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Madness and the Criminal Law, by Norval Morris

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BOOK REVIEW

Madness and the Criminal Law, by Norval Morris, Chicago: The University of Chicago Press, 1982. Pp. 235. \$20.00.

*Reviewed by Jill Switzer**

The seeming debacle of the John Hinckley, Jr. verdict revived the debate as to the continued wisdom of the insanity defense as presently used in this country. Lawyers and medical professionals, as well as the general public, have had legitimate concerns about the defense; the Hinckley verdict exacerbated them.

The insanity defense is just one of several criminal law-mental health topics discussed by Norval Morris in his book, *MADNESS AND THE CRIMINAL LAW*.¹ In a series of chapters devoted to pretrial commitment, the insanity defense, and sentencing of the mentally ill, juxtaposed with fictional parables, the University of Chicago professor analyzes the confusion surrounding these volatile areas and offers some suggestions.

The book is composed of five chapters, two of which are fictional.² The fictional sections set up the ambiguities which Morris explores in his nonfiction discussions: the blurry distinction between moral and legal guilt, and the dilemma as to whether criminal liability should be assessed for involuntary conduct due to mental illness. The fictional episodes illustrate the inevitable conundrum of the criminal law and mental health powers—the criminal justice system requires one set of responses, while mental health considerations require another.

The author's theses are threefold. He advocates the abolition of both the special plea of incompetency to stand trial and the special defense of insanity,³ and takes the position that sentencing should con-

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1. N. MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982). Morris is Julius Kreeger Professor of Law and Criminology at the University of Chicago. He is the author of *THE FUTURE OF IMPRISONMENT*, and the co-author of *LETTER TO THE PRESIDENT ON CRIME CONTROL AND THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL*, all published by the University of Chicago Press.

2. For reasons never made clear, Morris claims that the fictional chapters are the "imagined events" of Eric Blair, later known as George Orwell, during his early years as a provincial magistrate in the Far East. See N. MORRIS, *supra* note 1, at 3.

3. *Id.* at 33. Morris argues that well-established criminal law principles can better handle the problems created by the special pleas of incompetency to stand trial and the defense of insanity.

sider individual factors, including state of mind.⁴ The problem with Morris' theses, however, is that much of what he says is not new, and the question of whether his suggestions will work remains unresolved.

Morris contends that the plea of incompetency to stand trial should be replaced with a six months continuance by reason of mental disability to enable the accused to "maximize his fitness for trial."⁵ Morris prescribes that at the end of the six month period the accused either stand trial "under rules of court designed so far as practicable to redress the trial disadvantages under which the accused labors, or a *nolle prosequi* should be entered."⁶ This scenario, however, assumes that the case proceeds to trial only if there is no civil commitment at the end of the six month hiatus.⁷

If the accused is unrestorably incompetent, Morris relies on the reasoning of *Jackson v. Indiana*.⁸ In *Jackson*, the United States Supreme Court held that there must not be an indefinite civil commitment—an accused can be held no more than a reasonable period of time necessary to determine whether it is likely that he will attain competence in the foreseeable future.⁹ If future competence is not probable, then the state must either bring civil commitment proceedings or release the accused.¹⁰ In essence, Morris argues for the abolition of that twilight zone between arrest and trial, between uncertainty and conviction.

If the trial procedures cannot adequately compensate for the mental disadvantages under which the accused stands trial, then Morris relies on *People ex rel. Myers v. Briggs*.¹¹ In *Briggs*, the accused was a deaf mute, whose incompetency to stand trial based on his ability to communicate was so profound that the Illinois courts could not agree upon his eventual fate.¹² Morris suggests that the solution for un-restorable incompetents is to give them their day in court and to proceed to trial. Morris' rationale is that a conviction for an alleged criminal offense may ultimately mean less incarceration time than a

4. *Id.* at 129.

5. *Id.* at 36.

6. *Id.*

7. *Id.*

8. *Id.* at 39 (citing 406 U.S. 715 (1971)).

9. 406 U.S. at 738. Morris suggests that while *Jackson* was an important step forward it left unsettled the best legislative solution to the problem of the unrestorably incompetent defendant. N. MORRIS, *supra* note 1, at 39.

10. 406 U.S. at 738.

11. N. MORRIS, *supra* note 1, at 41 (citing 46 Ill. 2d 281, 263 N.E. 2d 109 (1970)).

12. 46 Ill. 2d 281, 288, 263 N.E.2d 109, 113 (1970).

civil commitment.¹³

Morris advocates the abolition of the special defense of insanity.¹⁴ In its place he proposes the diminished capacity defense.¹⁵ The diminished capacity defense was popularized during the trial of Dan White, convicted of manslaughter for the assassinations of San Francisco Mayor George Moscone and Supervisor Harvey Milk.¹⁶

Morris asserts that it does not matter whether the *M'Naghten*, *Durham*, or American Law Institute tests are used to define insanity because the subtle and not so subtle nuances of each are meaningless to his proposition.¹⁷ To Morris, the special defense of insanity was created by society's concern that it is improper to impute guilt when there is a lack of free will.¹⁸ He savages the defense, labelling it a "genuflection" to a morality that extricates those who lack the free will to control conduct.¹⁹ Ironically, as Morris points out, the special defense of insanity is used with relative restraint, because the defense is pleaded only when it is advantageous for the accused to do so.²⁰

Morris notes the unavailability of the insanity defense in crimes other than the most frightful and heinous as another reason for its abolition.²¹ In California, for example, the defense is not available for rape or child molestation.²² Morris asserts that the defense, by its very nature, is used only in sensational cases to escape the noose of capital punishment.²³ Operationally, he argues, the defense is a paean to hypocrisy, rather than to morality; the defense caters only to a select few, and ignores others whose mental illness may truly affect volitional conduct.²⁴

Morris suggests that if the defense were abolished, mental illness

13. N. MORRIS, *supra* note 1, at 43.

14. *Id.* at 53.

15. *Id.* at 54. Morris prefers legislative substitution of a qualified defense of diminished responsibility to a charge of murder having the effect, if successful, of a conviction of manslaughter with the usual sentencing discretion.

16. *See* *People v. White*, 117 Cal. App. 2d 270, 172 Cal. Rptr. 612 (1981).

17. *See* N. MORRIS, *supra* note 1, at 56.

18. *Id.* at 57.

19. *Id.* at 59. Morris indicates that in a 1978 census of state and federal prisons only 3,140 persons were being held as not guilty by reason of insanity. *Id.*

20. *Id.*

21. *Id.* at 63.

22. California permits a plea of diminished capacity to specific intent crimes. *See* *People v. Noah*, 5 Cal. 3d 469, 477, 487 P.2d 1009, 1014-15, 96 Cal. Rptr. 441, 446-47 (1971).

23. N. MORRIS, *supra* note 1, at 63-64. Morris suggests that the defense is used where the likely punishment is of sufficient severity to make the indeterminate commitment of the accused a preferable alternative to a criminal conviction. *Id.*

24. *Id.* at 64.

would remain relevant and admissible on the issues of actus reus²⁵ and mens rea.²⁶ For example, a person who commits a crime while in the grasp of a *grand mal* seizure should not be guilty of that crime.²⁷ Morris contends, however, that in California, for example, ordinary mens rea principles have been "corrupted" in a line of cases.²⁸ He cites *People v. White*,²⁹ for the proposition that California's case law has been confused with the doctrine of diminished responsibility.³⁰

Morris' third thesis is that mental illness should be considered at the time of sentencing.³¹ But, again, is this a new insight into what has been a consideration for some time? Obviously, aggravation or mitigation of a sentence depends upon the circumstances of a particular case. But Morris contends that this aspect of sentencing is one that is frequently lost in the controversy over the "sexier" issues, such as the applicability of the insanity defense.³²

The author repeatedly speaks of the concept of a moral "desert," as justification for reduction of punishment for the mentally ill.³³ Essentially, his suggestion is that the sentencing authority should consider the effect of mental illness upon a defendant's culpability.³⁴ Even in crimes of negligence or strict liability, Morris contends that mental illness should be considered in sentence mitigation.³⁵

When would mental illness provide a basis for sentencing aggravation? Morris states that the defendant's criminal history or lack thereof, coupled with the gravity of the crime, should guide the court.³⁶ He cautions, however, that a mere prediction of recidivism, or "danger-

25. *Id.* at 65.

26. *Id.*

27. *Id.*

28. *Id.* at 66-67. Morris contends that while mental illness may be relevant to disproving the presence of a state of mind necessary to first degree murder or necessary to the "malice aforethought" element—the distinguishing characteristic of murder in California—the mental illness/mens rea relationship has been pushed to an unacceptable complexity and is thoroughly confused in the law of homicide.

29. *Id.* at 66 (citing 117 Cal. App. 2d 270, 172 Cal. Rptr. 612 (1981)).

30. N. MORRIS, *supra* note 1, at 66-67.

31. *Id.* at 129. Morris reasons that mental illness at the time of the crime is properly taken into account to *reduce* the severity of duration of punishment; mental illness continuing or likely to recur is also properly taken into account to *increase* the severity or prolong the duration of punishment. He suggests that there is no contradiction in these opposing effects because they may be reconciled and will coexist in every developed system of sentencing. *Id.*

32. *Id.* at 130.

33. *Id.* at 134.

34. *Id.* at 152.

35. *Id.* at 158.

36. *Id.* at 162.

ousness" as Morris chooses to call it, should not influence the sentence.³⁷

Morris' final chapter is dedicated to a discussion of the concept of anisomy, *i.e.*, treating like cases in an unlike manner. This area is another in which the public's perception, fueled by headlines, is askew. What Morris advocates is not heresy, at least from a lawyer's perception, but may be seen as such by the lay public. Morris argues that similar cases need not, and in fact, should not be treated similarly.³⁸ He concedes, however, that when the public sees two people, convicted of the same crime receiving different sentences, the public concludes that justice is really unjust. Morris acknowledges that advocating sentence inequality flies in the face of the American equality ethic.³⁹ Nevertheless, he points out, justice requires only that a defendant be punished appropriately in light of all factors contributing to a sentencing determination.⁴⁰

The author contends that the concept of selectivity pervades the law: it is present from the time a decision is made to file a criminal complaint to the time a decision is made to either try or plea bargain a case.⁴¹ To Morris, sentencing inequality is nothing more than a continuation of that well-entrenched concept. While this philosophy is by no means a "categorical imperative," Morris suggests that such a policy actually contributes to justice.⁴²

For a student, scholar, or lawyer passionately interested in the issues Morris addresses, his book is provocative and worth reading despite its turgid style. While his personalization of the discussion is irritating, the fictional chapters, by contrast, are absorbing and well-written.⁴³ The ultimate issue is whether the book's suggestions contribute significantly to potential resolution of the controversy surrounding

37. *Id.* at 163. Morris contends that punishment should not be imposed nor the term of punishment extended by virtue of a prediction of dangerousness (no matter how valid) beyond that which would be justified as a deserved punishment independently of that prediction. To support this thesis, Morris quotes from J. MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR*, in which Monahan states that "the best" clinical research currently in existence indicates that psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior over a several-year period." *Id.* at 165-66 (quoting J. MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 48-49 (1981)).

38. N. MORRIS, *supra* note 1, at 180.

39. *Id.*

40. *Id.* at 181.

41. *Id.* at 190. Morris argues that because the criminal justice system is "overloaded" due to a shortage of personnel and facilities, this overload compels selective enforcement. *Id.*

42. *Id.* at 209.

43. *See supra* note 2.

the insanity defense and other criminal law and mental health law questions.

Morris contends that California cases have corrupted the diminished capacity defense.⁴⁴ Therefore, is Morris' advocacy of the abolition of the insanity defense really a good idea? Some might say that it is, especially in light of *People v. Drew*.⁴⁵ But why should an accused be forced to plead diminished capacity when the insanity defense might truly be appropriate?

Proposition Eight, "The Victim's Bill of Rights," approved by California voters in June, 1982, has extended Morris' premise by redefining the insanity defense to avoid *Drew* and abolishing the defense of diminished capacity in its entirety.⁴⁶ It is questionable whether such provisions will withstand the inevitable constitutional challenges. By contrast, Morris, smugly confident, predicts that a statute abolishing the insanity defense would pass constitutional muster, if the statute retained the actus reus and mens rea elements.⁴⁷

The book, *MADNESS AND THE CRIMINAL LAW*, prompts debate on the issues of mental health and the insanity defense, and is certainly a useful vehicle for discussion and thoughtful consideration. Morris' theses should not be summarily dismissed or disregarded. Coincidentally, since publication of the book, both the American Bar Association and the American Psychiatric Association have taken positions on the issue of the insanity defense. The American Psychiatric Association does not favor the abolition of the insanity defense.⁴⁸ It argues that integrity of the criminal law demands its retention.⁴⁹ Rejecting the "guilty but mentally ill" plea is ineffectual,⁵⁰ the American Psychiatric Association advocates a standard that permits exculpation due to mental illness or retardation if, at the time of the offense, the accused was unable to

44. N. MORRIS, *supra* note 1, at 67.

45. 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978). In *Drew*, the California Supreme Court rejected the *M'Naghten* test and called for a new standard based on MODEL PENAL CODE § 4.01(1) (1980) which specifies: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."

46. CAL. LEGIS. SERV. 1166 (West 1982).

47. N. MORRIS, *supra* note 1, at 74-75.

48. AMERICAN PSYCHIATRIC ASSOCIATION, *Statement on the Insanity Defense*, December 1982, 8 [hereinafter cited as *Statement*].

49. *Id.*

50. *Id.* at 9. *But see* Turner & Ornstein, *Distinguishing the Wicked from the Mentally Ill*, 3 CAL. LAW., Mar. 1983, 41-45, in which the authors appear to lobby for the "guilty but mentally ill" verdict.

appreciate the wrongfulness of the conduct.⁵¹ The American Psychiatric Association suggests the following standard for mental illness or retardation: "gross and demonstrable impair[ment] [of] a person's perception of understanding of reality not attributable primarily . . . to alcohol or other drugs."⁵² Similarly, the American Bar Association, at its midyear meeting, voted to recommend the enactment of legislation to delete the volitional part of the ALI test, that is, the part which may excuse criminal conduct because an accused lacks the ability to control such conduct.⁵³

MADNESS AND THE CRIMINAL LAW contributes to the literature of the criminal law, especially in its measured discussion of the insanity defense. A book such as this should stimulate argument, contention, and debate that may, in turn, provide the impetus for true reform.

51. *See Statement, supra* note 48, at 12.

52. *Id.*

53. Pressman, *ABA House Urges Narrower Test on Insanity Reform*, L.A. Daily J., Feb. 10, 1983, at 1.

