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Dangerous Mentally Disordered Criminals: Unresolvable Societal Fear?

REFERENCE: Leong, G. B., Silva, J. A., and Weinstock R., **"Dangerous Mentally Disordered Criminals: Unresolvable Societal Fear?"** *Journal of Forensic Sciences*, JFSCA, Vol. 36, No. 1, Jan. 1991, pp. 210–218.

ABSTRACT: The average person fears dangerous criminals, especially those suffering from mental illness. Existing mental health and criminal justice systems provide social control for some of these dangerous individuals, but may be inadequate to deal with those mentally disordered offenders who were not found not guilty by reason of insanity (NGI). In California, innovative laws have attempted to address this problem. However, putative lack of efficacious treatment of mentally ill criminals, insufficient economic support, and individual liberty concerns loom as limiting factors in solving the criminal and psychiatric recidivism problem posed by non-NGI dangerous mentally disordered offenders.

KEYWORDS: psychiatry, jurisprudence, mental illnesses, dangerousness, mental disorder, criminals, insanity, social control

Mentally disordered individuals who commit criminal acts ignite public passion and legislative response. The average citizen may fear those who are either "mad" or "bad," but the fear of those who are both "mad" and "bad" is greatly intensified [*1*]. The caricature of the psychotic criminal as portrayed in the media, whether fictionalized by the entertainment industry or embellished by news reporting, strikes terror in the mind of the common person. Elected officials have responded to this vexing issue by legislating social control rules to govern dangerous individuals [*2*].

In this paper, the authors first briefly highlight the existing social control mechanisms for dangerous persons. We then discuss the problem of the dangerous mentally ill criminal. "Dangerousness," as used in this paper, refers to an individual's potential for physical harm to others.

Presented at the 42nd Annual Meeting of the American Academy of Forensic Sciences, Cincinnati, OH, 19–24 Feb. 1990. Received for publication 8 Jan. 1990; accepted for publication 2 Feb. 1990.

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Existing Social Control Mechanisms

Social control mechanisms that govern the dangerous mentally disordered and dangerous criminals derive from the government's police powers. These rules vary depending on whether an individual is mentally ill and on the degree of danger posed.

The Dangerous Mentally Ill

Involuntary civil commitment can occur for a person whose actual or potential behavior as a result of a mental disorder reaches a jurisdiction's statutorily defined level of dangerousness. A state's police powers allow the segregation from society and treatment of mentally disordered dangerous persons who are a threat to public safety [*3*]. Such commitment may prevent or forestall entry of the dangerous mentally disordered individual into the criminal system by not allowing the danger to be translated into a criminal act. Alternatively, one legal viewpoint condemns civil commitment on the grounds that potential harm (dangerousness) to others resembles preventive detention. Nevertheless, public safety interests generally override this criticism for short-term commitments. Moreover, from either a legal or a clinical perspective, civil commitment generally involves short-term prediction of violence and time-limited hospitalization, thus making it not a particularly onerous action.

Dangerous mentally ill individuals can return to society. If a mentally ill individual does not meet the statutorily defined level of dangerousness required for continued involuntary commitment, regardless of whether his or her mental illness is in remission, discharge into the community occurs. If a mentally disordered person subsequently becomes more dangerous, civil commitment is again possible. Nonetheless, the "clear and convincing" burden of proof for civil commitment enunciated by the Supreme Court in *Addington v. Texas* [*4*] can be a difficult standard to meet. Rigorous adherence to this judicial level of proof could result in many individuals who are believed, with good reason, to be dangerous being released into the community.

The Dangerous Criminal

Social control of individuals who break societal rules is necessary for any society to function. Each jurisdiction has established specific sanctions for those found guilty of committing a particular crime. The criminal who has committed a physically violent crime fits into this category. Dangerous felons can, however, return to society. If a convicted felon serves his or her prison term and subsequent parole time (if any) without breaking certain rules, he or she is free from further social control whether or not his or her propensity for harmful behavior has actually changed. If a convicted felon re-offends, imprisonment is again possible.

NGI Acquittees

Mentally ill individuals who commit criminal acts can be found not guilty by reason of insanity (NGI). An NGI finding requires that a certain mental state existed at the time of the crime. The statutorily defined mental state and the burden of proof necessary for an NGI finding varies by jurisdiction [*5*]. NGI acquittees are then generally committed to state hospitals for treatment. The commitment term generally parallels that of the penal term for the underlying crime. As an NGI acquittee's psychiatric condition improves, transfer to a less restrictive setting, such as a community-based facility or an outpatient program, may be offered. Transfer from a secure forensic facility to a less secure one or discharge from NGI commitment varies with each jurisdiction's statutory

requirements. For example, in California, "recovery" or "restoration" of sanity and return to the community is possible for NGI acquittees prior to the end of the maximum possible commitment time. However, few physically violent individuals are returned to the community by this procedure. If NGI acquittees are found to represent a statutorily defined level of danger to others at the end of their commitment term, their institutionalization can be extended until they are less dangerous. A recent Supreme Court ruling, *Jones v. United States* [6], has continued to allow such commitment extension. Operationally, an NGI adjudication allows continued, long-term social control over mentally ill criminals beyond what would have been their maximum penal sentence.

Ironically, the public perception of the mentally ill as being able to escape punishment by imprisonment with commitment to a state hospital has limited the use of the insanity defense by adoption of either more restrictive insanity standards or elimination of the NGI option altogether. For example, in 1982 the California electorate adopted Proposition 8, which mandated replacement of the American Law Institute (ALI) insanity test then in use [7] with criteria even more restrictive than those of the M'Naghten test. Parenthetically, the California Supreme Court found these criteria to be overly restrictive and returned the insanity standard to the M'Naghten rule [8]. Excluding many dangerous mentally ill criminals from the NGI system could leave society without a social control mechanism, except for the criminal justice system, for those who present a continuing threat to society as a result of their mental disorder when their sentences are completed and they do not meet civil commitment standards.

The published literature currently reflects conflicting findings regarding the course of NGI acquittees after institutional release. Outcomes for NGI acquittees vary according to the program (and jurisdiction) in which they receive treatment. Most of the pertinent findings from recent studies are summarized below, as they represent the best look we have at the related mentally disordered offender group and their dangerousness.

NGI Acquittee Studies

Type of Mental Disorder

Studies of NGI acquittees indicate an overwhelming preponderance of chronic psychotic disorders found among NGI acquittees. In an Oregon study, 61% were diagnosed schizophrenic and another 6% psychotic [9,10]. In a California study, 80% carried a diagnosis of schizophrenia, with at least another 11% carrying a psychotic diagnosis (and the other 9% carrying a diagnosis of major affective disorder and possibly also psychotic) [11]. In a Hawaii sample, 64% had a psychotic diagnosis [12]. In a New York study, 62.7% of the males and 68.2% of the females had a psychotic diagnosis [13].

Recidivism

Since 1978, the Psychiatric Security Review Board (PSRB) has had the responsibility of overseeing insanity acquittees in Oregon, with public safety as its primary mandate [14]. In its first three years of the operation, 165 of the 440 persons under PSRB jurisdiction were given conditional release into the community. Sixty-six (40%) had their conditional release revoked either for re-offending or for exacerbation of mental illness [9]. At the five-year point, 295 persons had been granted conditional release. Thirty-nine (13%) were charged with new crimes (18 were felonies) [10].

In a study of 107 male NGI acquittees from Hawaii, it was found that 61 (57%) had a prior arrest history, with 40 (37%) having had a prior felony arrest. Fifty-six (52.4%) had NGI offenses for crimes against the person. After release, 44 (41%) were involuntarily hospitalized under civil commitment statutes, and 72 (67%) had a subsequent arrest, with 60 (56%) having a felony arrest. Of the 35 on conditional release, 11 were arrested [12].

In a New York study, 42 men and 8 women NGI acquittees were matched with a group of felons according to criminal offense, age, education, marital status, previous arrests, and sex. As there was no significant difference between the two groups with regard to the post-hospital rearrest rate for the men, the researchers questioned the efficacy of psychiatric treatment via hospital commitment for NGI acquittees. Moreover, the re-hospitalization rate of the NGI group was higher [*15*]. In another New York study, a similar postinstitutional arrest rate was found for 46 NGI acquittees matched with comparable nonmentally ill felons [*16*].

In California, 79 NGI acquittees who were conditionally released into the community for mandatory outpatient treatment were followed for five years after release. During this period, 25 (32%) were rearrested, of which 18 arrests were for violent crimes. Thirty-seven (47%) of the original sample were hospitalized. Thirty-eight (48%) of those discharged into the community had their conditional releases revoked [*11*].

In Maryland, 91 NGI acquittees were discharged into the community on a "five-year conditional release." Data collection took place 15 years after the first patient was released from the state hospital. After community release, 86 (94.5%) of the 91 were arrested. Of the 86 arrested, four were again found NGI, 26 were convicted of the new crime, and 56 were not convicted [*17*].

In summary, these studies strongly suggest a significant criminal and psychiatric recidivism rate. In addition, little difference was found between the postinstitutional course of NGI acquittees and their demographically and criminally matched non-mentally-ill felons.

Efficacy of Treatment in NGI Acquittees

The studies have noted the extensive criminal history of many NGI acquittees [*11,12*]. The New York studies suggest that currently available psychiatric treatment is not effective for those NGI acquittees with an antisocial core [*13,18*]. The New York data also suggest that psychiatric treatment has limited usefulness for many NGI acquittees. In fact, a Maryland study found six variables that predicted criminal recidivism in 75% of the cases [*19*]. This suggests that the treatment failures can be identified with reasonable accuracy in several cases prior to the proposed hospitalization.

Non-NGI Mentally Disordered Criminals

The insanity defense is not commonly raised and rarely successful since less than 1% of felony trial adjudications are estimated to result in an insanity determination [*10,20*]. Thus, many more mentally ill persons lie outside the social control of the NGI system.

The alternative, guilty but mentally ill (GBMI) verdict will not be discussed in this paper since its purpose is perhaps best described as a ruse to reduce the number of NGI acquittals while allegedly allowing the trier of fact to provide the same mental health treatment or lack of it during incarceration [*21*]. Moreover, the GBMI verdict does not address postinstitutional problems. What happens when the convicted mentally ill offender's sentence is about to end and he or she does not meet civil commitment criteria for further segregation from society and is believed to be a continuing threat to public safety? The Supreme Court case of *Baxstrom v. Herold* [*22*] provides some data relevant to this question.

Baxstrom *and the False Positive Problem*

Baxstrom declared unconstitutional a New York state statute that prisoners at the end of their sentences could be civilly committed and kept in a prison department administered institution for the criminally insane (not to be confused with those found NGI) if deter-

mined not to be suited for care in a mental health department administered hospital following a decision by an administrative official. In contrast, other persons facing civil commitment in New York had the right to a court hearing. The Supreme Court held that the statute denied equal protection of the law since Baxstrom had been denied judicial review available to other civil committees. As a result of this decision, 967 patients who had been identified as dangerous were released. Follow-up study of the discharged patients over a four-year period found only 2.7% requiring prison incarceration or recommitment to a facility for the criminally insane [*23*]. Thus, *Baxstrom* produced a natural experiment for follow-up of individuals identified as dangerous and showed a high false positive (that is, those who are identified as dangerous but who did not commit harmful acts) rate over the four-year post-discharge time period. However, after four years, about half the released patients had been committed to civil hospitals, 27% were in the community, and 14% had died [*24*]. Thus, after four years, a clinically significant percentage of "released" patients exhibited psychiatric recidivism, though the false positive rate nevertheless remained considerable insofar as all these patients had been said by their evaluating psychiatrists to require maximum security in a correctional facility.

Recent California Law

California has recently attempted to cope with the problem of mentally ill prisoners who appear to be dangerous by enacting a statute that allowed certain mentally ill prisoners to have further social control under the auspices of an apparent clinical standard—non-remission of mental illness. From 1 July 1986 until 6 Oct. 1988, a California statute was in operation that provided the postponement of release into the community of prisoners with treatable, "severe" mental disorders who had committed violent crimes in which the mental disorder was a factor until such mental disorders were in remission [*25*]. The intended purpose of this statute was the social control of the violent mentally ill convict who poses a threat to public safety if released into the community while on parole or upon termination of parole [*25*].

This California statute defines a "severe mental disorder" as a condition that "substantially impairs the person's thought, perception of reality, emotional process, or judgement . . . grossly impairs behavior . . . [or] demonstrates evidence of an acute brain syndrome for which prompt remission, in the absence of treatment, is unlikely" and specifically excludes "personality of adjustment disorder, epilepsy, mental retardation or other developmental disabilities, or addiction to or abuse of intoxicating substances" [*26*]. This mentally disordered offender statute also set forth criteria for non-remission of the severe mental disorder which could trigger continued social control of the mentally ill offender [*26*]. Criteria for non-remission of a mental disorder required that one of the following four criteria be present within the past year: (1) acts of physical violence, (2) serious threat of substantial physical harm, (3) intentional property damage, or (4) refusal of psychiatric treatment.

In its first 1½ years of operation, the California program identified 213 potential candidates as dangerous "severe" mentally disordered criminals, 58 of whom ultimately remained in the program after administrative, clinical, and judicial review. This "severely" mentally disordered subset of felons constituted about 0.1% of potential or actual parolees. The cost per individual detained in the program over the 1½-year period is estimated to have been $108,153 [*27*].

The statute's future was placed in jeopardy when it was declared unconstitutional by the California Court of Appeal of the Second Appellate District on 6 Oct. 1988 in *People v. Gibson,* coupled with the California Supreme Court's subsequent refusal to hear the case [*28*]. The appellate court ruled that confinement to a mental hospital as a condition of parole violated ex post facto clauses of both federal and state constitutions. The court

also noted that the equal protection clauses of both federal and state constitutions were violated because the statute mandated involuntary commitment of former (mentally ill) prisoners without a proof of (present) dangerousness [*28*].

The California legislature responded by enacting a replacement statute [*29*] that the governor quickly signed into law [*30*]. There is little change in the replacement statute, except that it adds the requirement that the prisoner represent a "substantial" danger of physical harm to others (that is, a present dangerousness criterion to respond to the equal-protection objection), and it applies only to those who committed their crimes after 1 Jan. 1986 (to answer ex post facto objections) [*29*].

A comparison of legal criteria for extension of social control over the non-NGI dangerous mentally disordered offender and dangerous NGI acquittee reveals both similarities and differences. The present level of "substantial" dangerousness required for both is identical [*31*]. Parenthetically, this level of dangerousness is less stringent than the "demonstrated" level required for ordinary civil commitment in California after the initial 17-day period of emergency commitment [*32*]. Differences between the two groups needed to qualify for their social control involve specific criteria required by the mentally disordered offender statute. For mentally disordered felons, a "severe" mental disorder must be present [*29*]. Commitment extension of NGI acquittees, however, only requires that a mental disease, mental defect, or mental disorder be present without restriction as to the type [*31*]. In addition, in order for someone to qualify for social control as a mentally disordered offender, he or she must have committed one or more specific acts during the past year, although this is not needed for an NGI acquittee to qualify for commitment extension.

Discussion

Assuaging public fear of dangerous individuals may be an impossible task. For example, a recently released Justice Department study reported that 63% of released state prison inmates are rearrested for a serious crime within three years [*33*]. Social control of dangerous individuals can be activated for those who fall into the categories of the dangerous mentally ill, dangerous criminal, and dangerous NGI mentally ill offender. In California, despite the shadow of the 1966 Supreme Court decision in *Baxstrom* and the problems of assessing long-term dangerousness from one context to another, statutory law has been enacted to expand social control over some non-NGI dangerous mentally disordered criminals. This group may be the most feared by the average citizen.

The non-NGI dangerous mentally ill offender has been problematic for society, since social control outside of ordinary civil commitment has been generally nonexistent, especially since *Baxstrom*. Despite the legal difference between NGI acquittees and mentally disordered criminals (namely, that the former are technically not criminally responsible, whereas the latter are criminally responsible), there may be little substantive difference between the two groups in other areas. The findings of NGI acquittee studies, such as a high rate of psychosis (severe mental disorder), high recidivism rate, and antisocial background, suggest clinical similarity between the NGI and non-NGI group. We do not anticipate that additional research would discover significant differences between the two groups. Assuming this, we can offer a preliminary forecast about California's non-NGI dangerous mentally disordered criminals. Given the lack of efficacious treatment outcomes and the recidivism rate for NGI acquittees, a similar pessimistic forecast seems likely for the non-NGI dangerous mentally disordered criminal.

Lack of treatment response for both the NGI and non-NGI group can trigger continued social control of these individuals. While this diminishes society's fear, it raises professional concerns among psychiatrists and other mental health clinicians who are treating these individuals. Clearly, psychiatrists and other mental health care providers assume

nontherapeutic social control roles in these cases. In the case of the recently declared unconstitutional and reenacted California law, the social control role is quite obvious and may contain more dissonance than that found when NGI acquittees are treated. First, the issue of an offender's mental disorder need not have been raised at the trial for the individual to quality later as a mentally disordered offender. Second, severely mentally ill individuals who are violent and who otherwise refuse treatment can be kept under psychiatric care while not meeting civil commitment standards. Social control of NGI acquittees can be argued as acceptable because of the NGI status and its ramifications. On the other hand, social control beyond their sentences of non-NGI mentally disordered criminals who do not qualify for civil commitment seems highly troubling, both clinically and ethically [*34,35*]. This role is likely to be further exacerbated by recent California right-to-refuse-treatment cases [*36–39*]. It is almost as if California is trying to utilize an indefinite confinement for NGI acquittees while denying the defendants the "advantages" of such a verdict. This trend in California suggests that the insanity defense may have become too restrictive.

Because of its high criminal recividism rate, the non-NGI group poses a threat similar to that of NGI acquittees. But in order for the public fear of the dangerous mentally disordered offender to be decreased, a high false positive rate of inclusion in the group to be socially controlled will be needed. What level of false positive rate can society tolerate? What role for psychiatrists in evaluating such individuals is ethically permissible? Will other states follow California's lead and perhaps go further to require a less stringent test for dangerousness? Will the problem of "overprediction" of dangerousness, as demonstrated in *Baxstrom,* be repeated?

Notwithstanding the limitations of psychiatric intervention for dangerous (non-NGI and NGI) mentally ill offenders, any measurable hope we have of providing efficacious psychiatric treatment will probably take a great deal more financial support than is presently available. This is in addition to the previously mentioned, already tremendous cost of treating and socially controlling these individuals. Moreover, these offenders dilute the available money for all (public sector) mentally disordered persons. Nevertheless, even if adequate money were available, realistic clinical limitations and individual liberty concerns continue to play a central role in the criminal and psychiatric recidivism of these individuals. Society indeed will probably continue to face the problem of the dangerous (non-NGI) mentally disordered criminal despite our best efforts.

Acknowledgment

The authors thank Sara Latz, J.D., M.D., for her thoughtful comments.

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