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The Dilemma of Criminal Responsibility*

BY DAVID L. BAZELON**

INTRODUCTION

Today the insanity defense is under more sustained attack than at any time since I wrote the opinion for our court in *Durham v United States* nearly thirty years ago. Congress is considering a number of proposals to eliminate the insanity defense or to curtail it dramatically. Just last week the American Medical Association Board of Trustees jumped on the bandwagon, calling for complete abolition of the defense.

We are told, to put it mildly, that the insanity defense is not working very well. Juries are confused, it is claimed, by the spectacle of competing psychiatric experts. More importantly, it is said that our society, plagued as it is by the nightmare of street crime, can no longer afford the luxury of a test of criminal responsibility. When we are fighting for our very survival, we cannot be too humane to the enemy within our gates. It seems as though the insanity defense has become a scapegoat for the failure of the entire criminal justice system. Although the defense is raised in only about two percent of the criminal cases that go to trial—and succeeds in only one of four cases in which it is raised—many of the most sensational cases involve well-publicized insanity pleas. As a result, each new insanity acquittal brings renewed cries of outrage that criminals are, literally, "getting away with murder." The law itself is seen as an enemy of social order rather than a safeguard.

This, I believe, is what Senator Mattingly was driving at when he said on the floor of the Senate: "[s]ociety has a right to be pro-

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1 214 F.2d 862 (D.C. Cir. 1954), overruled, Brawner v. United States, 471 F.2d 969 (D.C. Cir. 1972) (en banc).
ected from the likes of John Hinckley, [whether] sane or insane.” 2 Or Presidential Counselor Edwin Meese, when he suggested that with the abolition of the insanity defense, “[w]e would do a lot better as far as ridding the streets of some of the most dangerous people that are out there, that are committing a disproportionate number of crimes.”

I agree with these critics that the insanity defense has not worked very well. I agree too that there is a connection between the terrible problem of street crime and our tests of criminal responsibility. But here we must part company. I believe that the failure of the insanity defense and the problems of street crime have been caused not by too much compassion, but by too little—by a failure of our moral imagination, not an excess. Curtailing or even abolishing tests of criminal responsibility will not stem the persistent flow of street criminals into our courts. These “get tough” measures betray a complete misunderstanding of the problem. It is only through an expansion of our tests of criminal responsibility that we can hope to alert the community to the root causes of crime, and, in turn, to move toward solutions.

I would like to share with you the lessons of over thirty years’ experience with the insanity defense. Some might view our grappling with these questions of criminal responsibility as a failed experiment—full of sound and fury, but signifying nothing. But I have always viewed law not as a static order built on certitude, but as a dynamic order built on process. Courts work through cases, actual conflicts which must be resolved whether or not all the information we might wish to have is available. Facts and values in the world are ever changing; every decision is made in that terrible period known as meanwhile. What is more, the world changes as a result of our decisions. How the world will be reshaped through law is never predictable with certainty beforehand. So in later cases we must peer out and see the consequences—or the wreckage—of our handiwork. In our thirty-year experiment with the insanity defense in the District of Columbia, we have seen a lot of wreckage. But the process has been as illuminating as it has been frustrating.

Our story begins on the eve of the decision in Durham v United States. At that time, we were optimistic that the young and pro-

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mising discipline of psychiatry would open up new vistas in our inquiry into the causes of human behavior. That hope, expressed in Durham, was not realized. Over the years I have grown disillusioned in many ways with the application of psychiatry to the criminal law. At first, I was troubled that psychiatrists were not candidly sharing their knowledge with us. In time, I came to realize that the difficulty was more profound. The problem was not that psychiatric medicine wouldn't give us all the answers. The problem was that it didn't have all the answers. What have we learned from M'Naghten to Durham to Brawner to the present? That the bedrock issue in the law of criminal responsibility is not medical but societal; and the scale of the solution must match the scale of the problem.

I. PARADIGMS LOST: FROM M'NAGHTEN TO DURHAM TO BRAWNER

At the time of my appointment to the bench in 1949, defendants who raised the insanity defense in the District of Columbia were subject to a slightly modified M'Naghten test. The M'Naghten test was the revolutionary piece of judicial lawmaking of another era. In 1843, Daniel M'Naghten, convinced that British Prime Minister Peel, the Pope and the Jesuits were all conspiring to kill him, decided to launch a preemptive strike of his own and kill Peel. Upon his arrival at 10 Downing Street, M'Naghten killed Peel's secretary, Drummond, under the mistaken belief that the poor fellow was Peel. M'Naghten was acquitted by a jury, but his case created a furor in Parliament. The issue was referred to the common law judges, who set out the famous formulation that an accused could not be found criminally responsible if it was shown that he was suffering from 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 what he was doing was wrong." The new rule expressed the simple principle that it is both wrong and useless for society to impose punishment where it cannot attribute blame. The rule was, of course, met with cries of outrage. A popular poem of the time foreshadowed the public's response over a century later in the Hinckley case:

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3 For a brief general discussion of the M'Naghten Test see W. LaFave & A. Scott, HANDBOOK ON CRIMINAL LAW § 37 (1972).
"Ye people of England: exult and be glad
For you're now at the will of the merciless mad."

Well, the heresy of one age often becomes the orthodoxy of another. In the early 1950's *M'Naghten* was the prevailing rule in almost every American jurisdiction. The more cases I reviewed, however, the more strongly I felt that *M'Naghten* had become an anachronism. *M'Naghten* required that behavioral scientists confine their testimony to a single narrow issue: whether the defendant knew what he was doing and knew whether it was right or wrong. It seemed to ignore the modern dynamic theories of the human personality as an integrated whole. It concentrated on a single aspect of that personality—cognitive reason—as the sole determinant of human behavior. Psychiatrists who testified under *M'Naghten* were engaging in a charade. They were supplying answers under the guise of expert medical opinion to questions that were essentially metaphysical.

Psychiatrists implored us to free them from the straitjacket of *M'Naghten* and to permit them to give a more adequate account of psychic realities. If psychiatrists were to testify meaningfully as experts on the issue of criminal responsibility, they had to be allowed to address that issue in terms appropriate to their medical discipline.

I felt strongly at that time, as I do now, that the question of guilt or innocence was *not* a medical question, but a moral one. Valid moral judgments, however, required the best information available about every aspect of the defendant's functioning, and psychiatrists promised a wealth of facts about human behavior. To obtain these facts for the jury, I wrote the opinion in the *Durham* case. *Durham* held that an accused is not criminally responsible if it is shown that "his unlawful act was the product of mental disease or defect."

*Durham* was a challenge both to behavioral scientists and to juries. It challenged the behavioral scientists because it subjected their discipline to full and searching inquiry. Now that we had removed the millstone of *M'Naghten*, they had to make full disclosure: to let us know everything that their discipline could tell us about the accused, and perhaps more important, everything their

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5 214 F.2d at 875. See W. LaFave & A. Scott, supra note 3, § 38, at 286-92 for a discussion of the *Durham* test.
discipline could not tell us. We needed to know both the known and the unknown about human behavior. *Durham* was also intended to challenge juries to come to informed moral decisions without the benefit of conclusory testimony from the experts.

Some have said *Durham* was intended to give over the question of moral responsibility to the doctors. Nothing could be more wrong. Our goal in broadening the scope of their testimony was to give the jury a more complete picture of why the accused acted the way he did. It was up to the jury to decide for *legal*, not medical, purposes whether a mental disease or defect was present and, if so, whether the act was the product of that disease or defect. These questions were intelligible only in the moral sphere, not in medical science.

Well, it didn’t work out that way. Law in action is very different from law in theory. For while better decisions required candor from psychiatrists and initiative from jurors, easier decisions did not. And easy decisions were what we got. Psychiatrists continued to use conclusory labels without explaining the origin, development, or manifestations of a disease in terms meaningful to the jury. Instead of testifying as to the defendant’s capacity to discern right from wrong, they testified as to new ultimate conclusions: the existence of mental disease and the question of whether the act was its product.

I don’t mean to suggest that psychiatrists are evil people, or even that the failure of *Durham* was entirely their fault. Partisan lawyers wanted certain, not equivocal answers; the legal process has trouble with ambiguity. Indeed, the psychiatrists were only responding to the conclusory questions put to them. Psychiatrists also were unaccustomed to having their diagnoses, and even the integrity of their discipline itself, subjected to the often hostile scrutiny of the adversary process. Finally, judges and juries preferred to have their weighty responsibilities delegated to experts.

But the psychiatrists had promised candor and had a special obligation to make good their promise. Psychiatrists had an obligation to reveal that a proper examination required time and resources that they did not have. The late Dr. Winfred Overholser, superintendent of St. Elizabeth’s Hospital in Washington, was one of the early champions of the *Durham* decision. Yet, even after *Durham*, St. Elizabeth’s psychiatrists continued to come into court and give the
same conclusory testimony as before. After a few years I asked Dr. Overholser why his staff still clung to their boilerplate testimony. He told me not to blame the psychiatrists. He informed me that a sanity examination that would fulfill the Durham requirements would take up to 100 hours of interviews and investigation and that such examinations were impossible given the hospital’s meager resources. State hospitals like St. Elizabeth’s could only manage a few hours at most with each defendant. I told him that if this were true, I did not blame the staff psychiatrists. Instead, I blamed him for his failure to fight with Congress for the resources necessary to do proper examinations, and for his failure to instruct his staff to point out in their testimony the patent inadequacy of their data.

State psychiatrists had an obligation as well to acknowledge that their appraisals were often influenced by the bedspace they had available, by their willingness to have certain defendants as patients after acquittals, by political pressure, and by their own ideas about criminal responsibility. They also had a duty to reveal the uncertainties in their diagnoses and the disagreements among the staff in official hospital reports. Often the final report that appeared in court reflected only the majority view at the staff conference. As a result, attorneys and their clients, as well as judges and juries, were left unaware of minority viewpoints that might have shed a very different light on their inquiries. For years I tried unsuccessfully to obtain records or tapes of St. Elizabeth’s staff conferences where official diagnoses were made. I believed that juries had a right to see the practice of psychiatry as it was: not as a science dealing with absolute physical laws, but as a diagnostic art based on educated, but nonverifiable, hypotheses.

Durham was a simple contract between law and medicine. Doctors offered candor and insight if the law would free them from M’Naghten. We accepted. For eighteen years we tried to avoid the conclusion that the contract had been breached.

We tried in a long series of cases to work with the Durham formulation to evolve a way of gaining the benefit of all relevant information, while avoiding the kind of conclusory expert testimony I have described. Nothing worked. Finally, in 1972, we admitted that our best laid plans had gone awry; in Brawner v United
States, our court unanimously decided to abandon the Durham rule.

The court substituted a new test proposed by the American Law Institute. The rule provides: "[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 wrongfulness of his conduct or to conform his conduct to the requirements of the law." Mental disease or defect was limited to medically-recognized conditions characterized by broad consensus that free will was absent.

II. United States v Brawner: Looking For Law in All the Wrong Places

While I agreed that Durham had failed in operation and had to be abandoned, I believed then, and continue to believe that, at best, Brawner did nothing to address the problems of Durham, and at worse, aggravated them. I concurred in overruling Durham, but not in the new test adopted. As I said in my opinion, "while the generals are designing an inspiring new insignia for the standard, the battle is being lost in the trenches." Brawner seemed to believe that the infirmities of Durham could be cured by manipulation of the language of the test. But the problem of conclusory testimony on the issue of "productivity" could not be altered by magically changing the word "product" to the word "result." Both embody the ultimate question of causality. Neither is suitable for resolution by experts. One term is as liable as the other to be abused. If we had learned anything at all from Durham, it was that the problem of administering the defense could not be solved by a verbal trick.

Nor did Brawner solve the problem of domination by medical experts. In effect, it limited the range of testimony to medically recognized conditions. The battle over the validity of diagnoses was

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6 471 F.2d 969 (D.C. Cir. 1972) (en banc).
7 This test is discussed in W. LAFAVE & A. SCOTT, supra note 3, at 292-95.
8 471 F.2d at 973 (citing Model Penal Code § 4.01 (Proposed Official Draft 1962)).
10 Id. at 1012.
merely diverted to a battle over medical recognition. This greater reliance on acceptance in the medical community flew in the face of the critical lesson of nearly two decades with Durham: that psychiatrists did not have a monopoly on knowledge about human behavior. All around us were signs that we knew very little about the causes of human behavior, and that much of what we were beginning to know was coming from sources other than psychiatrists.

Neuroscientists, for example, are making gigantic strides in solving the mysteries of the human brain, and in turn, of human behavior. They are beginning to discover that deficiencies in neurotransmitters, complicated protein molecules in the brain, may play a role in abnormal behavior. I have been engaged for some time in a dialogue on the potential contributions that neuroscience can make to law with some of the world's leading neuroscientists, including Dr. Joel Elkes of the University of Louisville and, more recently, with Dr. Floyd Bloom of the Salk Institute. Dr. Bloom informs me that scientists are learning how specific circuits in the brain, operating through known chemical substances, perform functions which outline how behavioral events may be regulated. Anxiety, depression, and aggression can all be enhanced or diminished by the action of certain chemicals in the brain. Behavior is, of course, a highly complex phenomenon and is invariably socially determined, at least in part. Science may never provide complete answers. Moreover, the possibilities of biochemical alteration of behavior will present new challenges for law. But my discussions with Dr. Bloom and others have convinced me that there is more to know about human behavior than is dreamt of in DSM III. They have convinced me too that there is more that remains hidden about the wellsprings of human behavior than we ever thought. Our moral judgments of other human beings must reflect the humility borne of self-doubt.

Of even greater importance was evidence about human behavior that no judge could fail to see. Day after day I found myself reviewing the convictions of persons who had committed horrible acts of violence. I needed no experts to tell me who these people were. The overwhelming majority of defendants who came through our court

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11 DSM III is the common abbreviation for the standard manual of psychiatric diagnoses.
came from the very bottom of our society. They have been called by different names—the underclass, the culture of poverty, the other America. But the reality remained the same. Our courts were and are being filled by this wreckage of our affluent society.

As an appellate judge, I could have chosen to ignore this harsh reality; I could have concerned myself solely with the abstract legal principles involved in each case without inquiring into the identities of the human beings whose lives were to be affected by our determinations. Indeed, Justice Felix Frankfurter, a good friend despite some differences, often implored me to maintain precisely this sort of "disinterestedness in the judicial process." Yet, I have always felt it was part of my function to infuse my consideration of legal principles with the passion and pain of life in our society, for law is a social product. Legal principles have meaning only as they affect human beings. Obviously, this does not mean that personal feelings can determine the outcome of cases, or that criminal convictions may be overturned merely because a judge feels sympathy for the defendant. But I have always felt compelled to learn as much as possible about the impact of law on individuals. Consequently, I made it my practice in every criminal case to request the pre-sentence investigations made by the trial court. These reports, although frequently conclusory and uninformative, did provide enough evidence to reinforce my impression that the defendants whose cases fill our criminal dockets have never really had a chance in life. I did not need doctors and exotic diagnostic categories to inform me of the terrible burdens of poverty, racism and despair under which these people struggled. I did not need Rorschach tests and EEG's to explain to me the causes of crime.

My experience with Durham taught me that valid moral judgments of these offenders required information from any and all sources about their lives. The tragedy of Brawner was that it re-medicalized the problem. It permitted jurors to focus on medical jargon but deprived them of insight into the social pressures that produced the tragedies in front of them. In my separate opinion in Brawner, I suggested a new approach. I proposed that the jury be instructed that a defendant is not responsible "if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be
This test, if properly administered, frees the law of criminal responsibility from a medical model. It allows anyone with knowledge of the offender's life—psychologists, sociologists, teachers, ministers, neighbors—to tell the jury about the defendant and his environment. The test, moreover, candidly informs the jury that it is their function to apply the moral standards of the community to what they have learned about the offender.

III. JURIES AND JUSTICE

Only if the jury can hear the broadest possible array of evidence and then invoke its collective moral sense can a criminal trial realize the potential that I envision for it. Every criminal trial should be an audit of an event and an offender. The criminal trial is a window into a world that the community rarely sees. The jury's consideration of the issue of criminal responsibility is an opportunity for a cross section of the community to confront the culture of poverty, to see its pernicious effects, to understand the crushing reality of deprivation, ignorance and despair. It is my hope that this forced association of community and criminal will lead to insight. And that insight will lead to empathy And that empathy will lead to action. It is my belief that one of our few hopes for addressing the crime problem lies in this stark confrontation between juries and defendant. The courtroom is perhaps the only place that we can compel society's attention to the root causes of crime.

The test proposed in my opinion in Brawner will not in itself effect any magical transformation. Indeed, it may introduce new problems. We will have to decide, for example, what to do with offenders who are found "not justly responsible," but who are, nevertheless, not mentally ill in any medically recognized sense. But I am firmly convinced of one thing: we will never resolve the problem of crime without first addressing its roots in poverty and social injustice. I have suggested one possible method, but precisely how we focus society's attention on this issue is less important than that we do, somehow, direct attention to it.

Some may find my call to confront the roots of crime in the culture of poverty out of place in the more hardheaded world of

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12 Id. at 1032 (emphasis added).
the 1980's. Today we are told that crime can be controlled, but only if those who violate society's norms, whatever the reason, are quickly apprehended and subjected to swift, certain, and severe punishment. As President Reagan phrased it, we should "put on the back burner the idea of reforming and rehabilitating criminals and get back on the front burner the idea of prosecuting, punishing, and putting them away."

I can well understand the attractiveness of this crime control perspective. The explosion of violent crime in our cities has made us strangers in our own land. It would be comforting to believe that there are simple answers to this terrifying problem. Comforting, but wrong. Changing a word here and a word there in the insanity test will not effect any great metamorphosis. The much-touted "guilty but insane" verdict will do little but reassign people from grossly underfunded mental hospitals to prisons with their all-but-nonexistent psychiatric services. Eliminating the defense entirely will similarly reallocate from hospitals to prisons those least likely to survive in the savage jungle that is our prison system.

What we must do to reduce crime is attack the conditions that breed it. It will require money to rebuild our inner cities, to provide quality education, proper nutrition, health care and social services. It won't happen tomorrow, even if we make the commitment. And in the meantime, our criminal justice system must operate. We must conduct this searching inquiry into the criminal's life history, not so much to excuse, but to appreciate the conditions that inevitably lead to criminal behavior. For if we fail to wake up to the realities of crime, we will be doomed to the vicious cycle of crime and repression and more crime.

IV  FIRST STEPS: TOWARD PROCEDURAL JUSTICE FOR THE POOR

While I am convinced that the solution to our crime problem lies in a long term investment in alleviating the burdens of poverty, I believe that our commitment to a more just society must begin by eliminating the continuing injustices confronted by the criminal defendant—and, in particular, the indigent defendant—in the arms of the law.

The insanity plea, for example, has been criticized as a "rich man's defense." Sensational cases like those of Patricia Hearst and
John Hinckley create the impression that a successful insanity defense requires vast resources. This is largely true. A proper insanity defense costs money. It requires a good lawyer, as well as extended examinations by independent experts. Indigent insanity defendants usually get neither. Lawyers representing indigents are often overworked and inexperienced. In addition, a defendant raising the insanity defense presently has no right to an independent expert in most jurisdictions. Most often, the accused who gives notice that he intends to raise an insanity defense is sent to the state hospital for examination.

As I noted earlier, psychiatry is not a value-free discipline. Psychiatrists in state hospitals often have a hidden agenda, whether conscious or not. By hidden agenda I mean the institutional pressure and personal biases that cause psychiatrists to serve interests other than the therapeutic needs of their patients. In one case before my court, United States v. Morgan, a government psychiatrist, after being informed by an Assistant United States Attorney that a case was “one of major significance,” actually changed his diagnosis of the accused from “chronic undifferentiated schizophrenia” to “without mental disease.” Although cases involving such direct prostitution of the diagnostic process are probably rare, forensic psychiatrists are often at least indirectly influenced by external demands. Years ago the Superintendent of the Napa State Hospital in California told me with commendable candor that “Sacramento was always looking over [his] shoulder on internal decisions.” While most hospitals are probably not so closely monitored, it is clear that state hospital psychiatrists have institutional needs and perspectives which make them less likely to support the defendant’s insanity plea. Since insanity trials fail to elicit the institutional biases that lead to particular results, the indigent defendant, as a result of his inability to secure an independent expert, is fundamentally prejudiced in his attempt to raise this affirmative defense provided by law.

What is more, while at the state facility, the defendant is on alien ground, without the procedural protections afforded at other stages of the criminal process. A recent case decided in our circuit,

13 482 F.2d 786 (D.C. Cir. 1973).
14 Id. at 788-89.
**United States v Byers,**15 is illustrative. Byers was arrested for murder and committed to St. Elizabeth’s, the government hospital, for examination.16 The psychiatrists found that Byers had been afflicted with delusions at the time of the killing, believing himself under a spell that could only be broken by killing the victim.17 The government did not accept this diagnosis and so committed Byers, over defense objections, to a second government hospital, this one in Springfield, Missouri.18

Byers spent eight weeks there without a lawyer, without any warning that the psychiatrists encouraging a free flow of communication could be adversaries at trial, and without any records kept of the psychiatric interviews.19 At trial, the psychiatrist dropped a bombshell. He stated that Byers told him that the story of the spells had been suggested to him by his wife after his arrest. No record of this disclosure was in the psychiatrist’s notes or any place else.20 In the words of the trial judge, this testimony was “devastating” to Byers’ defense.21 The prosecutor agreed it was critical.22

The Byers case points out fundamental problems with the administration of the insanity defense. It seems to me that the constitutional protections against self-incrimination as well as the fifth and sixth amendment guarantees of due process and effective assistance of counsel all require, at a minimum, the presence of counsel or a taped record of psychiatric interviews. The American Psychiatric Association has opposed such measures on the ground that they would undermine the therapeutic relationship between the psychiatrist and the defendant. But the state hospital is an institution where a therapeutic facade masks a real adversity of interests between doctor and patient. Psychiatrists cannot have it both ways. They cannot invoke the sanctity of the doctor-patient relationship to justify the unimpeded collection of information that may then

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16 *Id.* slip op. at 1 (Bazelon, C. J. dissenting).
17 *See id.,* slip op. at 13, 14-15 & n. 47.
18 *Id.,* slip op. at 1, 12.
19 *Id.,* op. at 1, 25-27
20 *Id.,* slip op at 18 & n. 54, 24-25 & n. 75.
21 *Id.,* slip op. at 19.
22 *Id.*
convict that patient at trial. The protections that I suggest assure that insanity verdicts will not come down to the defendant’s word against the unverifiable word of the expert.

While any criminal defendant raising the defense can be ordered to the state hospital, it is the indigent defendant who is almost always forced to rely on state doctors for his own defense. Still greater procedural protections could be assured if an independent pool of defense psychiatric experts were attached to each public defender’s office.

We must also assure that the indigent defendant’s sanity or insanity does not hinge on a psychiatrist’s or factfinder’s stereotyped view of ghetto life. Psychiatric experts have speculated whether the defendant would have committed the act in question had he not been mentally ill. Such speculation is rife with potential for the articulation of social prejudices in the guise of medical science. I was once told by some lawyers (the story was later verified to me privately by the judge in question) of the case of a sixteen-year-old black girl who had literally sliced her boyfriend to ribbons with a piece of broken glass. Although the child had a previous history of mental health problems, the judge, relying on the testimony of a psychiatrist, found that the girl’s behavior was not “sick” because such conduct was “normal” in her ghetto subculture. Thus, to the limited degree that this offender’s background was taken into account, it was used to convict an indigent person, for whom violence was seen to be “normal.” Presumably, a wealthier offender might have been acquitted since her acts would be considered sick because violence is not part of her environment. Such discriminatory conjecture must not be permitted to affect the decisionmaking process.

CONCLUSION

Again, I must emphasize that these procedural protections are nothing more than tentative first steps. By themselves, they will not even make a dent in the underlying problem of crime. The problem presents our society with a stark choice between two largely conflicting alternatives, each of which will consume a substantial portion of our financial and spiritual resources. First, we can vent our frustration and rage, by lashing out after the fact at the criminals we apprehend. Sentences can be made even longer; procedural pro-
tectitions can drop away. I do not embrace this view, but not because I think it is an overreaction to the problem.

I do not deny that crime in America has reached the point of crisis. Everyone feels compelled to offer tough talk and suggest tough measures. The insanity defense has become a convenient symbolic target in this war of words. But righteous rage even if eloquently or loudly expressed will not solve the problem. Nor will turning the screw even more tightly. For as sanctions have become more stringent, crime rates have soared. The only constant correlation with crime has been deprivation. Collective anger hasn’t worked. We must take a different path.

Judge Elbert Tuttle, one of the great jurists of our time, has said: "[t]he only way the law has progressed from the days of the rack, the screw and the wheel, is the development of moral concepts." But with our prisons at the bursting point, and the despair in our inner cities as great as ever, I am skeptical about the extent of our moral evolution. Today I see an ominous chasm between the idea of law and the idea of justice in our society. The law of criminal responsibility, as I envision it, provides a glimmer of hope that the chasm can be bridged. The community must realize that the solution to the problem of crime is not in casting out its outcasts a second time, but in reaching out and fashioning a community to which all can belong. Over a century ago, Dostoevsky put these words in the mouth of a minor character in Crime and Punishment: "In this age the sentiment of compassion is actually prohibited by science." Let it not be said today that it is prohibited by law.
