Social and Cultural Factors as a Diminished Capacity Defense in Criminal Law

BERNARD L. DIAMOND, M.D.*

Mental illness, as a defense in criminal law, has traditionally been closely linked to the medical model of psychological deviance. Without exception, every definition of criminal insanity starts with or includes the phrase "mental disease or defect." Although not every degree or kind of mental disease or defect is exculpating, a psychiatric diagnosis of some type is a necessary, if not sufficient, requirement for such a defense in the criminal trial.

Social and cultural factors may be relevant evidence, but only insofar as they are material as causation or provocation of the psychiatric condition. The logic of such a restriction is not as clear as formerly when the medical model of mental illness was accepted unquestionably. However, now that much disputation has arisen, and continues, over the conventional medical model of psychological deviance, examination of that limitation seems indicated. Szasz and others have challenged the very existence of mental disease as being in any way analogous to physical disease.[1] Sociologists, such as Scheff, have focused upon the labeling process and have doubted the reality of the disease believed to underlie the medical label.[2]

The District of Columbia Experience

Chief Judge David Bazelon of the United States District Court of Appeals for the District of Columbia has long expressed concern over this definitional and labeling process. This problem arose in a very acute manner in 1957 when the staff of St. Elizabeth's Hospital decided to include "sociopathic personality disorder" as a legitimate mental illness. This had an immediate impact upon the *Durham* definition of insanity, and much controversy arose over this inclusion of sociopathy as an exculpating psychiatric condition.[3] Attempting to separate the legal definition of mental disease or defect from the whims of psychiatric nosology, the District of Columbia appellate court laid down the *McDonald* definition in 1962:

> Mental disease or defect includes any abnormal condition of mind which substantially affects mental or emotional processes and substantially impairs behavior controls.[4]

*Dr. Diamond is Professor at the School of Law of the University of California at Berkeley and Clinical Professor of Psychiatry at the School of Medicine of the University of California at San Francisco. His latest publication is the section on "Criminal Responsibility of the Mentally Ill" in the *International Encyclopedia of Psychiatry, Psychology, Psychoanalysis and Neurology*, Volume III, published in 1977. See also the introductory list of Isaac Ray Award winners.

That definition was affirmed in the 1972 *Brawner* decision replacing the *Durham* rule with a formula essentially the same as the widely accepted Model Penal Code rule of insanity.[5]

In a separate, concurring opinion in *United States v. Eichberg,* in 1971, Judge Bazelon stated:

> Under *McDonald v. United States,* any abnormal condition that impairs mental or emotional processes and behavior controls may deprive an individual of the freedom of choice that we regard as a prerequisite to imposing criminal responsibility. The source of that impairment may be physiological, emotional, social, or cultural. In order to be sure that the jury does not defer to the expert's decision on the matter of mental illness, it may well be appropriate to abandon the term "mental illness" altogether. In that case, the jury would be instructed simply to consider all the testimony describing the defendant's mental and emotional processes and behavior controls, and determine the nature and extent of any impairment. The jury should then decide, in accordance with the discussion above, whether that impairment was sufficiently serious and sufficiently relevant to the unlawful act so that it would be unjust to hold the defendant criminally responsible.[6]

Preceding the decision in *Brawner,* the D.C. appellate court invited a number of professional psychiatric and legal organizations to submit *amicus curiae* briefs. Answers to specific questions were solicited, including one which dealt with the issue of social and cultural impairment:

> 6. If a defendant's behavior controls are impaired, should a test of criminal responsibility distinguish between physiological, emotional, social, and cultural sources of the impairment? . . . Is it appropriate to tie a test of criminal responsibility to the medical model of mental illness?[7]

In its decision the court resolved the question in a somewhat equivocal manner:

> We agree with the amicus submission of the National District Attorneys Association that the law cannot "distinguish between physiological, emotional, social and cultural sources of the impairment" . . . and all such causes may be both referred to by the expert and considered by the trier of fact.
>
> Breadth of input under the insanity defense is not to be confused with breadth of the doctrines establishing the defense. As the National District Attorneys Association brief points out, the latitude for salient evidence of *e.g.,* social and cultural factors pertinent to an abnormal condition of the mind significantly affecting capacity and controls, does not mean that such factors may be taken as establishing a separate defense for persons whose mental condition is such that blame can be imposed. We have rejected a broad "injustice" approach that would

have opened the door to expositions of *e.g.*, cultural deprivation, unrelated to any abnormal condition of the mind.[8]

In 1973 the Washington University Law Quarterly published an extensive symposium on the *Brawner* decision. In my contribution I stated:

> Another possible response to the limitations of psychiatry, as experienced by the criminal justice system, would be to broaden the perspective of the law, yet still retain the concept of exculpation and mitigation toward those who are less capable than the normal person to exercise the free will which the law insists is the basis of all criminal justice. Thus, the law could be "demedicalized" (to coin a word) by extending legal exculpation to all those persons who *for any reason* lack the ability to make a free, rational, responsible decision when faced with the temptation or impulse to commit a crime. Such exculpatory reasons might well include poverty, continued unemployment, chaotic living conditions, such as that associated with ghettos, and other social and environmental detrimental factors which could impair an individual's powers of free will without necessarily resulting in a disease or mental abnormality. Thus, proper attention could directly be given by the law to cultural deprivation and other external factors which override the individual's capacity for free choice.
>
> *Brawner* does acknowledge that social and cultural determinants are relevant to the issues of criminal responsibility, but only insofar as they result in an "abnormal condition of the mind." Thus, all such evidence of social and cultural abnormality must be filtered through the medical funnel of mental abnormality (at best a synthetic construct and statistical abstraction), regardless of the *McDonald* definition.[9]

The *Brawner* court had concluded:

> Our recognition of an insanity defense for those who lack the essential, threshold free will possessed by those in the normal range is not to be twisted directly or indirectly, into a device for exculpation of those without an abnormal condition of the mind.
>
> Finally, we have not accepted suggestions to adopt a rule that disentangles the insanity defense from a medical model, and announces a standard exculpating anyone whose capacity for control is insubstantial, for whatever cause or reason.[10]

I commented:

> Such a statement is an open invitation to indulge in the invidious semantic quibbling that has characterized so much forensic psychiatry in the past. The expert may simply assert that, in his view, lack of the power of free will by the defendant is proof in itself of mental abnormality; that mentally normal persons are presumed to have the power of free will, *ergo,* this defendant who has been shown to lack free will because of, let us say, cultural deprivation, is by definition

mentally abnormal, for he is deficient in one of the essential elements of mental normality. This is simply not a good way to deal with such a fundamental and controversial issue.[11]

The Diminished Capacity Defense

My inclination is to accept the traditional limitations of the insanity defense and not to advocate extension of that defense further into the areas of social and cultural factors divorced from the formal medical concepts of mental disease or defect. This is not to agree in principle with the *Brawner* court, but rather because I have believed for a long time that the insanity defense is not a very useful or practical way for the law to cope with the problem of responsibility of the mentally ill offender. My own interest has been much more in the use of the diminished capacity (or diminished responsibility, as it is sometimes called) defense as the most logical and pragmatically useful way of relating the criminal law to the mentally ill offender.

In England, since 1957, in crimes of homicide, a diminished responsibility defense has been permitted. The English Homicide Act of 1957 states:

> Sect. 2 (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
>
> Sect. 2 (2) On a charge of murder, it shall be for the defense to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> Sect. 2 (3) A person who but for this section would be liable, whether as a principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.[12]

In the first six years that followed the introduction of this defense into the English law of murder, it was successful, either at trial or on appeal, in three out of every four cases in which it was offered.[13] The successful attempts have included a number of cases in which the "abnormality of mind" was considerably outside the bounds of the conventional medical model of mental illness. Yet there has not been any significant increase in the proportion of homicide cases which are adjudicated as mentally abnormal. Instead, the diminished responsibility defense in England has apparently supplanted the use of the insanity defense or the incapacity to stand trial defense in many cases. In the five years before the passage of the 1957 Homicide Act, 46% of indicated murderers were found incompetent to stand trial, or guilty but insane.[14] In the four years after passage of the Homicide Act, 47% of indicted murderers were found to be incompetent to stand trial or guilty but insane, or of diminished responsibility, with the latter verdict greatly predominating. Walker comments:

> We have already seen that a defense of insanity is seldom or never

attempted nowadays when the charge is capital murder, and these percentages suggest that cases which before the Homicide Act were smuggled through the M'Naghten Rules by the efforts of medical witnesses and juries are now offering the more honest and less risky defense of diminished responsibility.[15]

The diminished capacity defense has been permitted in California since 1949 and has been used extensively since 1959 in homicide and other serious felony cases. Statistical information is not available, but it is my impression that the situation in California is somewhat comparable to that in England: the total number of offenders judged to be mentally abnormal has increased only slightly, but the diminished capacity defense has tended to replace the incompetency to stand trial and the insanity defenses. However, I am sure that the combined percentage of the three defenses of mental abnormality does not nearly approach 47% of all indicted murderers as in England.

The diminished capacity defense developed in California out of a series of appellate decisions.[16] Hence, it is closely tied to the common law concept of *mens rea* or criminal intent. However, the traditional common law definitions of the various specific intents, such as premeditation, malice, and similar terms which constitute the *mens rea* specified by the definition of the crime, are subject to judicial revision, and new definitions have entered into the law.[17] At the present time, in California, the diminished capacity defense is available only in specific intent crimes, and not in the so-called general intent crimes.[18]

The essentials of the diminished capacity defense can be described as follows: traditional Anglo-American law defines each crime in terms of a combination of a deed and an accompanying mental state (*mens rea*). This mental state is commonly referred to as the criminal intent. The intent may be specified by statute or judicial decision, in which case it is considered a specific intent. Or the intent may not be specified but merely imputed, in which case it is considered a general intent. For example, malice is the specific intent required by the definition of the crime of murder; assault, however, is a general intent crime and no intent is specified.

The differences between general and specific intent can be very confusing and unclear with certain crimes despite the fact that most serious consequences to the defendant hinge upon this distinction. Whenever a crime is defined by a specific intent, that intent has to be proved beyond a reasonable doubt to establish the guilt of the defendant; proof of the act, alone, is never sufficient. The defense may introduce evidence of various kinds that the defendant did not, or could not, have the specific intent (mental state) of which he is accused. Even though the defendant may appear, by ordinary legal or common sense standards, to have possessed the specific intent (such as premeditation), evidence of mental abnormality may serve to negate the intent which is alleged. This is so because most, if not all, of the various specific mental states infer, in their definitions, the existence of free-will: the capacity to make a free choice by a rational individual acting as a free agent.[19] Psychiatric evidence that the defendant is suffering from some abnormality of mind, even though far less than that required by the defense of insanity, may prove that the defendant had no power of free

choice, and that he was less than a rational individual acting as a free agent. If the trier of fact accepts this as proven, the defendant cannot be found guilty of a crime which includes that intent in its definition. Instead, the defendant may be found guilty of a lesser offense for which that specific intent is not required. For example, a defendant may have carefully planned a homicide ahead of time. Nevertheless, evidence of psychopathology may negate the specific intent of premeditation (by proving that the defendant was acting under psychopathological compulsion, for instance); and the defendant may now be found guilty only of second degree murder. Or the specific intent of malice may be negated, in which case the defendant may be found guilty only of manslaughter, even though under the ordinary circumstances and motivation of the crime, he would have been guilty of murder.

This is not the place to debate the virtues of the diminished capacity defense as against the insanity defense. There are advantages and disadvantages to each defense and technical difficulties abound with each. Many of the arguments over this issue are purely theoretical and have little relation to the realities of the criminal justice system. For example, it is frequently proclaimed that a defendant who is mentally sick should not be punished by sending him to prison, even though it is for a lesser offense; he should be defined as insane and sent to a hospital for the mentally ill. Such a view ignores the reality that the hospital for the mentally ill may, in fact, be a badly designed prison disguised as a hospital for the criminally insane.[20] Or, in the absence of the diminished capacity defense, the jury is forced to choose between full guilt or total exculpation. When confronted with such a choice, the jury frequently will ignore the evidence of mental illness and find the defendant guilty of the major offense of which he is charged. The result is that the mentally ill offender goes to prison, but he is punished with full severity, for he is not defined as mentally ill.[21]

I believe it can be empirically demonstrated by the experience in both England and in California that the diminished capacity defense, in its actual operation, is far superior to the traditional insanity defense and that it tends to replace that defense as the chief means of coping with the mentally ill criminal offender.[22] It seems to be one of the few legal sanction devices which reasonably meet the needs of both the individual defendant and the public.[23]

In contrast to the insanity defense, which developed within the medical model of mental disease, the diminished capacity defense has its roots in the issue of intoxication.[24] In England, in 1838, in a case of assault with intent to murder, for the first time a jury was instructed that gross intoxication might disprove the intention required for this aggravated offense.[25] Since 1872, the California Penal Code has included the following:

> §22. . . . No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed

the act.[26]

Through a long series of decisions of the California Supreme Court, starting in 1949,[27] the possibility of negation of a specific intent by mental illness or defect, short of insanity, has been firmly established in California. Most other state, federal and military courts permit such negation, but its use has been sporadic in jurisdictions outside California.[28] Until recently, it was not believed that the diminished capacity defense in California was restricted to only the three conditions: intoxication, mental disease, or mental defect. This was reflected in the California jury instructions:

> If you find from the evidence that at the time the alleged crime was committed, the defendant had substantially reduced mental capacity, whether caused by mental illness, mental defect, intoxication, *or any other cause,* you must consider what effect, if any, this diminished capacity had on the defendant's ability to form any of the specific mental states that are essential elements of murder and voluntary manslaughter. . . .[29]

However, in 1976, the California Supreme Court chose to regard a previous listing[30] of the conditions appropriate to a diminished capacity defense as restrictive, and forthrightly stated that such a defense is possibly only in cases of intoxication, mental disease or mental defect.[31]

It appears to me that this last decision is in error and has no proper foundation, either in jurisprudential logic or in the previous decisions which established the diminished capacity in California. In the first of these decisions, *People v. Wells,* in 1949, the court stated:

> It seems quite indisputable that evidence, relevant and material to proving lack of criminal capacity other than legal insanity (such, for example, as that the defendant at the time the overt act was committed was under the age of 14 and did not know the act was wrongful; or that the defendant committed the act while sleepwalking and unconscious or while under the coercion of another), must be admitted at the first (not guilty) stage of the trial, or not at all.[32]

Again, in *People v. Gorshen,* in 1959, the court said:

> It would seem elementary that a plea of not guilty to a charge of murder puts in issue the existence of the particular mental states which are essential elements of the two degrees of murder and manslaughter. . . . Accordingly, it appears only fair and reasonable that defendant should be allowed to show that in fact, subjectively, he did not possess the mental state or states at issue.[33]

These are the two key decisions which established the diminished capacity defense in California, often referred to as the *Wells-Gorshen Doctrine.* I submit that nowhere in either of these decisions is there any implication that this defense is to be restricted to only intoxication, mental disease or defect.

To the contrary, the court made it abundantly clear that evidence of *any* condition which affects the defendant's capacity to possess the mental state required by the definition of the crime of which he is charged is admissible.

Nevertheless, the current law in California, as stated in *Berry*, does govern at the present moment.[34] It is unfortunate that the California Supreme Court reached this decision of limitation without adequate analysis or even consideration of its contraction with earlier decisions.

Socio-Cultural Factors and Diminished Capacity

Accepting the historical reality of the close association of the insanity defense with the medical model of deviance, I see no valid reason why the same should hold for the diminished capacity defense. If a specific intent is required by the statutory definition of a crime, and if that specific intent must be proved,[35] *any* evidence which tends to show that the defendant did not possess that intent should be admissible. Sheer logic requires that evidence, such as relevant cultural or social factors which can be demonstrated to significantly restrict the exercise of free choice and power of decision, must be relevant to the existence of the capacity for such intent. And if no capacity for the intent existed, then the intent did not exist and the crime, as defined by such specific intent, was not committed.

Courts may not agree with this position for social policy reasons, rejecting the legal and common sense logic of the argument simply because they believe it is not desirable to permit any further amelioration of the harshness of the criminal law. Essentially, this is what prevented English law from recognizing the relevance of alcoholic intoxication to criminal intent prior to the 19th century. Courts have sometimes refused to accept mental illness as a diminished capacity defense purely for immediate policy reasons.[36] However, I believe that short-sighted decisions based only upon the court's personal belief as to what constitutes desirable social policy cannot in the long run survive the intrinsic logic of the law. Therefore, I expect that sooner or later appellate courts must recognize the thesis that evidence of social and cultural factors, entirely separate from the medical model of mental illness or defect, is relevant to the determination of the existence of a specific intent, if it can be demonstrated that the defendant lacked the powers of free choice and decision implied by the definition of that intent.

A single legal decision now exists which approaches, but does not quite reach, this position. In *State of Connecticut v. Rodriguez* in 1964, the superior court review division ruled that a sentence of seven to eleven years imprisonment for manslaughter was excessive.[37] The defendant, a Puerto Rican youth of 21, had been involved in an altercation with a group of other Puerto Ricans which ended when the defendant fired a gun and wounded one of the group. The court apparently accepted the information that "with Puerto Ricans . . . . one of the things they never do is run; that you are not a man if you back off, you must face your enemy"[38] and reduced the sentence to five to ten years imprisonment. The court made it clear that such reduction of sentence was responsive to the defendant's "excellent record, his youth and apparent lack of judgment because of it, and his racial heritage."[39] This decision, however, is not, strictly speaking, an example of diminished capacity or even of diminished responsibility; rather, it is a

mitigation of sentence. Similar mitigations of sentences because of sensitive consideration of ethnic and cultural factors probably are not uncommon, but go unreported in the law case books. Further, attempting to cope with social and cultural factors solely on the sentencing level of the judicial process does not ensure the admissibility of such evidence for the primary purpose of determining the degree of guilt and responsibility.

It is important to keep in mind that the establishment of a diminished capacity defense based upon social and cultural factors does not mean that every defendant whose ethnic, social or cultural background differs from that of the standard "middle American" will be excused from full responsibility for his criminal acts. The finding of guilt on a level of lesser responsibility, as, for example, a verdict of second degree murder instead of first degree murder, is a matter for jury decision. That decision must reflect the careful weighing of the particular factors of the defendant's background, the impact of those factors upon his mental faculties, and their relevance to the criminal act and to the *mens rea.*

The key issue here is *admissibility* of evidence. At the present time there is practically no limit to the type and variety of evidence of psychological, social, cultural and psychopathological evidence which can be introduced as long as it is contained within a medical model of mental illness. Such a medical containment may be undesirable for many reasons: it may, in fact in many cases, be scientifically untrue; it may be very mystifying and confusing to the jury to have to consider social and cultural factors only as components of a psychiatric condition; the defendant may object strenuously to a label of mental disease which he experiences as perjorative and derogatory; it improperly subordinates the scientific and probative value of the social sciences to medicine; it incorrectly assumes that the psychiatric expert is the only proper expert for such evidence; and most of all, it leads to stretching and shoving of the evidence, with blurring of definitional distinctions, and consequent reduction of precision, in order to make room within traditional diagnostic categories for these social and cultural elements.

I propose that the trier of fact, in a criminal trial, for a crime of specific intent, be allowed to hear evidence giving in full and outside of a medical context the relevant social and cultural background of the defendant in order to determine whether such evidence might negate, through diminished capacity, the specific intent required by the definition of the crime of which he is charged. Such evidence might be presented by the expert testimony of psychiatrists, sociologists, anthropologists, psychologists, or any scientist having relevant expert knowledge. In some instances, supportive evidence by lay witnesses may be very pertinent. In all instances, the value of such testimony would depend directly upon its relevance to the criminal act and to the *mens rea.* Vague generalizations introduced to achieve sympathy and empathy for the defendant would have no probative value. The evidence would have to be specific to the defendant, directly related to his thinking and decisional capacities in the context of the crime of which he is charged. It would be up to the trier of fact to decide whether the weight of such evidence overcomes the ancient free-will presumption that each sane man intends to that which he does do.

The Croatian Skyjacker

Recently I had the opportunity to offer such testimony in the trial of a Croatian Nationalist skyjacker in a federal district court. The trial judge refused to admit the testimony, a refusal which was not unexpected. The defendant was convicted of air piracy and was sentenced to life imprisonment. An appeal has been made before the United States Court of Appeals for the Second Circuit and their decision is awaited. If the appellate court rules that my testimony should have been admitted, it will be a most important and innovative development, and widespread acceptance of the use of social and cultural factors as a diminished capacity defense can be anticipated. However, there were other issues raised in the trial which might be grounds for reversal, a fact which might permit the appellate court to evade the specific issue of admissibility of this type of evidence. One of the problems is that it is not entirely clear whether air piracy is a general intent or a specific intent offense. If the appellate court agrees that it is a general intent crime,[40] then a diminished capacity defense for air piracy would not be available even if given within the traditional medical model of mental disease or defect.

The following is my testimony which was offered and rejected as inadmissible in this trial:[41]

> I examined Z.B. at the Metropolitan Correctional Center, New York City, on December 14 and 15, 1976 and on February 14, 1977. I also interviewed his sister, Mrs. Z.L., on December 14, 1976, and his wife, Mrs. J.B., on February 14, 1977. My opinion of the mental state of Z.B. is based upon my examination of the defendant, upon the information he provided me, and upon the information related to me by his sister and his wife.
>
> It is my opinion that Z.B. was in an abnormal mental state on September 10, 1976 when he is alleged to have committed air piracy, homicide, and other criminal acts. I believe his abnormal mental state existed previously, at least since January 1976 or before, and that it has persisted until the present time. It is also my opinion that this abnormal mental state was of such a quality and degree that it prevented the defendant from exercising the ordinary, reasonable and rational powers of free-will, choice and decision that constitute the intent required by the definitions of the crimes of which he is charged. Hence, I conclude that Z.B. lacked the capacity for such criminal intent.
>
> I am of the opinion that this abnormal mental state was not caused by mental disease, illness or defect. I do not find the defendant insane or mentally ill in any sense of those terms. Psychiatric examination revealed intact sensory, perceptual, memory and intellectual functions. Volitional functions are, however, disturbed; but not, I believe, as a result of mental illness. There were no hallucinations, delusions or other psychotic manifestations elicited.
>
> Z.B. talked freely to me with emotional response of great intensity but always appropriate to the content of his thoughts. Consistently throughout my discussions with Z.B. he took full and sole responsibility for every detail of the planning and execution of the

skyjacking. He describes the other participants as knowing nothing, as simply responding to his orders, blindly following his instructions at all times, and having no real comprehension of what was happening until it actually happened. He was, however, somewhat evasive in response to my inquiries concerning possible European connections who might have known what was planned. He seemed reluctant to allow any blame to fall upon anyone other than himself. Aside from this, B. impressed me as being very honest, frank, sincere, and willing to communicate all details of his thoughts, behavior, and actions.

It is my opinion that the abnormal mental state of Z.B. was the consequence of prolonged exposure to social and cultural factors which existed since his early childhood. These factors, when combined with realistic fears for his own life and safety, his belief that his own assassination was imminent, caused him to become fanatically obsessed with the accomplishment of what he perceived as a necessary act of patriotic, nationalistic service to his ethnic group, the Croatians, in their struggle against Serbian domination. He was born in 1946 in a small Croatian village where he spent his childhood under conditions of poverty and deprivation. He determined in adolescence to devote his life to the rectification of what he believed to be the persecution of his people and the wrongs against his ethnic culture. He regarded the formation of the nation of Jugoslavia as a forced, unnatural amalgamation of the Serbian oppressors with his own Croatian people. At the age of 16 he was asked to join the Jugoslavian communist party. He refused, not because he was against communism, but because he believed the Jugoslavian communists to be wholly dominated by Serbian interests.

Z.B. emigrated to the United States in December 1969, settling in Cleveland, Ohio. Since then he has devoted himself to furthering the national independence of the Croatians. He has pressed the cause of the Croatians and tried to reveal what he believed to be the oppression of his people by the Serbians. His European activities often involved considerable risk and he had encounters with the secret police of Jugoslavia, Germany and Austria. In 1971 he was expelled from Austria on one hour notice. He was arrested twice in Cleveland for causing a disturbance at a political meeting. On the second arrest he was found to be carrying a handgun (his life had been recently threatened) and he was fined and the gun confiscated. He had met his American wife, J., in Vienna in 1969 and married her in May 1972 in Germany.

Z.B. states that he has always been dedicated to peaceful means of pressing his cause: speeches, writing, distributing leaflets and publicizing what he believes to be the true facts of the oppression of the Croatian people. He strongly deplored violence and has long been convinced that violence or any activity which might result in harm to anyone, friend or foe, would be immoral and detrimental to his cause.

For several years he has been aware that he might become the victim of assassination at any moment, at any place, in order to silence his protests. Since at least January 1976 he has been completely convinced that he was in imminent danger, that he would soon be killed. He

believed that there was no way of indefinitely avoiding assassination by his political enemies who, he was convinced, would go to any length to silence him. He believed there were Serbian secret agents in the United States as well as in Europe, and that his time was running out. He thought they would not dare an assassination attempt in the presence of his wife who might be a witness against them. Yet, he firmly believed that they would get to him alone eventually and kill him. He estimated his own life expectancy as a year or less.

It was in this frame of mind – a highly abnormal mental state, in my opinion – that he determined to perform one last, meaningful, heroic act for the benefit of the Croatian cause. He felt compelled to devote his remaining life to the accomplishment of an act which would bring the attention of the entire world to the injustices imposed upon his Croatian people. To do this he planned the skyjacking with the sole intention of forcing the skyjacked plane to drop leaflets over various cities. The idea had developed slowly in his mind over a period of months.

Preparations were made to deposit a real bomb with actual explosives in the locker in downtown Manhattan. The plan was to make it appear that the harmless psuedo-bomb which he smuggled onto the plane was an exact duplicate of the real bomb in the locker. He personally bought all of the materials for the construction of both the real and the false bomb, wrote the text of the leaflets, arranged for their translation into English and French, had them printed, purchased the airplane tickets, and took care in each detail, including the placement of the real bomb in the locker. He insists that none of the men knew anything about what was planned and that they played no part in these preparations. The printer was not informed.

The bomb placed in the downtown locker was constructed by him in such a manner, he believed, that it could be safely disarmed when discovered. There was no timing or other delayed action device. As described by Z.B., it was the type of bomb which could only be detonated by someone pushing the switch, causing the bomb to explode but also killing the person pushing the switch. It was constructed in this manner so that the police who found the bomb, at B's direction, would believe the bomb on the plane was identical and that the skyjackers were prepared to sacrifice their own lives, if necessary.

At the same time Z.B. firmly believed that he had constructed the real bomb in such a manner that it could safely be disarmed by the police upon its discovery. He persists, still, in this belief and he is dismayed and remorseful that this bomb resulted in the death of a policeman. He wanted more than anything else to avoid violence and harm to anyone because of his conviction that any harm would tend to discredit his cause. Particularly, he did not want to be, or appear to be, a terrorist or criminal.

The skyjacking, the placement of the bomb in the downtown locker, and all of the complicated preparations were, in my opinion, the acts of a desperate man, in a highly abnormal mental state, acting out of fear and compulsive determination. Believing in the righteousness of his

cause and in the imminence of his own death, he felt compelled to plan and perform what was to be one last heroic act: to inform the entire world of the cause of the Croatian people, language and culture. He hoped and believed that if the world were so informed it would thwart any further oppression by the Jugoslavian government and the Serbian groups who, he believed, controlled that government.

Taking into consideration Z.B.'s lifelong social and cultural indoctrination, the social and political circumstances of his childhood and adolescence, his total preoccupation with the Croatian cause, the belief in the reality of the threat to his own life, and his obsessive and fanatical determination to perform one last act of value to his people, it seems clear to me that he lacked the mental ability to make the choice or decision to do other than what he did do. In terms of an element of criminal intent implying the power of free-will, choice and decision as exercised by ordinary men, Z.B. lacked, in my opinion, the capacity for such criminal intent. He did what he did out of psychological necessity, not free choice.

References

1. Szasz TS: The Myth of Mental Illness, New York, Harper and Row, 1961; Law, Liberty and Psychiatry, New York, Macmillan, 1963; Psychiatric Justice, New York, Macmillan, 1965. Leifer R: In the Name of Mental Health, New York, Science House, 1969
2. Scheff TJ: Being Mentally Ill: A Sociological Theory, Chicago, Aldine Press, 1966; Labeling Madness, Englewood Cliffs, Prentice Hall, 1975
3. *Blocker v. United States,* 288 F.2d 853, 873 (D.C. Cir. 1961), Miller and Bastian, dissenting
4. *McDonald v. United States,* 312 F.2d 847, 851 (D.C. Cir. 1962)
5. *United States v. Brawner,* 471 F.2d 969, 990 (D.C. Cir. 1972)
6. *United States v. Eichberg,* 39 F.2d 620, 626, 627 (D.C. Cir. 1971)
7. *United States v. Brawner,* 471 F.2d 969, appendix A, 1007 (D.C. Cir. 1972)
8. *Id.* at pp. 994, 995
9. Diamond BL: From Durham to Brawner, A futile journey, 1973 Wash Univ Law Quart 109, 119 (1973)
10. *United States v. Brawner, supra,* at p. 995
11. Diamond, *supra,* at p. 120
12. 5 & 6 Eliz. 2 c. 11 (1957)
13. Walker N: Crime and Punishment in Britain, Edinburgh, University Press, 1965, p. 279
14. The equivalent of the American verdict of "not guilty by reason of insanity."
15. Walker, *supra,* at p. 280
16. *People v. Wells,* 33 C.2d 330, 202 P.2d 53, cert. denied, 338 U.S. 836 (1949); *People v. Gorshen,* 51 C.2d 716, 336 P.2d 492 (1959); *People v. Henderson,* 60 C.2d 482, 386 P.2d 677 (1963); *People v. Wolff,* 61 C.2d 795, 394 P.2d 959 (1964); *People v. Anderson,* 63 C.2d 351, 406 P.2d 43 (1965); *People v. Conley,* 64 C.2d 310, 411 P.2d 911 (1966); *People v. Goedecke,* 65 C.2d 850, 423 P.2d 777 (1967); *People v. Nicolaus,* 65 C.2d 866, 423 P.2d 787 (1967); *People v. Bassett,* 69 C.2d 122, 433 P.2d 777 (1968); *People v. Risenhoover,* 70 C.2d 39, 447 P.2d 925 (1968); *People v. Castillo,* 70 C.2d 264, 449 P.2d 449 (1969); *People v. Morse,* 70 C.2d 711, 452 P.2d 607 (1969); *In re Kemp,* 1 C.3d 190, 460 P.2d 481 (1969); *People v. Mosher,* 1 C.3d 379, 461 P.2d 659 (1969); *People v. Noah,* 5 C.3d 469, 487 P.2d 1009 (1971); *People v. Sirhan,* 7 C.3d 710, 497 P.2d 1121 (1972); *People v. Cantrell,* 8 C.3d 504 P.2d 1256 (1973); *People v. Poddar,* 10 C.3d 750, 518 P.2d 42 (1974); *People v. Berry,* 18 C.3d 509, 556 P.2d 777 (1976).

    For discussion of the California doctrine of diminished capacity see Diamond BL: Criminal responsibility of the mentally ill, 14 Stanford L Rev 59 (1961); Cooper G: Diminished capacity, 4 Loyola L Rev 308 (1971); Leib CR: Diminished capacity: Its potential effect in California, 3 Loyola L Rev 153 (1970); Hasse AF: Keeping Wolff from the door: California's diminished capacity concept, 60 Cal L Rev 1641 (1972); Lewin THD: Psychiatric evidence in criminal cases for purposes other than the defense of insanity, 26 Syracuse L Rev 1051 (1975)
17. *People v. Wolff,* 61 C.2d 795, 394 P.2d 959 (1964); *People v. Conley,* 64 C.2d 310, 49 P.2d 911 (1966)
18. *People v. Hood,* 1 C.3d 444, 462 P.2d 370 (1969); *People v. Rocha,* 3 C.3d 893, 479 P.2d 372 (1971). See also Young D: Rethinking the Specific-General Intent Doctrine in California criminal

law, 63 Cal L Rev 1352 (1975)

19. For discussion see Diamond BL: With malice aforethought, 2 Arch Criminal Psychodynamics 1 (1957). Also *People v. Nash*, 52 C.2d 36, 50; 338 P.2d 416 (1959)
20. See, for example, the description of Atascadero (California) State Hospital for the criminally insane in Observations and Comments Based On a Survey of California State Mental Facilities by the California Medical Association, submitted to the California State Department of Mental Hygiene, January 18, 1965, p. 21
21. Diamond BL: Criminal responsibility of the mentally ill, 14 Stanford Law Rev 59 (1961)
22. Walker, *supra* note 13
23. Diamond, *supra* note 21
24. Diamond BL: With malice aforethought, 2 Arch Criminal Psychodynamics 1, 12 (1957). The California Supreme Court, as early as 1866, held that intoxication could negate the intent of the crime of voting twice in the same election (*People v. Harris*, 29 Cal. 679).
25. *Regina v. Cruse*, 8 C. & P. 541, 173 Eng. Rep. 610 (N.P. 1838)
27. Note 16, *supra*
28. The most up-to-date list of the jurisdictions which accept diminished responsibility is contained in the appendix to Lewin THD: Psychiatric evidence in criminal cases for purposes other than the defense of insanity, 26 Syracuse L Rev 1051, 1105 (1975)
29. California Jury Instructions Criminal (CALJIC) 6.77 (1976 revision). Italics added.
30. *People v. Conley*, 64 C.2d 310, 322, 411 P.3d 911 (1966)
31. *People v. Berry*, 18 C.3d 509, 556 P.2d 777 (1976)
32. *People v. Wells*, 33 C.2d 330, 349, 202 P.2d 53 (1949). Before *Wells* trial judges uniformly excluded such testimony from the main (guilt) trial and admitted it only during the sanity trial. In California, the issue of guilt and the issue of sanity are tried in separate trials.
33. *People v. Gorsben*, 51 C.2d 716, 733, 336 P.2d 492 (1959)
34. *People v. Berry, supra*
35. *People v. Wells, supra*, at p. 346
36. As, for example, in *Fox v. State* [of Nevada], 73 Nev. 241, 361 P.2d 924 (1957), and *State* [of New Jersey] *v. Sikora*, 44 N.J. 43, 210 A.2d 193 (1965)
37. *State v. Rodriguez*, 25 Conn. Supp. 350, 204 A.2d 37 (1964)
38. *Id.*
39. *Id.*
40. The court in *United States v. Boble*, 445 F.2d 54, 60 (7th Cir. 1971) has apparently ruled that air piracy is a general intent crime. If so, it would seem extraordinary to require only a general intent in a felony punishable by death.
41. *United States v. Z-- B--, et. al.*, U.S. Court of Appeals for the Second Circuit, Docket No. 77-1332, appendix B. In addition to the statements of the defendant and his relatives, there was information which made me believe that the political, historical, and social situation was as described by the defendant, and that the defendant's fears for his own life had a reality basis.