

# The Evolution of Legal Methods for Dealing with Mind-State in Crimes

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**From its very beginnings, British and American common law have attempted to deal with the mind-state of perpetrators of crime. This has taken various procedural and statutory forms that have often been characterized by confusion and contradictions in purpose. Clarification of the psychological and legal issues may assist in bringing the criminal treatment process to a more rational basis.**

From earliest historic times, human societies have been wrestling with the problem of mind-state during the commission of "crimes." Although formal psychological theories about the working of the mind did not evolve until relatively recently, awareness and concerns about it have been the focus of social conflict for a very long time. Earlier, such matters were understood to be mainly questions of morality.

The "criminal-mind" has become the focus of much study by psychiatrists for the past 150 years and now, of course, it is the central professional concern for a growing number who specialize in "forensic" psychiatry. One of the leaders in this movement was our late lamented friend and colleague, Dr. Bernard Diamond, to whom this issue is dedicated. This article, written in his honor, will

briefly review the evolution of some of the ways that criminals have been dealt with by the law. It will show the complex, convoluted, and ambivalent ways in which society has struggled with its contradictory impulses to be vengeful and retributive, as well as understanding and rehabilitative. This ancient and slow-moving process should not cause us to be unduly pessimistic about future possibilities for improvement; it is the nature of all social change. To achieve a more effective system of "justice" in the treatment of criminals is our goal, and our progress, or lack of it, will measure the degree of the civilizing process.

From the period of pre-Norman English history, there have been "criminal laws" that have reflected the ongoing struggle to deal with the mind-state of individuals committing those crimes. In early medieval times, the mere act of committing what was later to be designated the felony of murder triggered a response from the clan or family of the

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victim.<sup>1</sup> Such an act was settled by vengeance, and slowly procedures were evolved to attempt to handle the punishments fairly. Since early trials were dealt with by ordeal or by combat, the assumption was made that God would see to it that the party having justice on their side would heal from the ordeal or prevail in the combat.<sup>2</sup> After a while it was noted that God seemed always to favor the combat of the largest and fiercest party, so ultimately, it was made possible for the felon to have a relative or fellow clansman act as his champion. Such a mode of settlement often led to blood feuds that were detrimental to social stability, and so alternative forms of trial were developed in which a "court" became more influential.<sup>3</sup>

At this point in time, the criminal law bore considerable similarity to tort law. One of the early manifestations of this fact was the development of the concept of *wergeld*.<sup>4</sup> In this situation, the value of the victim was calculated in terms of wealth, and the wrongdoer had to pay that value to the family of the murdered one. In some circumstances, this amounted to lifelong servitude, and the culprit was seen to be paying the family back for the personal losses caused by his wrongdoing. Also over time, there was a progressive change toward paying the penalty monies to the king, and this caused him to have an interest not only in prosecuting the crime, but even in discovering it.<sup>5</sup>

By the thirteenth century, many felonies had been defined but they contained no descriptions of mind-state (*mens rea*). Individuals were found to be guilty

by the baronial court, and at the time of sentencing, mitigating circumstances such as infancy, or "*non compos mentis*," or accident were raised, and sentences would be lowered accordingly.<sup>6</sup> From the twelfth century onward, definitions of mental state began to come into the descriptions of major felonies. Some of them reflected the relative social status of the Anglo-Saxons and of their Norman conquerors. Over the next several centuries, the mental portion of the definitions of crimes began to take more formal shape.<sup>7</sup>

As noted above, persons who were *non compos mentis* had sentences mitigated,<sup>8</sup> and progressively a more formal description of the defense of insanity began to emerge. One of the first was the so-called "wild beast" test in which the mentally ill assailant was seen to be acting with the same lack of control as would be evidenced by a wild beast,<sup>9</sup> with a mind-state in which there was a total lack of control and/or ability to comply with the requirements of lawful behavior. It described a person who responded only to his inner impulses with no concern at all for such external niceties as law. Later, the "policeman at the elbow" test emerged which described the assailant as unwilling or unable to obey the law, even when there was a policeman standing beside him. (One of the interesting California cases studied by Diamond involved an assailant, with a policeman at each elbow, who actually fired his revolver through the arm of a union business agent to kill his victim!<sup>10</sup>)

From the earliest development in the defense of insanity, it should have been

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clear that the medical evidence put forward in such a defense would contain the same psychological elements as those utilized in describing the *mens rea* of a crime, only they were developed within a procedural variation. This was demonstrated clearly in California, where it became possible for a defendant to have two trials for the same crime. Psychological evidence could be put forward as a defense on the *mens rea* issue in the first trial, and if that were unsuccessful, the defendant could present exactly the same evidence, perhaps even to the same jury, for the defense of insanity.<sup>11</sup> This conceptual anomaly in the development of criminal law was first noted and fully discussed by the Australian high court judge, Sir Owen Dixon.<sup>12</sup>

Over time, definitions for insanity were changed and included the "irresistible impulse" test,<sup>13</sup> M'Naughton's rule,<sup>14</sup> the Durham rule,<sup>15</sup> and that of the ALI (American Law Institute) Model Penal Code.<sup>16</sup> All of these tests were said to be attempts to provide the jury with a more precise and certain definition that would enable them to have a greater sense of clarity about the fact of insanity they were to find. Many commentators have noted that when any of these tests is explored instrumentally, they all embrace the same information, they all require an extensive delineation by the expert witness about how they relate to the presence or absence of mental illness, and they all explore the way such illness impinges on the defendant's capacity to make choices about his behavior.<sup>17</sup> In no circumstance is the definition of mental illness legally tied to the presence

or absence of psychosis, although many expert witnesses attempt to establish such a relationship.<sup>18</sup> As my former colleague, B. J. George, put it nicely, "The law does not care whether the defendant's mental illness is Scasnafran, Willowfraw, or Idlebrick. It only cares about his capacity to make choices, and that is a fact for the jury to find."<sup>19</sup>

In addition to matters involving the precise (or imprecise) verbal content in descriptions of insanity, there is also the very weighty effect of how the judge interprets their meaning. Justice Holmes has made the point vividly that the law is only that which a judge will sustain in his opinions.<sup>20</sup> (This is like the old saw about the baseball umpire who remarked that a pitch isn't anything until he calls it a ball or a strike.) This was well illustrated in Pennsylvania, when in 1951, a new mental health act was passed that redefined insanity and abandoned the M'Naughton rule. It only took one case on appeal to the State Supreme Court for them to hold that what the legislature really meant was whether or not the defendant knew the difference between right and wrong, and knew the nature and consequences of his acts!<sup>21</sup> Thus, in one fell swoop, they reverted to the M'Naughton rules, although that was far from the clearly stated intention of the legislature as expressed in the statute. The judicial rule, of course, prevailed.

The fact that there appears to be so much variation in what jurors will accept as *mens rea* in criminal cases makes lawyers and judges restless. This occasionally leads to a statutory return to the

same kind of "strict liability" as reflected in the earliest definitions of crimes, but such a course of action doesn't hold up with the passage of time. Exceptions, made in the name of "fairness," swiftly erode away the absoluteness of the rules, and once more, the courts and the participants are back to all of the uncertainties of having mind-state become a question of fact for a jury.<sup>22</sup>

Another area in which there is considerable evolved variation in handling mental state in criminal law has to do with issues of "presumption." For example, a common presumption in law is that a person's acts and their results reveal his intention, and to alter or eliminate that presumption, evidence must be introduced.<sup>23</sup> This procedural device is used in the defense of insanity. The case opens with a presumption of sanity, but when "some evidence" of insanity is introduced by the defense, in most jurisdictions the burden shifts and the prosecutor has to prove sanity.<sup>24</sup> This is not often pressed vigorously, and thus an important defense possibility is lost. To explore such a presumption requires the introduction into evidence of concepts about levels of consciousness, a subject that itself is somewhat disquieting to most fact-finders as well as many others, including lawyers.<sup>25</sup> Most people intensely dislike and even fear the idea that they have the capacity to carry on mental activity below the threshold of their cognitive control. This, of course, is the essence of the characteristic kind of behavior that leads to the defense of insanity.

The issue of mind-state also relates to

various theological dogmas, such as that which exists in the Catholic church, whereby thoughts and acts are treated as moral equivalents. If one accepts such a presumption, it would seem to eliminate completely the possibility for the kind of mental behavior that characterizes maturity, whereby a person carries out what John Dewey called an "imaginative rehearsal" before deciding what line of action to take.<sup>26</sup> Most of the people I have examined in legal contexts where mental state is at issue, have precisely that kind of incapacity: they cannot think about all of their psychological impulses with the kind of freedom that allows them to come to a rational judgment about what they will choose to do or not to do in a given instance. This is usually at the center of any psychiatric expert testimony involving mental activity, and it *is* the mental illness or defect that must be established before presumptions about motivation may be shifted in a criminal defense.<sup>27</sup>

A recent change and a new approach to "solving" some of the tensions about crime and mental illness has been development of the defense of "guilty but mentally ill."<sup>28</sup> The blame for this new anomaly and source of confusion (and I say this without hesitation) must fall to psychiatry. Fortunately, the idea has not gone far or gained much support. This new line of legal psychiatric defense is a product of the ancient fear and fantasy that people who are found not guilty by reason of insanity, will be turned loose on the streets to "prey on us again." Virtually every prosecutor makes this argument except in those rare jurisdic-

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tions where the true outcome of the NGRI findings must be explained to the jury. (This was best worked out in the District of Columbia, starting with the case of *Lyles v. U.S.*<sup>29</sup>) Through the generosity of Bernie Diamond, I once had the opportunity to read a broadside published within a few weeks of the trial of Daniel McNaughton and titled *Monomania* that vividly describes this fear.<sup>30</sup> The message of this piece makes exactly the same points heard today in virtually every case in which insanity is plead.

Under the new status of "guilty but mentally ill" (a condition that I must say totally defies my understanding) an individual is found guilty of the substantive crime but with the attendant appellation of "mentally ill." This provides the jury with the illusion that they are doing something helpful for the defendant because under such a finding, he may receive treatment for his mental illness within the Corrections Department. Of course, this offers no change at all in the status quo, since mentally ill prisoners are always provided with such psychiatric treatment opportunities as exist in the prison system. It simply allows the jury to believe that it is taking into account the defendant's mental illness and "helping" them, when they are afraid to find not guilty by reason of insanity because they think such a prisoner would be released to the streets. They see Corrections to be providing public safety at the same time they are being helpful to the prisoner. This defense only further confuses the law about mental status during crimes and, in my opinion, provides the jury with a fraud-

ulent opportunity to escape dealing with the mentally ill status. I am pleased that it has not been extensively promulgated, and I hope that my state, Michigan, will eliminate it.

At this point, I would like to reiterate the fact that all of these concerns about mental status at the time of criminal activity lead to the questions about treatment goals (in the criminal law sense). They reflect efforts to figure out a way of balancing society's need for security (and perhaps even for retribution) with concepts of fairness about blameworthiness as well as rehabilitation. Even though society has few resources to devote to the treatment of mentally ill criminals, we at least should be clear on what we call them so that rationality may be invoked in whatever treatment efforts we are able to make. I do not think it incumbent upon society to perform miracles so far as treatment resource production and distribution, but at least it should try to deal with these matters in a constantly logical way that will facilitate planning whenever we have any such resources to deploy.

The only proposals I know of that deal with mental status and criminality in a logical and rational fashion are the ones suggested by Baroness Wooten in England and Paul Tappen in the United States.<sup>31</sup> In their plan, it is suggested that all crimes be redefined in such a way that *mens rea* is totally removed from the definition. Each crime, according to society's proclivities and interests, would have a firmly set maximum treatment limit. The treatment sentence legally prescribed could be developed to fit the

needs of the individual criminal, but it could not exceed the statutory maximum for the crime of which he was convicted. The fact of criminality (the *actus reas*) would be determined in a trial, run essentially in the same way that trials are now run. Following a finding of guilt for a specified crime, there would be a second trial (perhaps with some treatment expert joining a conventional judge on the bench) to determine first, *why* the crime was committed. This would include such matters as, first, the degree of conscious control exercised or not exercised by the defendant. Second, it would reveal and explore the personality qualities of the offender in order that they might be related to future treatment goals and resources. The maximum sentencing definition would also allow for community input so far as dealing with fundamental morality questions and how they wished to handle these considerations in relation to the criminal treatment process. This phase of the trial would also explore issues of future risk to the community for the same criminal behavior and balance those risks against possibilities of rehabilitation. Even matters of primary and secondary deterrence could be explored and evaluated during this phase. Some questions have been raised about the constitutionality of eliminating *mens rea* for crime definitions.<sup>32</sup> Although this has not been fully explored, I (perhaps inexpertly and presumptuously) do not see how this would be a serious barrier if issues of fairness were handled adequately in the two trials.

There has been some legal debate

about whether psychiatric testimony can be admitted appropriately as evidence about *mens rea*, if it does not rise to the level of the defense of insanity.<sup>33</sup> I have already noted the precise parallel between issues of *mens rea* and issues of the insanity defense as illustrated in the bifurcated trial situation in California, and as exemplified by the *Wells* case.

The ongoing search for certainty has been expressed since *Hinckley* in statutory revisions that have removed the "volitional leg" of the defense of insanity. It seems difficult to eliminate such considerations if one is to consider the behavior and the motivating thought processes of any human being within the context of psychological theory. Just as it is possible to utilize psychodynamic theory under a narrow *McNaughton* definition, so the same may be said for the narrowed ALI standard. It appears to me that always the question comes down to the nature of the expert testimony presented. If it is brought forward in the context of a psychodynamic model in any of its forms, it has some utility for helping the fact-finder decide about the control and choice-making capacities of the defendant. Any other kind of psychiatric testimony does not appear to me to have much utility in the trial process, and probably will not be of much use. Certainly, Dr. Diamond's testimony in all the cases in which he appeared, were paragons of skillful presentation of psychodynamic information, and can only have helped the fact-finder in his deliberations about mental status. He always said that he would not testify for the prosecution; but probably the

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prosecution would not care to have him testify, at any rate, since his information nearly always would tend to demonstrate large areas of behavior not under conscious choice-making by the defendant. What he insisted upon was that he be able to present what he believed to be a full scientific explanation of the subject's behavior.

Frequently, psychiatric testimony is challenged on the basis of whether it is scientific, as if there was some stark line dividing it from the nonscientific.<sup>34</sup> Being scientific in the study of something as complex as mental behavior, is to describe an ongoing process that launches from positions of hypotheses that are *logically* supported by a theoretical construct that may not be anywhere near to the level of *validity*, and in fact, may end up to not be true. The opening forays of description, provided they are carried out systematically, orderly, and in ways that progressively help to refine the concepts, is the essence of a growing science. As Leslie White, a renowned sociologist at the University of Michigan in the 1950s said, "Science is sciencing."<sup>35</sup> An idea does not have to be rendered in a mathematical formation for it to be scientific. While it is always a source of anxiety when one is faced with complex ideas with multiple and convoluted origins, the effort must be made to reduce these to as nearly provable propositions as is possible, and as swiftly as possible. This, of course, is different from the frame of reference of a working clinician, where if he is to help his patients, he must always act *as if he knows*, even while he (hopefully) never

loses sight of the fact that the issue is not yet perfectly validated. To do that is to be scientific. The practical necessities of dispute resolution as they appear in the trial, require the admissibility of information that is less than fully settled from the standpoint of science. The *weight* of such evidence deserves comment by the judge. This is essentially the manner in which psychiatric testimony is admitted. There is a wide scope of admissibility, and an effort is made to help a factfinder to determine its weight in the decision making. This was an area of great interest to Bernie Diamond, and it came to its sharpest focus, perhaps, in his discussions about the admissibility of testimony derived from hypnosis. There he saw the distortion-potential as being so great, that such evidence should be inadmissible as a matter of policy. His outlook on this subject seems to have prevailed widely.<sup>36</sup>

Another psychological mind-state question that has been much used and abused in the past to deal with individuals who have committed crimes and are thought to have psychological problems, has been the finding of "incompetence to stand trial." Although originally formulated to help insure fairness in the trial of psychologically disabled defendants who might not be able to protect themselves, it was used progressively to facilitate a ritual and casual incapacitation for those so denominated. It was used as a basis for "hospitalizing" a multitude of people who were socially troublesome for one or another reason. When I first became involved with legal matters in the mid-1950s,

there were two or three times as many inmates in hospitals for the criminally insane who had been found incompetent to stand trial, as those who had been found not guilty by reason of insanity.<sup>37</sup> This became the subject for considerable research by some of my students and others, and perhaps one of the most striking changes brought about through the collaborative efforts of lawyers and psychiatrists, has been the extensive decrease in the numbers of persons held in that status. This problem was virtually settled by the Supreme Court in *Jackson v. Indiana*,<sup>38</sup> which forced the state either to bring the case to trial, civilly commit, or dismiss charges, and release those who were held in that status.

Around the time *Jackson v. Indiana* was decided, a survey of patients at the Ionia State Hospital for the Criminally Insane in Michigan revealed the same situation as elsewhere, and recommendations were made to move in the direction set by the *Jackson* holding. I participated in an "audit" of that institution, and we found many appalling situations. Perhaps the most striking and poignant example involved a Russian displaced person who spoke no English and who had been apprehended for breaking and entering in the night-time. Shortly after his arrest, a detective had recorded in his notes that he thought the arrestee did not speak English, and that he had been trying to communicate the fact that he had been invited by the woman of the household for "friendly activities." The unexpected early return of the husband caused the woman to set up the hue and cry to protect herself, and that led to the

charge against the defendant. Throughout his hospitalization, which by then was just over three years duration, it had been noted that he was "mute and uncooperative," and he was diagnosed as being "schizophrenic," thus justifying his continued hospitalization as incompetent to stand trial. I had listened to several of the case presentations before the review board of the hospital prior to this one, and was feeling considerably frustrated by the inadequacies of the psychiatric evaluations. Although the hospital had few well-trained psychiatrists, it did have several staff persons who spoke Russian, and one of them was sitting on the review board at the time. After a hasty review of his hospital record, they decided to continue his status as incompetent to stand trial. At this point, no longer able to contain myself, I wondered if anybody had had the opportunity to interview him in Russian, since it was noted in his early police record that he did not speak English, but only Russian. My question was somewhat startling, but the chairman and one of the Russian-speaking staff proceeded to address him in Russian. At this point, the poor patient practically jumped out of his chair in glee, unleashing a veritable explosion of speech and proceeded to explain the situation! Of course, shortly thereafter he was returned to court for trial and charges against him were dropped!

This, of course, was a relatively simple kind of problem, and yet, there were thousands of persons like this, held in the mental hospitals of the nation as incompetent to stand trial.<sup>39</sup> Most of the



people in that status were the victims of sloppy or even incompetent lawyers who did not follow their cases appropriately. In addition, they were victimized frequently by an incompetent mental health staff, taking the easy way out of sometimes complex social situations. *Jackson* has changed all of that, and much of the credit for this salutary change goes to the many psychiatrists who became involved with this issue.

As psychiatrists present expert testimony in criminal (as well as civil) cases, it is important that they avoid certain common pitfalls. First and foremost is the question about "drawing conclusions of fact." I have always believed that it is confusing to fact-finders if experts do not say what they think the "facts" are; but at the same time, it is all too easy for those experts to present ultimate facts as if they are clinical findings *per se*. These matters were explored thoroughly in the D.C. case of *Carter v. U.S.*<sup>40</sup> Psychiatric expert witnesses must always clearly set forth their theoretical tenets, their observational data, and then the inferences that they have drawn from these two sources. If this is done, then the judge may readily instruct the jury about how to handle their own fact-finding procedures. She can do this by making appropriate comments about the weight of evidence so that there will be some perspective on the expert testimony as it relates to other sources of information being evaluated. This will permit optimal utilization of psychiatric expert testimony as it explores issues that are, in the last analysis, essentially unprovable at this time. To figure out

what a person's mind-state was in the past when there were no observers present, is indeed a tough problem, and yet, that is exactly the procedure that *must* be carried out by the fact-finders. Psychiatry never has to apologize for the limitations of its tool kit. On the other hand, it should be made very clear to the fact-finder, what the limitations of psychiatric testimony are, and how it may be utilized to explore and answer difficult questions. If that is done, all parties will be working in the same harness to answer very difficult questions. As Sir James Stephen said, "I think that in dealing with matters so obscure and difficult, the two great professions of law and medicine ought rather to feel for each other's difficulties than to speak harshly of each other's shortcomings."<sup>41</sup> The loss of Bernie Diamond's voice in carrying out this ongoing legal, psychiatric, and social dialogue will be greatly missed. I am sure his spirit and his skill will live on forever for those of us who knew him, and those who will become familiar with him through his writings.

### References

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2. Plucknett, note 1 supra at pp 116-8
3. Plucknett, note 1 supra at pp 427-9
4. Plucknett, note 1 supra at pp 425-6. The Cossacks also followed this practice. See Hubson AE: Kazak Social Structure. New Haven, CT: Yale University Publications in Anthropology 20 (1938) at pp 67-9
5. Plucknett, note 1 supra at p 426
6. Plucknett, note 1 supra at pp 444-5
7. Plucknett, note 1 supra at pp 444-9
8. This was a residuum from Roman law although often stated in other words. See Walker, note 1 supra at p 41

9. See Walker, note 1 *supra* at p 28
10. *People v. Gorshen* 51 Cal.2d 716, 336 P.2d 492 (1959) For some description of this case by Dr. Diamond (who testified in it), see Diamond BL: Criminal responsibility of the mentally ill. *Stan L Rev* 14:59-86, 1961
11. This is set forth in California Penal Code § 1026. See also Louisell DW, Hazard GC Jr: Insanity as a defense: the bifurcated trial. 49 *Cal L Rev* 5:805-30, 1961
12. See Dixon, Rt. Honorable Sir Owen: A Legacy of Hadfield, M'Naghten, and Maclean. *Australian LJ* 31:255-66, 1957
13. An important early case was *Parsons v. State*, 81 Ala 577, 2 So 854 (1887). For discussion, see Goldstein AS: The Insanity Defense. (1967) New Haven, CT, Yale University Press, pp 67-97
14. *M'Naghten's Case*, 10 Cl. & F.200, 8 Eng. Rep. 718 (1845)
15. *Durham v. U.S.* 214 F.2d 862 (D.C. Cir. 1954)
16. For a discussion of this rule, see Goldstein, note 13 *supra* at pp 86-8. One of the early incorporations of this rule into law occurred in *U.S. v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972)
17. See Chapter 3, pp 23-42 in Goldstein, note 13 *supra* for a full discussion
18. For example, see *McDonald v. U.S.*, 312 F.2d 847, 851 (D.C. Cir. 1962)
19. This is a quotation from a comment Professor George made in a criminal law class we were teaching together
20. See Holmes' quotation in *Baker L: The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes*. New York, Harper Collins, 1991, pp 216-7
21. See *Commonwealth v. Moon* 383 Pa 18 (1955)
22. For a well elaborated explanation of this issue, see Singer RG: The resurgence of *mens rea*. III—The rise and fall of strict criminal liability. *B C L Rev* 30:337-408, 1989
23. See Goldstein, note 13 *supra* at pp 110-5. Also see *Wright v. U.S.* 250 F.2d 4 (D.C. Cir. 1957)
24. Goldstein, note 13 *supra* at pp 16-8
25. See *Confrontation in Psychotherapy*, edited by Adler G, Myerson PG. (1973) Science House. This entire book explores the process problems of dealing with the unconscious in psychotherapy and otherwise. Chapter One, Myerson EG: The meanings of confrontation, pp 23-38 set forth the issues very succinctly
26. See Dewey J, Tufts J: *Ethics*. New York, 1908, p 323
27. See Goldstein, note 13 *supra* at pp 18-9
28. For a discussion of this subject, see Morris N: *Madness and the Criminal Law*. Chicago, University of Chicago Press, 1982, pp 83-7
29. The D.C. Court of Appeals explored this issue in *Lyles v. U.S.* 254 F.2d 725 (D.C. Cir. 1957). This procedure for informing the jury had been mandated by 69 Stat. 610, ch. 673 § 1 (1955), D.C. Code § 24-301 (1981). Also see Goldstein, note 13 *supra* at Chapter 10, pp 143-70
30. *Monomania*. Written by "Wetnurse," published in London in 1843. Bernie had a vast and virtually all-inclusive library involving mental illness and the law. I would like to note here that Bernie was a most unusual kind of bibliophile: he lent his materials freely and did not even seem too worried about losing them. He would send a rare and valuable treatise through the mail in a brown paper envelope and sometimes, seemingly forget where he had lent it. His generosity in sharing his materials was enormous
31. See Tappan P: *Crime, Justice, and Corrections*. New York, McGraw-Hill Book Co., 1960, in general. Also see Chapter 16, pp 455-75. Wooten, B. *Crime and Penal Policy*. London, George Allen and Unwin, especially Chapters 12 and 13, pp 220-51, 1978
32. See Goldstein, note 13 *supra* at pp 222-6
33. See Morris, note 28 *supra* at pp 53-76
34. For example, see Ziskind J: *Coping with Psychiatric and Psychological Testimony*. Beverly Hills, Law and Psychology Press, 1970
35. See White LA: *The Science of Culture*. New York, Farrar, Straus, 1949, pp 3-21
36. *Diamond BL: Inherent problems in the use of pretrial hypnosis on a prospective witness*. *Cal L Rev* 68:313-49, 1980
37. See *Wilson BB, Hamilton RM: Note: hospitalization of mentally ill criminals in Pennsylvania and New Jersey*. *U Pa L Rev* 110:78-112, 1961. Comment: *Commitment to Farview: Incompetency to Stand Trial in Pennsylvania*. *U Pa L Rev* 117:1164-96, 1969. McGarry AL: *Demonstration and research in competency for trial and mental illness: review and preview*. *B U L Rev* 49:46-61, 1969. Hess J, Thomas H: *Incompetency to stand trial: procedures, results, and problems*. *Am J Psychiatry* 119:713-20, 1963
38. *Jackson v. Indiana*. 406 U.S. 715 (1972)
39. See McGarry, note 37 *supra*
40. *Carter v. U.S.* 252 F.2d 608 (D.C. Cir. 1957) See also *Watson AS: Psychiatry for Lawyers*. (ed rev) New York, International Universities Press, Chapter XI, pp 396-438, 1978
41. *Steven J: History of Criminal Law in England*. Vol. 2. London, MacMillan, 1883, p 128