Ruby case—provides an important clue to the effect of publicity on the operation of law by contrasting an unpublicized case to one widely publicized. From the Bohan case, they infer that it was the publicity which influenced and interfered with the result of the Ruby trial, and that, but for this factor, the result of the trial might have been different. Their thesis has gained a good deal of popular support.80

VI. DIFFERENCES BETWEEN THE RUBY AND THE BOHAN TRIALS

I submit that the differing results between the Ruby and Bohan trials turned on the effects of "adversarial gamesmanship"—not just publicity and the attempts to prove a lack of knowledge. But for certain automatic responses elicited when the consideration of mental illness and psychiatric testimony were introduced into the trial, a considerably different result would likely have ensued in the Ruby trial. It may have been that the jury feared they were being deceived. For whatever reason, they were not persuaded. And having narrowed the issue down to a simple question of knowledge, they decided the issue according to the rules of the "game," thereby ignoring or obscuring all other determinants germane to the larger social issues which might have resulted in a different sentence, e.g., second degree murder.

In the Bohan case there were no psychological tests, no EEG's, no theories of insanity or impaired criminal responsibility. When introduced into the Ruby trial as issues and positively asserted as theses, they inevitably evoked negative propositions. It is axiomatic that any weakness in the validity of a proposition positively asserted moves the trier of fact in the direction of doubt. This doubt seems particularly likely to insert itself when the jurors are not sufficiently sophisticated to understand a complicated psychiatric or neurological phenomenon.

On the other hand, every man has had some experience with passionate anger or frustration. Once the jury is satisfied that this state of mind existed in the defendant, trial counsel does not have to allege that it influenced the accused's behavior. The jury is then likely to identify with the defendant's position.

It is when counsel alleges the existence of a particular state of mind and tries to prove it that the counsel, rather than the accused, becomes the central figure, and the jurors must identify with him in order to return a defense verdict. Eliciting identification is difficult for a variety of reasons, and especially so if counsel or his experts offer explanations for a phenomenon which is beyond the common knowledge or experience of the jurors. Even if a medical or psychiatric "truth" is asserted, a jury may feel suspicious and fear that they are being manipulated with a trial tactic, or they may simply be hostile to the person who propounds the explanation and therefore reject it.

Even granting that a biased coverage of a trial by the news media may sharpen and raise suspicions of manipulative tactics, the average person does not readily accept an abstract proposition. Before the average person will accept a proposition, his personal experience must somehow show its validity and probability.

In the Ruby trial, the topic of epilepsy and epileptic variants was

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31 It is at this point that the psychiatrist is called upon for his opinion, i.e., when his knowledge exceeds that of the jury. See Cal. Evid. Code § 801 (West 1966) which states:

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

*See also* Cal. B.A.I.J. Nos. 33, 33A (Supp. 1967) for samples of approved jury instructions. Instruction No. 33 provides:

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation may give his opinion as an expert as to any matter in which he is skilled. In determining the weight to be given such opinion you should consider the qualifications and credibility of the expert and the reasons given for his opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

Instruction No. 33A provides:

In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based.
introduced by attorney Melvin Belli to establish the defense that when Ruby shot Oswald he was in a mental state precluding knowledge of his deeds. The defense counsel hoped to present sufficient expert psychiatric, psychological, and neurological evidence to support two jury charges he requested from Judge Brown. The desired charges were: (1) "A person who has no knowledge of his deeds cannot be held guilty for the commission of that act;" and (2) "No principle of criminal jurisprudence was ever more zealously guarded than that a person is guiltless if at the time of his commission of his act defined as criminal he has no knowledge of the deed." These charges were rejected, but Judge Brown gave the jury a more detailed charge on the defense of insanity.

Despite the fairness of Judge Brown's instruction on M'Naghten, such instructions are poorly understood by most juries. They are, at best, only attempts to enunciate a criterion for guilt or innocence by means of a formula, which is overly reductive and which begs the important issues discussed earlier. It seems paradoxical that there is always this attempt to reduce the complex problem to one super-simple taxonomic criterion that obliges the jury and the court to choose between opposite alternatives, neither of which may be precisely correct. Hence, the rules of the "game" often deflect the court

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32. J. Kaplan & J. Waltz, supra note 22, at 86.
33. Id. at 307.
34. Id.
35. Id. at 309-10. The pertinent part of the charge reads as follows:

"If . . . the guilt of the defendant has been established beyond a reasonable doubt, it devolves on the defendant to establish his insanity at the time of committing the act in order to excuse himself from legal responsibility . . . as to his mental condition at the time, with reference to the offense charged. It is peculiarly a question of fact decided by you from all evidence in the case. . . . [If] the defendant was not of sound mind but was affected with insanity and such affection, if any, was the cause of the alleged act and he would not have committed the act, if he did, but for that affection, if any, then he ought to be acquitted, for in such a case the reason would be at the time dethroned and the power to exercise judgement would be wanting; but this unsoundness of mind or affection of insanity, if any, must be of such a degree as to obliterate the sense of right and wrong, depriving the accused of the power of choosing between right and wrong as to the particular act done, if any . . . . If his mind was sufficiently sound to be capable of reasoning and knowing the act he was committing, if any, to be unlawful and wrong and knowing the consequences of the alleged act, his plea of insanity would not avail him as a defense. Although a person may be laboring under partial insanity, if he understands the nature and character of his act and the consequence, if he has knowledge that it is wrong and criminal and the mind sufficient to supply that knowledge to his own case and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for his criminal act . . . it is not necessary that the insanity of the defendant be permanent. It is sufficient if it is temporary. It is not necessary that the insanity of the defendant be established beyond a reasonable doubt. It is sufficient if it be established to your satisfaction by the weight of preponderance of evidence . . . ."
and the triers of fact from a true understanding of what happened in the mind of the accused at the time of the act.\textsuperscript{36}

It is considerably easier for a psychiatrist to construe the outcome of Jack Ruby's trial as largely due to factors described above than as the result of excitement induced by publicity. After the battle of the experts, the jury had to decide the issue of Ruby's mental state, according to \textit{M'Naghten}, on the specific point of whether he had a "psychomotor variant" when he committed the act. Many psychiatrists, although limited in their firsthand knowledge of the case, thought it likely that Ruby did have some other organic brain condition, which made him easily subject to "episodic dyscontrol," whether or not they also subscribed to the "psychomotor variant" theory propounded by the defense. Every one of the pathological states brought up in trial testimony was a distinct possibility. However, it was just as possible that Ruby was an emotionally unstable, highly neurotic or borderline psychotic individual whose level of integration and capacity for effective self-control was characteristically overcome in moments of passion. Whether the stimulus to his action, granting that it was undertaken during a passionate response, was sufficiently within the range of normal variation as to permit most "normal" persons to understand and sympathize with the impulse is another question. There is a world of difference between an impulse to act and an action taken of impulse. Again presented is the question of capacity to conform one's behavior even in the face of impulse. In the Bohan trial, Judge Paradise, who was not confronted with the issue of insanity or diminished responsibility and its inherent "gamesmanship," could state that under the circumstances he could understand Bohan's action though he, as an agent of society, could not condone the action taken. The judge was able, in view of the overall circumstances and the context in which the action took place, to form an "hypothesis ad hoc" which permitted him to rule that the degree of the crime was insufficient to constitute first degree murder and, hence, it did not warrant the death penalty. He was also expressing a kind of faith that Bohan's action in this instance was unique, and that Bohan would never again encounter such a provocative set of circumstances. What distinguished this provocation from

\textsuperscript{36} Ideally, when informed of (1) the historical data which comprises the psychological set of the defendant, and (2) the details of the transaction between the defendant and his purported victim, the jury then should seek to discover the competence of the defendant to act freely under that set of circumstances (at least as freely as any other normal adult) at the time he committed the harm at issue.
Ruby's? If the provocations were indistinguishable, why were the results almost diametrically opposed?

In the Ruby trial, once the issue of insanity or the presence of a psychomotor variant was put to the jury, they had to decide whether he was insane. After they had started the insanity "game," they automatically implemented the antithetical proposition that he was sane, and if he was not insane, by the narrow definition of *M'Naghten*, then he had to be punished for first degree murder.

The death sentence well left a psychiatrist with the feeling that the defense's various explanations for Ruby's action obscured the more apparent explanations, which were controlling in Bohan, and which would have reduced the degree of Ruby's crime. The more esoteric explanations were not persuasive to the jury, not because they were inaccurate, misleading, or trumped up to excuse the act, but because the jury could not personally identify with these complicated concepts. The jury could not relate the purported explanations to any analogous behavior of their own. Assuming that they were ultimately immersed in the "game" of deciding whether knowledge of the wrongful act was present, they could not be persuaded by a theory of behavior so far outside the range of their own experience.

There are few people, who would have been eligible to serve on the jury, psychologically sophisticated enough to understand fully the concept of a psychomotor variant form of epilepsy, even if it generously be granted that such a condition accounted for Ruby's actions. Even had it been a convincing concept, it might still have remained suspect in the jurors' minds.

VII. The Issue of Insanity

If the defense of insanity and its attendant issues had not been forcefully raised, in the Ruby trial, then the concomitant rebuttal by the prosecution and the consequent doubt or confusion of the jury would probably not have been elicited. It does not seem too much to presume that, in the absence of the necessity to take a stand concerning these issues, both the judge and the triers of fact might have reached a result not greatly dissimilar to that in the Bohan case. However, by the time the trial had reached the point of determining these issues, the jurors were already consolidating their identification, and hence their bias, either positively or negatively, with either of the opposing counsel.
Strikingly different were the approach and conduct of the psychiatric experts and the opposing counsel in *People v. Gorshen.* In this trial, Dr. Bernard Diamond was permitted to testify outside the narrow range of the hypothetical question. In so doing, he presented pertinent information from the defendant's history, which clarified Gorshen's transaction with his victim. When these data were made available and the act viewed in the context in which it took place, the act could be understood, and Gorshen's diminished capacity for malice and premeditation could be accepted by the judge and the jury. The result of this trial was a significant step in the evolution of the law of criminal responsibility in California. In *People v. Henderson* the California Supreme Court followed the *Gorshen* lead and stated:

[D]efense of mental illness not amounting to legal insanity is a "significant issue" in any case in which it is raised by substantial evidence. Its purpose and effect are to ameliorate the law governing criminal responsibility prescribed by the M'Naghten rule... Under that rule a defendant is not insane in the eyes of the law if at the time of the crime he knew what he was doing and that it was wrong. Under the Wells-Gorshen rule of diminished responsibility even if a defendant be legally sane according to the M'Naghten test, if he was suffering from a mental illness that prevented his acting with malice aforethought or with premeditation and deliberation, he cannot be convicted of murder of the first degree. This policy is now firmly established in the law of California... The rule is not only firmly established, but it has been extended in California. There is now case authority for accepting evidence of a defendant's mental capacity irrespective of the cause. Hence, intoxication, trauma, and disease can all be used to show that the accused's

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38 51 Cal. 2d at 731, 336 P.2d at 502.
In such a case the question whether the intent to kill was formed as the result of deliberation and premeditation can be answered by evidence that the particular defendant, because of impairment of his mental ability by intoxication, injury, or disease, could not and therefore did not deliberate, as well as by evidence of objective circumstances... 39 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).
40 Id. at 490-91, 386 P.2d at 682, 35 Cal. Rptr. at 82 (citing *Gorshen* and additional cases).
mental state rendered him incapable of forming or harboring malice aforethought,\textsuperscript{41} thereby rebutting the presumption of malice.\textsuperscript{42}

Although case law, in California at least, may be as set forth above, it is not conclusive on the matter, for one problem remains—getting the jurors to trust and accept the psychiatrist’s opinion in order that they may then apply the appropriate law.

One facet of the problem is the fact that psychiatric testimony is often unfavorably compared with the testimony of other medical experts. Perhaps this is because most jurors and many lawyers lose sight of certain apparent differences between psychiatrists and other medical practitioners; yet they measure the psychiatric expert’s performance by the same standards of his orthopedic colleague. There is a difference between palpable structural change in an organ or a measurable biochemical variation and the type of criteria used in mental-status examinations by psychiatrists and psychologists. The former are relatively easy to define and measure. They lend themselves to the concrete formulation of established norms, while the “objective” criteria of the psychiatrist, albeit actually distinguishable, are generally incapable of precise measurement.\textsuperscript{43}

The efforts to objectify psychiatric data have led to the develop-

\begin{footnotesize}
\begin{enumerate}
\item[42] CAL. PEN. CODE § 188 (West 1966) provides in part: “It [malice] is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.”
\item[43] J. Kaplan \& J. Waltz, supra note 22, at 189-90.
\end{enumerate}
\end{footnotesize}
ment of a great many psychological tests. Some of them are of doubtful validity, and many turn out to be sharply limited by the skill, value judgments, personality, and so forth of the psychologist or psychiatrist himself. Nevertheless, when carefully selected, properly administered, and skillfully scored by a qualified person, they can reveal the more subtle reaches of emotional, mental, and cognitive disturbance. Whether one subscribes to the validity of psychological tests or not, it is a fact that a clinical impression of mental illness does not turn on the presence or absence of any one single set of criteria.44

Perhaps it is due to the multiplicity of criteria that psychiatric testimony is often prejudicial to the side which introduces it. All too frequently due to courtroom tactic the fabric of a valid conclusion is destroyed by unraveling the threads and looking at each microscopically under cross-examination. This "gamesmanship" technique may make the criterion seem preposterous and, therefore, the collective criteria absurd by inference.

This amplification of the microscopic was the tactic used by the government during the cross-examination of Dr. Carl Binger in the case of United States v. Hiss.46 The government's case was based on the creditability of one man, Whittaker Chambers, who in the view of Dr. Binger was "psychopathic with a tendency toward making false accusations."47 A detailed longitudinal study of Whittaker Chambers' history left little doubt that Dr. Binger's ultimate conclusion—that Chambers was mentally ill—was accurate, however labeled.47 The government's cross-examination seized on three of Dr. Binger's criteria: (1) Chambers' untidiness, (2) his habit of glancing headward during reflection, and (3) his stealing. By forcing a detailed scrutiny of each of these features out of context and as if each fact were the sole criterion on which the opinion was based, the prosecution reduced Dr. Binger's testimony to seeming absurdity. It

44 Even if some of the psychiatrist's data can be objectified by being reduced to predictable results from psychological tests, the psychiatrist is often in no better position, for if the test's validity is questioned and disproved, he is totally discredited; if the tests are valid, they are likely to be so subtle or esoteric as to be incomprehensible to the layman juror.


not only appeared to be meaningless but actually proved to be dete-
riental to the side on whose behalf it was proffered.

Later, Dr. Binger, in private correspondence with one of his
colleagues, complained that the prosecution was:

trying to turn words around in my mouth . . . forced me to answer
"yes" and "no" to questions framed by him in such a manner that
the answers did not convey the meaning that I wished to present. I
know it is all part of the game.48

Dr. Binger made further criticisms of the hypothetical question:

The hypothetical question is an absurdity. An expert witness is not
allowed to testify to facts he knows to be true, but only to assump-
tions which often leave out important facts. From these he is asked
to draw conclusions . . . Who is a reliable witness [under such cir-
cumstances] ?49

Testimony from expert witnesses is not limited to hypothetical ques-
tions, of course, but it is true that a great many trial attorneys use
them. It is clear that one of the reasons why so much psychiatric
testimony seems to be contradictory is because these experts are asked
different hypothetical questions. Each side phrases its questions in
such a manner as to evoke the "right" answers. This practice results
in different answers based on criteria which experts from both sides
would agree were present when they examined the defendant. How-
ever, different hypothetical questions always elicit different answers.

Thus, what value does the hypothetical have, particularly in view
of the variability of its phraseology even when it is applied to the
same set of facts? Would not the ends of law, society and the indi-
vidual best be served if the confusing and sterile use of hypothetical
questions were discarded and concentration were centered on dis-
covering the meaning and motive of a particular anti-social action? In
order to make this determination and to deal with the actor appro-
priately, should not an assessment be made of the degree of reason-
ableness of the action in view of its total social context? It seems that
this is what we are trying to do when we attempt to determine what
might diminish or reduce the degree of culpability of the offender.
When this becomes the goal of a fair trial, there may be no valid
reason why the issue should be restricted to consideration of "knowl-

48 Unpublished correspondence between Meyer Zeligs, M.D. and Carl Binger, M.D.
49 Id.
"edge" within the narrow criterion of M'Naghten's rules. The relationship of the action to its context is more likely to be perceived when the sequence of events which brings the actor to the point of his action is understood. By taking this linear view of the historical factors which established the psychological and emotional set of the actor, it would be naive to fail to attempt to understand the transaction which takes place between the purported victim and the alleged criminal. These are the factors which must be considered in sentencing, and it is in this area where the opinions of psychiatrists and other social scientists can prove valuable.

The psychiatrist, whose testimony is limited to an opinion on the narrow issue of a defendant's knowledge of right and wrong as in M'Naghten's rules, participates in the process of social evolution to a very limited degree indeed, and generally then only as a tool in the taxonomic classification for trial purposes. The broadening of the limits of his permissible testimony to give an opinion as to whether or not the unlawful act was the product of mental disease or mental defect, as in Durham, although an improvement over M'Naghten, still seems to be an extended form of taxonomic ritual. Even an opinion given under the more liberal test enunciated in the Currens decision or the test in the Model Penal Code of the American Law Institute barely fulfills the psychiatrist's ethical responsibility to the individual and is of minimal utility to society. Is it any wonder that there is reluctance on the part of many psychiatrists to participate in this process?

If psychiatric examinations and opinions are meant to assist the court in its decision as to which socially deviant individuals are to be classified as mentally ill and therefore subject to treatment, and which are to be defined as criminal and therefore subject to punishment, are

50 Some of us may recall Judge Samuel Leibowitz, the late President of the Court of General Session for New York, whose broad trial experience before mounting the bench made him recommend that the complaining witness as well as the defendant in every case of an alleged sexual crime be examined psychiatrically. When this policy was implemented it was discovered that many times the complainant had initiated, induced, or encouraged the action of which he or she had later complained.
51 See Durham v. United States, 214 F.2d 862, 875-76 (D.C. Cir. 1954).
52 See M'Naghten's Case, 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843).
54 MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955) provides:
(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform to the requirements of the law.
(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.
they ever really important before or during the trial? It may be that the only real value of psychiatric examinations and opinions before trial is as an aid in the determination of the capacity of the defendant to assist in his own defense. This determination is probably best made by the man who needs this assistance, i.e., the defense counsel. Except for the use of a panel of psychiatrists to corroborate such an opinion under oath, for the purpose of protecting the defendant from possibly being unjustifiably committed to a mental hospital in violation of constitutional due process, it may be that psychiatrists should stay out of court prior to the determination of guilt.

VIII. CONCLUSION

After a determination of guilt, the fullest understanding of the defendant and all the interrelated factors is desirable before the court passes sentence. It seems a travesty of justice for any court to pass sentence after refusing to hear evidence beyond one expert's opinion that the defendant was sane. Any gain in our knowledge of the determinants of behavior would appear to permit a more fair and rational sentence. Additional information may even effect a different attitude toward the crime. This is illustrated by an example from Seymour Halleck, which provides a fairly clear model of how shifts in attitudes occur with a gain in knowledge. With broader knowledge we often see a modification in the action as it was originally defined:

If a man molested a five year old girl, society would almost immediately seek to define him as a criminal. If he were examined by a psychiatrist, however, and found to have been motivated by delusional ideas, he might never be convicted of a crime, and would be called mentally ill. If, through further medical diagnosis it was discovered that he had a brain tumor, society would redefine him as physically ill.

By striving for understanding in the broadest manner possible under the circumstances, we are likely to deal with behavior in accordance with our secure knowledge of what that behavior means and what approach to the problem will best balance the humanistic and social interests involved.

If the criminal defendant is unable to conform his behavior within the range of acceptable variation, i.e., if he is disabled from adaptive

56 Ideally, the panel should be impartial and appointed by the court.
58 S. HALECK, supra note 10, at 37.
group living, we are legitimately concerned about whether the dis-
ability renders the defendant dangerous. If he is dangerous to the
security of significant social institutions, to persons, or to the property
of others, our next concern should be what course of action is best
to deter him from future repetitions of the offense charged. It is at
this point—only after careful and conscientious study—that psychia-
try makes a useful and legitimate entry into criminal proceedings.
The psychiatrist's fifteen-minute "look-in" before trial is never suf-
ficient to justify an answer to the following germane questions. Is
there sufficient capacity for emotional growth, for relearning and
reconditioning, as to make the person treatable? If treatable, in what
setting is the treatment best effected? These are questions to be con-
sidered at sentencing, and are of such serious significance that they
should not be entwined in the trial "game." They should be decided
dispassionately and carefully as possible with a view to the best
ultimate result for the individual and society.