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Mental Illness and Criminal Responsibility

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MENTAL ILLNESS AND CRIMINAL RESPONSIBILITY

But as soon as a man, through lack of character, takes refuge in doctrine, as soon as crime reasons about itself, it multiplies like reason itself and assumes all the aspects of the syllogism. Once crime was as solitary as a cry of protest; now it is as universal as science. Yesterday it was put on trial; today it determines the law.

Camus
The Rebel

To trace the law of criminal justice from *M'Naghten*[1] to *Durham*[2] and beyond is to know what it means to say: "Yesterday crime was put on trial; today it determines the law." The ancient requirement for criminal responsibility of a culpable state of mind—said by many to be the essence of crime itself[3]—has been so eroded away by ever-broadening concepts of mental illness as to verge at times on total meaninglessness.

It would appear that psychiatry was never pleased with the *M'Naghten* formulation of rules of insanity as a criminal defense. To base excuse from criminal responsibility upon "a defect of reason" as *M'Naghten* did[4] was even at the time an affront to psychiatry. Although still in its first century of development at the time of *M'Naghten* and evidencing almost

[1] M'Naghten's Case, 10 CL. & FIN. 200, 210, 8 ENG. REP. 718, 722 (H. L. 1843).
[2] Durham v. United States, 214 F.2d 862 (D. C. Cir. 1954).
[3] *See* Morrisette v. United States, 342 U.S. 246 (1952); 1 J. BISHOP, CRIMINAL LAW § 287 (9th ed. 1930); Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).
[4] The gist of the M'Naghten Rule is that "to establish a defence on the grounds 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 *deffect of reason, from* disease of the mind, as not to knw 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." 10 CL. & F N. at 210, 8 ENG. REP. at 722 (emphasis added).

exclusively a belief that all abnormal behavior has its cause in some corresponding physical abnormality, psychiatry had begun to speak in terms of defects of the will. Dr. Isaac Ray, a pioneer in the field of forensic psychiatry whose influence is still being felt in almost every legal reform made in the area of criminal responsibility, was the first and strongest American critic of *M'Naghten.* Even before *M'Naghten* Ray had attacked "knowledge of right and wrong" tests of criminal responsibility by arguing that mental disorders were not limited to the intellect. Elaborating in 1871 upon ideas he had expressed shortly after the *M'Naghten* rules were devised, Ray stated:

> [W]ith hardly a single exception these "rules of law" on the subject of insanity are in conflict with the well-settled facts of mental disease. They would never have been made, we are quite sure, by persons practically acquainted with the operations of the insane mind. To such it is well known that in every hospital for the insane are patients capable of distinguishing between right and wrong, knowing well enough how to appreciate the nature and legal consequences of their acts, acknowledging the sanctions of religion, and never acting from irresistible impulses, but deliberately and shrewdly. Is this all to be utterly ignored in courts of justice?[5]

As early as 1838, five years before *M'Naghten,* Ray had challenged other psychiatrists to exert an influence upon the law. In the preface to his first edition of *A Treatise on the Medical Jurisprudence of Insanity,* he wrote:

> Few, probably, whose attention has not been particularly directed to the subject, are aware, how far the condition of the law relative to insanity is behind the present state of our knowledge concerning that disease . . . . This, no doubt, is mainly the fault of medical men themselves, who have neglected to obtain for the results of their researches, that influence on the law of

[5] I. RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 344 (5th ed. 1871).

insanity which they have exerted on its pathology and therapeutics.[6]

The first tangible results of Ray's efforts to modify the law of criminal responsibility may be seen in the opinion of Justice Doe of the Supreme Court of New Hampshire in *State* v. *Pike*,[7] decided in 1869. Ray argued that whether an alleged mental disorder excused the defendant or not was a question of fact for the jury to decide. His correspondence on this point with Justice Doe is credited with helping to bring about the New Hampshire rule regarding criminal responsibility. The New Hampshire rule, in effect in that state today and gaining wider acceptance in principle, rejects all legal definitions of insanity and leaves the question to the jury: "It was, for a long time, supposed that men, however insane, if they knew an act to be wrong, could refrain from doing it. But whether that supposition is correct or not, is a pure question of fact."[8] The court reasoned further that the question of fact was purely a medical one, to be answered by the testimony of medical men. Ray's victory was total. The law had been pre-empted in favor of medicine.

But the New Hampshire rule did not replace *M'Naghten* anywhere but in New Hampshire, and psychiatry was growing increasingly impatient with the law as it expanded its own role in human knowledge and affairs. The law had become progressively cognizant of the strides legitimate psychiatry was making, but this was seen generally only in more liberal interpretations of the *M'Naghten* rule.

It was in the second half of the nineteenth century that psychiatry reached true incompatibility with existing legal definitions of criminal responsibility. A hostile coexistence has prevailed ever since. Every concession made to reconcile criminal law theory with psychiatry has been on the part

[6] Cited in W. OVERHOLSER, THE PSYCHIATRIST AND THE LAW 4 (1953).
[7] 49 N. H. 399 (1869).
[8] *Id.* at 437.

of the law. They have all been mistakes. The two developments in psychiatry at this time which have plagued efforts at reconciliation where the widespread recognition of functional as opposed to organic mental disorders and the equally well accepted theory of the "unconscious". Whereas Ray had recognized defects of the will and had emphasized the role of the emotions, or affects as he termed them, in human behavior, Freud talked about nothing else. His postulation of the "unconscious" to explain abnormal behavior and the accent throughout psychiatry upon the emotional rather than, or virtually to the exclusion of, the intellectual aspect of human behavior resulted in the acceptance in some jurisdictions of the defense of the "irresistible impulse".[9] Despite the obvious philosophical, if not medical, impossibility of distinguishing between the true irresistible impulse and the impulse which is simply surrendered to, some fourteen states and the federal courts have incorporated the concept into law as a release from criminal responsibility.[10] The United States Supreme Court has given tacit approval to the doctrine.[11]

Freud's position regarding the relationship between psy-

[9] It is interesting that psychiatrists' chief criticism of *M'Naghten* has long been that it requires an erroneous view of the personality in that man's cognitive and conative processes must be considered separate and distinct in order to apply it. In arguing for the irresistible impulse test they have taken the same approach. To say a person may "know right from wrong", and yet not be able to resist certain impulses—may function perfectly well cognitively but not conatively—is also to effectively dis-integrate the personality. Psychiatry has yet to improve upon Plato's imagery of each man's driving both a black horse and a white horse and being responsible to let neither get out of check.

[10] Pollard v. United States, 282 F.2d 450 (6th Cir. 1960) (dictum) Sauer v. United States, 241 F.2d 640 (9th Cir. 1957), *cert. denied,* 354 U.S. 940 (1957) (dictum).

[11] Hotema v. United States, 186 U.S. 413, 420 (1902); Davis v. United States, 165 U.S. 373, 378 (1897).

chiatry and the criminal law was certainly unlike that of Ray, and almost unique among psychiatrists generally. His direct comments on the matter were rare, but when they came they expressed without fail his strong belief that psychiatric or psychological findings should not change what the court's verdict in a case would otherwise have been. Nonetheless, psychiatric theory, and especially Freud's own contributions to it, began to play a larger and larger role in criminal proceedings. There were no milestones of legal reform such as the *M'Naghten* rule, the New Hampshire rule, or the irresistible impulse doctrine to point to in the first half of this century, but the impact of psychiatry on the law was undoubtedly greater than before.

This impact was seen probably more clearly in the related areas of penology, probation and parole, and social work. But it reached the courtroom, too. Jurists and juries began recognizing excusing conditions of a psychiatric nature regardless of statutory or case law definition. Skilled lawyers who read Freud, such as Darrow, won acquittals or greatly reduced sentences by showing how, given the defendant's background and certain events leading up to the crime, he could not have acted otherwise. The next step was then inevitable. Criminal behavior itself began to be viewed in some quarters as a form of mental illness. The derogation of *mens rea* was complete.

Ray and others had spoken of "moral insanity" more than a hundred years ago, meaning essentially what is meant today by the terms psychopathic and sociopathic personality. Although psychiatry classifies persons with such a condition neither psychotic nor neurotic, it still considers them mentally ill.[12] It was not too surprising, then, when a 1954

[12] In 1952 the American Psychiatric Association removed psychopathic personality disturbance and sociopathic personality disturbance from the non-disease category in its Diagnostic and Statistical Manual and placed them in a disease category.

decision of the United States Court of Appeals for the District of Columbia Circuit[13] resulted in later trials in the finding "not guilty by reason of insanity" when the criminal act was shown to have been produced by a psychopathic condition.[14] Such rulings are as vacuous as the tautology they stand for—that criminal behavior is the product of a criminal mind.

Perhaps no judicial decision has pleased psychiatry more than *Durham v. United States*[15] which led to empty holdings such as the above. *Durham* is the most recent, significant legal reform regarding criminal responsibility. Although no other jurisdiction has adopted the *Durham* rule, its acceptance in principle has been wide spread, and its impact and ramifications have been great.[16] The *Durham* test is simply that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect".[17] The reasoning was:

> We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the "irresistible impulse" test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted.[18]

The court in *Durham* acknowledged its indebtedness to

[13] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[14] Blocker v. United States, 274 F.2d 572 (D.C. Cir. 1959); O'Bierne v. Overholser, 193 F. Supp. 652 (D.D.C. 1961).

[15] 214 F.2d 862 (D.C. Cir. 1954).

[16] *Sec.* S. GLUECK, LAW AND PSYCHIATRY 4 (1962).

[17] 214 F.2d at 874.

[18] *Id.*

the report of the Royal Commission on Capital Punishment, which proposed in 1953:

> The Jury must be satisfied that at the time of committing the act, the accused, as a result of disease of the mind or mental deficiency, (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it . . . .[19]

The American Law Institute has proposed yet another test:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.[20]

This formula, in substantially the same form as proposed, was adopted by the United States Court of Appeals for the Third Circuit in *United States v. Currens*.[21] The court did reject the phrase "to appreciate the criminality of his conduct" because of its "overemphasis of the cognitive element in criminal responsibility," again revealing, as the reform proposals themselves do also, a bias toward a psychiatric view of behavior which it is believed can be shown to be neither philosophically nor scientifically valid, nor the kind of structure upon which society may safely build a system for regulating social relationships. Moreover, it is apparent that any view of man which puts forth an irrational existence, on the premise that human behavior is not consciously chosen but unconsciously driven, is so ridden with self-contradictions that no coherent system of criminal justice may be postulated upon it. Still, psychiatry's most fundamental weakness is its failure to say who is responsible.

[19] ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT, 111 (Cmd. No. 8932, 1953).

[20] MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).

[21] 290 F.2d 951 (3d Cir. 1961).

WHO IS RESPONSIBLE?

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

Lewis Carroll
Through the Looking-Glass

The basic postulate of our criminal law, in the words of Dean Roscoe Pound, as quoted by Mr. Justice Jackson in *Morissette v. United States*,[22] is "a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong."[23] How mental illness affects this basic postulate is almost assuredly the most vexing problem to confront any society committed to the principle of justice for all. Most problems in providing equal justice arise and become troublesome in the practical application of ideas; this one does so in its very conception.

Judge David Bazelon, author of the *Durham* opinion, couches his conception of the problem as follows:

> Evil, of course can only be punished or forgiven. But illness is supposed to be ameliorated or cured. Thus the name we put to our failures makes a difference. We all tend to believe in free will when we entertain hopes for the future, but switch to determinism when recalling our past failures. *I suggest we extend the same consideration to the failure of others.*[24]

Judge Bazelon has undoubtedly cast his lot with psychodynamic concepts of human behavior, as has almost every other reformer or would be reformer of *M'Naghten*. The triumph in this century of psychodynamic, or Freudian, interpretations of human behavior over all others has been virtually absolute. When the law has yielded to psychiatry, one may be quite sure it is Freudian psychiatry that has been yielded

[22] 342 U.S. 246 (1952).
[23] *Id.* at 250.
[24] Bazelon, *The Awesome Decision*, SAT. EVE. POST, Jan. 23, 1950, at 56.

to. Legal questions of criminal responsibility apparently more and more will be settled by resort to psychodynamic concepts. Yet even the most cursory examination of those concepts will show why they cannot be depended upon to tell the law who is responsible.

The model of psychodynamic theory, from its inception, has been that of Newtonian physics. Freud theorized that human affairs are no different fundamentally from other natural events, which he accepted were irrevocably determined by prior events. In order to explain human behavior, Freud developed the concept of the "unconscious", and the theory that men's actions are determined by inherited instincts, or drives, and past experiences, the psychic effects of which are stored in the "unconscious". This is of necessity a closed concept, even though Freud and his successors have unwittingly suspended its logic in certain instances, the most notable being therapy itself.[25]

Determinism in the physical sciences was abandoned by most scientists after Heisenberg's "principle of indeterminacy" was established and quantum theory recognized. Many scientists saw in this development their first honest opportunity to believe in man's moral responsibility. A large number of them published books and articles expressing their

[25] The success of psychoanalysis is said to depend upon the patient's gaining an understanding of and insight into his past experiences (his "unconscious"); and in such a way being able to change, himself, the course of his behavior. But his understanding or insight must also be determined by his past experiences. In other words, what is determined is determined.

There is another serious flaw in the theory of the "unconscious". The mechanism of repression purportedly "stocks" the "unconscious"—shoves things unwanted on the conscious level back into the "unconscious". But why do some repress many more things than others? What agent is responsible for the operation of the mechanism of rpression? Is the individual responsible for the content of his "unconscious"?

great relief that religious and ethical concepts might now be possible of rationalization. This reaction to the principle of indeterminacy was puzzling, to say the least. The principle established that events in the sub-atomic world cannot be predicted, that they are capricious. Does it support the concept of man's moral responsibility to say that his behavior, like sub-atomic particles, is capricious? No. In fact, it is just as damaging to that concept as to say his behavior is determined by elements beyond his control. In either case he could not be considered responsible.[26] Quantum physics does not affirm man's freedom of will any more than Newtonian physics denied it. It does, however, destroy the Freudian psychodynamic model of human behavior.

Determinism in the area of human behavior, the theory that man is not free, has no responsibility for his behavior, rests upon an equivocal way of viewing man. We do not excuse a Hitler of his behavior simply because he was once an innocent infant. I do not excuse myself of my misconduct today because of what happened yesterday. It is the "I" of today that commits the act of today. It is whatever I am at present which chooses to act in a certain way. It is whatever I am at present which is responsible. Perhaps whenever we have misgivings, as Judge Bazelon does, about holding a person responsible for his behavior at a certain point in

[26] Neither freedom of the will nor any other metaphysical truth can be proved or disproved by reference to the sphere of natural phenomena, whose categories quite naturally resist such inferences. Plato put it clearly in the *Phaedo* where Socrates was sitting in prison awaiting his death, discoursing on why he would not avail himself of the opportunity to escape. It was not because his body was made up of bone and muscles, and that the muscles moved the the bones at their joints by contraction and relaxation, nor any other of ten thousand causes of the same sort which could be given. The true cause was simply because he thought it better and right to remain there and undergo his sentence. PLATO, THE DIALOGUES OF PLATO, 244 (B. Jowett transl. 1924).

time, we are not thinking about what he is at that same point in time, but a complete abstraction—what he was at some time previous to the act we are considering, what he might have been, perhaps. Of course, what he was previously or what he might have been would not have produced the present act. Very simply, we deny that who it is that committed the act committed it, and instead prefer to think of that present person in some other terms, terms which excuse the present behavior.[27]

Psychiatry based on psychodynamic principles unquestionably relieves man of any responsibility for his acts. His behavior is only part of a chain of predetermined natural events. If such principles are accepted by the law as truths, it makes no more sense to bring men under the judgement of law for "causing" the death or injury of others than, for instance, an avalanche, or any other natural phenomenon. Such a posture is patently absurd. Why is a concept such as *mens rea* meaningful in human affairs? As Holmes pungently put it, "Even a dog distinguishes between being stumbled over and being kicked."[28] It is no wonder that Freud argued against his presuppositions being embraced by the law.[29] Why the body of psychiatrists as a whole have not done so is the question.

[27] For a good illustration of how contemporary thinkers are continuing to miss the real point of the free will question, *see* S. GLUECK, *supra* note 14, at 28-29.

[28] HOLMES, THE COMMON LAW 7 (1881).

[29] There is evidence that Freud on occasion saw through the whole problem of individual responsibility. He once wrote: "Must one assume responsibility for the content of one's dreams? . . . Obviously one must hold oneself responsible for the evil impulses of one's dreams. What else is one to do with them? Unless the content of the dream (rightly understood) is inspired by alien spirits, it is a part of my own being." FREUD, *Moral Responsibility for the Content of Dreams* 19 (1923); *The Standard Edition of the Complete Psyclological Works of Sigmund Freud* 132 (1961).

There is no trick to rationalizing away any individual's conduct.[30] If sociology should enter the legal arena with the same force as psychiatry (it is already present with considerable force in the post-conviction process), it could accomplish about the same result without bothering with the question of whether or not the defendant was mentally ill. A case in point is *State v. Rodriguez*,[31] where a reduced sentence was given in part because of the cultural background of the defendant. He had shot a person rather than retreat from his threatening advances. In the Puerto Rican culture severe ostracism results if one does not face up to his enemy. This sociological argument carried considerable weight with the court. Other more systematic sociological theories would apparently have an even greater influence. According to Sheldon Glueck "[t]here are a few cases where companions, parents and the social order itself do not share responsibility for a criminal offense."[32] Why stop there? If society is responsible for its members, who is responsible for society? If an individual is not responsible, how can a society be, for it is then only a collection of individuals who are not responsible. Perhaps it is the individual who is responsible for his society; or, at best, there is mutual responsibility one for the other, and the only way it can be maintained is to refuse to excuse the individual from his part in it.

It would seem that while the law in some quarters willingly has begun to accept the shackles of a psychodynamic view of men, some within the field of psychiatry and re-

[30] It was easy for Zeno to rationalize that Achilles could never catch the tortise. First he must catch up to it half way, then half of that, and half of that ad infinitum, as any distance or number is infinitely divisible. The application of any theory of determinism to human conduct, enabling the individual to evade responsibility for it, yields the same kind of empty truth.

[31] 25 Conn. Supp. 350, 204 A.2d 37 (1964).

[32] S. GLUECK, *supra* note 14, at 17.

lated disciplines are beginning to throw them off. Albert Bandura and Richard Walters have written:

> In some respects the widely accepted psychodynamically based theories of psychopathology are dominated by models provided by physical medicine. In accordance with these models, behavior deviations are frequently considered to be derivatives or symptoms of underlying disease processes which disrupt social functioning in a manner analogous to that in which toxic substances affect the functioning of the body. This symtom—underlying disease analogy is reflected in the use of terms such as "mental health", "mental disease", and "emotional disorder", and in the labeling of persons exhibiting "patients" and even of cultural and subcultural patterns as "sick", "healthy" and "unhealthy" . . . . Some clinicians who have adopted this medical model hold the view that the basic pathology is somatic in nature; the majority, however, regard the underlying disturbance as a psychological rather than neurolgic dysfunction. The latter employ symptom — underlying disease models in which the "disease" is a function of conscious or (more often) unconscious inner agents akin to the supernatural forces that once provided the explanatory concepts of physics, biology and (more recently) medicine. General medicine has progressed from the demonology that dominated it during the dark ages; as scientific knowledge has increased, magical explanations have been replaced by scientific ones. In contrast, theories of psychopathology, in which demons reappear in the guise of "psychodynamic forces", still reflect the mystical thinking that once predominated in science.[33]

This criticism of coventional psychiatry strikes at the heart of all the recognized alternatives to *M'Naghten.* There can be no question but that the *Durham* rule cannot withstand the criticism. In its provision for release from criminal responsibility if mental disease or defect produced the crime, *Durham* clearly allows for non-organic types of disorders under the

[33] BANDURA AND WALTERS, SOCIAL LEARNING AND PERSOANLITY DEVELOPMENT 29-30 (1964).

category of mental illness. In fact, as pointed out, under the *Durham* rule defendants have been found not guilty when psychiatric testimony convinced the jury they were mentally ill and not responsible, even though there was no known organic defect and no diagnosis other than psychopathic or sociopathic personality. For Bandura and Walters, a typical behavior is not necessarily "sick" behavior. For them, it would seem, the *Durham* rule would be better suited to the dark ages. A look at the other alternatives to *M'Naghten* reveals the same vulnerability in them.[34] The Royal Commission proposal in its "incapable of preventing himself from" and the Model Penal Code and *Currens* test in their "lacks capacity to conform" fall into the same category as "irresistible impulse". They beg the question of responsibility. In an era of psychodynamic theory and psychogenic mental illness they give simply too much to the psychiatrist—not because psychiatry is a pseudo-science, which some say,[35] nor because it is an infant science, which surely it is, but because at present its

[34] The Model Penal Code does indicate some recognition of the weakness in *Durham's* breadth by its second point: "The terms 'mental disease' or 'defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).

[35] Dale G. Hardman, University of Missouri professor of social work, said in his key note address to the Minnesota Corrections Institute of 1962: "It is my firm conviction that Freudian theory constitutes the greatest aggregation of pseudo-scientific slop that has ever been compiled in the history of science; that it has retarded the progress of social work for fifty years . . . ."

Ernest Nagel has said regarding psychoanalytic theory: "[A] theory must not be formulated in such a manner that it can always be construed and manipulated so as to explain whatever the actual facts are, no matter whether controlled observation shows one state of affairs to obtain or its opposite." E. NAGEL, METHODOLOGICAL ISSUES IN PSYCHOANALYTIC THEORY, PSYCHOANALYSIS, SCIENTIFIC METHOD AND PHILOSOPHY 38 (1959).

most cherished dogma offers not the slightest means by which men may regulate in an orderly fashion their relationships with each other. We have seen how the true thrust of psychodynamic theory eliminates responsibility and morality altogether. Judge Bazelon, feeling this is as it should be, wrote: "The legal process differs from religion in that being concerned with factual decisions, it cannot utter moral imperatives."[36] Such a precept can be followed only so far. Lon Fuller, in *The Morality of the Law,* suggests:

> Legal morality can be said to be neutral over a wide range of ethical issues. It cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.[37]

To see how psychiatry's development of the psychogenic class of mental illnesses has also misled those searching for a workable test of responsibility, one should study the work of Dr. Thomas Szasz, a practicing psychiatrist. Perhaps no one has attacked psychiatry and psychiatry's influence upon the law more vehemently or thoroughly than Szasz. In two highly controversial books, *The Myth of Mental Illness*[38] and *Law, Liberty, and Psychiatry,*[39] Szasz develops in great depth the position that there is actually no such thing as mental illness. Because of the obvious implications which a pronouncement such as "mental illness does not exist" has in regard to all legal reforms in the area of criminal responsibility from *M'Naghten* to this day, lengthy consideration is due it.

Szasz, in historically reviewing how the concept of mental

[36] Bazelon, *supra* note 22.
[37] L. FULLER, THE MORALITY OF THE LAW 162, (1964).
[38] T. SZASZ, THE MYTH OF MENTAL ILLNESS (1961).
[39] T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963).

illness arose, uses hysteria as a paradigm. He points out that hysteria gained the attention of the early neuropsychiatrists, and that its study eventually led to the differentiation of neurology and psychiatry. This is widely recognized to be historically accurate. Jean Charcot, teacher of Sigmund Freud, developed an interest in patients whose symptoms were the same as those with verified neurological diseases, but in whom no such disease could be found. He took the position that they were suffering from a real illness rather than feigning one, to gain sympathy or for some other motive. These nervous disorders, in spite of having no known cause, had been termed hysteria; but until Charcot, those with the symptoms were judged more often to be malingerers rather than hysterics. Because of Charcot's great reputation at the time, people were willing to accept his diagnosis of this problem as a "functional nervous illness" rather than an organic illness or malingering.

Szasz maintains that Charcot made his diagnosis, or took the position he did, as an act of *social reform* or to remove from the physician the fear that he was perhaps being defrauded, or both, rather than from compelling empirical or scientific evidence. The hysteric had been sneered at, had been an outcast, and his physician had been discredited before Charcot gave dignity to his condition by labeling it an "illness". It would seem that Freud, whose works Szasz cites in this regard, was also as much moved by the social and professional considerations involved as by the medical ones.

In any case, Freud did accept and pass on Charcot's reclassification of hysterics and went much further himself with the whole classification process. According to Szasz, Charcot and Freud did not discover that hysterics *were* mentally ill. They advocated that they be *declared* mentally ill. From the point of view of science and intellectual integrity, this was a grievous error. About reclassifying, Szasz said:

> Since all systems of classification are made by people, it is necessary to be aware of who has made the rules and for what purpose. If this precaution is not taken,

> there is the risk of being unaware of the precise rules, or worse, of mistaking the product of classification for "naturally occurring facts or things". I believe this is exactly what happened in psychiatry during the past sixty or seventy years. During this period a vast number of occurrences were reclassified as "illnesses". We have thus come to regard phobias, delinquencies, divorce, homicide, addiction, and so on almost without limit as psychiatric illnesses. This is a colossal and costly mistake.[40]

Szasz examines current concepts of mental illness from two possible points of view, as a "sign of brain disease" and as a "name for problems in living." He acknowledges that one school of psychiatric thought still holds to the belief that all so-called mental illness is caused by some neurological defect, even though medical science as yet is not able to determine what the defect is in all cases. This Szasz cannot accept because it implies that "people's troubles cannot be caused by conflicting personal needs, opinions, social aspirations, values and so forth."[41] Besides, he says, it is misleading and unnecessary for the concept of mental illness to be used in reference to those suffering from brain disease because it is actually a physical illness.

For Szasz the symptoms most widely labeled mental illness today are really simply problems in living. Since the concept of illness implies deviation from some norm, psychiatry must first establish the norm if it is to diagnose anything as illness. In the physical illnesses, for instance, the norm might be the natural functioning of an organ, which may be objectively verified. But what is the natural function of the mind? Because psychiatrists have never been able to reach any agreement on this question does not mean simply that they have set for themselves a harder task. It means, rather,

[40] T. Szasz, *supra* note 36, at 43.

[41] T. Szasz, *supra* note 37, at 12.

that they have set for themselevs an improper task, that such a question is outside the scope of medicine.[42]

Thus Szasz has been led to conclude:

> Psychiatric activity is medical in name only. For the most part, psychiatrists are engaged in attempts to change the behavior and values of individuals, groups, institutions, and sometimes even nations. Hence, psychiatry is a form of social engineering. It should be recognized as such.[43]

From these basic points of Szasz's argument, it is clear he opposes the writing into law of any excusing conditions for criminal behavior based upon "mental illness". The two major themes of his work are: (1) It is a mistake to label problems in living as mental illness (or as any kind of illness), and (2) in so far as mental illness, as that term is understood today, consists of problems in living, why should we turn to medical science for explanations and treatment of these problems?

It seems reasonable to ask, before a person or a group of persons is pronounced expert in some human study, just how the person or group has distinguished itself in handling or answering the problems involved in that study. Szasz has asked that question, and he is still waiting for an answer.

Along this same line of thought, Dr. O. Hobart Mowrer, Research Professor of Psychology at the University of Illinois, has written:

> For more than a decade now, it has been evident that something is seriously amiss in contemporary psychiatry and clinical psychology. Under the sway of

[42] It is interesting to note that Judge Bazelon used very similar language in the *Durham* opinion to explain why the law should not try to define insanity: "In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role, not merely one for which they have no special competence." 214 F.2d at 872.

[43] T. SZASZ, *supra* note 37 at vii.

> Freudian psychoanalysis, these disciplines have not validated themselves either diagnostically or therapeutically. Their practitioners, as persons, have not manifested any exceptional grasp on the virtues and strengths they purportedly help others to acquire. And the impact of their philosophy of life and conception of man in society as a whole has been subtly subversive.[44]

Why would the impact of the "philosophy of life" of psychiatry be termed subversive? Szasz answers that it, "undermines the principle of personal responsibility, upon which a democratic political system is necessarily based, by assigning to an external source (i.e. the illness) the blame for antisocial behavior."[45]

Beyond Szasz's criticism, there seems to be a crucial logical error in psychiatry's conception of mental illness and criminal behavior, and thus in any legal ruling, such as *Durham*, which finds or allows to be found that mental illness produced a criminal act. How is mental illness (of the functional type) diagnosed? It is done by observing and examining the subject's behavior in all its forms. How is mental illness defined? It is defined in terms of behavior. Then what is mental illness? It is no more than certain types of behavior. Therefore to say that mental illness causes certain types of behavior, for example, criminal, is to say that behavior causes behavior. Or, to say that criminal behavior is a form of mental illness rules out finding that mental illness ever causes criminal behavior.[46]

If psychiatrists deny that mental illness *is* certain types of behavior, but instead *causes* certain types of behavior, they

[44] Mowrer, *Foreword* to W. GLASSER, REALITY THERAPY at xi (1965).

[45] T. SZASZ, *supra* note 36, at 297.

[46] Psychiatrists apparently are not bothered by this bit of illogic. "The average psychiatrist's attitude toward criminal behavior seems to embody, *as a basic assumption*, that such behavior is prima facie evidence of mental illness." De Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 337, 342-43 (1955).

must lapse into complete mysticism to explain just what mental illness is, which they, as Bandura and Walters point out,[47] are quite willing to do. Again the problem is that they will not acknowledge that they do. Plainly, psychiatrists cannot operate if they are not allowed to define mental illness in terms of behavior.[48]

This is not merely a word game. The point to be made is that the law functions as if it understands mental illness to be something which happens *to* a person, which robs him of his free will, of his responsibility; [49] whereas actually, if it is anything at all, it is only a way in which he behaves. More importantly, it is a way in which he *chooses* to behave. If the so-called functionally mentally ill person does not choose to behave the way he does, then no one chooses to behave the way he does. Thus, no one is responsible. This the law cannot afford to acknowledge.

Does it seem harsh or inhumane to say a person chooses to behave in a "mentally ill" way? It should not, for to believe anything else, and for him to be told anything else, is to admit the hopelessness of the condition, and to convince him of its hopelessness.

This theme has been expounded very recently by Dr. William Glasser in a revolutionary book entitled *Reality Therapy*.[50] It is plausible to think of the person called mentally ill as one actually suffering from an acute case of dishonesty, both with himself and with others. He does not like the world the way he finds it so he begins to tell small lies to himself about

[47] *Supra,* note 31.

[48] But psychiatrists have operated under *Durham* because of the looseness of their theory as shown by Nagel and others and because of their attitude that criminal behavior is prima facie evidence of mental illness.

[49] *Durham* is the best example, but see also Warren v. State, 243 Ind. 508, 188 N.E.2d 108 (1963) and Dugan v. Commonwealth, 333 S.W.2d 755 (Ky. 1960).

[50] W. GLASSER, REALITY THERAPY, (1965).

it in order to make it more acceptable. If he dislikes it enough his lies become great enough that others can plainly see something is wrong with him. Something is, but it is not illness. Glasser calls it irresponsibility. His therapy is based upon getting people to accept responsibility and to face reality. It is everything that conventional psychotherapy is not. The following are some of the major ways in which it is different:

> Conventional psychiatry believes firmly that mental illness exists . . . .
>
> Because we do not accept the concept of mental illness, the patient cannot become involved with us as a mentally ill person who has no responsibility for his behavior.
>
> Conventional psychiatry holds that an essential part of treatment is probing into the patient's past life . . . .
>
> Working in the present and toward the future, we do not get involved with the patient's history because we can neither change what happened to him nor accept the fact that he is limited by his past.
>
> Conventional psychotherapy . . . emphasizes that if the patient is to change he must gain understanding and insight into his unconscious mind.
>
> We do not look for unconscious conflicts or the reasons for them. A patient cannot become involved with us by excusing his behavior on the basis of unconscious motivations.
>
> Necessarily accompanying the conviction that mental illness exists, conventional psychotherpy scrupulously avoids the problem of morality, that is, whether the patient's behavior is right or wrong. Deviant behavior is considered a product of the mental illness, and the patient should not be held responsible because he is considered helpless to do anything about it.
>
> We emphasize the morality of behavior. We face the issue of right and wrong . . . .[51]

It is not a distortion of the proposed alternatives to *M'Naghten* to say that: (1) they attempt to evade the issue

[51] *Id.* at 42-44.

of right and wrong; (2) they would sometimes excuse behavior on the basis of unconscious motivations; and (3) they are based on the firm belief that functional mental illness exists and that it may release people from responsibility for their behavior.

Thus, the law today would, in many cases, interfere with the return to normal behavior by a deviant as much as conventional psychiatry has in the past.

Consider a defendant found "not guilty by reason of insanity" under present legal rulings. Upon his commitment to a mental hospital for treatment, "reality therapy" could not very well be employed since the law would have already found him not responsible for his behavior in the same way and for the same reasons that conventional psychiatry has always done so; and it has shown itself no more successful in correcting criminal behavior than traditional penal procedures.[52] Again the question must be asked: Why has the law begun to accept the general principles of a theory of behavior which has not yet produced any scientifically verified results? There can be no doubt that the treatment or correction of the offender is hampered by his being told he was not responsible for his offense. Henry Hart, Jr., has written regarding "The Aims of the Criminal Law": "[I]t is the criminal law which defines the minimum conditions of man's responsibility. The assertion of social responsibility has value in the treatment even of those who have become criminals."[53]

[52] Sol Rubin, Legal Counsel for the National Council on Crime and Delinquency, speaking on the trend from criminal to civil commitments at the 1967 National Institute on Crime and Delinquency, made it clear he would prefer seeing offenders in traditional correctional programs rather than hospitals. He observed that results produced by correctional institutions would be shown by statistics to be better than those of mental hospitals.

[53] H. HART, THE AIMS OF THE CRIMINAL LAW, LAW AND CONTEMPORARY PROBLEMS 410 (Vol. 23, 1958).