

The Insanity Defense

Paul E. Meehl, Ph.D.

The proximate cause of my being invited to present this lecture was concern among Minnesota psychologists about what the legislature might do, perhaps with insufficient reflection on the complexities, by way of amending the Minnesota statute covering the insanity defense to a criminal charge. In a previous session, a bill was introduced that excluded the insanity defense except insofar as the patient's mental condition went to the possibility of intent as a material element of the crime. Within a larger social context, we know that there is widespread concern about the insanity defense, leading to what some consider ill-advised legislation in several states. This was largely attributable to public dissatisfaction with the outcome of the Hinckley case, about which I have no informed opinion since I do not read the newspapers or watch the television news. It is my understanding, from what informed persons have told me, that the outcome was arguably erroneous, and it seems to have violated the community sense of justice. Current social pressures aside, the whole problem of the insanity defense to a criminal charge is a topic on which psychologists should reflect. As in most such matters of professional expertise (real or alleged!) it is desirable for practitioners and scholars to examine the situation and contemplate possibilities for improvement at leisure, rather than as a reaction to urgent social pressures such as can arise in a state legislature.

I do not propose to discuss here the various rules for the insanity defense, partly because the empirical data on jury behavior suggests that while there are some statistically significant differences, they are numerically smaller than one might have supposed. Although it is true that the proportion of cases in the Washington, D.C. circuit where insanity was pleaded did show a marked increase in the 1950s following the famous Durham opinion. If you are familiar with these competing rules, such as M'Naghten and ALI [American Law Institute], there's no need for me to remind you; and if you aren't familiar with them, telling about them briefly won't help much. In any case, I felt it would be more interesting for all of us if I address myself to some more fundamental issues rather than to the specific language of the various rules.

I'm not prepared to say that, as presently formulated and administered in Minnesota, the insanity defense results in any appreciable amount of injustice, granted the inevitable percentage of incorrect results that the criminal justice system has to put up with whether madness is at issue or not. On the basis of some unpublished MMPI research that my psychiatrist colleague Carl Malmquist did

on statistics in Hennepin County, I'm inclined to think that to the extent that injustice is done, it is more commonly in conviction of persons who ought to have been acquitted than the other way around; but I cannot assert this confidently. This is, of course, opposite to the lay opinion that all sorts of bad characters get off the hook by successfully pretending to be crazy. One reason for concern among psychologists—which I do not think should be lightly dismissed as mere trade unionism—is that the public image of the psychologist (and psychiatrist) is one of a “muddle-headed, bleeding heart shrink” going into court and getting some murderous switchblade artist out of his just dues by selling the jury a bill of goods that the accused didn't get enough breast-feeding or was born on the wrong side of the tracks. I'm going to presume in what follows that if either the philosophical justification, or the statutory formulation, or the administration of the insanity defense is gravely disharmonious with the community sense of justice, it is bad for our profession, it is bad for the public attitude toward the criminal justice system, and, more to the point, it won't be carried out. There is ample evidence that neither police nor juries will consistently do things that violate the community's sense of justice. If a psychologist believes that the community sense of justice is ill informed, it may be his or her responsibility to contribute, by writing and popular lecturing and by the way he or she conducts a professional practice, to improving the community sense of justice. But it is not one's professional prerogative to slant testimony or otherwise accept a professional role that essentially consists of subverting the community sense of justice when he or she has not succeeded in persuading the citizenry that their moral and political views are mistaken.

I doubt that anyone who has functioned as a witness, or as a courtroom observer of psychological testimony, or has read transcripts of trials, would claim that as presently conducted the spectacle of the “battle of the shrinks” in the courtroom arena is edifying. In my opinion, there are mainly four reasons for its scientifically frustrating and clinically disedifying character. First, we have to face the fact that quite a few people in the mind business are not very smart, not very logical, not very well informed about relevant disciplines (e.g., ethics, political theory, jurisprudence, and alas, even statistics and probability theory) or are, even when cognitively competent, effective on the witness stand. Secondly, some lawyers are not very good courtroom lawyers, and are particularly inept about the insanity issue if they have not made it their specialty. We

have here also the problem of inadequate preparation of counsel. For example, an expert witness should prepare the lawyer as to what sorts of questions will bring out the relevant points, especially how counsel can protect on re-direct examination from effective cross-examination of the expert that, if unrebutted, leaves a misleading appearance of refutation. Thirdly, while I myself am fond of the courtroom scene, admire lawyers, and find the legal process fascinating, I think it fair to say that there are some built-in defects of the criminal court as a forum for exploring the insanity defense. It is, of course, stupid for psychologists or other social scientists to say that the courtroom situation is not a disinterested pursuit of the truth, which obviously it cannot be because people's lives and liberty are at stake. It is irrational to expect a conflict of factual interpretations, backed up by the terrible power of the state, to be conducted like a philosophy of science seminar or a psychotherapy session. But the Anglo-American rules of evidence and the whole procedure of the adversary system (I include here importantly the enforced passivity of the trial judge) are not always conducive to bringing out the psychological truth. I must add, however, that if the first two defects (that is, of incompetent experts and poorly prepared or incompetent counsel) were removed, I believe that the leeway given to expert witnesses in the format of their testimony, even in our adversary system, would usually permit adequate exploration of all the issues and bringing out the relevant material. Fourthly, despite my view that the presently formulated insanity defense is better than some critics think, if I were dictator of the universe trying to construct the best of all possible legal worlds in this respect, I would make some radical changes in the statutory definition and the associated judge's charge to the jury.

How does the problem arise in the first place? Consider a patient suffering from typhoid fever delirium (which is technically a psychosis). He misperceives the nurse, who comes to give him an injection, as a Klu Kluxer planning to kill him. Under this misapprehension, he knocks her down and she suffers a fatal brain concussion. Even disciples of Thomas Szasz would agree that it is inappropriate to convict this individual of murder. To do so would be neither just nor socially efficient. I find that lay persons who are completely innocent of psychology, even those who have a suspicion of shrink testimony in murder cases, will readily agree that it would be both stupid and unfair to punish this individual as a murderer by locking him in a cage for many years. Why? Because, as the layman would say, he was out of his head, he was not himself, he was nuts, he didn't know what he was doing. Correlated with that assessment, and of great importance to lay thinking in the matter, when he gets over his typhoid fever, he will also be free of his delirium, and consequently he will not be a menace to the rest of us any more than a randomly chosen person would be. Laymen, I find, do not like predators loose who will rape them or stick them with switch blades or take their property by violence, and I confess that, unlike some

people, I have not reacted to my many years' training in social science by developing a fondness for predators. In this respect my views are closer to the layman's than to some social scientists'.

A slightly harder case, but one which I find also is persuasive to the lay mind (although it may take a little more doing) is that of a pious, conventional homemaker with no criminal history who becomes severely depressed. (It helps here to point out to the layman that psychotic depression is a biochemical disease of the brain produced by abnormal genes.) Evidencing the classical textbook signs of a psychotic depression (e.g., marked weight loss, severe intractable insomnia, delusions of guilt, complete loss of hope) she follows the hallucinatory instructions of the devil by putting her baby in the oven and turning on the gas, and then makes an unsuccessful suicide attempt. When further informed that this woman's depression will probably lift spontaneously in a matter of months (unless she's one of the unlucky ones), and in two or three weeks in most cases with antidepressant medication, after which time she will be her former, non-criminal self again and no more risk to society than you or I, I find the layman says, as in the typhoid fever case, that it would be both unfair and inefficient to send her to prison as a murderer. The point I want to make here is that there is no appreciable disparity between the professional view of a major mental illness leading to what would otherwise be a criminal act, and the way the ordinary psychologically naive layman thinks of the matter. Historically, the idea that a person is not criminally responsible if he is "out of his mind" goes back to the 13th century in our Anglo-Saxon legal tradition.

Now in explicating this lay intuition one must ask what are the functions of the criminal law? One cannot address the question under what circumstances of mental condition an individual ought not to be held responsible for a rape or a murder without a background understanding of why we do hold people responsible otherwise. As you know, there are a half-dozen commonly recognized functions of the criminal sanction, four big ones and two minor ones. First, *incapacitation*: He can't kill me or steal my car while he is locked up, or on Devil's Island or in Siberia, or has been executed. Secondly, *reform*: He will learn his lesson, or he will learn something else while locked up which will lower the odds of his being criminal on being released. A sub-heading of reform is like "punishment" in the animal psychology sense, learning a lesson via unpleasant consequences so you won't do it again, and is generally called "special deterrence" by criminologists. Thirdly, *general deterrence*: By locking criminals up, we give public notice to others who might be tempted that it's not a smart move to commit a crime. Fourthly, *retributive justice*: We keep the society's moral bookkeeping straight, we give predators their just deserts. I note that even those who don't officially believe in this one affirmatively are likely to become upset if you violate it negatively, that is, if you punish people who didn't do anything wrong for the

purpose of deterring others, or propose to incarcerate a non-offender because his pattern of personal and social attributes shows him statistically to be at high risk for criminal conduct. So the idea that it is unjust to punish the non-guilty is present even among those social scientists who reject any notion of retributive justice to the guilty as an affirmative obligation of the state.

These four biggies are supplemented by two that are emphasized mainly by Scandinavian jurists, namely, the syphoning off of society's counter aggression (which is not the same as retributive justice, because we might consider it necessary as a matter of social engineering, even if we reject retribution as a moral or political concept); and moral education, not as dumb as it sounds. It's one of a half-dozen ways society inculcates people with a sense of what is and is not a baddie, and how bad a baddie is by the knowledge that some baddies are penalized far more severely than others. While family training and peer group models are doubtless more important in this respect, I do not believe we should hastily dismiss the idea that the background awareness of the criminal penalty does have some effect in moral education.

Now, given these six distinct functions of the criminal law, we have what any economist will tell us is an intractable mathematical problem. Whatever "input" variables are involved in the criminal justice system—taxes spent on cops versus social workers, or surveillance versus group therapy, severity of sentencing, the kind of milieu provided in the prison, and the like—the six output variables are obviously not going to be the same mathematical function of the several inputs that the society can manipulate, even if society proceeded totally "rationally" in an effort to optimize results. This mathematical problem would be present even if there were social agreement on still disputed empirical questions, such as the efficacy of special deterrence. Hence, absent some assignment of different utilities to the six functions, there is simply no way of deciding what to do. As we all know, there is far from universal consensus on the relative importance of these six aims. While this presents problems for selecting a good insanity rule and implementing it procedurally, I don't think it makes as much difference here as in non-insanity cases, because I think that in the clear-cut insanity cases, where the layman and the professional would easily come to close agreement (as in my typhoid fever or depressed homemaker examples) it is plausible to argue that *none* of the six functions of the criminal law is appreciably advanced by a conventional criminal penalty to the psychotic person.

Without deciding what is the incidence of injustice under the present rules of our system, or whether it errs more often by false positives than false negatives, I don't have much to suggest "institutionally" regarding poor preparation of counsel nor inadequate competence of experts, since these are primarily matters of the internal policing of the professions involved. Statutorily we might require that

an expert witness be more than any generally qualified psychologist or physician, whereas in the present system special competence in the forensic area or in psychopathology is not required. Whether one is a psychiatrist or a GP, or whether one is a clinical psychologist or some other kind, only goes, in the lawyer's jargon, to the weight and not the admissibility of the testimony. It would probably be unconstitutional to exclude less qualified testimony than real experts, but one could require that they testify simply as laymen and not with technical expertise. I myself would advocate that an expert witness must be a boarded clinical psychologist or psychiatrist; but I realize that I wouldn't get very many takers on such a stringent proposal.

As to the character of the forum, I advocate a bifurcated trial (despite some allegedly unsatisfactory experiences with that in a couple of states) in which psychological evidence in the first trial at most bears upon the question of *mens rea*, and then the second "trial" would deal with the defendant's exculpability under whatever insanity rule was in effect. The second trial would be conducted more like a hearing by an administrative tribunal. It would not use a jury, but instead a 3 or 4 person panel consisting of a lawyer (the chairman, for well-known reasons), a psychiatrist and a clinical psychologist, plus a lay member. (Because of the Asch Phenomenon, one might want to have two lay persons.) There would be a rebuttable presumption of sanity, and I would put the burden on the defendant, provided the Nine Holy Persons in Washington will hold still for that, which I guess they won't. I would define that burden as a preponderance of the evidence, although perhaps we could squeak through easier with the Supreme Court by making it something closer to "probable cause" or "any warrant in the record"—some lower degree of evidentiary support as occurs in administrative law. I would require that the professional panel members, in addition to their general qualifications and experience, pass a written and oral examination in the specific area of forensic psychology and psychiatry, assuring that the lawyer is knowledgeable in these areas, and the psychologist and the psychiatrist are knowledgeable about criminal law, jurisprudence, political theory and ethics. I realize this is radical because in the United States, people are sometimes appointed to judgeships on the basis of minimal scholarly qualifications (plus being an old poker playing croney of the executive). In European countries candidates embark on formal curricula with the specific vocational goal of becoming a judge, and must pass rigorous examinations in "judgin'." The only "political" or "ideological" considerations that would come up for examination before appointment to such panels would be ascertainment that the candidate is not some sort of axe grinder out to impose his own set of ideas in defiance of the community sense of justice, or who has resistance to applying such technical knowledge as psychology, psychiatry, statistics, and genetics genuinely possess.

The rules would be like those of an administrative tribunal, and the panel members would play an active role as interrogators. I do not mean that all elements of an adversary proceeding would be eliminated, which would be inappropriate. Counsel would be present, but the various reasons that have been accepted for the development of administrative tribunals instead of the ordinary courtroom battle would seem to apply here. I give you two brief examples. I don't think I've ever participated in, observed, or read an insanity defense where the prosecutor failed to bring out the fact that the defendant was oriented for time and place, that he remembered somebody's name, or even knew the telephone number of the Yellow Cab Company (a point made much of in the Eubanks murder case where I was an expert witness). Suppose the defendant is pleading paranoid schizophrenia. Then whether he is oriented, and whether he remembers a telephone number, is not only not dispositive, it is not even *relevant*. An objection of the traditional kind ought to be sustained, although I've never seen a lawyer try it. Such facts are completely irrelevant to the probandum. To a lay jury, it sounds important. To such a sophisticated panel of experts, its irrelevance would be apparent. They would, without waiting for objection by opposing counsel, simply stop the line of questioning and say, "Counsel, the defendant is pleading paranoid schizophrenia as a form of mental illness. Are you unaware that the retention of orientation and ordinary memory is one of the accepted medical criteria for diagnosis of paranoid schizophrenia? Defendant is not claiming organic brain syndrome or delirious hypermania, so why are you bringing up the irrelevant fact that he was oriented and remembered a phone number?" Similarly, on the other side, if counsel for the defendant tries to bring in the fact that he had an older brother who was a pickpocket, his father was a mean bastard, and his mother was a drunk, none of this bears upon exculpability under the sort of insanity rule that I'm going to propose below. So again, without requiring objection by the prosecutor, the panel would simply put a stop to it on the grounds it has nothing to do with what is being pleaded in exculpation. As you can see, my proposal for a bifurcated trial is not simply a matter of "loosening things up." It's loosening them in some directions while tightening them in others, bringing them closer to rational criteria of psychotic exculpability.

There is a constitutional problem here because of the right to trial by jury. I can think of two ways of handling this, and there are probably others a lawyer could cook up. One is to make the expert panel optional, hoping that defense counsel would gradually learn that they stood a better chance with such a panel of experts than with the usual lay jury and courtroom rules, which I assume the empirical statistics would bear out after a while. Secondly, we could allow a plea in the *first* trial of "guilty but mentally ill," as is done in Michigan, and then we don't consider this second hearing as a "trial" in the strict sense at all, but rather as administrative handling of a *convicted*

(but specially labeled) person from the standpoints of forecasting and treatment. This requires suitable machinery of interlocking between the criminal justice system and the mental health system. Whether there would be some constitutional objections even to this, I am not enough of a lawyer to say. One can imagine a class action in which it was argued that offenders who go through this second process are being treated in a special way that is subtly unfair to other convicted persons, because it amounts to kind of an "exculpatory second trial" whether we call it a trial or not. Again, we have to be careful not to violate the community sense of justice, complaining that a panel of so-called experts rather than a lay jury gets to decide whether somebody "pays for his crimes" as he justly should. This brings me to the radical substantive proposal I have about the statute.

To capture the essence of the community's sense of justice—that a person should be exculpated from criminal responsibility only if he was "crazy," "nutty," "out of his mind," "didn't really know what he was doing," "totally out of control for a medical reason"—it might be desirable to write the statute so that pleading not guilty by reason of insanity (or guilty while mentally ill) amounts to pleading psychosis. I say this despite current emphasis by the psychiatric profession that *psychosis* is a medical term and *insanity* a legal one, a true but trivial observation that doesn't tell us anything useful about the extent to which they denote the same class of individuals. I think that they usually do, with exceptions so few that it would be unwise to attempt covering the exceptions by special statutory language. It is therefore my proposal that a list of exculpable psychotic diagnoses, *nosological rubrics*, be put into the statute. I'm not certain of that list's composition, but it would be quite short. My own candidates would include: manic depressive disease, unipolar psychotic depression, paranoid schizophrenia, catatonic schizophrenia (I have here in mind the rare cases of Bleuler's "catatonic raptus"), coarse brain syndrome (with definite clouding, memory loss and disorientation) and the psychomotor epileptic equivalent. Nothing else goes. So you can't plead not guilty by reason of mental illness on the grounds that you had a battle-axe mother, or a pickpocket uncle, or a poverty-stricken childhood, or whatever. It is true that if a person is psychologically or socially disadvantaged by aberrant parents or racial prejudice or going to a crummy school, the community sense of "fairness" increasingly recognizes that he or she is entitled to some sort of special aids and reparative benefits. But the community sense of justice as regards criminal conduct does not hold that because I had a battle-axe mother or an alcoholic father or a poverty-stricken slum background that I am somehow entitled to stick knives into people or rape them or rob a bank. I might be open to a suggestion that irresistible impulse (which I am rather inclined to doubt really exists) could be included. But in that case I would specify proof of a classic textbook severe compulsion neurosis. The point is that

mere intensity of motivation, of whatever character and origin, is not an excuse for predatory conduct.

Putting aside the Szaszian claim that there is no mental illness (I'm really not interested in discussing things with people who are 30 years behind in their reading of the literature on genes and biochemistry, not to mention taxometrics and the reliability of improved psychiatric mental examination methods), I'm aware that the suggestion to include a list of nosological labels right in the statute itself bothers most lawyers. It seems to bother lawyers and law professors a great deal. What they usually tell me is that "we don't write statutes in specific terms but in general language." My response to this is two-fold. First, there may be times when we *ought* to write statutes in quite specific terms, and we do, as in speed limits or the percent of alcohol in beer, or permissible interest rates, or the properties of a negotiable instrument. More importantly, this "general language" principle is no longer an accurate description of American Law, which today has all sorts of very detailed language about chemical substances and landlord-tenant relationships and corporate management and child care and medical procedures and the environment and so on and on. It is simply not true that all statutory language is in highly general terms, so I do not find myself much influenced by this argument.

I wish time permitted me to expand on the formal nosology problem, both as to its intrinsic validity (i.e., construct meaning) and its interjudge reliability aspects. We may confidently assume that counsel will become more sophisticated and critical about psychodiagnostic labels, as a result of law school exposure and especially the rapidly growing number of faculty with double degrees. These Ph.D.-J.D. amphibians (e.g., Jay Ziskin, Stephen Morse) write articles and books that are read by lawyers and judges. The "critique of nosology" in social science will affect trial tactics under prevailing rules, and of course would have major importance in considering statutory change along the radical lines I have suggested. Unfortunately, the conceptual level of much social science criticism is sophomoric, being "sophisticated" more than the ordinary M.D. practitioner, but pitiable when judged by a scholarly clinician knowledgeable in genetics, taxometrics, philosophy of science and history of medicine. I find—even in the academy, where intellectual responsibility is supposedly a top virtue—a depressing reliance on anti-nosologic clichés, such as "everyone knows that psychiatric diagnoses are completely unreliable."

This was not an empirically validated statement even before the reliability-oriented interview developments of recent years, and I am amazed at psychologists who cite, say, Schmidt and Fonda's classic study as anti-nosological evidence, when the interjudge reliability of the "schizophrenia/non-schizophrenia" dichotomy was tetrachoric .95. The careful recent studies show that diagnostic reliability in psychiatry is at least as good as that of organic medicine. In a murder case, we want as high a reliability as

we can get, and we as psychologists should be imaginative in applying our psychometric and decision-theoretic know-how to improving it. *Example:* The Spearman Brown Prophecy Formula has been in our psychometric tool kit for over 70 years. Why don't we use it? The fact that human ratings behave like test items in closely following this old equation has been known since the 1920s. So if clinician's ratings on "paranoid delusion" had a pairwise interjudge reliability of only .70 (we can do better than that) the old Formula tells us that we need four clinicians to get a pooled rating reliability of .90, and six raters would yield .933 (permitting, if content-valid, a net attenuated construct validity of .97, which should satisfy anybody!).

This sounds like a lot of clinical raters, but 2-4 clinicians independently viewing say, two videotaped standardized mental status interviews conducted by 2 others would cost less than the usual 4 "experts" (2 on each side) being put through their courtroom paces as we now do it. I admit that persuading lawyers to accept the fact that statistically combined numerical ratings are superior to unformalized talk would be a difficult educational task, especially since I have thus far had negligible success in educating supposedly scientific psychologists in such matters. *Another example:* One merit of taxonic models is that when the inferred entity is a taxon (e.g., manic depressive disease) rather than a dimension (e.g., general intelligence, social introversion) the distribution of the diagnostic probabilities yielded by Bayes' Formula is deeply U-shaped, with clear cusps at the ends, and the lowest sign-pattern frequencies occur in the mid-region of doubtful diagnoses. Thus, for a taxon base rate $P = \frac{1}{2}$ and only three diagnostic signs, each no better than an MMPI scale (and quasi-independent within taxa), 62% of cases are classifiable with 99% confidence, and the other 38% with 85% confidence. This is, of course, due to the multiplicative structure of Bayes' Theorem whose applicability depends on the difference between a taxometric and ordinary dimensional situation. How many forensic psychologists use this in their work or, for that matter, how many know about it?

So one must counter the cliché objection that psychiatric diagnosis is completely unreliable, but that's a question of informing people who have been falsely brainwashed in some social science course as to the present state of the evidence. I find that some lawyers and law professors have a double standard of epistemological morals in this regard, because they seem to require that psychiatric diagnosis show reliability vastly superior to what is found in studies of the reliability (and validity against pathologist's findings) of diagnoses in organic medicine. Equally double-minded are those psychologists who derogate formal nosology on unreliability grounds and then proceed to predict (or explain) from complicated psychodynamics as inferred from the Rorschach! Furthermore, if we insisted on reliability coefficients of .95 for any procedure that is used to make important judgments about

human beings—their health or income or freedom—most of the legal system would have to be junked as judged by its present functioning.

I have given less thought than I should to the question of subsequent handling of a person found not guilty by reason of insanity or guilty while mentally ill, but certain things seem fairly obvious, given the initial assumption that a defense of this sort is rational at all. Commitment to a mental hospital of good security should be automatic upon either of these verdicts, despite the fact that the verdict itself hinges upon mental state at the time of the offense rather than the trial. This is because the behavioral engineering element now predominates over (I would say to the exclusion of) concepts of general or special deterrence or of retributive justice, so that the only thing that's relevant here is the protection of society and the individual from future predatory behavior on his part. I can see no good reason to keep such a person in custody once the empirical probabilities of his dangerous behavior are ascertained to be quite low, although it is not obvious without further discussion that they should be lowered to the level of a "randomly chosen member of the population." The terrible problems of forecasting dangerousness are known to all of you, and that controversy on present evidence deserves a lecture longer than this one, so I can say little about it. If my proposed list of nosological categories were in effect, the ascertainment that somebody has made a clinical recovery from a major affective disorder is fairly easy, but probability of subsequent recurrence is around .80. However, search of the literature by Malmquist and me failed to reveal one single instance of a psychotically depressed patient who, after an altruistic homicide of a family member (unlike paranoid schizophrenics, depressed patients don't kill strangers or neighbors), was a repeater. When it comes to schizophrenia, the problem is stickier. As Rado says, "A schizotype is one from vume to tume," and there is fairly high probability of future attacks, which in their early stages, and in some clinical forms, are probably harder to detect than a depressive episode, at least on an outpatient, rare-contact basis. Presumably lesser degrees of confinement where the psychiatric offender is dealt with like the paroled criminal offender, with careful monitoring of status, is the best we can do. One of the main reasons for maintaining some carefully defined insanity defense as fully exculpatory is that consideration of "just deserts" and of general deterrence having been eliminated from consideration by that kind of verdict, what remains is purely social engineering, that is, clinical and statistical forecasting problems. Of course, if psychologists persist in employing irrational and low-validity means of prediction, it won't help much.

The community sense of justice applies also to the moral or policy issue before a legislator in assigning utilities to the two kinds of errors. If, for instance, the taxpayer is most concerned about his own and his family's

safety from predators—the inactivation function of the criminal law (the only one of the six that we know, without any systematic research, is achievable!)—it is reasonable to require that some defensible assignment of weights to the false positive and false negative errors exist both in the criminal justice system and the mental health system for persons who have in fact performed a dangerous social act like raping or killing a human being, whether the verdict was one of criminal responsibility or insanity acquittal. There is a widespread cliché among social scientists, based upon uncritical interpretation of some well known studies of criminal recidivism, that the false positive rate in recidivism prediction is so high that there is something inherently "unfair" about incarcerating even offenders who have committed dangerous acts. To think clearly about this, one must remember that the crime reporting rate, as shown by victimization studies for the seven index felonies of the Unified Crime Reports (homicide, rape, robbery, aggravated assault, burglary, grand larceny, and car theft), is less than 50%, for a variety of complicated social and psychological reasons. The clearance rate, that is, percentage of reported cases which police consider effectively solved and hence close investigation, is very much less than 50%, as for example in the case of burglary and aggravated assault, less than 10% in most studies. And then finally, of cases reported and cleared, less than 50% result in conviction for an index crime, the rest being cases of prosecutorial discretion as to insufficient evidence, or police carelessness about Miranda, or derailment from the criminal justice system to some other such as chemical dependency or mental health, or simply being asked to leave the jurisdiction, and then, finally, the two biggest factors, plea bargaining and cases tried but acquitted. Multiplying these probabilities we see that the upper bound for tallying a recidivating offense is 12%, that is, for every tallied recidivating event there are seven that do not appear in the statistics. Of course, I've used upper limits on all three probabilities, so a more realistic ratio would be two or three times larger than that! That means that a recidivism study reporting a valid positive rate of only 10% means that, in reality, the valid positive rate is at least 80%. I don't know why it is necessary to explain such elementary arithmetic to social scientists, except that so many of them have a greater emotional identification with predators than with their victims. If it is objected that we only have an 80% group figure, and we don't know about the individual, I would reply that we don't need to at the level of legislative policy. One of the main reasons for having an insanity defense that declares some people "innocent of crime" is that such cases are now candidates for purely behavioral engineering disposition, whereas the criminal offender can have a penalty attached related to the social severity (and, in the community's sense of justice, the moral turpitude) of the offense. Within that permissible sentence I cannot see why a reduction of the degree of security (such as represented by an electronic-

ally monitored parole) offends either the community sense of justice or a rational intellect's ethical principles.

If a homicide is acquitted as insane, his disposition presents moral, political, and statistical problems essentially the same as those we face in ordinary civil commitment. The main difference is that our acquitted killer is *known* to be "dangerous" in the strong sense that he actually *has done* a fearful antisocial act, rather than only being inferentially "disposed to" such. Unfortunately, stating this difference rigorously is a surprisingly difficult task. As to the arguments on civil commitment generally, while I am a card-carrying member of the Libertarian Party and my fear of the State is probably as great as anyone's in this room, I am unpersuaded by Szasz and Co. that it is always wrong, although it is unquestionably subject to abuse (as I saw concretely during my three years on the Hastings State Hospital Review Board). The core issue is not psychology; it is an issue at the moral/political philosophy interface: Under what conditions, if any, should the community be permitted to use force in restraining someone, to prevent probable self-injury or harm to others? The first element presents the problem of paternalism, the second that of preventive detention; both are issues of formidable complexity, currently *sub judice* among moral philosophers, political theorists and jurists. A psychologist who settles them offhandedly or dogmatically shows a lack of scholarship.

As regards the paternalistic issue in civil commitment or upon successful insanity defense, I find it surprising how many of my colleagues (and educated persons generally) are very uptight about interfering with a paranoid schizophrenic's behavior against his will for his own benefit no matter how crazy he is, but these same people think it's all right to have mandatory investment in a poor investment program (to wit, social security), to compel people to go to school when they don't want to, to pay extra for air bags in automobiles, not to mention a large number of things which we do by way of protecting the consumer. I don't mind if the law requires honest packaging in my soda pop. But if Regents' Professor Meehl, with a respectable IQ and not insane, has to be protected against his own folly, should he ingest saccharin in his Diet Coke, I think it odd that someone who is clearly psychotic and wants to assassinate the Governor should not be entitled to protection by the community.

Operating on the general principle that we wish to implement the community sense of justice in formulating statutory language, it might be further specified that exculpation for a criminal act (as found in the first trial) should depend upon there being some sort of "intimate content relationship" between the psychotic delusional or hallucinatory material and the criminal act performed. In the case of Mr. Hinckley (and, I repeat, I'm not familiar with the details of this, except second hand) it is admittedly a peculiar way of thinking for him to believe that he could get this actress to love him by shooting the Presi-

dent. If pressed, I might be willing as a clinician to say that this is goofy enough mentation that probably he was schizophrenic as alleged. But I gather it was not alleged that he actually had paranoid delusions as part of his schizophrenia. While in terms of social engineering I *might* be willing to concede that he should be treated as a non-responsible person, it's a debatable point. I fear that here my clinical instincts may not be harmonious with the community sense of justice, because I think that the reflective layman would argue that even if one has a strange notion of how you make somebody fall in love with you this does not, so to speak, entitle you to shoot the President. For that reason it might be cleaner to add to the list of nosological rubrics a specific requirement that for the defense to be successfully maintained, it must be shown, at least by reasonable inference, that the action was performed in close connection with the delusional ideas. I don't think that this will get us into the sort of difficulty that the Durham rule did by its merely referring to "a product of..." which is more difficult to ascertain. Going back to my case of the depressed woman who puts the baby in the oven and then unsuccessfully attempts to suicide, we know that the content of psychotic depression includes delusions of guiltiness and hopelessness. In the case of parents, these delusional ideas often involve not meeting their responsibilities toward their children. This is something we know clinically about such patients generally, most of whom do not perform any acting out behavior that results in a criminal charge. She sincerely believes the devil told her that the kids would be better off dead because she was such an awful mother, that she would be doing them a favor, and that seemed quite reasonable to her at the time. I repeat that I'm not quite satisfied with this "content-connected" criterion clinically. But I'm trying to arrive at some reasonable compromise between the community sense of justice (as imperfectly informed) and what *we* might look upon as optimal from the standpoint of psychopathology.

These radical suggestions are predicated upon the assumption that the thing cannot be made to work satisfactorily if one of the currently available rules, such as ALI or M'Naghten, are retained in the statute. As I said at the beginning, I am not myself persuaded that they cannot be made to work better than they currently do. I am not even convinced that there is an inordinately high percentage of injustice being done as they are presently defined and implemented. It was argued in your *ad hoc* committee (that Dr. Long chaired) that sometimes it's better for a professional group to "let well enough alone." The committee was impressed by our inability to come up with good examples when one of the lawyers in the legislature asked whether there were any clear cases where we were satisfied as clinical psychologists that a serious injustice had definitely been done, particularly an injustice of the kind where an individual had been wrongly acquitted when he was guilty. I do know of several instances of the opposite result, and Malmquist's unpublished study on MMPI's of

unsuccessful insanity defense pleaders leads me to think that there are some people in Stillwater Prison who really ought to be in a mental hospital or long since released. But I wasn't able, nor was anybody else on the committee, to come up with any clear examples of the other sort. The proposed statutory changes, both in the Minnesota legislature and the ones that have been enacted in other jurisdictions, are uniformly in the direction of tightening up the grounds of exculpability rather than loosening them. It isn't obvious that it's advantageous for these defendants, or for society's protection, or for our professional image, to take a strong stand in advocating such radical changes as the ones I have been here discussing.

There is a mixed metaphysical/moral/political bugbear which, while not directly related to the insanity defense, lurks in the shadows of discussion about it, and I believe contributes to the layman's suspiciousness about psychologists. It is the idea that if we exculpate some persons for psychological reasons, philosophical consistency will push us to exculpate everybody, since everybody's behavior is determined by his genes, his upbringing, his race, his peer group, his economic status, etc. You know the line—we all had bull sessions about freewill, determinism and accountability as sophomores—so I needn't elaborate it. It would be absurd for me to try resolving this old controversy in a few minutes, but let me list briefly, without argument, the main components as I see them. First, "moral blameworthiness" in the sense of some omniscient cosmic evaluation of a human act (or life!) is not the same as "accountability" in the legal or political sense, although these concepts are related. Second, whether strict psychological determinism entails non-responsibility is a dreadfully complex question, about which the ablest intellects in moral philosophy continue to disagree. The majority of contemporary philosophers are so-called "compatibilists," holding that determinism and free choice (in whatever sense of *free* is required for accountability) are not inconsistent. Thirdly, while strict psychological determinism is a plausible extrapolation from empirical evidence to date, it *is* an extrapolation, and we do not know it to be true. Some eminent philosophers of science (e.g., Sir Karl Popper) don't believe it, and claim to have strong arguments against it. Fourthly, even if determinism holds and precludes blame-worthiness, it does not follow that society

should give equal weight to the predator's interest and the victim's. (If I see a big angry dog about to slay a kitten, I try to protect the kitten, although I don't regard dogs as rational moral agents, capable of deserving blame in the sense that persons can.) Fifthly, one must be careful about this word *society* in excusing those who commit antisocial acts. Even if I believed that "society" forces people to be criminal (which I don't), that claim doesn't translate into "The widow washerwoman, whom Jones mugs and robs, deserves no protection because—being part of 'society'—*she* is responsible for Jones' becoming a thief." That is, because Smith didn't give Jones a good job, the washerwoman deserves to suffer, and the rest of *us* are stopped from protecting her whether *we* in turn ever treated Smith unfairly or not. The absurdity of such an inference, when stated thus explicitly, is so obvious as to require no comment.

In summary, I have tried to make several points, doubtless somewhat dogmatically under the constraints of time and format. The insanity defense should be retained, on grounds of both fairness and social efficiency. The disharmony between a sophisticated professional view and the community sense of justice has been exaggerated. Whether the insanity defense errs excessively as currently defined and administered, I do not know; but I opine that errors of false conviction preponderate. Its main defect is perhaps the public image of us and of the criminal justice system, where a few atypical cases filtered through the media's muddy lenses can arouse widespread fear and anger in the public mind. As a blueprint for the utopian future, I advocate a bifurcated trial with the second trial being a specially qualified and carefully screened panel of lawyer, psychologist, and psychiatrist, plus a layman. The statutory criterion of exculpability would be narrowed to psychosis and mental deficiency, and I even advocate listing formal nosological rubrics in the statute. It is urged that psychologists show more imagination and resourcefulness in applying their technical knowledge of human ratings, taxometrics, and decision theory to improve accuracy and to save taxpayer money. Finally, unless we think there's a decent chance of accomplishing such perfectionistic refurbishments, one strategy our profession should consider is letting well enough alone.