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A Moralist Looks at the Durham and M'Naghten Rules

Insanity, for purposes of establishing a legal defense in a criminal trial, has been variously defined. Today, the M'Naghten and Durham Rules represent competing viewpoints of how best to cope with this definitional problem. Although both Rules have been the subjects of numerous writings in the legal periodicals, Professor Raab, in this Article, discusses both Rules from a new and enlightening viewpoint. He concludes that to the moralist, the Durham Rule is preferable.

Francis V. Raab*

The problem of what sort of a test should be employed to determine whether an offender is to be held legally responsible for his offense is bound to be vexing because we are at once involved in an effort to balance several moral considerations. These considerations include maximizing the security of the community, avoiding the infliction of unpleasantness upon offenders and their families, and avoiding the punishment of those who, according to our most reflective judgments of moral responsibility, either are not clearly responsible or are not responsible at all. It would be exceedingly difficult for any thoughtful person to be constantly of the same mind that a certain test of legal responsibility is, from a moral point of view, the most suitable one to employ. This is because it is not easy to estimate, and remain fixed in one's estimation of, the strength of these competing moral considerations. We are not always equally strong in our conviction that the protection of society is of paramount importance, and any weakening in this conviction may increase our sense of obligation to formulate a test of legal responsibility which will be consonant with the other two considerations.

What often tends to undermine acting upon the conviction that the protection of society is so important is the fact that we are not sure how this aim is to be achieved, and whether current punitive methods are the best ways to achieve it. Adding to our uncertainty

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about what morally would be the most suitable test of legal responsibility is the fact that there are many cases where we are uncertain whether an offender is morally responsible. Such uncertainty has always existed, but today we have increased grounds for uncertainty for we do not yet know how to fit the new facts about mental life into the old, established criteria for making judgments of moral responsibility. That is, to what extent does the existence (in an offender) of neurotic compulsions, unconscious hostile motivations, unconscious desire to be punished, lack of conscience, delusions of persecution, or withdrawal from reality—to name only a few—relate to the question whether his action was intentional or whether he could have helped doing what he did? Since such questions are often too difficult to answer, we are perforce puzzled whether the offender was morally responsible. This puzzlement is magnified when we have to decide what ought to be our criteria of legal responsibility, for then the other considerations complicate our deliberations. Yet such decisions are being made, whether or not in a way that is morally satisfactory. My principal task in this Article will be to consider the merit of some of the reasons that are being offered for these decisions.

Since one of the dominant requirements of a suitable test of legal responsibility is that it be in accord with our notions of moral responsibility, it would be highly desirable that we understand the concept of moral responsibility. Any weakness in our grasp of this concept would surely reflect itself in our attempt to justify any test for legal responsibility. However, clarity and certainty are not easily achieved in discussing the concept of moral responsibility.

First of all we should distinguish between the function of statements which employ the term "responsible," and the criteria or reasons we give for making these statements. It seems to me that the function of the statement: "He is not responsible for what he did," is to prevent an offender from being censured, whether it be in the form of scorn, verbal criticism or formal legal punishment. The contexts in which we would make such a statement are those in which the sort of harm done would provoke censure, and we make the statement in order to prevent it. Making such a statement and giving appropriate reasons for it will, in our moral community, usually produce the desired inhibition of hostile behavior toward an offender, for we believe that it is wrong to censure those who are not responsible for their misconduct. Responsibility for one's wrongdoing is usually assumed so we seldom bother to say that an offender is responsible. But there would be a point in so saying if someone had claimed that a certain offender was not re-

sponsible for what he did, and we did not agree with the claim. The function of the statement that the person was responsible would be to indicate our disagreement, and perhaps also to indicate our approval of the person being censured for what he did. Once again, we are required to give reasons for our disagreement and these would be that the standard criteria for determining moral responsibility are satisfied in the particular case. If there were no standard criteria, or if people employed different criteria, then there could be no intelligent argument over whether a person was responsible. Of course they might well conduct an intelligent discussion over the question of what criteria ought to be employed. Fortunately, there seem to be criteria upon which there is general agreement.

Two such criteria or considerations for determining whether an offender is morally responsible for what he did, are: (1) Could he have helped doing it? and, (2) Was his action intentional? These are not the only criteria for determining whether a person is morally responsible for some harm, but they are very important ones. Now it is often true that we decide questions of responsibility without directly appealing to any such notions which I call criteria. Instead, the existence of some fact such as having been tortured or brainwashed or having one's life threatened, or a severe internal pain or a heart attack, or being insane or in great panic, will be sufficient to excuse the offender. That is, the existence of such a fact will count as a reason for saying that an offender was not responsible for what he did. Such facts have become excuses, and are considered sufficient reasons for denying moral responsibility. I think the justification for this practice is that when such conditions are present the offender either did not intentionally do what he did or could not have helped doing what he did. One might say that our criteria for saying that a person is not responsible serve as a rationale for the practice of allowing these other conditions to exculpate. Thus when we find that an offender acted in one of the above circumstances, we excuse him without further inquiry into whether he acted intentionally or whether he could have helped doing what he did.

These two questions, however, are asked when we encounter an action committed in circumstances that do not easily fit into one of the established kinds of excuses. These questions quite naturally arise when we consider whether to excuse a dope addict who commits a crime to get money to buy dope, or whether to excuse a sociopathic offender, or a person who signed a propaganda document for the enemy after having been brainwashed. Some-

times we are still unable to decide whether an offender is morally responsible, though we may decide that for the benefit of the community the circumstances of his action should not be allowed to count as a *legal* excuse. Our general tendency, I think, is to hold an offender legally responsible when we are in doubt about whether he is morally responsible. Considerations such as the protection of society will usually weigh against any such moral sentiment we are likely to feel. Perhaps unconscious hostility toward an offender also works against our acting on any such sentiment.

We have been discussing two criteria of *moral* responsibility which are also considered very important for determining *criminal* responsibility. Undoubtedly the reason why these are appealed to in punitive law is that they have our support in determining moral responsibility. However, it does not follow that we can equally justify their employment in punitive law when, as a consequence of holding a man responsible, we may execute him. Giving moral approval to fixing responsibility by an appeal to the fact that a person intentionally did something immoral, when as a consequence he would suffer some small reproof, is quite different from giving such approval to fixing legal responsibility by an appeal to the same fact, when as a consequence he might be executed.

Because of the very basic moral injunction: "Do not injure others," the justification for employing the criteria we employ in the law becomes a morally strenuous issue in light of the often harsh consequences of a finding of responsibility in punitive law. Thus, it would seem that if the M'Naghten Rule¹ in any way allows the punishment of people who, according to our best deliberations, are not completely morally responsible, the rule has been dealt a morally telling blow. I think it is evident that M'Naghten is, to many psychiatrists, judges, and lawyers, morally offensive on just this point. However, the fact that it is morally offensive on this account is not sufficient reason to reject it. There are other values which we try to preserve through punitive law. If, for example, the deterrent or educative value of punitive law were to suffer markedly in the event M'Naghten were abandoned in favor of some less restrictive rule, then our moral concern for the community might

1.

To establish a defence on the ground of insanity, 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. M'Naghten's Case, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843).

outweigh our moral concern that only those who are fully morally responsible should be punished. However, it is certainly not morally anachronistic to believe that when in doubt about the moral responsibility of offenders we should declare them non-responsible. Indeed, for most of us it would be much easier to give high priority to such a consideration if there were no unconscious impulses to censure wrongdoers, or if we hadn't been uncritically acclimated to the idea that punishing them will help to deter others. Further, most of us have become acclimated to the idea that allowing too many exceptions will reduce the efficacy of punitive law.

The question whether to adopt the Durham Rule² or other criteria of criminal responsibility is not a question of whether one is more adequate, efficient, or intelligent. It is a question of morals. It is moral because of the various moral injunctions that are bound to demand consideration in the mind of a morally sensitive person. These include the right of the individual to be spared pain, his right to be penalized only when he is morally responsible, the value of the community's sense of security, and protection from violence and loss. Then too there are considerations of justice, for inequitable decisions—decisions that reduce the community's respect for the law because of its uneven distribution of justice—might result unless the criteria employed are clear guides to jury decision.

One of the principal charges against the M'Naghten Rule is that it does not make sufficient allowance for those offenders whose capacity for controlling their impulses is very limited. They have little by way of internal controls (conscience); and the existence of punitive sanctions does not seem to possess their minds at the time they are engaged in some criminal activity. Increasing the severity and frequency of punishment for a certain type of crime does not deter them. Perhaps the policeman at the elbow would, but it would also deter those who are often exculpated under M'Naghten. Thus, the question arises whether we are morally entitled to punish such offenders—nondeterrables, or questionably deterrable persons—since they are so little capable of restraint. This question cannot be bypassed by moralists, even though it might be reasonable to punish such offenders in order to maintain the security of the community. However, it must be recognized that the members of a community need not place such a paramount value upon their own security so that it outweighs

2. "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

their sense of protecting the right of everyone to be spared the unpleasantness of the punitive law unless they obviously are morally responsible for their wrongdoing. Even if liberalizing our criteria of legal responsibility contributed to an increase in the crime rate, this increase might not cause too much alarm or disruption of fundamental living patterns.

What then is the upshot of these remarks regarding the justification of a formula for deciding whether an accused is criminally responsible? It seems to me we want a formula which will not arouse our suspicion that we are allowing too many types of mental states to excuse criminal activity so that the community is likely to suffer appreciably from such activity which could otherwise have been repressed. Also, that the new facts about mental life are permitted to bear upon the question of moral responsibility so that we are not punishing offenders who are not morally responsible or are only partially so. Finally, we must have a formula that a jury can employ in a uniform way, because they know how to apply the formula, given the facts of the mental life of the accused.

I shall now try to show the defectiveness of one defense of the M'Naghten Rule (as against the Durham Rule) which considers none of these desiderata. This defense is that M'Naghten is based upon a sound theory of the nature of the human personality and thus is bound to do complete justice to the individuals who are tried under it, *i.e.*, no one who is not morally responsible is likely to be punished under an application of the M'Naghten Rule.

In discussions about a suitable test of criminal responsibility, reference has been made to the integration theory of the personality. Let me quote from Professor Jerome Hall:

a psychological theory that . . . is independently valid . . . is that man functions as a unitary being. That is, reason, will, feeling and so on coalesce; in normal persons they are integrated. In discussions of the M'Naghten Rules, what emerges most prominently is the wide agreement concerning this theory of the personality. The personality is seen as a fusion of functions and not a mere interrelation of separate faculties, whether these be designated cognition, will and emotion, or ego, super-ego and id; hence, there can be no serious impairment of one of these functions without serious impairment of the others.

It will be seen that, given the premise of an integrated personality, the concept of "irresistible impulse"—of will totally separated from reason and emotion—is untenable.³

One reason why Professor Hall discusses this theory is that acceptance of it would preclude criticism that M'Naghten makes no ex-

3. Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 775 (1956). Professor Hall also quotes from Professor A. Ellis: "It is, in the case of any normal adult human being, the whole *person*, or *individual*, or

ception for criminal actions done from an irresistible impulse or from seriously reduced capacity for self-control. But the other reason for mentioning it is by way of criticism of the Durham Rule which, he believes, contains a covert reference to the irresistible impulse test. The latter test, in his opinion, should be discredited on the grounds of the integration theory of the personality; that is, a condition such as an irresistible impulse cannot exist apart from diseased or impaired cognition, or impaired knowledge of right and wrong. It cannot exist apart because no one function of the personality, such as the capacity to control one's behavior in accordance with law, can be impaired without an accompanying impairment in cognition or knowledge of right and wrong. According to Professor Hall these latter impairments are determinable by M'Naghten.

As Professor Hall states the theory, it asserts that every *normal* person has the various functions of his personality so integrated that any serious impairment in one of the functions will be attended by a serious impairment in the others. Let us suppose for the moment that this theory is true. What follows from it with respect to an *abnormal* person? Absolutely nothing whatever! As a theory about the normal person, no deductions can be made that in an abnormal person where one finds impairment in, say, capacity for self-control that there will be an impairment in the capacity for judgment. It is possible that a large number of those who commit crimes are abnormal, and it does not follow from the integration theory that because there is no impairment in their cognition or in their knowledge of right from wrong, as tested by

organism who thinks, emotes, and acts." *Id.* at 776, quoting from Ellis, *An Introduction to the Principles of Scientific Psychoanalysis*, 41 GENETIC PSYCHOL. MONOGRAPHS 149, 169-70 (Murchison ed. 1950).

This quotation from Professor Ellis will not give one scintilla of support for the integration theory of personality, for even one who opposed this theory would have to consent to Professor Ellis' statement. One could very well hold that judgment, emotion and the capacity for self-control are independent of each other and still hold that it is the whole person who thinks or feels. In fact, one would have to hold the latter because it is a *linguistic* truth. It is not an empirical or scientific claim at all. No clinical evidence could support it because it needs no support. It would be equally true to say that it is the whole lion or ape that perceives or becomes angry. There is just no room in our language for statements like: A part of the man felt angry or thought about his car. Since such statements make no sense, Professor Ellis' statement is necessarily, but not scientifically or empirically, true. See also the statement of Simon E. Sobeloff: "Medical psychology teaches that the mind cannot be split into watertight, unrelated, autonomously functioning compartments like knowing, willing and feeling. These functions are intimately related and interdependent." Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793, 794 (1955).

M'Naghten, there will be no impairment in their capacity for self-control.

The reader will by now be begging for an explication of "normal" and "abnormal," but no such insight is provided by the theory. Yet it is absolutely required. For until a definition is provided, we can not make any deductions about the abnormal individual nor can we decide to which persons in our population the theory applies. It is plain that the criteria which must be supplied for deciding whether a person is normal or abnormal, must be independent of the integration theory itself. One cannot employ, as his criteria of normality, the fact that the various functions of the personality are integrated, for if one does this his theory will be a tautology, utterly vacuous. The theory would then be: If a person is normal (*i.e.*, the various functions of his personality are integrated) then the various functions of his personality are integrated. But what criteria of normality will the supporters of the theory propose? We do not know. Yet, until the criteria are stated the truth of the theory can never be decided; one cannot tell what facts would be evidence for the theory.

Since the theory is useless until criteria of normality are provided—and there are formidable difficulties in the way of providing them—it might be stated without including the word "normal," so that we now have: "In *every* person the functions of the personality are so integrated that serious impairment in one of these functions will be attended by serious impairment in the others." In this form the integration theory is completely general, and would be falsified if there were but one person who, for even a few hours, while having no impairment of cognition, had very little capacity for self-control. The theory is so sweeping that one should not be maintaining it unless he had taken a tremendous sample of the population and followed the career of these people over many years of their life. The relatively few clinical observations that have been made with an eye toward supporting this theory would be but a drop in the bucket.

Now of course it might be maintained that the integration theorist never meant that *every* person, but that just the *vast majority* of persons have the various functions of their personality so integrated that any serious impairment in one would be attended by serious impairment in the other. This modification would make the theory less precarious, but it would also make it useless for those who wish to uphold the use of the M'Naghten Rule. It would then be possible for a large number of those who commit crimes to have an impairment in their capacity for self-control without a

concomitant impairment in cognition or knowledge of right and wrong, and thus would not be excusable under M'Naghten. The defender of M'Naghten might not be moved by this fact, but it would be morally offensive to punish those who could not help doing what they did even though they knew what they were doing and knew it was legally and morally wrong. There might also be those—the psychopaths—who perhaps could not be said in strictest accuracy to know right from wrong since they lack conscience in many respects. They do know what other people regard as morally wrong, and also what the law forbids, but since their moral inhibitions are weak, only fear of consequences can restrain them and this often is not enough when they think that they are not likely to be caught. Ought they be punished for not having a more active conscience? The moral issue here must not be glossed over even though we might claim that it must be overridden by the need to protect society from such people.

Professor Hall continues his attack upon the notion that “irresistible impulse” can exist independently of impairment in cognition. He quotes from the Report of the Royal Commission on Capital Punishment:

[I]nsanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient including both the will and the emotions.⁴

...
An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, but yet commit it as a result of the mental disease.⁵

Professor Hall claims that the second statement does not follow from the first. But I believe he says this because he misinterprets the first statement, though I admit it is not entirely unambiguous. I think he fails to heed sufficiently the force of: “or primarily.” His interpretation is: Insanity always *equally* affects cognition, will and emotions. I think Professor Hall may wish to hold this because he believes it follows from the integration theory of the normal personality. But as we have seen, it does not. It does, however, with some repairs, follow from that theory if the word “normal”

4. Hall, *supra* note 3, at 777, quoting from REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 113 (1953). It is not within my competence to determine whether this statement is true or false, but I do wonder whether the expression, “insanity affects,” is accurate. This way of talking makes it seem that insanity *causes* these disorders in cognition, feeling, etc.; as if these disorders were manifestations of some deeper psychic disturbance. It would seem to me that insanity is a disorder *in* these functions.

5. Hall, *supra* note 3, at 777, quoting from REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 80 (1953).

is omitted and if the theory is asserted of every person. But so stated the theory lacks sufficient credentials. Nevertheless, assuming it is true that "insanity in every case equally affects cognition, will and emotions," it does not follow that an irresistible impulse could not be present without full or sufficient knowledge of right and wrong in a criminal who has not been antecedently specified as insane. Moreover, even if the person is insane by medical standards, it does not follow that he would also be found insane by the application of M'Naghten. Professor Hall overlooks this point when he quotes from the Royal Commission Report:

Sir Norwood East said that in fifty years he had never met a murder due to irresistible impulse unconnected with mental disease.⁶

The Medical Superintendent of Broadmoor . . . emphasized that he never had known an irresistible impulse leading to a crime of violence except in association with other signs of insanity.⁷

But the crucial question here is: Would the existence of mental disease or insanity in these cases have been affirmed by the exclusive use of M'Naghten? Since the spokesmen have not said so, the quotes are worthless.

I conclude that none of Professor Hall's contentions, here considered, permit the conclusion that criminal actions cannot be done from irresistible impulse except when there is serious impairment in cognition or knowledge of right and wrong. Nor does it follow that when the degree of impairment in cognition or knowledge of right and wrong is not serious enough to be detected by M'Naghten, there can be no serious impairment in the capacity for self-control. The view that criminal actions may be done from irresistible impulse apart from impairment in other functions may be sound psychology. And if it is, then M'Naghten as a test of criminal responsibility is morally objectionable because it makes no allowance for one criterion of moral responsibility, namely, that a person is not responsible for his actions if he could not help doing what he did. Thus, exclusive adherence to M'Naghten would violate the moral injunction not to punish those who are not morally responsible. As I have said before, if it were established that the abandonment of M'Naghten in favor of Durham would lead to an increase in crime, then the value of protecting society might well override this moral injunction. But since we lack evidence that this would happen, and given current humanitarian attitudes, Durham would seem to be morally superior to M'Naghten.

6. Hall, *supra* note 3, at 776 n.54, quoting from REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 96 (1953).

7. Hall, *supra* note 3, at 776 n.54, quoting from REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 95 (1953).