

Mental health law and the US judicial system

Disturbing questions raised by the Nathaniel Abraham case

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7 January 2000

The prosecution of 13-year-old Nathaniel Abraham as an adult for the crime of second-degree murder raises disturbing questions about the criminalization of the juvenile justice system and about the absence of mental health protections, rights and legal defenses in his case.

Nathaniel was convicted November 16 on second-degree murder charges for the October 1997 death of 18-year-old Ronnie Greene Jr. in Pontiac, Michigan. Nathaniel, 11 years old at the time, was arrested and charged as an adult under a 1997 Michigan law that sets no minimum age for the prosecution of juveniles as adults for serious and violent offenses. His sentencing hearing is set for January 13, when he could receive up to life in prison.

Many questions related to mental health law and the US criminal justice system are posed by Nathaniel's trial and conviction. Why wasn't there any protection, care or treatment for Nathaniel when his IQ was around 75, he was functioning at a 6- to 8-year-old level, and his mother, Gloria Abraham, had repeatedly sought help for her son? Why was a diminished capacity defense not available at trial to protect the then 11-year-old Nathaniel, who did not understand a great deal of what was going on?

On December 13, US Surgeon General David Satcher issued a 487-page report examining the crisis in mental health care in the United States. According to this study, 50 million people, 20 percent of the population, suffer from some kind of mental illness or disorder each year. Five percent of these are severe illnesses like manic depression, schizophrenia and obsessive-compulsive disorder; nearly 40 percent of the homeless suffer from mental illness or disorders.

The report also notes there have been cutbacks in the facilities providing mental health care, and that the HMO-driven private health insurance industry is cutting per capita mental health care costs more rapidly than other health care expenditures.

The Surgeon General's report stresses that there is a national mental health care crisis because so few people suffering mental health problems get treatment despite the availability of effective therapies. The primary reasons that people do not get help are financial and the social stigma of psychiatric treatment.

At the turn of the century, the Progressive movement challenged the foundations of the criminal law system, which is based on the view that every person is an autonomous, responsible moral agent who should be rewarded for right choices and punished for wrong ones. This view ran contrary to two conclusions that developed among the Progressives. First, their study of the conditions in which people lived, especially in the crowded cities, suggested that poverty and the environment had an undeniable effect, producing criminal behavior. Second, even as Sigmund Freud was formulating and popularizing his psychoanalytic theory, the Progressives believed that the source of deviant behavior was internalized and located in the psychology of an individual.

In both cases, the Progressives were optimistic that society had advanced sufficiently so that scientific knowledge could change human psychology and behavior to correct, cure or rehabilitate people whom the

criminal law system said were guilty of a criminal mind and criminal behavior. Moreover, the Progressives were very conscious of the effects of social stigmas in society. They worked to shield the mentally ill from social stigma, and they were especially concerned to insulate people from the social stigma created by association with the criminal law system and its philosophy of moral condemnation.

The Progressives also doubted the effectiveness of punishment as a general deterrent, and they opposed the theory of retribution as the basis of a criminal justice system. The result of this was, as law professor James Hall observes, "The salient 20th century fact about criminal law is widespread skepticism of punishment.... [R]etribution is sharply disparaged as, at best, a disguised form of vengeance" (Jerome Hall, *Justice in the 20th Century*, 59 *California Law Review* [1971] pp. 752-68).

The Progressive movement did challenge the basic philosophy of the criminal law system that offenders are responsible moral agents freely choosing wrong behaviors, and that therefore they deserve punishment. This philosophy is a primary component of the social stigma surrounding the field of psychology today, and current law and order proponents are aggressively reviving this philosophy.

However, the Progressives did not press this challenge, but concentrated their reform efforts on turning the punishment system into a corrections system committed to the institutional goal of rehabilitation through making prisons similar to hospitals and creating probation, parole, custody and indeterminate sentencing alternatives to long-term, punitive incarceration.

Professor Francis Allen summed up the outlook of the Progressive reformers, in this field, as one focused on the pursuit of the "Rehabilitative Ideal." He explained how "in no other period has the rehabilitative ideal so completely dominated theoretical and scholarly inquiry, to such an extent that in some quarters it is almost assumed that matters of treatment and reform of the offender are the only questions worthy of serious attention in the whole field of criminal justice and corrections" (Francis A. Allen, *Criminal Justice, Legal Values, and the Rehabilitative Ideal*, in 50 *Journal of Criminal Law, Criminology & Police Science* [1959] p. 227).

The book *Back to the Asylum: The Future of Mental Health Law and Policy in the United States* written by John Q. La Fond and Mary L. Durham divides the recent period from approximately 1960 to the present into two eras based on changing attitudes toward mental health treatment and the law. The authors call the first period the Liberal Era which they regard as another period of reform, like the Progressive era, in which there were widespread attempts to revive the rehabilitative ideal, eliminate the social stigma of mental illness, and provide more and better mental health care treatment, rights and protections under law. They contrast the Liberal Era, approximately between 1960 and 1980, to a period of reaction against these reforms from 1980 through the 1990s, which they call the Neoconservative Era. They associate the latter period with outlook of law

and order, and the return to the principles of strict moral agency and responsibility of the old criminal law.

The symbol of the relationship between the two eras and the principles of strict moral agency and responsibility of the old criminal law, and a more determined, psychological view of human existence, is the status of the insanity defense in criminal law. The insanity defense raises the scientifically and politically accepted conception of mental illness and disability on society's scale of justice to the point that it outweighs a certain portion of the criminal law's philosophy of full rational capacity and free moral agency that create criminal culpability. The diminished capacity defense was developed as a psychological step-down from the insanity defense in the Liberal Era.

Until the beginning of the Liberal Era, the insanity defense was based on the rule established in the *M'Naghten* case which had been handed down by the British House of Lords in 1843. The Lords ruled, "It must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong," and this became the insanity test for more than a century.

The *M'Naghten* rule defined the insanity defense throughout the United States until 1954. Then it was expanded by Judge David Bazelon's decision in the *Durham* case in the District of Columbia. *Durham* held that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Judge Bazelon worked with a group of psychologists and psychiatrists to develop this new, expanded definition of insanity.

The prestigious American Law Institute began meeting in 1953 to draw up a new Model Penal Code that could be adopted by the states. Criminal law systems are primarily the responsibility of the individual states in the United States. After years of study, in 1962 they issued what became called the "ALI test." It tightened *Durham* a little bit, but it was nevertheless a marked liberalization of the *M'Naghten* rule because it recognized both cognition and volitional impairment. Volitional impairment, which was not recognized by *M'Naghten*, has frequently been described as the irresistible impulse; whereas cognitive impairment only concerns understanding the quality of the act.

From the time of the publication of the "ALI rule" in 1962 up until 1980, all the federal court circuits except one adopted the ALI insanity defense test. By 1980, more than half the states had adopted the ALI insanity test as well. This expansion of the insanity defense to include irresistible impulses, was also based on extensive collaboration between legal reformers and experts in the mental health field, psychologists and psychiatrists. It was a major, but short-lived reform of the Liberal Era.

It took over a century to change the *M'Naghten* rule. In less than 20 years after the publishing of the liberal "ALI test," the new test was overwhelming adopted by the federal courts and over half of the states. But within five years, the widespread acceptance of an expanded insanity defense and the creation of additional diminished capacity defenses, there was a dramatic change in social outlook, and the insanity defense was nearly abolished.

Newly elected President Ronald Reagan spoke for the law-and-order viewpoint of the political right which had gained ascendancy in 1980. These forces insisted that criminals were evil people who chose to commit their crimes in a fully conscious way. In 1981 Reagan signaled this change when he addressed the International Association of Police Chiefs in New Orleans on September 28. He told the police chiefs, "It's obvious ... that deprivation and want don't necessarily increase crime.... The truth is that today's criminals, for the most part, are not desperate people seeking bread for their families. Crime is the way they have chosen to live." The law-and-order forces said the solution to society's problems was to criminalize and punish more people, and they were very much in favor of abolishing

the insanity defense entirely.

After a jury found that John Hinckley, the man who attempted to assassinate President Reagan on March 30, 1981, was "not guilty by reason of insanity," the law-and-order forces concentrated their attack on the insanity defense. As a result, the progressive ALI insanity defense was rolled back, diminished capacity defenses disappeared, the insanity defense itself was nearly abolished, and psychiatrists and psychologists were barred from testifying on the ultimate legal issue of the insanity defense—whether or not a person was able to cognize the quality of his or her act.

Congressional hearings on limiting or abolishing the insanity defense followed the *Hinckley* verdict. However, the testimony made it clear that what was taking place was not just an overreaction to a high-profile case. It was unmistakable that a new social outlook and agenda was being introduced to reverse the old reforms.

Testifying before the Senate Judiciary Committee in 1982, President Reagan's Attorney General William French Smith said, "The administration's proposal to reform the insanity defense is one part of a larger program of legislation that would restore the balance between the forces of law and the forces of lawlessness. In recent years, through actions by the courts and inaction by the Congress, an imbalance has arisen in the scales of justice. The criminal justice system has tilted too decidedly in favor of the rights of criminals and against the rights of society."

In 1981, the Attorney General's Task Force on Violent Crime submitted legislation to Congress to abolish the insanity defense and limit the relevance of psychiatric testimony.

Facing an onslaught by the newly installed President and Congress against mental health care reforms symbolized by the insanity defense, little or no opposition to this attack was mounted by legal, psychiatric or medical professionals. The American Bar Association (ABA) had been reviewing their position on the insanity defense before *Hinckley*. A number of mental health issues in criminal law were being addressed beginning in 1981. They were scheduled for formal consideration by the ABA House of Delegates in 1984. After the *Hinckley* verdict, the ABA rushed the Task Force's work.

The ABA Task Force evaluated three alternatives: the "ALI test" which had just won such extensive national acceptance; returning to the 1843 *M'Naghten* rule; or abolishing the insanity defense entirely. The Task Force's Tentative Draft came out in 1983, and it reversed not only the previous 30 years of reform of the insanity defense, but it went backwards nearly a century and a half to favor returning to the discredited, 140 year old *M'Naghten* rule. The draft only apologetically recommended retaining the insanity defense at all, and the drafters justified retention on the basis of a law-and-order perspective. "The basis for the insanity defense is a moral one," the ABA drafters wrote appeasingly, "and this standard retains insanity as a defense to criminal responsibility in order to preserve moral culpability as a fundamental premise for imputing guilt and imposing punishment."

The Tentative Draft explained dropping the volitional element of the insanity defense by concluding that psychiatrists could not determine whether mentally ill offenders had lost volitional control. "Behavioral science," it said, "has not yielded clinical tools for calibrating impairments of behavioral controls." Therefore, they threw out the volitional element of the insanity defense that had its origin in *Durham* in 1954. This recommendation to return the insanity defense to its 1843 form was officially approved by the entire ABA shortly thereafter.

After the *Hinckley* trial, the American Psychiatric Association also refused to challenge these attacks on mental health care rights and protections. It went into full-scale retreat on the insanity defense issue. In 1982, the APA set up a special committee to reconsider the insanity defense. The *American Psychiatric Association Statement on the Insanity*

Defense issued later that year abandoned the “ALI test” that brought forward the volitional or irresistible impulse impairment, and like the ABA, it advocated a return to a narrow conception of *M’Naghten*. The statement glibly explained away its former position saying, “the line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk.”

The Psychiatric Association cowered before the new conservative viewpoint, and refused to justify the insanity defense on the basis of psychiatric or medical science. The reason it gave for not totally surrendering to the law-and-order forces' demand to completely abolish the insanity defense was similar to the ABA's reason. The nation's professional psychiatrists justified the continued existence of an insanity defense because it bolstered the moral integrity of the criminal law, enabling it to more effectively mete out punishment. The APA also advocated limiting the admissibility and relevance of psychiatric testimony.

The American Medical Association, however, went all the way backward. They agreed with the Reagan administration and called for the complete abolition of the insanity defense. In their report *The Insanity Defense in Criminal Trials and Limitations of Psychiatric Testimony*, the AMA issued a crude appeal to abolish the insanity defense. They ignored a century of scientific learning in the field and claimed. “The conventional insanity defense has long been subjected to intense and well-deserved criticism. It has outlived its principal utility, it invites continuing expansion and corresponding abuse, it requires juries to decide cases on the basis of criteria that defy intelligent resolution in the adversary forum of the courtroom, and it impedes efforts to provide needed treatment to mentally ill offenders. As a result, it inspires public cynicism and contributes to erosion of confidence in the law's rationality, fairness and efficiency.”

From that turning point in the early 1980s, the law-and-order agenda of what has been called the Neoconservative era has prevailed against the reforms in the field of mental health care all down the line. The insanity defense was almost abolished and only survived by being driven back to its formulation 50 years before Sigmund Freud. Diminished capacity defenses were rolled back and abolished. And expert psychiatric testimony was barred as irrelevant to the ultimate insanity issue of whether the accused understood the nature and quality of their act. Public health care programs and facilities were cut back, and private insurers found ways to stop funding mental health care.

This reactionary social period has contributed to a situation in which, according to the Surgeon General's report, people cite social stigma and financial problems as the primary reasons preventing them from seeking psychiatric care.

An understanding of this period also helps answer some of the questions about mental health care and the law raised by the tragic and disturbing circumstances of 13-year-old Nathaniel Abraham's conviction of second-degree murder. He had a low IQ, a series of mental health problems for which he could not get help, and difficulty understanding what was going on, but he was convicted because there is no effective diminished capacity defense available to Nathaniel that could protect him, despite his inability to form the required criminal intent.

The influence of this reactionary outlook—which has spread a social stigma over the role of psychiatrists in the courts and enacted rules to limit the relevance of psychiatric testimony in the courtroom—provides some insight as well into why the jury in their deliberations on the guilt or innocence of Nathaniel Abraham, while at first requesting transcripts of the psychiatric testimony in the trial, did not find them sufficiently relevant to wait for them before passing judgment against a child with a history of mental health problems.



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