

Reviews

The Insanity Defense. By *Abraham S. Goldstein*. New Haven: Yale University Press, 1967. Pp. vii, 289. \$6.00.

As the author observes in the introduction to this book, "preoccupation with the insanity defense" has produced "a voluminous literature, beginning in the nineteenth century and reaching near-torrential proportions in the twentieth." Nevertheless, "despite the age and the intensity of the debate," Professor Goldstein regards the present as an opportune moment to add to the "thousands of pages" already devoted to the subject—a judgment which is fully justified in the result. His contribution is informed, concise, and original, as well as eminently readable, commendably free from jargon, and scrupulously documented.

At the very outset the author acknowledges that the insanity defense (broadly defined as governing "the extent to which men accused of crime may be relieved of criminal responsibility by virtue of mental disease") is part of the tradition which makes the notion of "blame" or "desert" an essential element in any criminal conviction. If it were not for the importance attached to *mens rea*, and in consequence to the punitive character of criminal proceedings, it would not matter whether the *actus reus* was committed by a person of sound or unsound mind. At the same time the defense itself has not been static, but has had to be "as variable in purpose as the concept of crime itself," accommodating itself first to a criminal law which was primarily retributive, then to "one which tried to put retribution aside in favor of deterrence, and, more recently, in favor of rehabilitation." Today, however, when single-function theories of the criminal process are no longer acceptable, and when psychiatry is playing havoc with traditional notions of guilt, a clamorous demand has arisen for the rules of the insanity defense to be reformulated in the light of "the insights of modern psychology."

Professor Goldstein does not think such reformulation necessary. He goes along with "modern psychology" so far as to agree with the critics of the McNaghten rule that a purely cognitive test of insanity is inadequate. But he is emphatic that portraying *McNaghten* "as rigid and narrow and condemning it wholesale would seem . . . to be unjustified." He is able, moreover, to cite as evidence that *McNaghten* is, in practice, often given a liberal interpretation. Thus the word "know"

can be understood in more than a narrowly intellectual sense to include emotional appreciation of the true significance of an act, and realisation of its consequences with "full emotional clarity"; and a judgment of the Supreme Court of Wisconsin is quoted to the effect that if the testimony

had sufficiently tended to prove that at the time of the offense, defendant was subject to a compulsion or irresistible impulse by reason of the abnormality of his brain, the testimony should have been admitted. Even under the right-wrong test no evidence should be excluded which reasonably tends to show the mental condition of the defendant at the time of the offense.

So also the phrase "the nature and quality of the act" need not be construed as referring only to the physical characteristics of conduct. Psychiatrists are regularly allowed to testify to their own interpretations, and in no American jurisdiction are juries told that they must put a narrow construction on any of the terms of the *McNaghten* formula. Moreover, psychiatrists have their own way of escaping from any *McNaghten* dilemma. Those among them who believe that the equation of insanity and psychosis has results which "may be contrary to law but which are justified by a higher moral obligation" adopt the simple device of answering "no" to *McNaghten* questions even when they believe a "yes" is required. This is called sacrificing "honesty" in order that "psychiatric truth" shall carry the day. In short, as Professor Goldstein sees it, the trouble is that both lawyers and psychiatrists insist on this identification of insanity with psychosis, the former because they believe insanity to be a medical entity, and the latter because they believe that nothing but psychosis will satisfy the law's requirements. If only the lawyers would reject the stereotyped view of the insanity defense and begin to play a "more aggressive role," the "nagging questions" about *McNaghten* would soon be answered.

Lawyers, of course, can play highly sophisticated tricks with language; but how far lay juries can follow them is more doubtful. It is, therefore, hardly surprising that in a number of states (as also in the federal jurisdiction) an additional clause has been tacked on to the *McNaghten* language questionnaire to cover emotional abnormalities resulting in loss of self-control as well as cognitive deficiencies. Although Professor Goldstein is clearly sympathetic with the objective of these additions, he dislikes the use of the term "irresistible impulse" in this connection on the ground that it may be understood to imply surrender to a *sudden* urge, whereas loss of the capacity for self-control

due to mental disease ought equally to be a defense to crimes that have been carefully planned in advance. If these words are retained, Professor Goldstein would tell the jury that an "impulse may be the result of long . . . brooding and reflection"; he himself, however, would prefer to drop all reference to "impulse" and to refer simply to "control" in phrasing such rules.

In short, the *McNaghten* rules if properly interpreted and perhaps supplemented by a "control test," are not, in the author's judgment, the villains of the piece. Nor does he think that the invention of alternatives—notably the much-vaunted *Durham* formula—has done much to improve matters. "Durham's principal contribution has been less as a 'solution' to the insanity problem than as a dramatic demonstration that there are no solutions." Simple as the formula sounds, it leaves the jury to wrestle with the definition of mental disease (and this at a time when psychiatrists and sociologists are subjecting the concept to "withering attack"), and also with the no less elusive problem of how a crime can be said to be the "product" of such a disease. Even the recommendation of the American Law Institute's Model Code (already adopted in five states and two federal circuits), although praised by Professor Goldstein as a "modernized and much improved rendition of *McNaghten* and the 'control' tests," does not shake his conclusion that the various tests do not really differ much one from another, and that liberalisation is as likely to come through more flexible interpretation of the old rules as through invention of new ones.

The author will not, however, allow us to jump to the conclusion that that is the end of the matter, or that every offender who can legitimately plead not guilty on account of insanity will in fact be tried and acquitted on that ground. About 90 per cent of all those charged with criminal offenses plead guilty, and among these there must be many mentally sick persons who could properly advance a defense of insanity. But defendants who are unrepresented by counsel, as many have been hitherto, may well leave the issue unnoticed and untried; and those who do plead insanity encounter formidable procedural obstacles. Thus, if they are "indigent" persons, they are handicapped by not being able to employ their "own" psychiatrists, as the well-to-do would as a matter of course. Even in those states which provide for psychiatrists to be employed by the court itself, so as to avoid the "battle of experts," the defendant runs the risk that the evidence of the supposedly impartial expert may support the prosecutor's case, in which event he is left without any psychiatrist to speak for him at all. Since Professor Goldstein would deny that there can be any such thing

as impartiality in matters as controversial as those that are likely to be raised in an insanity defense, he rejects court-appointed psychiatrists as a panacea. Indeed, he goes so far as to suggest that even the law's presumption of sanity in the absence of evidence to the contrary amounts to a weighting of the scales against those who would plead insanity. The reason for this presumption, he says, is not that it is "demonstrable that most offenders are sane," but that judges prefer to "err on the side of a policy which imposes criminal responsibility."

Again, many possible candidates for the insanity defense never get to court at all. Even in states where the police are required by statute to prosecute *all* crimes coming to their notice, they exercise in fact a wide discretion in deciding whether an apparent offender should be ignored, or directed to a "helping" agency or dealt with by some form of civil commitment; and if a policeman decides not to charge someone whom he regards as insane, he is in effect "determining at the outset the very questions that the insanity defense is designed to reach at a later stage."

The ranks of those who plead insanity are, moreover, reduced still further by the expectation that success will only result in indefinite incarceration in a mental hospital. Nor can the accused be confident that he will be treated no differently in such a hospital from those who are detained as the result of civil commitment. "When the patient has been committed after a charge of serious crime . . . the medical aspects of the problem are inevitably affected by the public or 'legal' aspects of the case." "Psychiatrists will be sorely tempted to 'play it safe' and to wait out the years, giving greater weight to nonmedical considerations than would be the case if a criminal charge had not been involved." Continued restraint in fact ceases to be therapeutic and becomes a "device for preventive detention," a "way of protecting society from the risk that new crimes will be committed by the patients upon their release." As a safeguard against such excessive caution, Professor Goldstein clearly inclines to the view that, exceptional cases apart, detention for "treatment" should not continue beyond the limit of the sentence which might have been imposed had no question of insanity been raised. In other words the insane ought to enjoy the benefit, even if they do not suffer the rigors, of the criminal law.

From all this it is only too apparent that, in spite of all the thousands of pages written on the subject and of all the ingenuity devoted to the formulation of new rules, no clear and logical defensible line has yet been drawn between the wicked and the weak-minded; nor can we be confident that the insanity defense protects anywhere near

all those who might reasonably claim, even under the law as it now stands, to be outside the permissible reach of penal measures.

In Britain, the boundary between the criminal and the medical is no less confused. A defendant dealt with under any one of three relevant statutes may find himself part patient, part criminal. Thus, under the Criminal Justice Act of 1948 an obligation to undergo either residential or non-residential mental treatment may be written into a probation order (the terms of which in any case require the subject's consent). To that extent the probationer is transformed into a patient. Rather surprisingly, no specific diagnosis is required: all that is necessary is that the offender's mental condition should appear to the court, on the evidence of only one medical practitioner experienced in the diagnosis of mental disorders, to be such as requires and may be susceptible to treatment. The number of cases dealt with in this way increases very slowly year by year: in 1966 the total stood at 1,348, which is only about 2½ per cent of all the probation orders made in that year. What is interesting, however, is that probation conditioned upon mental treatment is by no means confined to sexual or violent offenders. In 1966, 440 persons convicted of larceny and 184 convicted of house- or shop-breaking were required to undergo mental treatment as a condition of their probation, as against 161 persons convicted of either homosexual or heterosexual offenses and 42 convicted of assault or malicious wounding. History does not relate just what peculiarities may have induced the court to prefer medical to strictly penal treatment in cases of offenses against property; but, whatever his crime, the probationer who fails to conform to this or any other term of his probation can be brought back to court and punished for his original offense. His status as a patient is thus contingent upon good behavior, and any lapse may result in his return to the ranks of the criminal, and to a substitution of penal for medical treatment.

It is, however, in the diminished responsibility clause of the 1957 Homicide Act that the most determined effort has been made to escape from what was felt to be the McNaghten straitjacket. Under Section 2 of this Act a charge of murder can be reduced to manslaughter if the defendant can establish that he was suffering from "such abnormality of mind . . . as substantially impaired his mental responsibility for his acts." Impaired responsibility is not, of course, in itself a disease known to medical science, so the door is left wide open for evidence to be adduced that the defendant's condition was due, in the words of the Act, to "arrested or retarded development of mind," to "any inherent causes" or "to disease or injury." A successful defense on these lines is

enormously more appealing than an old-style plea of insanity, inasmuch as a manslaughter verdict leaves the court complete discretion as to sentence, which can range from life imprisonment to absolute discharge; whereas indefinite detention during "Her Majesty's pleasure" is the inevitable result of a verdict of insanity. It is not surprising, therefore, that diminished responsibility has practically ousted insanity in murder cases. In 1956, the last year before the Homicide Act came into force, 32 people were convicted of murder, while 18 were found to be "guilty but insane" (as the "special" verdict was then worded). In 1966, 72 persons were found guilty of murder, and only one was found to be "not guilty by reason of insanity"; but at the same time 51 others were convicted of manslaughter under the diminished responsibility section of the Act.

A term so vague as "diminished responsibility" has naturally been stretched to cover all manner of diametrically opposite conditions. In the case of a defendant whose previous record has been impeccable, it can be argued that his responsibility must have been impaired for him to commit a crime so far out of character. Alternatively, it may be said that one who has had a long criminal history clearly never could have been fully responsible. Even those murderers who might well be regarded as exceptionally responsible have managed to creep under the diminished responsibility umbrella, as when an Army Major, after serious study of the prognosis for mongolism, decided to smother his mongoloid baby, and got away with a diminished responsibility manslaughter verdict and a sentence of 12 months' imprisonment. It seems, in fact, that this clause is becoming not so much a means of sifting the mentally disordered from the fully responsible, as a device, in cases where there are obvious mitigating circumstances, for dodging the obligatory sentence of life imprisonment which follows a verdict of murder. In this connection it is perhaps significant that, in the House of Lords debate in 1965 on the Murder (Abolition of Death Penalty) Bill, the Lord Chief Justice argued that this obligatory sentence ought to be abolished, and the distinction between murder and manslaughter obliterated, so that a Court could impose, in any case of homicide, the sentence which in all the circumstances appeared to be appropriate. It was, he said, "a horrifying experience" to have to sentence the perpetrator of a mercy killing to life imprisonment. Juries also, one imagines, must be alive to the horror of this experience, and may well be disposed to clutch at diminished responsibility simply as a means of avoiding it, and without much regard to relevant psychiatric evidence.

In law, however, anyone convicted under Section 2 of the Homicide

Act is held to be suffering from an abnormality of mind as the result of disease, injury or mental retardation, and must therefore be regarded as a sick man. But it does not follow that he will be treated as such. On the contrary, he stands a good chance of being sent to prison either for life or for a specified term like any responsibly guilty criminal. Until the end of 1960 this could perhaps have been justified on the ground that no obvious alternative was available; but since that date it has been open to the Court to make a hospital order instead of passing sentence. Yet between 1961 and 1966 the proportion of diminished responsibility cases in which a hospital order has been substituted for a sentence has never exceeded 60 per cent and in some years has been as low as 42 per cent; the others, with few exceptions, were sent to prison. Of those imprisoned a few have subsequently been transferred by order of the Home Secretary to mental hospitals; but of 99 such prisoners, only 12 have been thus dealt with.

The third statute which seeks to direct the mentally disordered into medical rather than penal channels is the 1959 Mental Health Act, which confers on any criminal court the power already mentioned to substitute a hospital order for a sentence. This power is a limited one, however, inasmuch as (1) it applies only to offenses for which a sentence of imprisonment could be imposed and (2) an order can only be made on the recommendation of two doctors, one of whom must have special experience in the diagnosis or treatment of mental disorders, and (3) arrangements for the patient's admission must have been made with a named hospital before the order is made. Moreover, in contrast with both the hospitalization provisions of the Criminal Justice Act and the Homicide Act, a specific diagnosis must be recorded under one of four headings: mental disease, subnormality, severe subnormality, or psychopathic disorder. Incidentally, this last category, though to date narrowly interpreted in practice, is defined in extremely broad terms as a "persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient, and requires or is susceptible to medical treatment"—subject only to the provisos that no one can be pronounced to be suffering from any mental disorder "by reason only of promiscuity or other immoral conduct," and that a psychopath must be diagnosed before he is 21, and cannot ordinarily be detained after he reaches the age of 25.

Once a hospital order has been made, the subject's status officially becomes that of a patient. Even so, however, his position differs from that of patients compulsorily hospitalized under civil procedure. The

offender does not have the right to apply to a Mental Health Tribunal for his release, nor can his nearest relatives at any time demand that his detention be terminated. Moreover, the court which imposes a hospital order also has the power to add a restriction order of either indefinite or specified duration, during the currency of which the patient may not be released without the Home Secretary's consent. This last power clearly has nothing to do with the subject's medical condition and virtually turns the hospital order into a sentence. In any case the idea that a Court can forecast better than the doctors who are in continuous charge of his case whether a patient will be fit to be returned to the community five, ten or fifteen years ahead is patently absurd.

With one accord the critics of the McNaghten formula have directed their fire against its exclusively cognitive standard and its consequent failure to take account of crimes which are due to deficiencies not merely of understanding, but of self-control. This, they say, is tantamount to ignoring the "insights of modern psychology." Professor Goldstein differs from the inventors of rival formulae in contending that McNaghten would be all right as it stands, if only we could make up our minds to interpret it more liberally; but his objective is fundamentally the same as that of all the other critics. Indeed, writing of the early days of the insanity defense, he states categorically that "it was apparent then, as it is now, that there were people who could not control their conduct because they could not respond adequately to what they knew about consequences."

What, however, I think has been insufficiently appreciated is that a volitional test raises practical difficulties far more formidable even than those involved in a purely cognitive formula. I am not suggesting that the McNaghten test, interpreted (as most laymen would surely understand it) in strictly cognitive terms is free from ambiguities, or that it is an adequate instrument for distinguishing between the sane and the mentally disordered. But it is clear that in certain circumstances the limits of a man's knowledge and understanding can be convincingly demonstrated. Thus, if I am asked to translate a passage from Japanese into English it is indisputable that this is beyond my powers: everyone knows that merely trying harder will not make me any more successful. But if I assert that I have an uncontrollable impulse to break shop windows, in the nature of the case no proof of uncontrollability can be adduced. All that is known is that the impulse was not in fact controlled; and it is perfectly legitimate to hold the opinion that, had I tried a little harder, I might have conquered it. It is indeed apparent that some people, such as sadistic sexual perverts, suffer from tempta-

tions from which others are immune. But the fact that an impulse is unusual is no proof that it is irresistible. In short, it is not only difficult to devise a test of volitional competence the validity of which can be objectively established: it is impossible.

Why then retain the insanity defense at all? Toward the end of his book Professor Goldstein raises this question. "Why not," he asks, "substitute a system in which the courts decide only whether the offending act has occurred—and then pass the offender to a 'treatment tribunal' which will take his mental condition into account in determining what is to be done with him?" In any case the procedural difficulties are such that only a small proportion of the mentally sick ever avail themselves of the defense: moreover, "there is little purpose in trying to assess 'blame' because the factors which move a man to crime are too various and too unfathomable."

These arguments are so forcefully put by Professor Goldstein that I for one was convinced that he must be going to come down in favor of them. But no! Having come right up to the fence he swerves away and refuses to take the jump. His final conclusion is that, "despite the superficial plausibility" of the abolitionist proposal, "there are a great many objections to it." In the first place the attempts of the only jurisdictions which have tried to separate the offending act from the mental state of the offender have been singularly unsuccessful if not unconstitutional. Second,

the proposal tends to sweep past the jury and toward the sentencing stage large numbers of "offenders" who would now go free, because they lacked *mens rea*, on the assumption that they would be weeded out by the "treatment tribunal." Experience suggests, however, that prematurely labelling a person an "offender" is more likely than any other single factor to confirm him in a criminal career.

Third, and most fundamental, "eliminating the insanity defense would remove from the criminal law and the public conscience the vitally important distinction between illness and evil, or would tuck it away in an administrative process."

The first of these arguments is obviously inconclusive, at least for those who are not bound by the terms of the American Constitution. The second, I must confess, I find very difficult to understand. Surely it is not true that large numbers of "offenders" *who would now go free*, because they lacked *mens rea*, would be swept past the jury to be sentenced by a treatment tribunal. Professor Goldstein himself has repeatedly emphasized that mentally disordered people who are ac-

quitted on the grounds of insanity do not go free, but are normally committed to mental institutions for indefinite periods.

Clearly the root of the matter is to be found in the third objection. The "vitaly important distinction between illness and evil," writes Professor Goldstein, would be blurred. The "emphasis on whether an offender is sick or bad helps to keep alive the almost forgotten drama of individual responsibility. . . . In short, even if we have misgivings about blaming a particular individual, because he has been shaped long ago by forces he may no longer be able to resist, the concept of 'blame' may be necessary." Thus in the end Professor Goldstein comes back to the point at which he started. Blame, it seems, is essential "as a spur to individual responsibility." The basic purpose of the criminal law is to assign blame to those who deserve it, and the function of the insanity defense is to sort out those whose mental condition should render them exempt from blame. Thus legal orthodoxy prevails in the end.

The law, of course, always requires clear-cut distinctions. The responsible and sane stand on one side of the line, the irresponsible or insane on the other: every single defendant must be appropriately classified. Yet *natura non facit saltum*: in reality we are all strung out along a continuum which reaches from the most responsible to the most hopelessly weak-willed and weak-minded; and in many cases the degree of our responsibility almost certainly varies from time to time in accordance with our circumstances or physiological condition. In short, the "vital distinction between illness and evil" is anything but clear-cut. Indeed the worst feature of all the formulae that have been tried—*McNaghten*, *Durham*, British Homicide Act, or what have you—is their insistence on a hard and fast and totally unrealistic line between the sheep and the goats. Anyone who has followed trials in which this issue has been raised will be well aware of the sophisticated forensic subtleties for which it offers opportunity. Is careful planning of a crime consistent with diminished responsibility? Is it possible that a man should be fully responsible when he seizes a stick in the entrance to a house, but only partially so when he uses it to beat an old gentleman in bed upstairs? In these and the many similar examples which can be culled from trials in which the defendant's *mens rea* is in issue, all contact with reality seems to have been lost.

Clearly the only way to avoid getting entangled in these niceties and absurdities is to demote the concept of blame from its dominant position in the criminal process. If we could emancipate ourselves from the deep-rooted tradition that the basic function of the criminal law is to identify and punish wickedness, all this farcical hairsplitting about

the limits of mental abnormality could be done away with. Questions of the accused's mental condition could be ignored in the actual trial, the purpose of which would be to establish responsibility in a purely physical sense for the *actus reus* without reference to the presence, or absence, of malicious intent. *Mens rea* would thus no longer be written into the definition of every crime. Only *after* the accused's physical responsibility for a forbidden action had been proved would it be permissible to inquire into his mental condition, in order to determine how best he could be dealt with. In other words an offender's state of mind would be regarded as relevant, not to the measure of his guilt, or to the crime of which he should be convicted, but to the choice of the treatment most appropriate to his case.

Although he clearly regards development along these lines as the least desirable of various possible alternatives, Professor Goldstein makes a somewhat cryptic reference, at the end of his chapter on Competing Defenses, to the possibility of "legislative effort" to expand "the number of crimes which abandon *mens rea* and which impose strict liability on the offender." Regrettably, however, he does not pursue the theme beyond a single sentence. Yet is it not inevitable that the complications which modern psychiatry has introduced into traditional notions of guilt, and the total failure of psychiatrists to produce any criteria for distinguishing between wickedness and weakness of mind which can be empirically validated—is it not inevitable that these trends must sooner or later take all the stuffing out of *mens rea*?

Hitherto, of course, strict liability has generally been restricted to such statutory offenses as are generally regarded as of minor importance. In such cases disregard of *mens rea* is defended on the dual ground, first, that the number of these offenses is so enormous that life is simply not long enough to inquire in every case into the accused's motivation or mental state (imagine what would happen, for example, in a busy city court which disposes of some 300 parking offenses in a morning if proof of *mens rea* were required in every case!); and, second, that in any case these offenses are not "truly criminal" and do not involve any serious "moral turpitude."

Yet could not an equally compelling argument be made the other way round; *i.e.*, in favor of eliminating the requirement of *mens rea* from particularly grave offenses such as homicide or rape? Crimes such as these are just as damaging to their victims whether they are the result of calculated wickedness or of insane delusions. Is it not, therefore, proper that anyone who is suspected of having committed such an *actus reus* should be liable to answer for it in a criminal court, what-

ever the state of his mind—so long, that is, as he is not too ill to be able to instruct counsel or to understand court proceedings?

Already there are precedents—occasional exceptions to the rule that *mens rea* is a necessary element in all but minor offenses. Take, for example, the crime known to English law as causing death by dangerous driving. Of the two elements in this offense—dangerous driving and causing death—the first certainly involves no element of intent, while on the issue of negligence the authorities are more than a little confused.¹ It may, however, be presumed that juries would be reluctant to convict a driver who had not been at fault in any way at all. As to the second element in this offense—that of causing death—there can hardly be any question of intent here. In any case, a driver who deliberately drove at someone, intending to kill or injure him, would more likely be charged with murder than with a motoring offense. Nevertheless, the offense of causing death by dangerous driving is regarded as sufficiently serious to be triable only at Assizes.

That a crime in which intent is virtually absent should rank so high in the criminal calendar is remarkable. Its presence there, I suggest, is explained by a peculiarity of the modern industrial world which has no parallel in simpler societies—that is, the fact that more social damage is attributable to negligence, carelessness and indifference than to deliberate wickedness. An obvious illustration is the contrast between the number of persons killed on the roads with the number of deaths due to other forms of homicide. In Britain in 1965 nearly 8,000 persons suffered fatal injuries in road accidents, and more than 1,000 additional deaths were due to accidents in industry; whereas the total known to have been killed by murder, manslaughter and infanticide put together was only just over 200. Roughly the same pattern will be found in any “advanced” industrial society.

There may well be a moral here. For if homicides generally were dealt with on the same basis, that is to say, with as little attention to *mens rea*, as death caused by dangerous driving, the interminable quest for a reliable criterion by which to distinguish bad from sick could at least be abandoned. We should recognize this distinction for the will-o'-the-wisp that it is, and we should at least be relieved of the impossible task of deciding whether a defendant could or could not have acted otherwise than as he did.

Professor Goldstein, however, cannot get away from the idea that the

1. See Williams, *Absolute Liability in Traffic Offenses* (pts. 1 & 2), 1967 CRIM. L. REV. (Eng.), 143, 194.

Court's primary function is to pronounce moral judgments and to apportion blame. "The heart of the distinction between conviction and acquittal by reason of insanity," he writes, "lies in the fact that the former represents official condemnation." Yet he has immediately to admit that the practical importance of this distinction is weakened by the fact that "the acquittal is itself a sanction, bringing with it comparable stigma and the prospect of indeterminate detention"; and he argues that the choice between the two sanctions ought to be left to a jury rather than to experts "because the public can identify with the former but not with the latter Once the distinction between 'blame' and compassion has been made, decisions as to disposition should be made by those who are professionally qualified."

Blame and compassion are not, however, mutually exclusive. The unreal pretense that they are is simply a concession to the supposedly punitive character of the criminal law. Obviously, if the essential purpose of a criminal court is to punish the blameworthy as they deserve, the compassionworthy must be rescued from its clutches. But, were this obsession with the punitive once dispelled, the courts could be free to deal with every lawbreaker in whatever way, consonant with the moral standards of the community, seemed best calculated to discourage future lawbreaking. Their eyes would be on the future, not on the past. Nor need they be bound by rigid diagnostic categories. In this connection there may be something to be learned from the terms already quoted of Section 4 of the British Criminal Justice Act of 1948 under which mental treatment can be prescribed without any evidence of specific mental disorder, provided only that the court is persuaded by appropriate medical evidence that such treatment offers the best prospect of "improvement of the offender's mental condition."

It follows logically that, once the practice of classifying offenders into the wicked and the weak-minded is abandoned, the similar distinction between prisons and hospitals becomes equally inappropriate. Already hybrid institutions, such as Grendon Underwood in Britain and similar establishments in the United States, are beginning to make their appearance; and suggestions that the courts should simply pass "custodial" sentences without specifying under what conditions, penal or medical, this sentence is to be served are much in the air, and much to be commended. Obviously, in the case of sentences of any considerable duration, the court is in no position to forecast what kind of regime will be best suited to an offender several years ahead. Hence the need for a variety of institutions and for easy transfer from one to another without inhibiting labels, at the discretion of those who are in con-

tinuous touch with persons under detention. Nor must this be read as merely a plea for the "soft" treatment of offenders. If the weaker vessels need the protection of a kindly environment, there are others for whom a more demanding regime is certainly indicated; and the response of a single individual to different types of treatment is not necessarily constant throughout his history.

In a world as deeply traditionalist as that of the law, there can be no question of sudden radical change. The crucial issue is to determine the direction in which we are, or should be, travelling.

Here the choice is plain. We can continue to define and redefine the limits of responsibility in an attempt to keep pace with the increasingly subtle pronouncements of psychiatry. In that event, if past experience is anything to go by, the ranks of the blameless will be steadily expanded; and, paradoxically the decision, at any given moment, as to an individual's personal guilt will be contingent upon the contemporary state of medical science. The guilty of today may, a generation later, be safely bracketed with the blameless. Alternatively, the criminal courts may shift their gaze from past guilt to future prospects, and may come to see themselves as agencies for the prevention of criminal behavior.

Such a function would, I imagine, be dismissed by Professor Goldstein as "social engineering"—which prompts the reflection that perhaps the fundamental difference between us is that to him this term appears to carry pejorative overtones.

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Twenty Letters to a Friend. By *Svetlana Alliluyeva* (tr. by Priscilla Johnson McMillan). New York: Harper & Row, 1967. Pp. 246. \$5.95.

Miss Stalin both demonstrates and helps to perpetuate one of the myths of the modern world, the belief that the explanation of what is puzzling on the public stage lies in the realm of private life. There is a small grain of truth here. Sometimes a man's relations with his wife or friends may suggest a new light in which to see his actions as a revolutionary or a statesman. But in general what is crucial in the relationship of private to public life is the irrelevance of the one to the other.

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