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A Proposal for a Fountainhead of Rationality in the Jurisprudence of Insanity

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A Proposal for a Fountainhead of Rationality in The Jurisprudence of Insanity

Faced with the eternal metaphysical question: Can man ever know man fully? we find modern man answering in the affirmative without rationality. Unwilling to assent to the reality of the Intellectual Soul, he has with anxiety and in frustration attempted to solve the mystery of man by thrusting him into a test tube. An analysis of the operations of rational life can only lead us to a workable understanding of the true nature of man,[1] whether he be mentally sick or well. To conclude that the Uncaused Cause of all being can alone infinitely know what is in a man's mind, is not to suggest that we should relax our striving for a better understanding of human nature.

Hence, the purpose of this paper: to present a picture of the progress of the human court of justice in its attempt to reach a better understanding of the nature of mental illness when insanity is interposed as a defense to criminal responsibility.

In this difficult area of criminal law and procedure, involving those technical cases in which a defense of insanity is raised, there have been serious indictments of those charged with the law's administration that, in the words of Dr. Winfred Overholser:[2]

> . . . the law still proceeds on the basis of psychological assumptions which are not in line with prevailing psychiatric points of view.

Although the law must not be overcautious and fail thereby to truly progress, those entrusted with the effectual administration of justice must be extremely prudent in accepting novel principles which the test of time may prove to be incorrect.

The existing law, with respect to defense of insanity cases has evolved from an intricate history of confusion and controversy. The implications of the recent decision *Monte Durham v. United States*[3] are twofold: it constitutes an important step in the eradication of a serious objection to the existing substantive law, and eliminates the effective aspects of the old tests.

The Case That Changed The Law In The District Of Columbia

Monte Durham was convicted of housebreaking by the District Court sitting without a jury after a waiver of this right. The only defense asserted at the trial was that Durham was of unsound mind at the time of the offense. Durham had a long history of imprisonment and hospitalization, which indicated a profound

[1] Man is not matter alone. He is a composite of body and vital principle, the latter referred to as the "intellectual soul" in Dr. Cavanagh's treatise.

[2] See: Overholser, *The Psychiatrist and the Law,* New York: Harcourt, Brace and Company 1953, p. 6.

[3] 214 F. 2d 862 (1954).

personality disorder. Following the indictment, he was adjudged of unsound mind upon the affidavits of two psychiatrists. He was committed to St. Elizabeth's Mental Hospital. This commitment lasted sixteen months, when he was released to the custody of the district jail on the certificate of St. Elizabeth's that he was "mentally competent to stand trial and . . . able to consult with counsel to properly assist in his own defense." Durham's conviction followed Judge Holtzoff's rejection of the defense of insanity because the defendant did not establish to the satisfaction of the court that at the time of the crime he was of unsound mind in the sense that he didn't know the difference between "right and wrong" or that even if he did, he was not subject to an "irresistible impulse" by reason of a derangement of mind. The lower court held that the usual presumption of sanity governs because: "There is no testimony concerning the mental state of the defendant", as of the date the crime was committed, "while if there was some testimony as to his mental state as of that date to the effect that he was competent on that date, the burden of proof would be on the government to overcome it."

The Court of Appeals reversed, holding that the lower court was in error in failing to find "some evidence". The Appeals Court was of the opinion that since the requirement of "some evidence" was satisfied, the presumption of sanity failed and the burden of proof then shifted to the prosecution to prove the defendant's sanity beyond a reasonable doubt.

After a thorough consideration of the existing tests for criminal responsibility in the District of Columbia, the Court found both the *Right and Wrong* test and the *Irresistible Impulse* test as exclusive criteria, inadequate. It invoked its inherent power to adopt a new test, viz:

> The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire courts since 1870.[4] It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

The Evolution Of The Jurisprudence Of Insanity

The law has long recognized that those suffering from a mental disorder should not be held legally responsible for their criminal acts which are the result of the mental illness. In Roman Law the insane person was considered incapable of assuming civil rights and responsibilities. This was due to the theory that because he lacked free will he was incapable of volitional activity.[5] There is very little authority on the subject of insanity as a defense to criminal responsibility to be extracted from the times of both the Middle Ages and the Renaissance. This is due for the most part to the emphasis in lunacy law upon the lunatic's and idiot's right to property.[6] As a result to this emphasis upon property rights, the insane

[4] *State v. Pike,* 49 N.H. (1 Shirley) 399 (1870); *State v. Jones,* 50 N.H. (2 Shirley) 369, 398 (1871).

[5] Deutsch, *Mentally Ill in America,* New York: Doubleday, Doran & Company, Inc. 1937, p. 388.

[6] *Lunacy and Idiocy—the Old Law and its Incubus,* 18 U. of Chi. L. Rev. 361 (1950).

person who did not possess property, was given little, and many times no consideration in criminal cases,[7] and ". . . in certain regions of medieval Europe insanity was expressly barred as a defense in criminal trials.[8] Deutsch points out that although as early as the fourteenth century the common law courts of England began to recognize insanity as a defense to crime, it was not until the beginning of the seventeenth century that "tests" began to evolve as an aid to determining the kind and degree of insanity that would be sufficient to excuse from criminal responsibility.[9]

Sir Matthew Hale advanced a theory that only total insanity would excuse from crime. Hale described partial insanity in the following manner:

> Some persons that have a competent use of reason in some respect to some subject, are yet under a particular dementia in respect to some particular courses, subjects or applications, or else it is partial in respect of degrees.

Hale concluded that such partial insanity ". . . seems not to excuse them in the committing of any offense for its matter capital."[10] Hale suggested that "the best measure for total insanity" is whether the accused person has no more than the mental capacity of a child of fourteen years due to a laboring "under melancholy distempers". This "test" was criticized by Sir James Fitzjames Stephens in 1889:

> Surely no two states of mind can be more unlike than that of a healthy boy of fourteen and that of a man laboring under melancholy distempers. The one is healthy immaturity, the other diseased maturity and between them there is no sort of resemblance.[11]

One of the great writers at this time on the subject of insanity and the criminal law was Hawkins, who set up the *Good and Evil* test by advocating that: "Those who are under a natural disability of distinguishing between good and evil" should not be punished under any criminal prosecution.[12]

In 1724, in the *Case of Arnold,* Judge Tracy defined what he considered the nature of mental illness which would excuse from criminal punishment. In his charge to the jury, he laid down what was theretofore known as the *Wild Beast* test:

> . . . it is not every kind of frantic humor . . . in a man's actions, that points him out to be such a madman as to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than . . . a wild beast.

The *Hadfield Case* in 1800 disregarded the test for total insanity previously set forth by Hale, and presented as an equally inadequate substitution: the finding of a single symptom of *delusion* as the final and perfect test of criminal responsibility.[13]

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[7] Deutsch, *op. cit. supra* note 5, at 388.
[8] *Ibid.*
[9] *Id.* at 389.
[10] Hale, *History of the Pleas of the Crown,* London: Vol. 1, 1678, p. 30.
[11] Stephens, *History of the Criminal Law of England,* London: Vol. 2, 1883, p. 150-1.
[12] Deutsch, *op. cit. supra* note 5, at 391.
[13] Glueck, *Crime and Correction,* Mass. Addison-Wesley Press, Inc. 1952, p. 150. Sheldon Glueck states: "The delusion concept . . . while not in itself a test of irresponsibility, is sometimes an element considered in connection with one of the tests and like the other principles on the subject is today in a confused state."

Then came the adoption of the two most important tests for consideration: the *Right and Wrong* test and the *Irresistible Impulse* test. The *Right and Wrong* or *Knowledge* test became and has remained the principal test for criminal insanity in all but one jurisdiction in the United States,[14] until the *Durham* decision. The *Right and Wrong* test remains the sole test in at least twenty-eight states,[15] and seventeen have recognized *Irresistible Impulse* as an additional test.[16]

The Right And Wrong Test

A modified version of the *Right and Wrong* test was given birth to in the monumental *M'Naghten* affair of 1843.[17] Previous to this time the *Right and Wrong* test required that the accused, in order to be entitled to an acquittal on the ground of insanity, be unable to distinguish between right and wrong in general.[18]

The trial of Daniel M'Naghten, a paranoic with insane delusions, resulted in acquittal on the ground of insanity. After the trial, the pressure of public reaction warranted a request by the House of Lords that 15 judges opinionate upon the existing laws governing insanity. The questions propounded to the judges were specifically limited to the case of a person afflicted with an insane delusion as was M'Naghten. Fourteen of the judges agreed on two major rules in order to establish a defense on the ground of insanity: (1) ". . . it must be clearly proved that, at the time of the committing of the act, the party accused was laboring 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" (2) ". . . if he did know it, that he did not know he was doing what was wrong."[19]

It must be noted that the modified test refers to the very act charged. This is the distinguishing feature of the modified version. The innumerable cases which followed the *M'Naghten* opinion, reflect the confusion as to the meaning of the terminology used by the judges in spelling out the rule.[20] Sheldon Glueck points out that the vague terms "nature" and "quality" were bound to cause confusion:

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[14] In the New Hampshire rule, laid down in the case: *State v. Jones, supra* note 4, the issue is whether the act charged was: "The offspring or the product of mental disease in the defendant." The jury answers two questions: (1) Had the prisoner a mental disease? (2) If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind as to take away the capacity to form or entertain criminal intent.

[15] Arizona, California, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Maine, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin.

[16] Alabama, Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Utah, Vermont, Virginia, Wyoming, Montana, New Mexico, Ohio.

[17] *Daniel M'Naghten's Case,* 10 Clark & Finnelly, 200 (1843).

[18] Glueck, *op. cit. supra* note 13, at 142.

[19] See note 17 *supra.*

[20] As to the meaning of "right and wrong" and "nature and quality", Professor Glueck lucidly detailed the confusion that exists:

"Some (states) cite the nature and quality elements in the test disjunctively with the right and wrong feature, some conjunctively." See note 2 *supra* at 575.

> Whether the judges used the terms "nature and quality" as synonomous or whether they intended each word to have a distinct meaning and therefore that knowledge should have existed as to two different factors with regard to the act is not clear . . . If they did so intend, however, why did they use the word "it" as referring to both nature and quality, instead of "them" or a similar term implying the plural?[21]

It is insisted by some authorities that it was the intention of the judges that a distinct and separate meaning be given to the terms "nature and quality."[22] A careful study of the decisions will indicate a condition somewhat as follows:

> Some decisions today speak of knowledge of right and wrong in general, some of right and wrong as to the particular act involved, many employing these concepts interchangeably and indifferently. Some states have adopted the right and wrong from the point of view of knowledge of moral wrong, some from that of knowledge of legal wrong, some include both. . . . Many decisions jumble all these elements together throwing in other scraps of expert and inexpert opinion and dictum for good measure.[23]

But a look at the words of the test itself will clearly illustrate that the judges in the *M'Naghten Case* meant to relieve the accused of punishment for the act only if ". . . he did not know he was doing what was wrong." They laid stress upon moral subjective responsibility as a vital consideration. A clear cut distinction is made between knowing the nature and quality of the act, that is a knowledge of the objective wrongness or incorrectness, and knowing its wrongfulness. It is only when such "moral sense" is regarded as an outworn phrenological concept that inconsistency in the decisions reflect disagreement. It must be noted that confusion was the natural consequence of various conflicting psychological and philosophical theories.

To the present day the cases are far from clear in any state as to the proper application of the *Knowledge* test.[24]

Perhaps such confusion has in part also resulted from the failure to understand the difference between *responsibility* and *guilt*.[25] Should a defendant's responsibility for his act be based upon the patient's subjective judgment of himself as acting rightly or wrongly? Dr. Cavanaugh takes the position that there is little doubt that when reference is made to the *Right and Wrong* test the question of right and wrong refers to the right and wrong as a subjective evaluation of the objective order. That is to say, he looks upon the mentally ill man as one having misapprehensions of objective reality.[26]

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[21] Glueck, *op. cit. supra* note 13, at 142.

[22] Oppenheimer, *Criminal Responsibility of Lunatics,* 142 et. seq.

[23] Glueck, *op. cit. supra* note 13, at 144.

[24] *People v. Schmidt,* 216 N.Y. 324, 110 N.E. 945 (1915).

[25] Dr. Cavanagh in his treatise, *supra,* draws a distinction between *responsibility and guilt* when he states: "Responsibility does not mean punishability. It means only that the individual, whose responsibility is under examination, at the time he performed a certain act or acts, was in such a state of mental health that he was able to act freely on the basis of a proper subjective evaluation of his act or acts in accordance with objective reality" . . . "Responsibility in its derivation means ability to react to a situation, that is, to respond to punishment or to be deterred by punishment. There is frequent failure to understand the difference between responsibility and guilt."

[26] In reference to this point, Dr. Cavanagh states: "A man may believe subjectively that

Whether the use of the *Knowledge* test has value in determining responsibility is clearly dependent upon the proper interpretation and application of the test. But this question is of different consideration from whether this test should be used as the sole criteria for determining legal responsibility in criminal insanity cases.

The *M'Naghten* rule was formally adopted by the District of Columbia in 1882.[27] In the *Guiteau Case* the court said:

> Insanity is a defense on the very ground that it disables the accused from knowing that his act is wrong. The very essence of the inquiry is whether his insanity is such as to deprive him of that knowledge.

This test remained the sole criterion for the determination of criminal responsibility in insanity cases until 1929 when in the case of *Smith v. United States*[28] the court held:

> That the accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible impulse.[29]

The Irresistible Impulse Test

The *irresistible impulse* test encompassing the idea that the accused person had not sufficient will power to commit the act, by reason of mental unsoundness, originated in America in the case of *State v. Thompson.*[30] In this case the court instructed the jury that the defendant was responsible ". . . if at the time (he) could discriminate between right and wrong, and was conscious of the wrongfulness of the act, and had power to forbear or to do the act."

In the jurisdictions that have adopted the *Irresistible Impulse* test in addition to the *Knowledge* test proceed upon the theory that irresponsibility may result from the presence of an insane irresistible impulse even though knowledge of the nature and quality and wrongfulness of the act may allegedly have existed.

Although the test was not accepted in connection with the *Right and Wrong* test until much later it is interesting to note Lord Denham in his address to the jury in the M'Naghten case, which involved insane delusion, asked the jury to consider the possibility of an irresistible impulse as the motivating force in M'Naghten's crime when he said:

> If some controlling disease was, in truth, the acting power within him, which he could not resist, then he will not be responsible.

But Denham was only referring to cases of delusional insanity when he made this request to the jury. After M'Naghten's trial, the questions propounded to the judges were specifically limited to the case of a person "afflicted with an insane delusion" as was M'Naghten. Lord Denham joined in the answers of the judges

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he is doing right, whereas the act itself is wrong. The presence of misrepresentations of reality does not in itself relieve a man of responsibility. It would, however, if this misrepresentation was due to mental illness. It would undoubtedly relieve him of any *guilt*, if he sincerely believed, on the basis of his misrepresentations, that he was doing right."

[27] *The Guiteau Case,* 1 Mackey 498 (D.C. Sup. Ct. 1882).

[28] 59 App. D.C. 144, 36 F. 2d 548 (1929).

[29] *Id.* at 145.

[30] (Ohio 1834).

to the questions of the Lords. Keedy points out:

> It is not likely . . . that Lord Denham . . . would have done so if he had believed that the answers related to any problems of mental disease other than insane delusion.[31]

Keedy draws the conclusion that if the judges had been asked to state the test when insanity is set up as a defense they would have included in their answers that an irresistible impulse could be a defense in other types of insanity, and since the question of a test was restricted to delusional insanity the *Knowledge* test came to be generally employed whereas Irresistible Impulse was not acceptable as a defense until much later. There was an ensuing struggle on whether *Irresistible Impulse* was a valid defense.

There followed much controversy and conflict of authority as to whether the defense of *Irresistible Impulse* should be allowed, when the felon is able to tell the nature and quality of the act. The principal reasons for not recognizing *Irresistible Impulse* even though such is the product of mental disease were (1) one who knows the difference between right and wrong cannot have an irresistible impulse;[32] (2) it is difficult to prove that there is an irresistible impulse. "It seems to us however, that in the view suggested the difficulty would be great, if not insuperable, of establishing by satisfactory proof that an impulse was or was not 'uncontrollable'."[33] Justice Summerville in *Parsons v. State*[34] refutes this argument when he states:

> It is no satisfactory objection that the rule (*Irresistible Impulse* test) . . . announced by us is by difficult application. The rule in *M'Naghten's Case* is equally obnoxious to a like criticism. The difficulty does not lie in the rule, but is inherent in the subject of insanity itself.

James Fitzjames Stevens expressed the opinion that *Irresistible Impulse* should be a defense and a person who acts under such an impulse does not know the nature of his act.[35] Yet courts have held that there should be no conviction "even if the prisoner knew . . . that it was morally wrong and punishable by law and yet was from mental disease deprived of the power of controlling his actions at the time."[36] As a result of this shattering instruction, the Lord Chancellor in the *True* case[37] appointed a commission to investigate the problem of existing "tests" of insanity for a defense to criminal responsibility. The Commission did not approve a recommendation submitted by the British Medical Association which offered this proposal:

> The legal criteria of responsibility expressed in the rule in M'Naghtens case should be abrogated and the responsibility of a person should be left as a

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[31] Keedy, *Irresistible Impulse in the Criminal Law,* 100 U. of Pa. L. Rev. 961 (1952).

[32] "The possibility of the existence of such a mental condition is too doubtful." *Cunningham v. State,* 56 Misc. 269, 279 (1879).

[33] *State v. Bundy,* 24 S.C. 439, 445 (1886).

[34] 81 Ala. 577, 596, 2 So. 854 (1886).

[35] Stephens, *op. cit. supra* note 11, at 168, 171.

[36] *Case of Ronald True,* 16 Cr. App. R. 164, 169 (1922).

[37] *Ibid.*

> question of fact to be determined by the jury on the merits of the particular case.[38]

Professor Hall offered a mild rebuke to the courts for attempting to determine by judicial decision whether an irresistible impulse can exist: "Whether a truly irresistible impulse can exist is a question for psychiatrists rather than for judges to decide and judicial denials that such a condition is possible have rather gone out of fashion."[39] However, the validity of the test is a matter for judicial determination.

The major problem is to be considered in an evaluation of the *Irresistible Impulse* test is whether it is possible for a human being to have an Irresistible Impulse? If the various functions of the personality are integrated, how can a person understand what he is doing, realize that inflicting a serious injury on a human being is grossly immoral but, nevertheless at the same time be so impaired in his power to control his conduct that he is *irresistibly impelled* to commit a major harm?

The majority of the decisions which have employed the *Irresistible Impulse* test recognize that the cognitive powers need not necessarily have been disturbed for the defendant to have been the victim of an irresistible impulse to commit the act. In the case of *State v. Peel*,[40] the court said:

> One may have mental capacity and intelligence sufficient to distinguish between right and wrong with reference to the particular act and to understand the consequences of its commission, and yet be so far deprived of volition and self control by the overwhelming violence of mental disease that he is not capable of voluntary action and therefore not able to choose the right and avoid the wrong.

Sheldon Glueck analyzes the well known Massachusetts case of *Commonwealth v. Rogers* [41] as probably the first instance of the judicial recognition of the need of proof of the volitional element as well as the cognitive in the definition of a crime in insanity cases:

> This important decision recognizes the important psychological fact of the unity of the mental processes, in that it takes account of the influence of a delusional system not only upon the cognitive faculties of the mind but upon the volitional life.[42]

Guttmacher and Weihofen, in their book "Psychiatry and the Law,"[43] agree on the one hand to the theory of one integrated personality per individual human being, and on the other approve of the *Irresistible Impulse* test. Jerome Hall, in his review of the book,[44] points out that the authors attempt to resolve the conflict by stating:

> But while it is true that the effective, cognitive and conative processes of the mind are *interrelated* (distinct from integration) certain forms of mental

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[38] Rep. Comm. on Insanity and Crime, Cmd. No. 2005, 4 (1923).
[39] Hall, *Psychiatry and the Law—Dual Review*, 38 Iowa L.R. 687 (1952).
[40] 23 Mont. 358, 59 Pac. 169 (1899).
[41] 7 Metcalf. 500 (Mass. 1844).
[42] Glueck, *op. cit. supra* note 13, at 148.
[43] Guttmacher and Weihofen, *Psychiatry and the Law*, New York: W. W. Norton & Co. 1952.
[44] See note 39 *supra*.

> disease may affect one more than the others. A disorder manifesting itself in impulsive acts may affect intelligence somewhat, but it is quite possible that impulsiveness may have reached the point where it can be said that it is irresistible and yet intelligence has not deteriorated so much as to obliterate right and wrong.[45]

Keedy also takes this position.[46] But Professor Hall considers his stand more consistent. Because he agrees with the theory of the integrated personality, he rejects the *Irresistible Impulse* doctrine:

> In modern psychology integration has meant the personality functioning as a unit as opposed to the operation of separate faculties. This suggests the analogy of compound rather than of a mixture; a whole coalescence rather than an interrelation of separate parts.[47]

Hall then asks the question: "How, then, is it possible for the personality to be seriously disordered in some basic functions while others remain substantially unimpaired?"[48] However, Professor Hall is a staunch supporter of the *Right and Wrong* test. In an interpretation consistent with his prevailing view that various psychological functions are integrated; he suggests that the word "know" in the M'Naghten rule should mean "knowing in a moral sense".

Dr. Frederick Wertham is in accord with Professor Hall in rejecting the *Irresistible Impulse* doctrine and in supporting the *Knowledge* test:

> In my opinion the criminal law which makes use of the conception of irresistible impulse is not an advance belonging to the present scientific social era. It is a throw-back to or rather survival of, the previous philosophical psychological era.[49]

Sheldon Glueck criticizes both the *Irresistible Impulse* and the *Right and Wrong* tests:

> Their employment as such neglects the fundamental notion of the unity of the mind and interrelationship of mental processes and the fact that a disturbance in the cognitive, volitional, or emotional sphere, as the cause may be, can hardly occur without its affecting the personality as a whole and the end conduct flowing from the personality.[50]

It is conceded that the human personality is an integrated one. However it is possible for the cognitive faculty to be in operation and yet for the volitional to fail to resist the urge as presented by a mentally disordered intellect. This in no way assents to the validity of the *Irresistible Impulse* theory.

Of basic consideration in an analysis of the *Irresistible Impulse* test, is the metaphysical problem of the freedom of the will. The law has proceeded upon the theory that insanity is a defense in criminal law precisely because an individual should not be punished if he does not have freedom of his will.

The courts and psychiatrists have variously defined the term irresistible impulse. Most courts refer to it as the deprivation of the will power to choose

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[45] *Ibid.*
[46] See note 31 *supra* at 993.
[47] See note 44 *supra*, at 695.
[48] *Ibid.*
[49] Wertham, *Psychiatry of Criminal Guilt*, 164 N.Y.U.L.Q. Rev. (1950).
[50] See note 13 *supra.*

whether to do the act or refrain from doing it; or to choose between right and wrong.[51]

The *Irresistible Impulse* test is based on the assumption that in some forms of mental illness the victim does not have freedom of will in the commission of illegal acts and that freedom of will is essential to criminal responsibility.[52]

In the famous case of *Parsons v. State*,[53] the court said that freedom of the will is just as an important consideration in criminal intent as knowledge of *right and wrong;* and that even if the defendant knew right from wrong, " . . . he may nevertheless not be legally responsible if the two following conditions concur:

> (1) If, by reason of the duress of such mental disease, he had so far lost his *power to choose* between right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.
> (2) *And* if, at the same time the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*."

In order to take advantage of the *Irresistible Impulse* test as a defense that will bring about an acquittal, the defendant must prove that at the time he committed the act he was deprived of his free will by the insane impulse that he was incapable of choice. Hence, the *Irresistible Impulse* test raises the presumption that it is possible for the exercise of the free will to be suspended at the time of the criminal act.

This raises the question of whether a man can ever be deprived of his free will to choose, even at a time when he is suffering from a mental disorder. It is precisely because of the multiplicity of interpretations in the answers given by the various schools of thought to this philosophical question, that there exists confusion in the use of this test.

In refutation of the *Irresistible Impulse* test, we find Dr. Cavanagh[54] saying:

> The expression *irresistible impulse* connotes a distortion of the power of the will itself. This is an inaccuracy . . . the distortion is not of the will but of the whole person.

In other words, the will is always in operation, and the person acting, so chose to act in one particular manner based upon his particular judgment of reality—no matter how distorted was his judgment. This position is also advanced by Dr. Nolan:[55]

> We know that the grossly insane never completely lose their powers of judgment . . . Free will is exercised upon those conscious motives which become present to our minds. These conscious motives may, in turn, be *influenced* by *unconscious* factors, but the final choice is made by the will upon the basis of those conscious judgments which the intellect entertains. In other words, the will is free to act upon or to refuse to act upon those motives which the mind presents.

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[51] *Parsons v. State,* 81 Ala. 577, 2 So. 854 (1886).

[52] This is a condensed version of an excerpt taken from *"Relation of Mental Illness to Delinquency and Crime"*, Michael J. Pescor, M.D. FEDERAL PROBATION, September, 1953, p. 14.

[53] See note 51 *supra.*

[54] See Dr. Cavanagh's leading article, this review.

[55] See Dr. Nolan's leading article, this review.

Dr. Cavanagh says: "The choice of words used in the term (Irresistible Impulse) is unfortunate. The word *impulse* is incorrect. It leads to misunderstanding. A better word would be *urge.*"[56] Dr. Nolan would change the term *irresistible* to *unresisted.* A combination of these two theories consider it more accurate to re-label an *irresistible impulse* to an *unresisted urge,* and rightly so.

In Dr. Cavanagh's definition of *unresisted urge,*[57] the phrases: "impelled to act" and "unable to adhere" connote to the reader that mental illness deprives the actor of the will power to choose. There appears to be no distinction between this definition and the concept which the *Irresistible Impulse* test conveys to the Appeals Court in the *Durham* case: that the accused who suffers from an undefined diseased mental condition is deprived of the will power to resist the insane impulse.

However, Dr. Cavanagh's philosophical interpretation of his definition clarifies to the reader that the will is always in operation, and that the will is able to choose and does choose to perform the particular act. The urge to perform one act rather than another is so strong that it occupies the whole field of consciousness; presenting it to the will only as something desirable, while other notions which might tend to represent the urge as undesirable to the will are precluded entrance into the consciousness of the actor. The will chooses to satisfy the only urge consciously presented. It is very clear from this explanation that the will never ceases to choose.

The Durham Decision—Pro And Con

The new legal tests of criminal insanity in District of Columbia, which jettisoned the old tests of insanity, has been both hailed as a major improvement in the administration of justice, and warned against as an invitor of confusion due to inherent vagueness.

The opposing factions are well represented in the following personal interviews with and reports of the authorities closely connected with the *Durham* case.

*An Interview With Dr. Winfred Overholser**

In an interview with Dr. Overholser, one of the leading authorities in America on Forensic Psychiatry, the authors were presented with his views concerning the *Durham* decision and the various aspects of the present legal-psychiatric problem of criminal insanity.

At the outset, Dr. Overholser expressed his enthusiastic approval of the ruling of the Court of Appeals of the District of Columbia. He considers the elimination of the *Knowledge* and *Impulse* tests, as the exclusive tests for the determination of

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* Superintendent of St. Elizabeth's Hospital, Professor of Psychiatry at George Washington School of Medicine.

[56] See note 54 *supra.* Definition of *Unresisted Urge:* An unresisted urge is one which, because of mental illness, so far causes the individual to lose his power of choice in regard to particular acts that in spite of the fact that he may recognize an act as wrong, he feels so *impelled to act* that he is *unable to adhere* to what he considers right. (Emphasis added.)

[57] *Ibid.*

criminal responsibility, an advancement in the law, desired by the psychiatric profession. Dr. Overholser states: "Psychiatrists, in giving expert testimony as to the mental condition of the defendant at the time of the criminal act, need no longer play the role of a pseudo-doctor or a pseudo-lawyer. Since he is no longer confined within the narrow limits of the antiquated tests, the psychiatrist is now free to present to the jury his complete analysis of the defendant's mental condition."

Dr. Overholser was pleased and proud over the fact that the District is the first jurisdiction to follow the New Hampshire rule. Since the New Hampshire rule is broad enough to include the *Knowledge* and the *Impulse* tests, he favors the continued use of these tests as additional aids to the broadened ruling. "We should be willing to consider anything, which will help us to arrive at a proper diagnosis of the defendant's mental state."

He expressed his disapproval of the numerous jurisdictions which still adhere to the *Right and Wrong* test as the sole criterion, because: "It is well known in the field of psychiatry that many persons obviously suffering from severe mental illness can tell the difference between right and wrong." He considers, therefore, the *Irresistible Impulse* test a welcome supplement or alternate to the *M'Naghten* rule, though only one step forward. When questioned concerning the possibility of an impulse being truly irresistible, Dr. Overholser stated that in some cases of mental illness, such as true kleptomania, there may exist a real compulsion which overpowers the will to resist.

In the new instructions of the *Durham* decision, Dr. Overholser does not think that the court's use of the terms "mental disease" and "mental defect" should present any problem to the psychiatrist.[58] He considers the court's definition of these terms as psychiatrically accurate. Although the court's definition of "mental disease", ". . . a condition which is considered capable of either improving or deteriorating", offers no distinction between severe psychoses and mild neuroses, Dr. Overholser feels that the common sense of the average jury will prevent the acquittal of a defendant suffering only from a mild mental disorder. He considers the present theorizing that the new ruling will effectuate a succession of acquittals, ill-founded. "The effect of the test in this regard will in all probability be negligible. The new rule has not caused any epidemic of acquittals in New Hampshire, anyway!"

Dr. Overholser agreed with the interviewers that there exists a conflict of rights: the right of the public to be protected on the one hand, the right of the person legally irresponsible for crime to be relieved of punishment, and that the public's right to protection takes precedence until the hospitals are in a position to accept additional commitments. In view of the public welfare involved, being

[58] This opinion differs from the view expressed by Dr. Cavanagh. "The court has attempted to define it (insanity) in terms of no symptoms at all and in terms which are so confusing that they cannot be understood by most psychiatrists." See: Dr. Cavanagh, *A Psychiatrist Looks At The Durham Case,* this issue.

confined in jail until arrangements can be made to admit the person to a mental hospital should not be considered as synonymous with punishment.

The eminent psychiatrist offered the suggestion that the discretionary power of the judge concerning the commitment and examination of the acquitted-defendant should be replaced with a tightened mandate, viz. to commit to a mental hospital all those acquitted by reason of insanity, there to be detained until they can be released without danger to the public. "The protection of society is the important thing, whether the detention be in a prison or in a hospital. He favors the establishment of court clinics, similar to the one just set up in the District.

With the new ruling, one of the most important functions of the psychiatrist when offering his testimony, and of the court in giving its instructions, is to simplify the terms involved so as to make them readily understandable to the lay jury. "If this is done", says Dr. Overholser, "there is no need for a Blue Ribbon jury. The jury is presumed to be representative of the public. Your suggestion of an expert jury composed of e.g. psychiatrists, philosophers, psychologists and sociologists, might result in the additional problem of how to resolve conflicting professional opinions."

Dr. Overholser summed up his opinion of the new ruling by stating in effect that, although long at arriving, it is a hopeful sign that the gap between psychiatry and the law is narrowing.

*An Interview With Gerard J. O'Brien**

As Assistant United States Attorney, Mr. O'Brien played one of the major roles in connection with the *Durham* case on appeal. He afforded the writers, in the form of a constructive criticism, the opportunity of first hand information concerning his interest in the consequences of the new ruling.

Mr. O'Brien commenced his discussion of the *Durham* decision with an analysis of the "some evidence" question.

> Under the "some evidence" test, it is naturally presumed that the government has the burden of proof beyond a reasonable doubt with respect to every element of the crime. This doctrine has a ready application such as, with respect to the footprint left on the soil; the fingerprint left on the gun; and the eye-witness at the scene of the crime. But, we have yet to discover a criminal who dropped his mind at the scene of the crime for psychiatric observation.
>
> We can hope for quick apprehension of the criminal, but such does not mean an immediate subjection to mental examination, and, should it take a considerable length of time for the state to apprehend the abscounding criminal, it may be impossible for medical science to determine the exact mental condition at the time of the crime.
>
> Under the "some evidence" rule, the defense has only to raise the issue of insanity, such as, that the defendant does not remember the crime no matter how "weak, insufficient, inconsistent, or of doubtful credibility" that evidence may be. Now, under the new ruling, the government must prove the mind of the defendant to be neither "diseased" nor "defective", or that it did not produce the criminal act. It would appear this burden is relatively

*B.S. University of Notre Dame 1945; LL.B. University of Notre Dame 1949; LL.M. Catholic University of America 1951; Area Director, Great Books Foundation, Washington, D. C.; Member, Ricobono Legal Seminar.

scientific, and the rigors of such burden may not be discovered until trial when the defense asserts insanity.
It all raises a question as to whether the "some evidence" test as expressed in the *Davis* decision in the year 1895, is now properly in step with the burden placed on the prosecution.

Mr. O'Brien considers it of extreme importance that the determination of *responsibility* remain the primary function of the psychiatrist in order that the jury may determine *guilt* based upon such evidence.[59]

> The jury should have the aid of psychiatry on the question of *responsibility*—a psychic element. How can any scientist presume to inform of the defendant's total personality and eliminate an important aspect of environmental development. Not to consider the question of *responsibility,* presumes a matrix of human personality ignorant of right and wrong. A form of this was attempted by Hitler. As we know society, this matrix does not exist. Psychiatry should aid in the determination of responsibility. Only in this manner can scientific understanding of the defendant's *subjective responsibility* for the commission of the crime be ascertained.

With clarity of expression, Mr. O'Brien presented the writers with what he believes is an explanation of the *Right and Wrong* test.

> Specifically, *right and wrong* should be a simple issue. It is unfortunate that in instructions, judges plagiarize on the explanation given by the Judges of England in the *M'Naghten* case of 1843. The law should be capable of simplifying Elizabethan terminology with the simplified language of our day.
> The question really concerns whether, for example, when *A* pulled the trigger and shot *B*: did *A subjectively* understand that *B* had a right to live, and *A* for reasons of his own, determined that *B* should not. Somewhere in *A*'s mental experience, it can be presumed, until shown otherwise, that *A* was either trained or had an acquaintance with the fact that he should not destroy the life of another human being.
> Inquiring into this understanding of *A* is to determine the reason why he could not or would not conform to his understanding. We are not, under the *M'Naghten* rule as pronounced, requiring *A* to explain the underlying reason or principle for his understanding that he should not destroy the life of another human being.
> The opposition to *right and wrong* believe that the jury is testing *A*'s *objective* understanding of the moral doctrine that makes the destruction of human life intrinsically wrong.[60] But, that is not the function of the *Right and Wrong* test.
> Until an amoral society evolves, it is difficult to divorce the psychic content of today's moral understandings from that of an individual within the moral society as it exists. In other words, society is only a composite or unit of the individuals that make up society. The vast majority are today instructed in the basic concept that it is wrong to take human life. In order to construct an amoral society, it would be necessary to instruct individuals that make up society in a doctrine that it is not a question of wrongness in the taking of human life. But, since we have not yet evolved into an amoral society, the courtroom does not appear to be the proper medium for debate on a philosophical question.

Mr. O'Brien suggests an interesting question arises from the absence of any mandate in the *Durham* opinion that the psychiatrist offer testimony on the question of *right and wrong.*

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[59] Note that Mr. Chayes equates *responsibility* and *guilt;* and in that way relieves the psychiatrist of any participation in the determination of responsibility. See: *Brief Extracts and An Interview With An Amicus Curiae,* post.

[60] It may here be noted that in opposition to Mr. O'Brien's theory, Mr. Chayes expressed the view that the function of the *Right and Wrong* test was to test *A*'s *objective* appreciation of right and wrong. *Ibid.*

It may be said that if the professional opinion of the psychiatrist does not take *right and wrong* into consideration, the jury has no evidence of *right and wrong* to weigh. It is an interesting question as to whether the jury should be allowed to consider the question of *right and wrong* from other factors in the evidence despite the lack of the professional testimony on the matter. Since, under the new ruling the psychiatrist need not present testimony on the issue of *right and wrong*, the question arises whether the jury has, within its own capabilities the requisite understanding of *right and wrong*. Our tradition heretofore was to the effect that a jury did not necessarily need the crutch of a psychiatrist's opinion. Therefore, has this opinion written into the law a need for the psychiatric crutch before the jury can be considered competent to weigh this problem?

Law Day—George Washington University

Dr. Winfred Overholser, Mr. Gerard J. O'Brien and Mr. Abrams J. Chayes participated in a panel discussion concerning the *Durham* decision at George Washington University's First Law Day on November 13, 1954. This section will be devoted to a reprint of the address delivered by Mr. O'Brien.

Prof. Cooper, Dr. Overholser, Mr. Chayes, law students of the University, alumni and ladies and gentlemen.

It is an honor to share in the inauguration of Law Day at this great University.

It would appear that I am to be a Socratic gadfly on this panel.

My views are to be interpreted "constructive." I might add my remarks do not necessarily represent those of United States Attorney's office.

The issue of criminal insanity has been submitted to juries since 1843 in terms of the M'Naghten rule, recognized as the practice existent in this jurisdiction as early as 1882, as modified for the last quarter of a century by the doctrine of irresistible impulse. *M'Naghten's Case,* 10 Cl. & Fin. 200, 211, Eng. Rep. 718, 722 (1843); *Guiteau's Case,* 1 Mackey 498 (1882); *Davis v. United States,* 160 U.S. 469 (1895); *Smith v. United States,* 59 App. 144 (1929).

A determination of criminal responsibility was stated by the Court of Appeals in *Holloway v. United States,* 80 U.S. App. D. C. 3, 4 (1945), to be "nothing more than a moral judgment that it is just or unjust to blame an accused for his criminal act". The degree of that blame had direct relation to the capacity of an accused to think and act rationally on his act, and if knowing it wrong and not irresistibly compelled to do the act by reason of derangement of the mind, then the law imposed responsibility.

The Supreme Court in *Leland v. Oregon,* 343 U.S. 790, 801 (decided June 9, 1952), cited Holloway for the proposition that ". . . choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility". The longevity of the right and wrong doctrine indicated some practical utility; it is the exclusive test of criminal responsibility in a majority of American jurisdictions, *Leland v. Oregon, supra,* at 800, and the long survival of this basic test reflect the difficulty of substituting one having the virtue of equal precision.

It was of no minimal consequence to the community at large that a division of the Court of Appeals had adopted a test of criminal responsibility that appeared to alter materially our settled rule of criminal responsibility.

Certainly, substitution of a new rule presented ". . . issues (that) are intricate enough to invoke the pooled wisdom of the circuit." *Western Pac. R. Co., supra,* at 271, (concurring opinion of Justice Frankfurter), and it was submitted to the Court that the public interest would be served by an opinion reflecting the views of the Court *en banc* as to the need of any change.

The Court's decision was based on its power to change settled law in the light of reason and experience. And it was respectfully submitted that just as the public had the benefit of the wisdom of all the judges in the formulation of the M'Naghten rule the public interest should be similarly served in devising any detailed guide deemed necessary for the future. The Court denied the rehearing *en banc.*

Turning to the decision, generally.

A. The Court in its opinion explicitly disapproved the "right and wrong test" as inadequate, not in step with "psychic realities and scientific knowledge", and has characterized

the classic test as "one symptom" that cannot be validly applied in all circumstances. The irresistible impulse test was also declared inadequate because the word "impulse" connotes immediacy and does not circumscribe mental illness characterized by brooding and reflection. The Court formulated a new test—*"It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."*

To fill a void the Court formulated the new test in an approved instruction, couched in the language of causality, and omitting any reference to a jury's moral responsibility. The issue of moral responsibility is clearly implicit in the superseded test. To omit reference to it is to confuse a jury whose ultimate function, the Court recognizes in the opinion, is to make a moral judgment. Moral responsibility is an unqualified standard. The trier of the fact should be forcibly reminded of this especially where, as here, legal insanity is described in terms of causality, a variable standard not clearly limited as to degree.

It must be heeded that despite the negative aspects of the Court's opinion about the "right-wrong" and "irresistible impulse" tests, it ended on a positive note, *i.e.,* "The jury's range of inquiry will not be limited to, but may include, for example, whether an accused, who suffered from a mental disease or defect did not know the difference between right and wrong, acted under the compulsion of an irresistible impulse, or had been deprived of or lost the power of his will * * *'" (citing *State v. White,* No. 5724, decided May 12, 1954, Supreme Court of New Mexico, 22 U.S.L. Week 2559) (slip opinion at 26).

Now, the specific question of irresistible impulse.

B. The criticism of the Court that the doctrine of irresistible impulse "carries the misleading implication that diseased mental condition(s) produce only sudden, momentary or spontaneous inclinations—" (slip opinion at 21) is rather perplexing. Obviously, the two characteristics of an impulse are its strong tendency to initiate action and its lack of deliberation. The word "impulse" need not actually exclude at law an action premised on a brooding, simmering intellect, if we are to acknowledge the advances of psychiatry. In fact a broader interpretation of the impulse doctrine is commendable; yet the Court's opinion sounds the problem without resolution. There is an apparent continuation of the narrow doctrine from the quotation I just read to you, that is, "The range of inquiry will not be limited to, but may include * * * (whether the accused) acted under the compulsion of an irresistible impulse * * *" *ibid.* If the criticism of the Court is valid, future instructions of the trial courts should include this broader meaning where there exists evidence to support a defense by reason of an impulse. Hence the Court's opinion is not entirely clear on this point.

Considering right and wrong.

The right and wrong doctrine is no longer an exclusive test or criterion, but remains valid where the sumptomatology does justify an instruction.

The Court found that as an "exclusive" criterion the right-wrong test was inadequate—inadequate in the sense of circumscribing the entire field of criminal responsibility. The test was not to have a valid application across the board. Right and wrong is purely symptomatic; and, apparently, excludes other symptoms that in their aggregate would equally negate criminal responsibility. The Court does not state or define those other symptoms but shifts this burden to "psychic realities and scientific knowledge" (slip opinion at 22). The Court's view seems to give way to a concept of subjective wrong rather than objective wrong. For that reason wrongness per se cannot be an exclusive test. What does this mean? Well, if a criminal from the circumstantial facts of a crime would appear to comprehend that his criminal act is wrong and even if his admissions against interest may likewise indicate an appreciation for the wrongness of his act—this is of no material significance. Why? Because of the criminal's motives. His motives may color an otherwise objective understanding of wrongness to be subjectively not wrong.

I say the Court's view appears to give way to the subjective, freudian test, but then again it does not exclude the question of right and wrong where it has relevant application. It is confusing whether the classical test as it is allowed to survive continues as it did before or as the court would imply its criticism is to be followed. Like the impulse test, the question is raised but without resolution.

And so, the Court propounds, what it calls "A broader test" of criminal responsibility (slip opinion at 22).

Let us consider the new test.

C. A question will immediately rise to mind, and certainly to the jury's mind, as to what is a disease or defect? The new instructions require: "If you the jury believe *beyond a reasonable doubt* that the accused was not suffering from a *diseased or defective* mental condition at the time he committed the criminal act charged, you may find him guilty."

The Court defines *disease* in the sense of "a condition which is considered capable of either improving or deteriorating." It is doubtful that that definition adds much to the

jury's knowledge. Nor does the definition of "defect," which is the opposite of a disease, in that it is "a condition which is *not* considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease." The vagueness of these concepts to a jury's mind may be productive of confusion; not a desirable by-product of a standard that is to measure criminal responsibility.

It is doubtful that the word "disease" will have any significance to the science of psychiatry in that disease has a certain pathological connotation not descriptive of a functional disorganization or psychogenic condition. Disease may be as vague as "insanity," a word having significance only at law. Thus, psychiatrists may find difficulty channeling their diagnostic testimony within the legal confines of disease or defect.

Of course the broader concept of merely an unsound mind or mental illness has a greater range of understanding but the propounded instructions delimit that range to disease or defect.

However, should the jury acting as laboratory technicians abstract from the evidence by whatever side it is produced that the accused suffered a diseased or defective mind at the incident of the criminal act, to the degree they believe it (and I might mention the Court did not say "reasonably believe," but I suppose that is presumed) then the jury to arrive at guilt must believe beyond a reasonable doubt that the act was not the product of such mental abnormality.

Considering now—causal connection.

The question of causal connection has obvious difficulties. Is the mental abnormality to be the proximate or approximate cause? The superseded test more or less presumed the causal connection, that is, if a person simply suffered an unsound mind, regardless of whether it be diseased or defective, the jury's task was to determine beyond a reasonable doubt whether the accused understood his act to be wrong or was irresistibly impelled to its commission. The jury was never required to find a specific causal connection.

Psychiatry too may find this concept of productivity as wide as the horizon. The mental science does not proclaim certitude, it cannot empirically measure a delusion or other psychogenic symptoms to a degree that it can positively assure productivity. We can only await the onslaught of psychic realities on this point.

With these underlying complications of the "broadened" test, it is readily apparent that the burden falls squarely on the government—and I needn't remind you that the Government represents the social weal. The government to achieve guilt must prove each and every necessary element of the new test beyond a reasonable doubt. If the new test is innately confusing it may naturally create doubts in the jury's mind, and entertaining such doubt, they would be required to reach a not guilty verdict. It would be unfortunate if the *evidence* did not create doubt, but rather the legal test did.

What will this mean to future prosecutions.

D. It is well established in the law that a layman when properly qualified may express an opinion with respect to a person's mental condition in both the civil and criminal law. Is it now allowable for a layman to give an opinion on whether a person suffers a diseased or defective mind? The Court's opinion expressed a desire to equalize the criminal with the civil law but certainly no harsh requirement of disease or defect exists civilly to disprove testamentary capacity. Query: May only an expert testify to the new standard?

We do not have a psychiatrist at the elbow of every criminal and where apprehension is long months, a year or two after the crime, a psychiatrist may be unable to determine the mental condition on the crime date. With no expert testimony, does it mean that the Government may not successfully prosecute under the new test?

It must be remembered that under the *Tatum* rule announced by this Court "only *some evidence*" is sufficient to raise the defense of insanity, no matter how "weak, insufficient, inconsistent of or doubtful credibility" that evidence may be—and especially the defense evidence needs no psychiatric support beyond the exclaimed defense by the accused himself.

If the new test broadens the standard at law, it certainly does not appear to broaden it in favor of the Government. We have not had a sufficient number of cases under the new test to statistically analyze the test's impact on the criminal administration of justice. It will require some time to determine that factor.

E. It is argued, however, that the social interest is not harmed because under § 24-301 of the D. C. Code the Court may refer a case where there is a verdict of not guilty by reason of insanity to the Secretary of Health, Education and Welfare. In a recent brief I argued that the referral by the Court is not discretionary but mandatory, under Title 24, § 211 of the United States Code which repeals, *pro tanto*, the earlier District of Columbia legislation. However, both statutes provide that commitment by the Secretary is discretionary. Incidentally,

this very topic is mentioned in footnote No. 57 in the Durham decision, which was amended on October 13, 1954.

The discretion of the Secretary appears absolute. It would appear also legislation should be enacted to eliminate this inartful procedure. The courts should of their own power commit directly to the hospital on such a verdict. Something similar to the law of Massachusetts dealing with insane felons would also be appropriate to protect the public from premature release to the community. In fact, a defective felon by the nature of things could possibly never be a safe risk in the community. Yet there is no recourse from the decision of the Secretary or standard to be applied for commitment under the present statutes.

Beside increasing the obligations of the Government under the Durham decision, the Court gave full warning of a possible "partial responsibility" rule in the *Stewart* decision.

Now, the full implications of these two decisions cannot be appreciated alone. They are part of a composite or mosaic picture being painted by the Court. Studying the picture, let us now concentrate on a few trees to the disregard of the forest.

In the recent *Wear* case, the Court interpreted § 4244 of Title 18, the incompetency statute, in such fashion as to eliminate from the statute the right of the Court to determine the *reasonableness of the grounds* of a defense motion, or even a government motion, seeking the Court's inquiry into or examination of the mental competency of an accused to stand trial. Competency is a mental condition distinct from that of insanity at the commission of an offense. But there can be a relationship. The Court interpreted this statute to only allow denial of such a motion when it is not in *good faith* or is *frivolous*. Obviously, subjective good faith of a movant is a delicate question not usually ascertainable and not normally doubted by a court. Thus, the frivolousness standard is all that remains in the statute which incidentally does not use the term at all, but rather reasonable cause.

And, as a correlary and one more tree in our mosaic, in the recent *Gunther* decision, this same section 4244, was interpreted to require, upon the return by the Hospital authorities of an accused committed by the court and now medically determined competent to stand trial that the court may not customarily accept the medical finding of the doctors of St. Elizabeths Hospital or any Federal hospital as to the competency of an accused person to stand trial. The Court's opinion admitted its construction of the statute rested on an implicit rather than an explicit provision of the statute. The Court pursued the argument that psychiatrists couldn't determine full competency, but only a judge trained in the law.

What is perplexing is that under the *Wear* case the Court rejected the right of the trial court to determine whether the grounds asserted are reasonable to believe a question of competency exists, for the alleged reason, that it would be an attempt to detect mental disorders not "readily apparent to the eye of the layman." (slip opinion at 6). But under the *Gunther* decision, the eye of the layman, the judge, is a necessary check on the expertly trained eye of the psychiatrist.

And now for the forest:

The ease with which the defense may invoke the competency statute, the lack of adequate medical facilities at the present time to readily check the malingerer from being the legitimate, gives a criminal a potential advantage to delay and frustrate justice. And possibly to develop a convenient history of mental commitment in order to raise the defense of insanity, to require the Government to meet its burden, and finally to reach the stage where the Secretary of Health, Education and Welfare must arbitrarily measure the community interest against available beds. The acquitted, of course, may challenge by habeas corpus the power of the hospital authorities to further detain him.

It is an interesting picture—and like modern art, is subject to varying interpretations.

*Brief-Extracts and An Interview With An Amicus Curiae—Abrams J. Chayes**

While the *Durham* case was pending, Mr. Abrams J. Chayes was appointed an *Amicus Curiae* by the court in a similar case: *Stewart v. United States.*[61] In the amicus brief, Mr. Chayes requested that the defendant should have the benefit of any change in the tests of legal insanity then applicable in the district.

In a personal interview with Mr. Chayes concerning the new ruling in the *Durham* decision, he expressed the opinion that the new test for legal insanity

*A.B. Harvard University 1943; LL.B. Harvard University 1949; Mr. Chayes is a member of both the District and the Connecticut Bars and an Associate in the law firm of Covington & Burling in the District of Columbia.

[61] 93 U.S. App. D.C. (Slip opinion).

"reflects more adequately current levels of scientific and public understanding of the nature and causes of mental disorder." He said: "It (the test) affords the expert witness an opportunity to display more fully his technical knowledge of defendant's complete mental condition."

His criticism, spelled out in the brief, emphasized the major deficiencies in the old tests:

> In the first place, concentration on one of two symptoms ignores the growing understanding of the causes and nature of mental disease, a growth which has been conspicuously marked in the century since (those) tests were first formulated. This scientific development which to a large extent has been embodied in the general public attitude towards mental disease, has demonstrated beyond contradiction that the critical symptoms of the (old) judicial tests do not necessarily, or even in the majority of cases, in fact accompany a serious mental disorder . . . Indeed, scientific development has shown that emphasis upon rational activity, or any single phase of mental activity, is affirmatively misleading.

Mr. Chayes felt that in many instances a defendant, who was clearly mentally disordered and therefore clearly not responsible for his acts was at the same time shown to have appreciated the difference between *objective right and wrong.* Under the old rules, the jury was required, in order to mete out substantial justice, to ignore its oath and acquit the defendant. Injustice was many times avoided by the jury's distortion of the rules. But, the more serious consideration was the probability that many times under the instructions, the jury convicted where the defendant was in fact irresponsible and should have been acquitted.

The question propounded to the psychiatrist under the *Right and wrong* test, viz.: Did the defendant know the difference between *right and wrong* when he committed the act?, according to Mr. Chayes, violated one of the fundamental rules of evidence because it required the psychiatrist to answer what constituted the ultimate question of the fact of the defendant's responsibility. And the difficulty was compounded in that the answer was required in terms which are irreconcilable with the psychiatrist's special training and knowledge.[62]

In the view of the *amicus*: the issue of *responsibility* should be submitted "simply and directly to the jury." He conveyed his thought that the jury is capable of answering the question of criminal responsibility, if propounded under the new rules and of determining the ultimate question of fact of the defendant's responsibility. For, he said:

> When the jury comes in, they are more or less representative of the general moral attitudes and level of scientific understanding of the community at large. During the course of the trial, they will be subjected to an intensive technical "course" in psychiatry as applied to the particular defendant. In the end they will be in a perfect position to mediate in their judgment between the general moral sense of the community and the more specialized professional outlook of the psychiatric witnesses.

For a very interesting criticism of the old tests, an analysis of the *Holloway*[63]

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[62] Mr. O'Brien considers the question not to constitute an ultimate question of fact, and that in answering such question as to the defendant's knowledge of right and wrong, he is expressing an opinion in which the jury may either accept or reject, in weighing all the evidence.

[63] 80 U.S. App. D.C. 3, 148 F. 2d 665 (1945).

opinion by the *amicus* in his brief, can be examined. In the *Holloway* case, it was insisted:

> Legal tests of criminality are not and cannot be the result of scientific analysis or *objective* judgment. There is no *objective* standard by which such a judgment of an admittedly abnormal offender can be measured.[64]
> Psychiatry offers us no standard for measuring the validity of the jury's *moral* judgment as to culpability.[65]

Mr. Chayes analyzes as follows:

> Do they (the old tests) not attempt to standardize what this court rightly recognizes as essentially a *subjective* moral judgment given by the jury as the epitome of the *moral* sense of the community? Do they not compound the offense by erecting as the *objective* test and measure symptoms which coincide neither with the medical findings as to the nature of the disease nor the moral notions of culpability?
> We should improve both the science and the candor of the administration of the defense of insanity by abandoning the present symptom-oriented tests in putting the moral issue to the jury on a broad factual instruction . . . This ultimate moral issue is peculiarly in the province of the jury. It should be left to that body upon all the evidence, lay, expert and the jury's own observations of the defendant in court . . . Once it is recognized, as this court has done in the *Holloway* case, that the ultimate judgment is a moral one, it follows that it is impossible to assure mechanical equality of result by imprisoning the *moral* judgment in the strictures of a logical formula. (Emphasis added.)

Concerning our discussion of the procedural aspects of the *Durham* decision which constituted grounds for reversal, Mr. Chayes stated that in reference to the "some evidence" rule, he considered the lower court's application of this doctrine as inaccurate.

> Since there was testimony as to the mental condition of the defendant before and after the time of the crime and thus the court could have drawn an inference that as to the mental condition at the time of the act, the "some evidence" rule of the *Tatum* case[66] was satisfied.[67]

When the question was put to Mr. Chayes concerning the importance of a consideration by the court and the expert witness, of the metaphysical question of freedom of the will so obviously involved in a question of criminal responsibility, he answered:

> We should not attempt to impart refined and formal philosophical or metaphysical notions directly into the system of law. The community consensus on such controversies will be reflected *mediately* in the body of the law through the operation of juries and the decisions of judges whose roots are in a social and cultural context common to us all. The result, of course, is fuzziness—lack of precision. But this should not bother common-lawyers. Indeed, it is one of the glories of our law that it can serve a community so diverse as ours, and that men with quite antagonistic philosophical pre-suppositions—lawyers and laymen alike—may ask and receive justice of it.

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[64] *Id.* at 4.
[65] *Id.* at 5.
[66] *Tatum v. United States*, 88 U.S. App. D.C. 386, 190 F. 2d 612 (1951).
[67] In reference to this point, it must be remembered that when insanity is interposed as a defense to criminal responsibility under the *Right and Wrong* test, we are concerned with cause and effect and the specific time at which the crime charged was committed. Inferences are weak in the light of such a tenuous situation. Hence, it would appear to the writers that Judge Holtzoff who rendered the decision in the lower court was giving full import to the words of the M'Naghten rule when he found that there was "no evidence" of the defendant's mental condition *at the time of the act* and that the initial presumption of sanity was not overcome.

Abe Fortas v. The Evening Star

In a letter to the Evening Star Newspaper Publication, published November 10, 1954, Mr. Fortas, appointed by the Appellate Court in the Durham case to defend the accused, expressed his fears that the Star's editorials have contributed to a *Basic Misunderstanding* on the part of some of the citizens of the District of Columbia as to the meaning and effect of the new ruling.*

Excerpts have been taken both from this letter, (in order to present the views of one so closely connected with the decision), and from the Editorial which appeared in this publication on the same day.

Mr. Fortas writes the following concerning the old tests:

> These tests were formulated long before the discoveries of modern psychiatry revolutionized our understanding of the human personality. They are as obsolete as the belief that an insane person is possessed by the devil.
> There is widespread agreement that the tests do not provide a useful basis for distinguishing between those who should and those who should not be punished for their acts. In practice, the "right and wrong" test is frequently abandoned. Where it is proved that an accused person is "insane" and "irresponsible," the common sense of judges and juries has often prevailed even though it is clear that the defendant knew that his act was wrong.
> For many years, our law has not required that there be specific proof that the accused did not know the difference between right and wrong. Evidence from which this may be inferred (however arbitrarily) has been deemed sufficient.
> The real difficulty with the "right and wrong" and "irresistible impulse" tests, however, is that they seriously interfere with a scientific determination of the mental condition of the accused. They make it needlessly difficult for psychiatrists to lay before the court and the jury a complete and objective account of the psychiatrist's diagnoses of the accused's mental condition. Demanding that psychiatrists testify in these terms is like asking a doctor to testify as to whether a man has pneumonia and insisting that the standard by which the patient is to be judged is whether he blushes.
> The ability to distinguish between right and wrong is neither a disease nor a symptom. The vast majority of persons who are insane are aware of the difference between right and wrong conduct, but they may be incapable of adjusting their conduct to the consequences of this knowledge.
> Because of the wide gap between psychiatric reality and the legal formula, many competent psychiatrists have preferred not to participate in criminal proceedings. They have felt that they are not competent to testify as to "right and wrong," and they have not been willing to submit to questioning based on these standards which, to them, relate to metaphysics and not to their science.

About the new test to be applied in the District, Mr. Fortas approvingly declares that:

> This test enables the psychiatrist to tell the court all that he knows about the defendant, and to tell it in terms that are accurately descriptive of his diagnosis. He does not have to face the sometimes impossible and always distasteful prospect, under the questioning of lawyers, of fitting his scientific findings to the mold of irrelevant legal cliches.
> Durham's rule makes possible genuine and fundamental progress in the cooperation between psychiatry and criminal administration. It represents a conspicuous advance which, I believe, will result in improved administration of the criminal law to the benefit of both the accused persons and the community.

Mr. Fortas proceeded to discuss what happens when a verdict of "not guilty

*Permission granted to the authors of this article by Mr. Fortas.

by reason of insanity" is rendered and what the law provides concerning commitment to a mental institution:

> Under our law, when a verdict of "not guilty by reason of insanity" is entered, it does not mean that the defendant is released from custody. On the contrary, the law clearly empowers the judge to place the defendant in the custody of the Department of Health, Education and Welfare. The defendant is then placed under surveillance and is treated at a mental institution so long "as the public safety and . . . (his) welfare require." He should not be released until the authorities of the institution are reasonably certain that his mental condition will not result in the commission of new crimes.
> The point is that the defendant is not punished by being put in jail. Instead, he is treated for his mental condition. But he is in custody in either event. The Durham case does not affect this practice, which preceded the case and which is still followed.
> It is true that the trial judge has discretion and is not compelled by law to commit to a mental institution a defendant acquitted on grounds of insanity at the time the crime was committed if the defendant is sane at the time of trial. But this discretion existed when the "right and wrong" and "irresistible impulse" tests were followed. It was not the result of the Durham case. There is, therefore, no basis for the statement in The Star's editorial of October 7 that the "new rule" will "bring about the release of criminals from whom the public should be protected."

In its editorial, the Evening Star explains its statement which appeared in a former issue of the Star on October 7th, 1954:

> Mr. Fortas does not spell out the precise nature of the "basic misunderstanding" he has in mind. He does say, however, that there is "no basis for the statement in The Star's editorial of October 7 that the 'new rule' will 'bring about the release of criminals from whom the public should be protected.' "
> This is a misleading interpretation of that editorial. The statement which Mr. Fortas says has "no basis" was not The Star's statement, although it may well prove to be entirely correct, but rather a report of a statement by United States Attorney Rover. And it was made pursuant to a comment by District Judge Schweinhaut with reference to the new insanity definition. Judge Schweinhaut said this: "The defense of insanity is going to be used by every other defendant who comes into this court. We are embarked on a new era."

The Evening Star Newspaper has taken a tremendous interest in the outcome of the Durham decision. By means of an Editorial, the Star posed a number of questions in reply to the Fortas letter:

> The appellate court rejected the "irresistible impulse" test as being "inadequate in that it gives no recognition to mental illness characterized by brooding and reflection . . . ." With reference to its new test the court said: "We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."
> What, precisely, does this mean, as applied to a defense in a criminal case? Perhaps the appellate judges know. But The Star doubts very much that it will be meaningful to jurors. And some of our trial judges have said that its meaning is obscure to them.
> Mr. Fortas touched upon the point that a trial judge, after a finding of not guilty by reason of insanity, has authority to commit the accused to a mental institution. The Court of Appeals, as an afterthought, made the same point in an amendment to the Monte Durham decision. But there is a hitch to this. In a companion case, the appellate court ruled that a trial judge must make an affirmative finding, at the time of trial, that an accused person is of sound

mind, able to advise with his counsel and assist in his own defense. It is entirely conceivable, however, that such a person might be acquitted on the ground that he had a mental defect *at the time* of his offense and that the crime was a product of that defect. What happens then?

The Court of Appeals advises the trial judge to commit such a defendant to, say, St. Elizabeths. But the defendant, *after* the commission of the offense, has been found to be of sound mind in the sense of being competent to stand trial. Is the trial judge to commit a man of sound mind to an institution for the insane? Is that institution, its own psychiatrists having made the finding of sanity for purposes of standing trial, going to detain him for very long?

The Star fears that the answers to these questions, as they are worked out in practice, will be adverse to the interests of the law-abiding people of this city. The new definition of insanity undeniably throws a greater safeguard around a person accused of a crime, if he chooses to plead insanity as a defense. But as a practical matter it certainly does not add to, and may subtract from, the protection which the public heretofore has had from persons suffering from a mental defect—whatever the exact meaning of that term may be. In any event, it will be important to watch the workings of this new rule, as it is applied from day to day in the operation of the criminal courts, and The Star intends to do this.

Experience may show that the new legal definition of insanity as written by the Court of Appeals is broader than the standards which seem now to be applied in medical diagnosis of a condition requiring indefinite detention in a hospital for the insane, for treatment of the individual and protection of the public. If such a gap between legal definition and medical diagnosis of insanity exists, ways must be found to close it.

Conclusion

It is apparent from the various streams of thought, theory and opinion, which the *Durham* decision has already invited, that we are confronted with a very serious problem of whether the new test is a step upon the path of progress or a step in the wrong direction. It is conceded that "it was time for a change" in order to keep abreast of scientific advancement in the study of mental illness. However, in our anxiety to better the existing rules, a change for change sake should never be the motivation. The merits of what we have, should be prudently weighed before being cast aside.

A fear that the *Durham* decision opens the door too wide to a variety of untenable psychiatric testimony may well be justified. On its face, the new decision offers unlimited freedom in the elicitation of psychiatric testimony, devoid of any restrictions upon any one school of psychiatric thinking. However, by not preserving the old tests as a mandatory consideration, the court engenders an abuse of this new freedom by sanctioning a situation whereby testimony of only one school of psychiatric thinking is introduced.

It is the duty of the court not just to offer the opportunity for, but to assure the presentation of the various, valid conflicting theories of psychiatric thinking. The *Durham* court said: ". . . the jury's range of inquiry *may* include . . . for example, whether an accused, who suffered from a mental disease or defect did not know the difference between right and wrong, acted under the compulsion of an irresistible impulse, or had 'been deprived of or lost the power of his will' . . ." This is by no means an *assurance* that our concept of free will which is the foun-

dation of the entire jurisprudence of the criminal law, will be secured against change or risk.

From this mere *offer* of the opportunity to consider the old tests, it may be reasonably inferred that the court favored the determinist school of psychiatric thinking. Judicial decisions should not reflect such favoritism, if we are to presume that the science of jurisprudence is to be objective and impartial in weighing all relevant testimony upon the scales of justice. This accusation of favoritism may be refuted in that it is mere tolerance on the part of the court. Objectivity and impartiality means a tolerance which is right—but only in the presence of schools of thought which partake of truth in the objective order. However, . . . "Tolerance is not right when its basic principle is a denial of truth and goodness and when it asserts that it makes no difference whether murder is a blessing or a crime, or whether a child should be taught to steal or to respect the rights of others",[68] or whether the unconscious factors of man's intellectual processes coerce his will to such an extent that his acts are determined or whether man always has the free will to choose.

Proposal

A ruling which would truly be a step forward in helping to solve the many problems in the field of criminal insanity, should require: (1) that the *Right and Wrong* test be maintained as one of the criterion in the determination of criminal insanity precisely because of its value in the ascertainment of the defendant's moral responsibility based upon his subjective appreciation of the nature and quality of the particular act; (2) that the doctrine known as *Irresistible Impulse* should be replaced by an "unresisted urge" test, the theory of which is: that even if the defendant was able to distinguish between *right and wrong,* yet, if due to a mental disorder his intellect was so influenced, weakened or impeded in judging rightly on the desirability of his action, that he failed to resist the urge, chose to act, then he should not be legally responsible, i.e., non-guilty. This test would lay the foundation for determining whether or not a verdict of guilty should be rendered. It would preserve the concept of freedom of the will in the mentally ill person, and at the same time permit the jury to render a merciful verdict of not-guilty even in the face of moral responsibility; and (3) that as an additional aid in the determination of legal responsibility, the permitting of unhampered psychiatric testimony, in ascertaining whether or not the accused is suffering from a mental illness, and whether the particular act charged is a result of such illness.

The aforementioned proposed-means for the determination of criminal insanity could be arrived at if the courts would apply the principles of the *Cavanagh* treatise to the *Durham* ruling, when deciding future cases of this nature. Such

[68] Sheen, *Way To Inner Peace,* New York: Maco Magazine Corp. 1954, p. 69. Most Reverend Fulton J. Sheen, former Professor of Philosophy at the Catholic University of America, presents an excellent analysis of the 'Right Attitude Toward Those Who Differ With Us' in this work.

application would be an invaluable aid in bringing about relief from punishment for the criminal act which is the product of mental illness, without destroying our traditional concept of responsibility for crime.

This proposal could be the beginnings of rationality in the jurisprudence of insanity.

NATALIE R. YEAGER
GENNARO J. CONSALVO

Motorist Statutes and Federal Jurisdiction

An automobile collision occurs on a state highway. The injured party consults an attorney concerning the possibility of bringing an action against the negligent driver, or his principal, or the manufacturer of the car, or all of them.

A tort action being transitory in nature, the attorney may bring the action in either the federal[1] or state courts having their situs in the jurisdiction where the defendant resides. Clearly, however, this might well entail great inconvenience to the plaintiff or his witnesses and certainly may not bring the action to a "just, speedy, and inexpensive determination."

In addition, regardless of where the defendant resides, the attorney may bring the action in the courts of the state wherein the collision occurred. All forty-eight states and the District of Columbia have enacted motorist statutes[2] which universally provide that simply by driving on the state highways, a non-resident motorist becomes amenable by operation of law to suit for accidents caused by his negligent operation of his automobile. Furthermore, these statutes usually provide for the "implied appointment" of some state official as a lawful agent or attorney to receive service of process for the non-resident. No objection to jurisdiction or adjective Due Process may be raised successfully.[3] The plaintiff is thus assured of at least three forums which will adjudicate his cause.

If the defendant is sued in a state court and actually is a non-resident, he has a constitutional and statutory right of removal of the negligence action to the

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[1] Judiciary and Judicial Procedure, 28 U. S. C. §§ 1331, 1332, 1391 (1948); Federal Rules of Civil Procedure, 28 U. S. C. Rules 4 (d) and (f) (1938).

[2] Cf. An extensive analysis of all non-resident motorist statutes in *Knoop v. Anderson,* 71 F. Supp. 832, 836-837 (N. D. Iowa 1937); GOODRICH, CONFLICT OF LAWS (3d ed. 1949), § 73 (6); Scott, *Jurisdiction Over Non-Resident Motorist,* 39 Harv. L. Rev. 563 (1926); 20 Iowa L. Rev. 654 (1935).

[3] Cf. *Hess v. Pawloski,* 274 U. S. 352 (1927) wherein the Supreme Court decided that the difference between the "formal and implied appointment" of an agent for service of process "is not substantial" under the Due Process Clause of the Fourteenth Amendment for the purpose of state jurisdiction; *Kane v. New Jersey,* 242 U. S. 160 (1916); *Hendrick v. Maryland,* 235 U. S. 610 (1915).