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George J. Alexander

Santa Clara University School of Law, gjalexander@scu.edu

Thomas S. Szasz

State University of New York, Upstate Medical Center

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MENTAL ILLNESS AS AN EXCUSE FOR CIVIL WRONGS

George J. Alexander* and Thomas S. Szasz**

I. Introduction

Mental illness is one of the traditional excusing conditions for crime. Since Daniel M'Naghten's historical acquittal by reason of insanity in 1843,¹ the issue of nonresponsibility for crime because of mental illness has occupied the attention of legislators, judges, attorneys and psychiatrists, and has resulted in a massive body of judicial decisions and scholarly analyses.² In contrast, the subject of nonresponsibility for *civil wrongs* because of mental illness has received scant attention.³ In this article we intend to bring the discussion of the relation between mental illness and tort up to date.

II. The Concept of Mental Illness

In both civil and criminal cases the concepts of "mental illness," "insanity," and "psychosis" constitute an important part of the legal definitions in issue and thus strongly influence the ultimate determination of responsibility. Yet, the precise behavioral content or operational meaning of these terms is neither clear nor generally agreed upon.⁴ We shall begin therefore with a brief survey of the customary uses of the concept of mental illness.

First, mental illness is not the name of a physical incapacity. The crucial manifestations of mental illness are behavioral, not physical. Second, mental illness may be attributed to a physical disease or injury. A person with neurosyphilis may be said to be "insane" or to have an "organic psychosis," or a drunk person to suffer from a "toxic psychosis."⁵ In such cases, mental illness is attributed to anatomical or chemical alterations in the brain. Third, mental

* Professor of Law and Associate Dean, Syracuse University College of Law.

** Professor of Psychiatry, State University of New York, Upstate Medical Center. The authors wish to thank John T. Owens for his research assistance in preparing this article.

1 M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

2 For a small sampling, see: Goldstein & Katz, *Dangerousness and Mental Illness*, 70 YALE L.J. 225 (1960); Guttmacher, *Implications of the Durham Case Decision*, 3 J. FOR. SCI. 135 (1958); *Insanity and the Criminal Law—A Symposium*, 22 U. CHI. L. REV. 317 (1955); Montrose, *The McNaghten Rules*, 18 Modern L. Rev. 505 (1955); Mueller, *M'Naghten Remains Irreplaceable*, 50 GEO. L.J. 105 (1961); Rome, *McNaughton, Durham and Psychiatry*, 34 F.R.D. 93 (1964); Sobeloff, *Insanity and the Criminal Law*, 41 A.B.A.J. 793 (1955); *Criminal Responsibility and Mental Disease*, 26 TENN. L. REV. 221 (1959). One of the authors has published his views on the subject in: T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963).

3 See Ague, *The Liability of Insane Persons in Tort Actions*, 60 DICK. L. REV. 211 (1956); Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924); Cook, *Mental Deficiency in Relation to Tort*, 21 COLUM. L. REV. 333 (1921); Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52 (1960); Green, *Public Policies Underlying the Law of Mental Incompetency*, 38 MICH. L. REV. 1189 (1940); Hornblower, *Insanity and the Law of Negligence*, 5 COLUM. L. REV. 278 (1905); Weisiger, *Tort Liability of Minors and Incompetents*, U. ILL. L.F. 227 (1951); Wilkinson, *Mental Incompetency as a Defense to Tort Liability*, 17 ROCKY MT. L. REV. 38 (1944).

4 Ash, *The Reliability of Psychiatric Diagnoses*, 44 J. ABNORMAL AND SOCIAL PSYCHOLOGY 272 (1949).

5 D. HENDERSON & I. BATCHELOR, PSYCHIATRY Ch. 15 (9th ed. 1962).

illness may be attributed to a psychological disorder or stress. Thus, persons without demonstrable disease or injury of the body may be considered to be mentally ill. For example, a young adult who neglects his personal hygiene and refuses to study or earn a living may be diagnosed as "schizophrenic" or as suffering from a "functional psychosis."⁶ In such cases the mental illness is attributed to and is also the name of a malfunctioning of the personality. Finally, mental illness may be used as a socially acceptable excuse or pretext for claiming non-responsibility for socially deviant or legally prohibited conduct. For example, a young man accused of murdering his fiancée may claim that he was temporarily insane (with jealousy, perhaps) at the time of the killing. Yet, when making this claim, he may be in good bodily and mental health, both according to himself and the medical experts who examine him.

These examples illustrate the difference between the theoretical and the practical definitions of the concept of mental illness. Theoretically, mental illness may be defined as "unsoundness or derangement of the mind."⁷ Practically, the concept of mental illness must be broken down into two distinct components: a biological or behavioral condition and a social role.⁸

When we say that a person is ill (bodily or mentally), we may mean two things: first, that he displays an abnormal biological or behavioral condition; or second, that he occupies a deviant social role. For example, a person suffering from pneumonia displays symptoms of an abnormal biological condition (cough, fever, increased white count, clouding of the lung fields on X-ray examination). Similarly, a schizophrenic person displays evidences of an abnormal behavioral condition (incoherent speech, neglect of personal hygiene, assertion of a false personal identity). These characteristics, usually identified by a physician, signify that the person is in an abnormal condition called "illness." Usually, but not always, individuals assume the sick role because they suffer from a condition identified by a physician as an illness. Sometimes, however, a person diagnosed by physicians as sick contends that he is not; and sometimes a person diagnosed by physicians as not sick, contends that he is. In short, there is no fixed logical or empirical connection between illness as a condition and illness as a role. This is because illness as a condition is something that *happens* to a person. It is in this sense that a person "falls ill." The sick role, however, is usually the result of something that a person *does*. It is in this sense that we say that a person "acts ill" or decides to assume the role of patient.⁹ For example, a person suffering from pneumonia may call his physician and be admitted to a hospital for treatment; he then assumes the sick role. Another such individual, however, may eschew medical care, and seek instead the services of a Christian Science practitioner, he then does not assume the sick role. Similarly, a person suffering from mental illness may seek the services of a psychiatrist and be admitted to a hospital for treatment; he then assumes the

6 *Id.* at ch. 11.

7 WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1965).

8 Szasz, *Scientific Method and Social Role in Medicine and Psychiatry*, 101 A.M.A. ARCH. INT. MED. 228 (1958).

9 See generally, R. PETERS, *THE CONCEPT OF MOTIVATION* (1958); T. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961); and C. RYCROFT, *PSYCHOANALYSIS OBSERVED* (1967).

role of mental patient. Frequently, however, as in the example of the schizophrenic cited above, such a person behaves as if he wanted to be left alone; if so, he does not assume the sick role but may be cast into the role of mental patient against his will.¹⁰

Many people believe that all diseases, including mental illness, are abnormal biological conditions.¹¹ This narrow view ignores the concept of social role as part of the larger concept of sickness. Thus, the crucial question of whether the individual is cast into or assumes the role of mental patient is left obscure. This mystification is then used strategically, either by the patient to advance his interests or by the patient's adversaries to advance their interests.¹²

The medical evidence used to support or refute the presence or absence of mental illness, in both civil and criminal actions, will be rational and sensible only to the extent that our concept of mental illness is rational and sensible. In nonpsychiatric medicine, disease means an abnormal biological condition of the body. In psychiatry, however, disease means an abnormal behavioral condition of the person. Hysteria, depression and schizophrenia are considered mental diseases because in such conditions the conduct of the individual deviates from normal moral and social standards.¹³ Thus, it is evident that the differences between these two categories of disease are far more significant than their similarities.

The assessment of biological deviations is the legitimate task of physicians. Only medical experts have the requisite knowledge to ascertain whether an electrocardiographic tracing or an X-ray is normal or abnormal. However, according to the traditions of Anglo-American law, assessment of social standards of behavior is the task of the legal profession and lay juries. The nonmedical character of psychiatric determinations of mental illness may be illustrated by means of some examples. In the case of a murder trial, like that of Jack Ruby, some psychiatrists may testify that the defendant committed the act while he was insane, whereas others may testify that he committed it while sane.¹⁴ The experts on both sides base their judgment on observations of the accused person's behavior, obtained through either direct observation in the clinical interview, the reconstruction of behavior by means of the subject's own statements about past events, or the reports of other observers. Only in the rarest cases, where behavior is grossly impaired, is reference to strictly medical evidence (to disease or injury of the brain) conclusive support for the claim that the subject is incompetent. Ordinarily, such disease or injury is either nonexistent or, if present, interpretable as either a sufficient or an insufficient indicator of incompetence.

10 See generally, T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* (1963), especially chapter 12.

11 E.g., Kallman, *The Genetics of Human Behavior*, 113 AM. J. PSYCHIATRY 496 (1956); Meehl, *Schizotaxia, Schizotypy, Schizophrenia*, 17 AM. PSYCHOLOGIST 827 (1962); L. KALINOWSKY & P. HOCH, *SOMATIC TREATMENTS IN PSYCHIATRY* (1961).

12 Szasz, *The Uses of Naming and the Origin of the Myth of Mental Illness*, 16 AM. PSYCHOLOGIST 59 (1961); Szasz, *Psychoanalysis and Taxation: A Contribution to the Rhetoric of the Disease Concept in Psychiatry*, 18 AM. J. PSYCHOTHERAPY 635 (1964).

13 See, e.g., Reider, *The Concept of Normality*, 19 PSYCHOANALYT. Q. 43 (1950); Szasz, *The Myth of Mental Illness*, 15 AM. PSYCHOLOGIST 113 (1960); D. OFFER & M. SABSEIN, *NORMALITY* (1966).

14 M. BELLI, *DALLAS JUSTICE* 169-216 (1964); J. KAPLAN & J. WALTZ, *THE TRIAL OF JACK RUBY* 209-63 (1965).

In such cases, psychiatrists rely on what they call clinical judgment.¹⁵ It is important to keep in mind that the evidence the psychiatrist works with is behavioral, and thus his final judgment is an opinion about the socioethical normality of conduct. This explains how Freud could find President Wilson a seriously mentally sick individual,¹⁶ whereas others considered him the paragon of mental health. Physicians agree on the biological standards of bodily health; accordingly, they can agree that it is better not to have tuberculosis than to have it. Psychiatrists, however, do not agree on the moral standards of mental health; accordingly, they cannot agree whether it is better to read the Bible every day than not to do so.

If it is indeed true that the medical evidence underlying the assessment of mental illness or insanity is grounded upon a moral and social judgment of personal conduct, then a significant inference for law must be drawn from this fact. To the extent that personal conduct is public it is visible to experts and laymen alike. To prove or disprove that an individual has engaged in a certain kind of action requires conformance to the judicial principle of due process. If, for example, a person is accused of having sexually exhibited himself, and if he denies the accusation, it is necessary for the prosecution to present convincing evidence that the defendant is guilty. On the other hand, if the accusation is couched not in the concrete terms of an offense, but in the abstract terms of a mental illness, a person in effect is accused of a type of misconduct and may be cast into the role of deviant without it having been shown that he had actually engaged in any socially deviant or legally prohibited act. Only overt acts are considered publicly visible and fit for judgment by a lay jury. The mythical condition called mental illness, however, is considered visible only to the psychiatrist (just as a smudge on an X-ray film is "visible" only to the radiologist), and must therefore be judged by medical experts. The public judgment of social conduct based on common sense (the prevailing norms of the community) is thus displaced by a private judgment of it based on quasi-medical criteria (the moral sense of psychiatrists).

It is impossible to appreciate the significance of the concept of mental illness without paying due attention to the social consequences of being identified as mentally ill. The mentally ill person is held not responsible for any criminal act he may have committed.¹⁷ At the same time, he is treated as a member of a special class of inferior persons (in some ways similar to children) who cannot care for themselves and whose conduct may therefore be legitimately controlled by the state. Persons exculpated from criminal responsibility because of mental illness are usually confined in mental hospitals, often for longer periods than they would have to serve had they been convicted of the offense with which they were charged.¹⁸ Persons excused from social ineptitude because of mental illness lose such rights as the freedom to administer their possessions,¹⁹ to make con-

15 D. HENDERSON & I. BATCHELOR, *supra* note 5, at 419.

16 S. FREUD & W. BULLITT, *THOMAS WOODROW WILSON* (1966).

17 J. MILLER, *CRIMINAL LAW* § 36 (1934).

18 *E.g.*, The tragic case of Mr. Frederick Lynch in T. SZASZ, *PSYCHIATRIC JUSTICE* 226-45 (1965); *cf.* *Dennison v. State*, 49 Misc. 2d 933, 267 N.Y.S.2d 920 (Ct. Cl. 1966).

19 AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* ch. 9 (1961).

tracts,²⁰ to marry or divorce.²¹ Once so handicapped, they stand in constant threat of incarceration through civil commitment.

In short, though persons deemed irresponsible are considered in need of special care and treatment, society allows escape from responsibility only at the cost of imposing serious deprivations of civil liberties.²² Thus, to be classified as irresponsible is to be placed in a class of inferior persons. If such classification is imposed on a person against his will, it is — regardless of the benevolent or therapeutic intentions of the classifiers — very similar to overt punishment and ought to be treated with the same concern for individual rights that is displayed in criminal law.²³

III. The Legal Implications of Mental Illness in Civil Wrongs

Treating mental illness as a problem in personal conduct rather than as a medical illness has far-reaching implications for the law of torts. The simplest argument regarding the legal relation between civil wrongs and mental illness might run this way: in torts, liability is premised on fault;²⁴ since the mentally ill are not in control of their acts they are not at fault and consequently, they should not be liable for their action. Such a superficially appealing resolution of this difficult problem, however, is not very convincing. Generally the courts have rejected the mental illness defense to tort liability.²⁵ Those who would have the law absolve the mentally ill from civil responsibility²⁶ might, insist that the psychiatric and societal view of mental illness has changed substantially since the policy was last carefully examined.²⁷ It is equally true that the concept of fault in tort law also has changed. In the early stages of tort law the concept of fault had an extremely subjective application. A person was responsible for the damage he caused not only because he caused it, but also because he was morally to blame for it.²⁸ At present, while the fault concept is still intrinsic to tort liability, fault is interpreted in a more objective manner. Culpability turns more on a consideration of the societal judgment of the conduct in question than on the actor's motivation.²⁹

People raised in a society learn its taboos and are considered morally blame-

20 *Id.* at 263-64.

21 *Id.* at ch. 7.

22 For a dramatic illustration, see the case of Ezra Pound: J. CORNELL, *THE TRIAL OF EZRA POUND* (1966); and the review of this book, Szasz, *There Was No Defense*, N.Y. Times Book Review, Nov. 13, 1966, at 4.

23 See T. SZASZ, *supra* note 10, at 223-36.

24 Smith, *Tort and Absolute Liability*, 30 HARV. L. REV. 241, 257-59 (1917).

25 The cases are gathered in Wilkinson, *supra* note 3.

26 *E.g.*, Ague, *supra* note 3; Wilkinson, *supra* note 3. Neither author proposes absolute immunity but both strongly urge a partial immunity without giving a definition of its scope.

27 Modern psychology and psychiatry have revealed some information concerning the nature of mental diseases and disorders, but the decisions show little use by either counsel or court of this modern knowledge. In the reported cases the term 'insanity' is used as a blanket term which covers almost anything needing a label. Some of the generalities pushed around in an effort to create the appearance of reason show but slight progress since the witch-burning days of Lord Hale. Wilkinson, *supra* note 3, at 57.

28 Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954, 966 (1918).

29 W. PROSSER, *TORTS* 17-18 (3d ed. 1964); Vold, *The Functional Perspective for the Law of Torts*, 14 NEB. L. REV. 217 (1936).

worthy should they violate them. There are some cases, however, that test the difference between subjective fault and its objectified counterpart. *Garratt v. Dailey*³⁰ is such a case. In *Garratt* an infant pulled a chair out from under an arthritic woman who was seriously injured in the resulting fall. The woman sued the boy using the tort theory of battery which requires proof of the intention to commit the act in question. The trial court posed the issue of the intention to injure subjectively, finding that the defendant

*did not have any wilful or unlawful purpose [in pulling the chair out] . . . he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact with her person . . . [and] did not have purpose, intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff.*³¹

On appeal, however, the Supreme Court of Washington thought the test had been improperly chosen. The court observed that:

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. . . . The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault or battery on her would not absolve him from liability if in fact he had such knowledge. . . . Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair and, there being no wrongful act, there would be no liability.³²

The relevant question, then, is whether the defendant intended to commit an act, understanding its probable consequences. Beyond those intentions the court will not inquire. The choice of theory here determined the outcome. On remand, the plaintiff recovered \$11,000.³³

In evaluating the moral posture of an actor, it is customary to examine motivation. Ethically, a well-intentioned person may be held blameless even though he has caused serious harm. In tort law, however, good intentions frequently are not exculpatory. Thus, a person guilty of an intentional misstatement may be held for deceit even though his lie was intended to help rather than harm.³⁴ The converse, however, is not true. Courts often punish a person for harm caused maliciously under circumstances in which the same act done in good faith would not be actionable. A public official may be criticized for his official conduct even though the critic acting in good faith may be mistaken about his facts,³⁵ but a similar criticism made with knowledge of its falsity and in an effort to harm him is actionable.³⁶ A person may open up a competitive business with the intention of taking the customers of competitors. If

30 46 Wash. 2d 197, 279 P.2d 1091 (1955).

31 *Id.* at 199, 279 P.2d at 1092.

32 *Id.* at 202, 279 P.2d at 1094.

33 *Garratt v. Dailey*, 49 Wash. 2d 499, 304 P.2d 681 (1956).

34 W. PROSSER, *supra* note 29, at 715.

35 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

36 *Id.* at 279-80.

his only aim is profit, he escapes civil punishment,³⁷ but if it is to drive out a personal enemy, his conduct is actionable.³⁸ Indeed, the malicious intention of harming another by the use of unprivileged, though lawful, conduct may itself establish *prima facie* liability of the actor.³⁹

While it is interesting to note the extent to which the law still takes into account maliciousness of motive in cases which otherwise would not be actionable, for present purposes it is more important to emphasize that the law has become increasingly unreceptive to the use of good intentions as an excuse. Another pertinent doctrine, with a somewhat analogous effect, is that of transferred intent. This doctrine holds a person liable for injury to an unintended victim.⁴⁰ The necessary malevolence directed at the intended victim is transferred to the person actually injured, thus placing a claim in the hands of an individual whose injury was, from the standpoint of the perpetrator, wholly accidental. Similarly, a mistaken belief in one's right to commit an act, although honestly formed, is no defense to a tort action premised on the injury caused unless a countervailing reason makes the conduct privileged. For example, if a person interferes with the property of another by removing it or causing its destruction, he cannot defend an action seeking its value by showing that he reasonably believed it to be his own. His mistake about ownership, while morally significant, is legally irrelevant.⁴¹ A person who trespasses on land in the honest but mistaken belief that it is his own or that he has the consent of an owner, is nevertheless held liable for the damage he caused.⁴²

There are some mistakes, however, that the law will recognize as exculpating. Some of these are: an honest but misguided fear for personal safety, resulting in self-defense;⁴³ a mistaken but honest and reasonable belief by a peace officer that he had valid grounds to arrest for a serious crime;⁴⁴ and the reasonable detention by a storekeeper of a person whom he reasonably believes to have stolen from him.⁴⁵ What distinguishes the exculpatory mistakes from those

37 Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909) (dictum).

38 *Id.*

39 W. PROSSER, *supra* note 29, at 26.

40 Singer v. Marx, 144 Cal. App. 2d 637, 301 P.2d 440 (1956).

41 Poggi v. Scott, 167 Cal. 372, 139 P. 815 (1914).

42 Southern Counties Ice Co. v. RKO Radio Pictures, Inc., 39 F. Supp. 157 (S.D. Cal. 1941); RESTATEMENT (SECOND) OF TORTS § 164 (1965). Comment a. to the section is particularly instructive. In order to be held liable for trespass on land

it is necessary only that the actor intentionally be upon any part of the land in question. It is not necessary that he intend to invade the possessor's interest in the exclusive possession of his land and, therefore, that he knows his entry to be an intrusion. If the actor is and intends to be upon the particular piece of land in question, it is immaterial that he honestly and reasonably believes that he has the consent of the lawful possessor to entry, or, indeed, that he himself is its possessor. Unless the actor's mistake was induced by the conduct of the possessor, it is immaterial that the mistake is one such as a reasonable man knowing all the circumstances which the actor knows or could have discovered by the most careful investigations would have made. One who enters any piece of land takes the risk of the existence of such facts as would give him a right or privilege to enter. So too, the actor cannot escape liability by showing that his mistaken belief in the validity of his title is due to the advice of the most eminent of counsel. Indeed, even though a statute expressly confers title upon him, he takes the risk that the statute may thereafter be declared unconstitutional.

43 Paxton v. Boyer, 67 Ill. 132 (1873).

44 Schneider v. Kessler, 97 F.2d 542, 544 (3d Cir. 1938).

45 RESTATEMENT (SECOND) OF TORTS § 120A (1965).

that are not is a countervailing policy reason for immunity. For example, the injury inflicted in misconceived self-defense is as likely to leave a victim in need of compensation as damage caused in a mistaken belief as to ownership of property. Indeed, the damage is likely to be personal injury rather than property loss and thus should command greater concern. As against this, there are compelling reasons to allow a person self-help when he is under attack from which he cannot safely withdraw. In applying this customary rationale for privilege, it is concluded that one must allow reasonable mistakes for fear of otherwise impinging on a conceded right.⁴⁶ In any event, the law is thought to be incapable of effectively preventing self-defense in such situations, because it comes too naturally to the actor.⁴⁷ In the other cases mentioned, the policy reason is more apparent and less controversial. A police officer is performing an important societal function when he exercises his power of arrest. Under many circumstances he cannot be expected to know enough to make the final determination concerning the validity of the grounds on which he is proceeding. While one may wonder whether the threat of civil liability would actually dissuade many policemen from the performance of what they conceive to be their duty, at least there is a satisfactory reason for concluding that the risk of harm to innocent persons at the hands of honestly motivated policemen ought to be borne by some groups other than the policemen. For the storekeeper, the need to detain a person reasonably believed to be a shoplifter is equally important. As retail merchandising turns more and more to self-service, the danger of shoplifting becomes more acute and the need of a short time for investigation before the customer's departure may be critical. The present rule appears to strike the proper balance between the customer's interest in free movement and the shopkeeper's need for protection. To ensure that it is not too favorable to the shopkeeper, the law requires him to have reasonable grounds for believing that a theft has taken place.⁴⁸

A privilege, similar to that given a police officer, is afforded to private citizens in accomplishing similar functions. Thus, it is generally agreed that a private citizen is privileged in arresting a person who has actually committed a felony or a felony having been committed, a person reasonably believed to have committed it.⁴⁹ Similar privileges attend arrest in cases of attempted felony or lesser offenses committed in the presence of the arresting citizen.⁵⁰ Again, one can see the fashioning of the rule in terms of a close balancing of societal interests.

However, one privilege in which it is difficult to find the balancing of

46 1 F. HARPER & F. JAMES, TORTS § 3.11 (1956).

47 See W. PROSSER, *supra* note 29, at 110. There is every reason to retreat from such arguments. In the first place, they contradict each other. If one is not to be dissuaded from such actions by legal sanctions, then the other reason for including mistaken actions with well-founded ones ceases. Secondly, there is a better-reasoned doctrine in the law which provides that when necessity causes an actor to invade another's interests, his invasion is privileged in the sense that he may not be prevented from committing his act, *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908), but he is not excused from compensation for the damage he has done, *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910).

48 *Collyer v. S. H. Kress Co.*, 5 Cal. 2d 175, 54 P.2d 20 (1936).

49 *United States v. Lindenfeld*, 142 F.2d 829, 831 (2d Cir. 1944); W. PROSSER, *supra* note 29, at 135.

50 1 F. HARPER & F. JAMES, *supra* note 46, § 3.18, at 281-82.

societal interests is that attendant on the apprehension of mentally ill persons. The *Restatement of Torts* takes the view that a person is privileged to apprehend a person who is mentally incompetent if he suspects that such person is about to commit an act likely to cause death or serious bodily harm to himself or to others.⁵¹ While a mistake as to the likelihood of harm is excused if reasonable, a mistake as to the person's mental competency is not. One is left to wonder about the extent to which public policy is asserted in this particular privilege. If there is a public policy favoring the apprehension of mentally incompetent persons, such as protecting the interests of society or the interests of the person apprehended, it ought to lead to a privilege broad enough to encompass reasonable mistakes about a person's mental competency. Indeed, requiring a private citizen to predict the likely outcome in litigation of the question of a person's mental competency places a burden on him that in legal theory he is incapable of meeting, since mental competency is an issue on which psychiatric expert testimony is usually required. On the other hand, if one is hesitant to allow apprehension of mental incompetents unless the force used could be justified either on the grounds of civil arrest or self-defense, then it is questionable why any additional privilege is, in fact, granted.

In connection with exculpatory mistakes, it is necessary to consider the rather artificial distinction drawn at law between mistakes of fact and mistakes of law. While it may be difficult clearly to distinguish mistakes of law from those of fact, the general rule is that one is not excused for a mistake of law, even under circumstances that would excuse one if he relied on a mistake of fact.⁵² Prosser points out that the two major rationales for the distinction leave something to be desired.⁵³ The theory applied to a mistake of law, broadly stated, is that everyone is presumed to know the law and thus to be incapable of being misled by a misstatement of it. Furthermore, the law is thought to be so esoteric that no one would reasonably rely on another's account of what the law provides (unless the asserter were a lawyer) and thus would not make mistakes based on hearsay. Actually, as is true of the other mistakes mentioned, the basic decision can be understood only in terms of policy. To the extent that the law is sound in its distinction, it is so because of results that would follow from allowing parties to deny knowledge of the applicable provisions of governing law. In criminal law, at least, the state might understandably be loath to establish knowledge of the law in each case in which a prosecution was based on violation. It is doubtful, however, that a similarly important reason exists for the rule in civil cases since these cases usually involve an active assertion concerning law for which the actor is responsible and which he seeks to nullify.

What emerges from this discussion is the conclusion that, in mistake cases, the law is balanced rather carefully not only on the matter of whether there is likely to be moral fault by the defendant, but also on the question of whether the legal process can withstand the added concern for proof. For at least some forms of mistake, the further conclusion is that the fault question must be handled

51 RESTATEMENT (SECOND) OF TORTS § 120c (1965).

52 Cf. W. PROSSER, *supra* note 29, at 740.

53 *Id.* at 740-41.

more objectively with an accommodation being made to trial realities or to policy reasons favoring one course of action over another.

Having explored the vagaries of the legal effect of mistake, one can understand why courts might be as reluctant to allow immunity for harm to others caused by mental illness as for harm caused by misinformation as to the title to land. Not only are the policy reasons that create exceptions to the objectivity of the mistake doctrine hard to find in these cases, but any exception would also immediately involve courts in proof problems of extreme difficulty. Thus, some commentators conclude that the mistake doctrine ought to be applied by analogy to the insanity cases, and the insane held responsible for their acts.⁵⁴

It is our contention that this analogy is a too simplistic view of the legal responsibility of the mentally ill. It continues the law's general predisposition to consider insanity as an illness and to attribute the mistaken beliefs to disease. For the class of persons here discussed, the reasoning is curiously circular. While suffering from no known or relevant biological malfunction, a person is declared to be ill because of the mistakes he makes in interpreting reality and reacting to it. His illness consists of the likelihood of continually making similar mistakes. The greater the probability of his doing so, the more serious is the illness. To formulate a rule exculpating the insane would then come close to saying that mistakes must be disregarded if made in small numbers, but must be honored as defenses as they increase quantitatively and in scope. Indeed, as previously pointed out,⁵⁵ the relevant evidence is likely to concern itself with precisely the kind of conduct that classic tort law deliberately disregards. As also noted above,⁵⁶ in tort law it is usually irrelevant that an actor intended no harm, or perhaps even intended benefit, to his victim. That being true, it seems inconsistent to structure a rule which would exculpate because the actor has less capacity to resist inflicting harm than a more inhibited person.

In an article illuminating the liability of the insane,⁵⁷ Professor Bohlen grouped such persons with infants, and then, erroneously we think, equated the liability of the two groups. A review of the differences between the liability of insane persons and infants demonstrates the price paid for legal irresponsibility.

As a general rule children can be said to be liable for their torts to the same extent as adults or, for that matter, insane persons;⁵⁸ but a child is excused if he does not comprehend the probable consequences of his act. Thus in *Garratt v. Dailey*,⁵⁹ as discussed above, the infant would quite properly have been exculpated had he been incapable of understanding that the removal of the chair would result in the plaintiff falling to the ground. There is a strong commitment to exculpation in this type of situation. The child must be capable of understanding the specific consequences of his act, and his general capacity must be specifically evaluated even though a case-by-case examination has in

54 See W. PROSSER, *supra* note 29, at 1029.

55 Notes 13-16 *supra* and accompanying text.

56 Notes 34-39 *supra* and accompanying text.

57 Bohlen, *supra* note 3, at 31-34.

58 *Id.* at 9-10; 1 F. HARPER & F. JAMES, *supra* note 46, at 657.

59 46 Wash. 2d 197, 279 P.2d 1091 (1955).

most other areas been read out of tort law in favor of an objective standard. Although generic rules may guide courts as to children's capacity, in the final analysis the question remains what is the mental capacity of the specific child in question.⁶⁰ Clearly, the child's role in tort law is a protected one. He is exculpated for conduct believed to be beyond his comprehension. At the same time, and as part of the same protection, he is denied the privilege freely to engage in the business of the adult world. Not only is he denied the right to contract in a way binding on himself⁶¹ and thus in a way acceptable to others, but he is also the object of other protective legislation: child labor laws,⁶² laws relating to the morality of minors,⁶³ prohibitions against consumption of alcoholic beverages,⁶⁴ against marriage⁶⁵ and voting.⁶⁶ In addition, children are the subjects of parental discipline and of schoolmarm censure.⁶⁷ Where the parental guidance fails, the law does not pass the rights of decision-making to the child, but rather looks for a substitute decision-maker. Furthermore, court approval is sometimes required for transactions concerning a minor.⁶⁸ The guardianship of natural parents may be temporarily divested so that a court may order emergency care, such as a blood transfusion for a child despite the parents' religious scruples,⁶⁹ or the court may attend to some other emergency that it concludes is inadequately attended to by the parents.⁷⁰ In some cases the present custodian of the child may be divested of his mandate and a new custodian chosen.⁷¹ The decision-maker in custody cases is the state, usually operating through a court, and its decision can be made without consulting the child and, if necessary, in the face of the decision that the child would prefer to make.⁷²

Paternalistic supervision of the activities of the child and decision-making for the child differ significantly from comparable activity on behalf of the insane. However demeaning the role of child may be perceived to be by the child, at least it is a socially acceptable one. The same cannot be said of insanity. Furthermore, childhood is a status that one can, by the mere passage of time, count on outgrowing. Again, the same cannot be said of the status of insanity. Lastly, the matter of children's rights is under periodic review, and societal responsibility is often shared with persons still under the age of contract. For

60 *Charbonneau v. MacRury*, 84 N.H. 501, 153 A. 457 (1931).

61 *Wright v. Buchanan*, 287 Ill. 468, 123 N.E. 53 (1919).

62 *E.g.*, Fair Labor Standards Act of 1938, 52 Stat. 1067 (1938) *as amended*, 29 U.S.C. § 212 (1964).

63 *E.g.*, N.Y. PEN. LAW §§ 70; 483; 483a; 483b; 484; 485-4,5; 486-2,3; 494.

64 *E.g.*, N.Y. ALCO. BEV. CONTROL LAW § 65.

65 *E.g.*, N.Y. DOM. REL. LAW § 15-a.

66 *E.g.*, N.Y. ELECTION LAW § 150.

67 *State v. Pendergrass*, 19 N.C. 348 (1837); 1 F. HARPER & F. JAMES, *supra* note 46, at 290-91.

68 *E.g.*, N.Y. GEN. OBLIGATIONS LAW § 3-105.

69 *E.g.*, *Hoener v. Bertinato*, 67 N.J. Super. 517, 171 A.2d 140 (Juv. Ct. and Dom. Rel. Ct. 1961); *cf.* *Santos v. Goldstein*, 16 App. Div. 2d 755, 227 N.Y.S.2d 450 (1962) ("neglect" found in parents' failure to allow transfusion).

70 *See, e.g.*, N.Y. Fam. Ct. Act, Art. 3 (1963) (neglect proceedings) and especially § 356 (Order of protection) allowing court to mandate proper treatment for child.

71 *E.g.*, N.Y. Fam. Ct. Act, Art. 6, pt. 1 §§ 611-26 (1963).

72 *See Commonwealth v. Lotz*, 188 Pa. Super. 241, 146 A.2d 362 (1958) (mother ordered to send child to father for visitation despite child's protest and prior physical abuse of child).

example, a minor may drive,⁷³ marry,⁷⁴ in New York drink,⁷⁵ consent to intercourse,⁷⁶ and fight in the armed forces.⁷⁷ An insane person, however, cannot count on any of these rights.

The comparison of the legal position of the insane with that of the child illuminates what is, in many ways, obvious: that to deny a person the legal capacity to form intentional acts for which he is held responsible is to diminish, or even deny, his status as a full-fledged human being. Such a person can neither be blamed, nor credited, for his actions. This may be illustrated by the application of this principle to the defamation area. In defamation, the principal aim of a lawsuit is not compensation for the victim; instead, it is a vehicle for restoring his reputation. The jury awards money to the plaintiff in an amount sufficient to clear his name publicly. The amount awarded is symbolic rather than real, since reputation cannot actually be purchased with money. If the plaintiff wins his suit, his legal victory also establishes the correctness of his claim. If, on the other hand, the defendant wins or the plaintiff recovers merely a nominal sum, then the defendant is victorious for the defamation carries the imprimatur of the jury.⁷⁸ How nice it would be for a truthfully defamed person if he lost his suit not on the ground of defendant's proof of truth but on the ground that the defendant lacked the mental capacity to be responsible for his act. To the extent that he could maneuver such a mock battle, he could come close to rebuilding his falsely favorable reputation with the assistance of the court. Thus, we believe that on the balance the present law of torts disregarding the mental condition of the actor⁷⁹ is appropriate.

IV. The Ramifications of Mental Illness as an Excuse for Civil Wrongs

Perhaps the most obvious change that would be brought about by a policy broadening the scope of civil irresponsibility would be unjustifiably to deprive victims of compensation. To refuse the injured compensation is never a pleasant decision, but it is one made throughout the law of torts and thus at least a familiar one. It can be defended, to some extent, by pointing to the societal cost of shifting funds from one innocent person to another,⁸⁰ but this argument does not justify depriving deserving victims of fair compensation. We favor; therefore, the retention of the present rule because of our belief that acts ascribed to insanity are not blameless in the way in which indifferent accidents are.⁸¹

A reason often mentioned in some of the older cases that compensation should be awarded to the victim since this will encourage guardians of incompetents to exercise more control over their charges⁸² must be repudiated. If the

73 *E.g.*, N.Y. VEHICLE AND TRAFFIC LAW § 501-b.

74 *E.g.*, N.Y. DOM. REL. LAW § 25.

75 N.Y. ALCO. BEV. CONTROL LAW § 65.

76 *E.g.*, *People v. Marks*, 146 App. Div. 11, 130 N.Y.S. 524 (1911) (dictum). *See* N.Y. PEN. LAW § 2010.

77 Selective Service Act of 1967, S. 1432, 90th Cong., 1st Sess. (1967).

78 *See* C. MORRIS, TORTS, 284-86 (1953).

79 W. PROSSER, TORTS, 1029-30 (3d ed. 1964).

80 2 F. HARPER & F. JAMES, *supra* note 46, at 754-55; C. MORRIS, *supra* note 78, at 10, 209.

81 *See* T. SZASZ, MYTH OF MENTAL ILLNESS 142-43 (1961).

82 W. PROSSER, *supra* note 79, at 1029.

conduct of guardians is to be controlled, then that should be done on the basis of their negligent conduct rather than in a derivative fashion by casting liability on the insane.

It is also significant that a person dealing with another who might raise the defense of insanity is bound to be affected by the decision made concerning liability for injury. Adults justifiably avoid dealing legally with children because of a recognition of their immunity to suit. Likewise, mentally healthy persons may be expected to avoid dealing with mentally sick ones — indeed, with anyone who might be so classified for various reasons (*i.e.*, previous contact with psychiatrists, poverty, political or religious deviance) — if the mentally sick are held harmless when they injure. Such a policy would thus create a class of irresponsible persons, similar to the class of mental patients. However, persons in this hypothetical class might well be shut off from society and desocialized to an extent surpassing anything with which we are familiar today.

One of the classic tort cases concerning an insane person is *McGuire v. Almy*.⁸³ The plaintiff was a nurse injured through assault by her patient. It would seem that should the patient be exculpated for such an act, there might be a greater reluctance to be a caretaker. Unlike the ever-present parent or guardian in the child's case, a person who is mentally ill may or may not have a guardian. While a process exists for establishing a guardian to supervise a number of actions of an adjudicated incompetent,⁸⁴ many persons who might on trial be found to be insane have no such guardians. Refusal to compensate the victims of tortious acts committed by insane persons would surely leave the insane persons more dehumanized and friendless than they are at present.

No less important than the question of compensating the victim is the question of finding the source of the money that will be used to compensate. In this day of broad coverage for general liability in family insurance policies, it is probable that in a large percentage of cases, the ultimate recourse might be to an insurer. Disregarding the difficult question of whether an insurer is bound by these policies to compensate for intentional acts⁸⁵ as well as the additional complication of whether an act committed by an insane person is intentional for insurance purposes,⁸⁶ it seems legitimate to identify insurance companies as very much parties in the resolution of the question being considered. Where an insurance company is not involved, the money taken from a person mentally ill enough to be exculpated in tort might well be money that could be managed on the tortfeasor's behalf by a guardian appointed for him because of his mental illness. Finally, any money taken from the tortfeasor may ultimately deprive his immediate family and the other potential beneficiaries of his estate. Any member of these groups may be motivated to seek appointment of a guardian. With others so vitally interested in preserving the insane person's assets the result of a rule exculpating the mentally ill is obvious. These people would be strongly motivated to assure that the defense of mental illness was

83 297 Mass. 323, 8 N.E.2d 760 (1937).

84 AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* 223-24, 239-45 (1961).

85 See 1A J. APPLEMAN, *INSURANCE LAW* §§ 481-92 (1941).

86 *Id.* § 482.

raised whenever it was arguably applicable in tort cases. Unlike other defenses that presumably are raised or abandoned at the discretion of the litigant, the defense of mental illness is one which, by its very nature, may be logically imposed on him. After all, if a person is mentally ill enough to be exculpated, can he be sane enough to determine trial strategy?

V. Conclusion

Only recently in criminal law did the courts escape from this logical trap of arguing that one who is mentally ill cannot defend himself. This escape was not gained by confronting and meeting the fundamental problems posed by the criminal responsibility of the insane, but was secured instead by recourse to what can be only a temporary expedient, namely, civil commitment. Before the important decision of *Lynch v. Overholser*,⁸⁷ it was possible for the prosecutor to avoid the rigors of his prosecutorial duty by casting the defendant in the role of the insane and, as it were, proving the defense of insanity for him. Although he cannot do this any longer,⁸⁸ the prosecutor is still free to sidestep his task of proving the accused guilty of a specific offense and, instead, to seek his removal from society through civil commitment.⁸⁹

It is evident that impediments to forcing a defense of insanity on a defendant in a civil action could be swept away more easily than could a comparable defense in a criminal case.⁹⁰ The hasty appointment of a guardian to manage

87 369 U.S. 705 (1962).

88 At least under a statute of the sort in effect in the District of Columbia which mandates confinement of persons acquitted by reason of insanity in mental institutions. D.C. CODE § 24-301 (1967).

89 The Supreme Court asserted that "Congress' basic concern . . . of reassuring the public" concerning persons of unsound mind was provided for by civil commitment. 369 U.S. at 718.

90 Much of the concern for civil liberties of persons accused of crime applies only to the criminal process. Other forms of punishment are treated as less subject to protection. *Lynch v. Overholser*, 369 U.S. 705 (1962) (comparing civil commitment standard to criminal standard). *But see, In re Gault*, 387 U.S. 1428 (1967).

Civil commitment provides the most dramatic illustration of the manner in which persons accused of mental imbalance rather than crime are treated legally. According to Mihm, "No one questions the power of the state to commit to institutions mentally unbalanced persons who become dangerous to the peace and safety of the community." Mihm, *A Reexamination of the Validity of Our Sex Psychopath Statutes in the Light of Recent Appeal Cases and Experience*, 44 J. CRIM. LAW & CRIMINOLOGY 716, 718 (1954). If Mihm means that no one questions that right under present noncriminal procedures, he is wrong. We question it.

Mihm explains, "One of the purposes of these statutes [for civil commitment] is to escape the rigidity of criminal proceedings. The objectives of the act are remedial, therapeutic and preventive. . . . It seeks to cure and prevent rather than punish. The protection of society as well as the benefit of the individual are the main objectives, all of which spells out a civil rather than a criminal proceeding." *Id.* at 719.

It should not be overlooked that the criminal process for *identification* of persons who threaten the state is not inconsistent with the theory of "benefit" to the person involved. A convict need not serve his time in jail; mental hospital confinement is an alternative. (The District of Columbia provisions are discussed in *Lynch v. Overholser*, 369 U.S. 705, 718 (1962).) At least that sort of sentencing is finite. *See Baxstrom v. Herold*, 383 U.S. 107 (1966) (state may not provide for automatic retention beyond sentence). Whether it is more desirable than incarceration in prison depends on one's view of the institutions involved and is far removed from the thesis of this paper. That one could responsibly report that there was no opposition to a process for selecting persons to be confined on a basis less restrictive than criminal due process illuminates how ephemeral the rights of persons accused of mental imbalance are. Can one doubt that, in the context of tort litigation, they would be treated even more cavalierly?

the affairs of an alleged incompetent provides all the legal authority needed in such cases to take over the decision-making function.⁹¹ This raises the specter of an avaricious family rushing to court to prove one of its members mentally ill in order to preserve the family fortune. We might also witness cases in which insurance companies, fearful of the outcome of litigation, would introduce the issue of the defendant's mental illness against the wishes of the insured.

In criminal cases, as well as in civil cases, the issue of mental illness avoids the question of substance that would otherwise be litigated. Thus it is possible that others seeking a favorable judgment will force a defendant to win with an insanity plea when it would be more expensive or more complicated to litigate the substantive underlying issue. An assault victim might find himself cast as insane to avoid the vagaries of jury determination as to who was the aggressor. An alleged defamer might well find his words made meaningless by a determination of his insanity when he could have proven truth.

Unfortunately, the logic does not stop there. It commands one additional step. If a person deemed civilly irresponsible is at large, surely he cannot be allowed to continue to commit torts without compensating his victims. A person enjoying the liberties of a sane citizen, but licensed at law to commit tortious acts with impunity, is unthinkable. The pressure to restrain by incarceration in a mental hospital would seem irresistible, both logically and practically. That it is irresistible in fact is demonstrated by the history of the mental illness defense, especially in the District of Columbia. The Durham Rule,⁹² conceived as humanizing reform, has been open to criticism on precisely this ground. Persons exculpated of criminal offenses because of insanity have drawn longer "sentences" in mental institutions than they would have received in prison had they been convicted of crime.⁹³ Some, no doubt, could not or would not have been convicted. A similar fate for persons accused of civil acts that cause harm would seem extremely unfortunate. So unfortunate, indeed, that this outcome is perhaps the main deterrent to extending the "logic" of mental irresponsibility from the sphere of crimes to that of torts.

91 Decision making is customarily taken over in a pervasive manner. A good illustration is provided by J. CORNELL, *THE TRIAL OF EZRA POUND* (1966). See Szasz, *There Was No Defense*, N.Y. Times Book Review, Nov. 13, 1966, at 4.

92 *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

93 See note 18 *supra*.