

1979

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Recommended Citation

William C. Waddell III, *Virginia's Insanity Defense: Reform is Imperative*, 13 U. Rich. L. Rev. 397 (1979).
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VIRGINIA'S INSANITY DEFENSE: REFORM IS IMPERATIVE

I. INTRODUCTION

Rivers of ink, mountains of printer's lead, forests of paper have been expended on this issue [the insanity defense], which is surely marginal to the chaotic problem of effective, rational, and humane prevention and treatment of crime.¹

Virginia is no exception to the statement that a great deal of time and energy has been expended by writers in addressing the defense of insanity. Unfortunately, instead of generating some notable reform, this fact has served to desensitize the legislators, the legal profession, and the public in this controversial area.² In view of the current knowledge in the field of psychiatry, the approach for implementing the insanity defense in Virginia courts is not satisfactory.³

The significance of the insanity defense is increasing with changing views in criminal law as well as new developments in the psychiatric field. Many judges feel that existing concepts for determining the conditions of guilt and punishability are set forth with adequate clarity. But it has been recognized that perceptive legal scholars have expressed skepticism in these areas for some time.⁴ Dean Roscoe Pound has expressed this skepti-

1. Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 516 (1968).

2. A survey of current Virginia law indicates an absence of legislative action in regard to the applicable formulation of the insanity test. Case law in Virginia indicates no significant reform in the insanity test for almost a century. See *Dejarnette v. Commonwealth*, 75 Va. 867 (1881). The test applied by the court in *Dejarnette* was the M'Naghten right-wrong test supplemented by a modified irresistible impulse formulation. For a description of the test see note 26, *infra*.

3. In 1838 Issac Ray, M.D., made the extremely perceptive statement: "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 statement was five years before the trial of Daniel M'Naghten which led to what is known as the M'Naghten rules. See *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843). "These rules have been the guiding principal for most of the English-speaking world in criminal cases where insanity has been raised as a defense." Dearman, *Criminal Responsibility and the Insanity Tests: A Psychiatrist Looks at Three Cases*, 47 VA. L. REV. 1388 (1961). One hundred and thirty-five years have passed since these rules were put into effect. Needless to say, there have been many advances made by medical psychology during that time (Freud did not develop his theory of the unconscious until 1890) which the courts have been unable to use because of the M'Naghten formulation. The dissatisfaction among the members of the medical profession has, consequently, been exceedingly high. *Id.*; see A. GOLDSTEIN, *THE INSANITY DEFENSE* 68, 75-77 (1967). In criticizing the irresistible impulse test, Judge Bazelon stated that it gives "no recognition to mental illness characterized by brooding reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test." *Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954).

4. S. GLUECK, *LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE?* 9-10 (1962).

cism as to the well known legal concept of "criminal intent." He notes that substantive criminal law has been based on the theory of punishing the "vicious will" while assuming a free agent confronted with a choice between doing right and wrong and choosing freely to do wrong. A further assumption made is that the social interest in the general morals is to be maintained by imposing upon him a penalty corresponding exactly to the gravity of his offense. "However, Pound points out, as a matter of fact 'We know that the old analysis of the act and intent can stand only as an artificial legal analysis and that the mental elements in crime present a series of difficult problems.'"⁵ Dean Pound was correct in this statement since studies of motivating traits and factors of criminalism show that in most instances there is little 'free will' in the simple, naive sense of the traditional criminal law.⁶ The importance and difficulty of the defense of insanity increasingly confronts criminal jurisprudence in that the various approaches are founded on a legal proposition about which Pound and others have raised such serious doubts—"the proposition, namely, that no person can be held criminally liable and punishable for an unlawful act, unless he has 'sufficient mental capacity' to 'entertain a criminal intent,' or to have a *mens rea*"⁷

Recent developments relating to the constitutional rights of mentally disordered defendants indicate that the insanity defense will appear more frequently⁸ in the courtrooms of Virginia.⁹ Six years ago, in *Jackson v. Indiana*,¹⁰ it was settled that mentally abnormal defendants can no longer be indeterminately committed to a mental hospital as incompetent to stand trial. Consequently, more defendants with mental abnormalities and potential insanity defenses will be returned to court for trial.¹¹ The Code of Virginia¹² indicates that confinement for an indefinite period does not

5. *Id.* at 10 (quoting R. POUND, CRIMINAL JUSTICE IN CLEVELAND 586 (1922)).

6. S. GLUECK, *supra* note 4, at 10.

7. *Id.*

8. G. MORRIS, THE INSANITY DEFENSE: A BLUEPRINT FOR LEGISLATIVE REFORM 6-7 (1967).

9. VA. CODE ANN. § 19.2-169 (Repl. Vol. 1975).

10. 406 U.S. 715, 738 (1972). The Supreme Court held:

[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.

Id. (footnote omitted).

11. G. MORRIS, *supra* note 8, at 7.

12. VA. CODE ANN. § 19.2-181(1)(Cum. Supp. 1978). The Code provides that upon acquittal

automatically follow an acquittal by reason of insanity so that "defendants who were mentally disordered at the time the . . . act was committed may be more willing to assert the insanity defense."¹³ With the ever-increasing significance of the criminal responsibility issue, Virginia must strive to solve the difficult problems of the insanity defense.

"It has been said that the measure of a civilization is the way in which it treats the most despised among us."¹⁴ This, of course, refers to the treatment of the insane and of the criminal. The two avowed functions of the criminal process should be, "first, to find the truth and second, and equally important, to do so by a fair and civilized process."¹⁵ The approach any state uses to determine insanity and, ultimately, criminal responsibility, should be viewed in respect to these two praiseworthy goals.

This article discusses the current Virginia approach concerning the insanity defense. After evaluating this approach, by considering the field of psychiatry and the law of criminal responsibility, a recommendation is advanced in order to effectuate a long-needed change in Virginia. A change which should enable the courts to determine criminal responsibility in a fair and rational manner.

II. PROBLEMS IN DEVELOPING AN INSANITY DEFENSE

There are many issues underlying the determination of criminal responsibility.¹⁶ First, it must be recognized that an appropriate solution to the

on the ground of insanity:

[T]he court shall place him [defendant] in temporary custody of the Commissioner of Mental Health and Mental Retardation, . . . and appoint three physicians or two physicians and one clinical psychologist, skilled in the diagnosis of insanity and feeble-mindedness, to examine the defendant and make such investigation as they deem necessary in order to determine whether, at the time of their examination, he is insane or feeble-minded and to determine whether his discharge would be dangerous to the public peace and safety or to himself and to report their findings to the court. If the court is satisfied [that he is insane or dangerous] by the report, . . . the court shall order him to be committed to the custody of the commissioner. Otherwise, the defendant forthwith shall be discharged and released.

Id.

13. G. MORRIS, *supra* note 8, at 7.

14. This statement was made by Professor Foster of the New York University School of Law during a New York University Colloquium on "President Nixon's Proposal on the Insanity Defense." [Fall, 1973] *Journal of Psychiatry and Law* 297 excerpts reprinted in READINGS IN LAW AND PSYCHIATRY 711 (R. Allen ed., rev. and exp. ed. 1975).

15. *Id.*

16. This section is only intended to include those basic considerations relevant to developing a framework in which to apply the insanity defense. For a more thorough coverage of this area see H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* (1972); S. GLUECK, *supra* note 4, at 3-40; M. GUTTMACHER, *THE ROLE OF PSYCHIATRY IN LAW* (1968); A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967); Annot., 45 A.L.R.2d 1447-66 (1956).

insanity defense necessarily requires the cooperation of two professions which have opposing viewpoints. The law is developed from and based on the idea of precedence, that is, legal decisions justified by previous decisions. Psychiatry, on the other hand, is an evolving science whose profession has only recently contributed its most valuable skills and knowledge. Logically, then, any law defining the test of insanity which is based totally on the idea of precedence will be denying valuable progress made by psychiatry. Cooperation in this setting is impossible. The resulting distrust causes lawyers to look upon "psychiatrists as fuzzy apologists for criminals" when the psychiatrist expounds current psychiatric theory. Similarly, "psychiatrists tend to regard lawyers as devious and cunning phrasemongers" when the lawyer demands that the psychiatrist formulate his answers according to specific questions.¹⁷

Second, in recognizing the necessity of admitting psychiatric testimony as to the mental capacity of the defendant at the time of the act,¹⁸ it is clear that procedures utilized by the court must allow the psychiatrist to function within the legal framework. The difficulty arises in that the law, in its definition of crime and provision of the requisites for relief from responsibility, "omits psychological and sociological considerations which psychiatrists regard to be crucially significant to the explanation of conduct."¹⁹ The requirements of the technical, substantive law as to the causation of conduct do not describe the entire chain of psychological causation that resulted in the act.²⁰ No provision is made for motives of the act except for a few specific crimes and "certainly unconscious motivation is not all relevant in the law."²¹

Psychiatry is endeavoring to help the judiciary by its presentation of its knowledge of human behavior in deciding who should be treated and who should be punished. . . . [P]sychiatry does have considerable knowledge of human behavior and personality, and it does wish to be allowed to present

17. S. GLUECK, *supra* note 4, at 4-5.

18. The *mens rea* (a guilty mind; a guilty or wrongful purpose; a criminal intent) and the *actus reus* (guilty act or deed of crime) must concur to constitute a true crime, which is a crime requiring some form of criminal intent. In order to be held responsible and blameworthy for the act one must have had the criminal capacity for the requisite criminal intent. The actor who does not have the criminal capacity at the time of the *actus reus* is entitled to an acquittal. Mental disease or defect can serve as a limitation on criminal capacity so that psychiatric testimony on this subject is imperative. See generally R. PERKINS, PERKINS ON CRIMINAL LAW 739-47, 834-36, 850-58 (2d ed. 1969).

19. S. GLUECK, *supra* note 4, at 30.

20. *Id.* at 30, 31.

21. "This disregard of motive extends to the prevailing tests of irresponsibility of the insane in their ignoring of the most significant of all psychological forerunners and companions of acts of crime as well as of ordinary behavior; namely, the *affective* or emotional aspects of mental life." *Id.* at 31.

this knowledge to the court. It seeks to do this in such a manner that a judge and jury will understand and be able to follow its reasoning to a logical conclusion. To do this, the court must not limit what the psychiatrist says nor how he can say it. He must not be restricted to moral conclusions of right or wrong or legal determinations of sanity or insanity. The psychiatrist needs to be able to relate fully to the court what he knows of the total personality of the person on trial²²

Third, there is some confusion as to which of the four traditional purposes of criminal law is considered more important: (1) physical isolation of the individual offender to prevent his committing further antisocial acts; (2) reform, rehabilitation, and treatment to lower the probability of the commission of further offenses; (3) general deterrence which reduces the probability by general threat of criminal sanction; (4) retributive justice in that society should exact suffering from an individual. This decision should be made so society can combine the best available scientific information as to the effectiveness of the various procedures utilized to achieve the desired result.²³

Fourth, "[a] basic ethical and psychological stumbling block in an analysis of crucial problems of substantive Criminal Law and of sentencing policy is the ancient enigma about whether man possesses 'freedom of will' or is instead the deluded plaything of deterministic forces completely and always beyond his control."²⁴ In the area of developing an acceptable test of insanity at the time of the commission of the act, the resolution of this underlying fundamental issue may well lead to unprecedented approaches.²⁵

22. Dearman, *supra* note 3, at 1391.

23. Meehl, *Psychology and Criminal Law*, 5 U. RICH. L. REV. 1 (1970). For further discussion on the consequences of this confusion see A. GOLDSTEIN, *supra* note 16, at 11-15.

24. S. GLUECK, *supra* note 4, at 5-6.

25. This issue usually exposes the two diametrically opposed viewpoints: (1) "those who stress the prime social need of blameworthiness and retributive punishment as the core-concept in crime and justice," and (2) those who, under the impact of psychoanalytic views, "insist that man's choices are the product of forces largely beyond his conscious control, and that simply to blame and punish is neither to understand nor to cure the offender, nor in the long run to protect society." *Id.* at 6.

It is clear that freedom of will is the foundation of criminal law. A 1961 decision in the Eighth Circuit United States Court of Appeals, quoting extracts from opinions of Mr. Justice Cardozo, Mr. Justice Jackson, and Judge Thurman W. Arnold, had this to say:

The law, to this date at least, 'assumes the freedom of will as a working hypothesis in the solution of its problems' and also assumes 'that mature and rational persons are in control of their own conduct.' It has been aptly said that 'In the determination of guilt, age-old conceptions of individual moral responsibility cannot be abandoned without creating a laxity of enforcement that undermines the whole administration of criminal law.'

S. GLUECK, *supra* note 4, at 11 (quoting *Dusky v. United States*, 295 F.2d 743, 753-54 (8th

Fifth, an examination of the various insanity tests, which have been adopted by jurisdictions²⁶ to determine criminal responsibility, shows "deceptively simple yet realistically complex, and even baffling, concepts

Cir. 1961) (footnotes omitted)). The traditional tests of insanity have been developed on the assumptions of the unquestionable possession of freedom of will and the resultant blameworthiness. Recognition of current sociological, anthropological and psychiatric views which focus on subconscious forces and crucial early childhood experiences redirects the emphasis toward sympathetic and therapeutic approaches: A line of reasoning which may necessitate reworking the total framework for making the criminal responsibility determination.

26. In regard to the history of the development of the various tests of insanity see S. Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559 (1972); Note, *Modern Insanity Tests - Alternatives*, 15 WASHBURN L. J. 88 (1976) [hereinafter cited as *Alternatives*].

Today, jurisdictions use modifications of four basic tests of insanity:

(1) The M'Naghten rule or right-wrong test state that in order to establish a defense on the ground of insanity, 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, if he did know it, that he did not know he was doing what was wrong. "Although commonly called the right-wrong test, the M'Naghten rule actually has two parts," either of which exculpates the defendant, i.e., "if he did not have the capacity to understand the nature and quality of his act or if he lacked the ability to distinguish between right and wrong with respect to the act." *Alternatives, supra* note 26, at 93-94.

(2) The so-called irresistible impulse test as a sole standard has not been used by any jurisdiction. Those jurisdictions accepting it use it in conjunction with and supplementary to the M'Naghten test. This approach broadens the M'Naghten rules in that an individual is not criminally responsible under the irresistible impulse test if he had a mental disease that kept him from controlling his conduct, despite his knowledge of the nature and quality of his act and his awareness that it was wrong. S. GLUECK, *supra* note 4, at 13.

(3) The Durham or "product" test was an effort to avoid "articulating a particular test of insanity. Rather, it allows the jury to determine as a question of fact whether defendant suffered from mental disease depriving him of the capacity to entertain a criminal intent." 15 WASHBURN L.J. 102 (1976). Judge Bazelon announced this test of criminal responsibility stating that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Durham v. United States*, 214 F.2d at 875. The question is simply whether the accused acted because of a mental disorder.

(4) The American Law Institute's Model Penal Code Test [hereinafter referred to as ALI] reads:

Section 4.01. Mental Disease or Defect Excluding Responsibility

(1) 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 [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the term 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

embodied in their formulations."²⁷ Clearly, there is no black and white in mental illness so that these tests, designed to guide juries in their difficult determination, all involve the baffling problem of degree.

III. THE COMMONWEALTH'S APPROACH

The Virginia insanity defense is quite clear. In 1881, the Virginia Supreme Court of Appeals,²⁸ in *Dejarnette v. Commonwealth*,²⁹ set forth the approved test of insanity:

But in every case, although the accused may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, and has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, and possesses withal a will sufficient to restrain the impulse that may arise from a diseased mind, such partial insanity is not sufficient to exempt him from responsibility to the law for his crimes.³⁰

This statement of the law is based on the M'Naghten rules, or right-wrong test,³¹ and is supplemented by an irresistible impulse modification.³² *Dejarnette* approved the irresistible impulse test in the underlying phrase *and possesses withal a will sufficient to restrain the impulse that may arise from a diseased mind*. An "irresistible impulse" was defined as a moral or homicidal insanity which consists of an irresistible inclination to kill or commit some other offense, resulting from some unseen pressure on the mind drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, although its results are perceived, it is incapable of resisting.³³

27. S. GLUECK, *supra* note 4, at 19-20. The problem revolves around the findings required by the traditional tests:

[T]he presence (or absence) of a condition that can rightfully be called 'mental disease' or 'defect' and the extent of the causative linkage between such disorder, if proved, and the crime. These are obviously questions of *degree*. They derive in turn (although this is not obvious on the surface) from the fact of differences in the effect of various types of mental illness, at different stages, in varyingly endowed and circumstanced individuals, on the quantum of capacity for free choice and control.

Id. at 20.

28. The Virginia Supreme Court was previously the Virginia Supreme Court of Appeals. 29. 75 Va. 867 (1881).

30. *Id.* at 878; *see also* *Thornhill v. Peyton*, 285 F. Supp. 604 (W.D. Va. 1968); *Jones v. Commonwealth*, 202 Va. 236, 117 S.E.2d 67 (1960); *Boswell v. Commonwealth*, 61 Va. (20 Gratt.) 860, 868 (1871).

31. *See* note 26, *supra*.

32. *Id.*

33. 75 Va. at 878. The court in *Thompson v. Commonwealth*, 193 Va. 704, 717, 70 S.E.2d 284, 291 (1952), utilized the definition of irresistible set forth in 14 AM. JUR. *Criminal Law* § 35:

The irresistible impulse doctrine recognized in Virginia is applicable only to that class of cases where the accused is able to understand the nature and consequence of his act and knows it is wrong, but his mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain the act.³⁴ Therefore, the irresistible impulse portion of the insanity defense may in some cases be removed from the definition.³⁵ As applied in *Snider v. Smyth*,³⁶ "[a]n irresistible impulse cannot be considered as the product of a planned act; it comes upon a person rather hurriedly; it rises quickly; [and] short of interference by a third party, it is irresistible."³⁷

Although in the final analysis Virginia's approach to the insanity defense is vulnerable, there have been some who have noted various advantages and defended the use of similar tests.³⁸ One of the main arguments in defense of the M'Naghten rule is that the standard is simplistic, understandable, and, most importantly, easily applied by a jury of laymen³⁹ who consider mental illness (in the context of a defense) as a moral problem in which the ability to distinguish right from wrong is a crucial determination. Others argue that excluding only those who do not know right from wrong or the nature and quality of the act promotes crime deterrence; that

[A]n impulse induced by, and growing out of some mental disease affecting the volitive, as distinguished from perceptive, powers, so that the person afflicted, while able to understand the nature and consequences of the act charged against him and to perceive that it is wrong, is unable, because of such mental disease, to resist the impulse to do it. It is to be distinguished from mere passion or overwhelming emotion not growing out of, and connected with a disease of the mind. Frenzy arising solely from the passion of anger and jealousy, regardless of how furious, is not insanity.

34. *Thompson v. Commonwealth*, 193 Va. 704, 718, 70 S.E.2d 284, 292 (1952); see *Davis v. Commonwealth*, 214 Va. 681, 682, 204 S.E.2d 272 (1974); *Christian v. Commonwealth*, 202 Va. 311, 117 S.E.2d 72 (1960); *Thurman v. Commonwealth*, 107 Va. 912, 916, 60 S.E. 99 (1908); *Hite v. Commonwealth*, 96 Va. 489, 492, 31 S.E. 895 (1898); *Stover v. Commonwealth*, 92 Va. 780, 22 S.E. 874 (1895).

35. *Thompson v. Commonwealth*, 193 Va. at 716-18, 70 S.E.2d at 292 (1952). "[T]he 'right or wrong' instruction is predicated on the incapacity of a defendant to distinguish right from wrong and the irresistible impulse instruction is predicated on the capacity to make such a distinction. Different evidence is required to support each instruction." *Davis v. Commonwealth*, 214 Va. at 682, 204 S.E.2d at 273. Evidence of the ability to distinguish right from wrong is a prerequisite to an irresistible impulse instruction.

36. 187 F. Supp. 299 (E.D. Va. 1960), *aff'd sub nom.*, *Snider v. Cunningham*, 292 F.2d 683 (4th Cir. 1961); see *Snider v. Smyth*, 263 F.2d 372 (4th Cir. 1959).

37. *Snider v. Smyth*, 187 F. Supp. at 302.

38. See Hall, *The M'Naghten Rules and Proposed Alternatives*, 49 A.B.A.J. 960 (1963); Hall, *Responsibility and Law: In Defense of the M'Naghten Rules*, 42 A.B.A.J. 917 (1956); Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535, 550 (1917).

39. See R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 9 (1967); Slovenko, *Psychiatry, Criminal Law and the Role of the Psychiatrists*, [1963] DUKE L.J. 395, 403.

is, those who are capable of being deterred are subjected to punishment.⁴⁰ One author states that the critics of the M'Naghten rules, as well as public convention, public attitudes, and procedure, have combined to sustain a narrow view of M'Naghten so firmly established in popular culture of the insanity defense as to deny the legal process the opportunity to take a broader view.⁴¹ It also has been argued that critics who fear the connotation of "irresistible impulse" and the resultant application of the test do not actually see how the test is applied. In regard to the actual application of this test it is simply misnamed. Instead of a restrictive view which requires, first, that the act be the product of an "impulse," and second, that the act be sudden and unplanned, most states are concerned with the capacity for self-control or free choice and do not even refer to an impulse.⁴² Others have maintained that the irresistible impulse test is flexible and capable of alleviating those problems of M'Naghten standing alone.⁴³ The formulation admits all relevant evidence of a mental condition and does not restrict expert testimony.⁴⁴ Of course, the final contention of those in favor of retaining the traditional tests is similar to Mr. Justice Clark's statement in *Leland v. Oregon*.⁴⁵

The science of psychiatry has made tremendous strides since that test was laid down in M'Naghten's Case, but the progress of science has not reached

40. *State v. Esser*, 16 Wis.2d 567, 115 N.W.2d 505 (1962).

41. A. GOLDSTEIN, *supra* note 16, at 64. He argues further that the critics may be correct in their allegations that many defendants who are seriously ill are arbitrarily excluded from the insanity defense, but concludes that the fault lies less with the specific formulation of the defense and more with its presentation. "The responsible parties are counsel and psychiatrist who have contributed to a failure of the adversary process, allowing an unwarranted assumption of what the rule 'must' mean to govern their conception of the defense." *Id. But see U.S. v. Currens*, 290 F.2d 751, 765 (3rd Cir. 1961)(quoting Mr. Justice Frankfurter). "If you find rules that are, broadly speaking, discredited by those who have to administer them, which is, I think, the real situation, certainly with us - they are honoured in the breach and not in the observance - then I think the law serves its best interests by trying to be more honest about it . . ." *Id.* at 765-66.

42. A. GOLDSTEIN, *supra* note 16, at 67-79. *But see* note 36 *supra* and accompanying text. The application of the irresistible impulse test in Virginia is heavily pointed toward the misleading concept of impulse. The probability is high that the juror in Virginia's courts will get the full effect of such a misnomer. If, in fact, this is a case of misnaming, it is unfortunate but should not tip the balance in favor of retaining a test which, misnamed or not, leads to a result contrary to current psychiatric concepts.

43. A. GOLDSTEIN, *supra* note 16, at 72-75. "It catches in its exculpatory net many persons with mental aberration whom the knowledge tests miss, such as those whose mental processes have been affected by longstanding epileptic seized states . . . and perhaps even extreme compulsive neuroses." *Id.* at 54.

44. *Id.* at 53-58. "The irresistible impulse test, added to the right and wrong rule, of course gives much broader scope both to the expert witness in testifying on the accused's mental condition and to the jury in assessing the presence or absence of responsibility." *Id.* at 54.

45. 343 U.S. 790 (1952).

a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law.⁴⁶

In spite of the support for the M'Naughten test and irresistible impulse test, the fact remains that Virginia is currently adhering to an insanity defense which is based on the most restrictive test of criminal responsibility now in use. It is most restrictive in the sense that it defines insanity solely in terms of impairment of cognitive capacity or intellectual capacity to distinguish right from wrong.⁴⁷ Virginia has avoided some of the harsh results of this restrictive test by broadening its scope through supplementing it with the irresistible impulse doctrine. In those cases where the irresistible impulse instruction is allowed,⁴⁸ examination of the actor's volition or self-control recognizes that mental illness may affect the actor's will and emotions as well as his cognitive or intellectual capacity.⁴⁹ Authorities in favor of broadening M'Naghten to take into account the volitional element regard the irresistible impulse test as inadequate in that it does not extend M'Naghten sufficiently. The concept of irresistibility as utilized by the courts requires a total impairment of volitional capacity.⁵⁰ The word "impulse" implies that the defense is applicable only to those criminal acts which have been suddenly and impulsively committed as distinguished from insane propulsions that are accompanied by brooding or reflection.⁵¹

A survey of current authorities shows a disproportionate number extremely critical of the M'Naghten and irresistible impulse approaches.⁵² In

46. *Id.* at 800-01 (footnotes omitted). There has not been a recent direct ruling by the Supreme Court as to what should constitute a charge in the issue of criminal responsibility when a defense of insanity or mental illness has been interposed by an accused in a trial in federal court. *United States v. Currens*, 290 F.2d at 768. The M'Naghten test was held to be constitutional in *Thornhill v. Peyton*, 285 F. Supp. 104 (W.D. Va. 1968).

47. G. MORRIS, *supra* note 8, at 11.

48. See notes 34 and 35 *supra* and accompanying text. It should be noted that Virginia's practice of excluding the doctrine of irresistible impulse in specific cases increases the likelihood that the restrictiveness of M'Naghten will be retained.

49. G. MORRIS, *supra* note 8, at 13.

50. *Id.* (citing Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 375 (1955)).

51. G. MORRIS, *supra* note 8, at 13 (citing Royal Commission on Capital Punishment 1949-53, Report 80 (London: Her Majesty's Stationary Office, 1953)); see *Durham v. United States*, 214 F.2d 862, 873-74 (D.C. Cir. 1954); MODEL PENAL CODE § 4.01, Comments at 157 (Tent. Draft No. 4, 1955).

52. Authorities critical of the M'Naghten rule: see, e.g., Second Circuit Annual Judicial Conference, Panel Discussion, *Insanity as a Defense*, 37 F.R.D. 365, 380, 332 (1964); Berstein, *Criminal Responsibility: The Bar Must Lead in Law Reform*, 50 A.B.A.J. 341 (1964); Brancale, *More on M'Naughten: A Psychiatrist's View*, 65 DICK. L. REV. 277 (1961); Carroll & Leopold, *The Current Influence of Psychiatric Concepts in Determining Criminal Responsibility in Pennsylvania*, 31 TEMP. L.Q. 254 (1958); Dearman, *Criminal Responsibility and Insanity Tests: A Psychiatrist Looks at Three Cases*, 47 VA. L. REV. 1388, 1397 (1961);

fact, the criticism has been heavy since the day the rules were announced. Naturally these rules draw criticism based on the method of development and period of history in which they were developed. "Professor Sheldon Glueck says the early insanity tests are not the result of sacred legal traditions or mature judicial or legislative deliberation. Rather he argues they stem from judicial attempts to reduce complex concepts into simple rules and, to a large extent, are the result of historical accident."⁵³ Mr. Justice Frankfurter in testimony before the Royal Commission on Capital Punishment expressed the view that the M'Naghten rules are a sham. "[T]o have rules which cannot be rationally justified except by process of interpretation which distorts and often practically nullifies them, and to say the corrective process comes by having the Governor . . . [decide] when the consequences of the rule should not be enforced, is not a desirable system."⁵⁴ Mr. Justice Frankfurter argued against precedent when rules of law serve to suspend the state of psychological knowledge at the time the rules were formulated.⁵⁵

Even though the irresistible impulse doctrine does widen the scope of exculpation under the M'Naghten test, this measure of responsibility is inadequate from a psychiatric point of view.⁵⁶

[A]n unfortunate and misleading implication [is] that, where a crime is committed as a result of emotional disorder due to insanity, it must have been suddenly and impulsively committed after a sharp internal conflict. In many cases, such as those of melancholia, this is not true at all. The sufferer from this disease experiences a change of mood which alters the whole of his existence The criminal act, in such circumstances, may be the reverse of impulsive. It may be coolly and carefully prepared; yet it is still the act of a madman [S]imilar states of mind are likely to lie behind the crimi-

Zilboorg, *A Step Toward Enlightened Justice*, 22 U. CHI. L. REV. 331 (1955).

Authorities critical of the supplemental irresistible impulse test: see, e.g., Board, *Operational Criteria for Determining Criminal Responsibility*, 61 COLUM. L. REV. 221, 224 (1961); Roche, *Criminality and Mental Illness - Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320, 321 (1955); Skeel, *M'Naghten v. Durham*, 12 CLEV.-MAR. L. REV. 330, 336 (1963).

53. Note, *Modern Insanity Tests - Alternatives*, 15 WASHBURN L.J. 88, 92 (1976)(citing S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 156-60 (1925)). The lower courts, instead of appellate courts, formulated the tests and principles of law were confused with dicta. "Jury instructions consisted of conflicting excerpts from prior opinions, assembled into a single test. Thus although laying the foundation for present insanity tests, the early rules cannot be regarded as inherently sacred or absolutely authoritative." *Id.* at 93.

54. *United States v. Currens*, 290 F.2d at 766 (quoting Mr. Justice Frankfurter before the Royal Commission on Capital Punishment, *supra* note 50).

55. *United States v. Currens*, 290 F.2d at 765; see Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485 (1956).

56. See H. FINGARETTE, *supra* note 16; M. GUTTMACHER, *supra* note 16; G. MORRIS, *supra* note 8, at 11-14; see generally note 51 *supra*.

nal act when murders are committed by persons suffering from schizophrenia or paranoid psychoses⁵⁷

The test reflects a traditional notion of compartmentalized personality⁵⁸ which is contrary to most psychiatrists' view of the personality as an integrated unit.⁵⁹ Similarly, the delusion concept which pervades any determination of insanity has been entangled in both the M'Naghten and irresistible impulse tests.⁶⁰ This concept has been used as if one is capable of singling out one symptom from a general pathologic process, largely in paranoia and paranoid schizophrenia.⁶¹ Professor Glueck insists that to make responsibility hinge on the presence or absence of delusions is to assume too narrow and fragmented a view of mental illness and its effect on conduct since delusion is not necessarily more significant in distorting behavior than other "deranged mental dynamisms in the total pathological context."⁶² It is apparent that the approach utilized by Virginia is not sufficient to include the various mental disorders which can seriously affect the comprehension and control of behavior. Virginia courts decided long ago to limit criminal responsibility and, consequently, psychiatry demands that certain mental disorders be considered in the responsibility question.

It has been said that the M'Naghten rules are obsolete in theory and arbitrarily restrictive in practice by limiting testimony of the psychiatrist as an expert witness.⁶³ What do the M'Naghten rules test? "Certainly not mental disorder. They are a test of legal responsibility, and as used are merely a device whereby the psychiatrist as a medical expert is made to answer moral questions of right and wrong."⁶⁴ The misleading implication to the jury is that the psychiatrist is giving a scientific medical opinion to questions which involve bona fide medical criteria.⁶⁵ The narrowness of the traditional test makes it impossible to convey to the judge and jury the full range of informative material necessary to assess defendant's responsibility.⁶⁶ Typically, the psychiatrist is told to state whether or not the

57. S. GLUECK, *supra* note 4, at 58 (citing Royal Commission on Capital Punishment, *supra* note 50, at 110); see *Durham v. United States*, 214 F.2d at 873-74.

58. G. MORRIS, *supra* note 8, at 11.

59. *Id.* (citing Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 775 (1956)).

60. S. GLUECK, *supra* note 4, at 59; see generally S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925).

61. S. GLUECK, *supra* note 4, at 59. The delusion symptom is not isolated from the entire disease pattern as the use of this concept would suggest.

62. *Id.*

63. Dearman, *supra* note 3, at 1394.

64. *Id.* at 1393.

65. *Id.*

66. *United States v. Brawner*, 471 F.2d 969, 976-77 (D.C. Cir. 1972); see G. MORRIS, *supra* note 8, at 11.

patient knew the difference between right and wrong at the time he committed the crime. This is a question which the psychiatrist cannot answer, as he can only state whether or not the patient was suffering from a mental illness.⁶⁷ Because of the well recognized tendency of the M'Naghten rules to handcuff the specialist, it can safely be concluded that they are not effective in aiding the jury in making a determination of guilt when insanity is pleaded as a defense.

The problem of ambiguous terminology of the M'Naghten test has increased its vulnerability. Historically, the M'Naghten test has generated uncertainty and confusion due to varying interpretations of the rule and lack of definition or judicial construction of its terms.⁶⁸ The key words of the test have rarely been construed in judicial opinions. Courts have almost never defined "disease of the mind," although the remainder of the test indicates that only the most severe conditions will qualify.⁶⁹ The use of the word "known" has been subjected to scholarly criticism as referring to formal cognition or intellectual awareness alone.⁷⁰ The word "wrong" has also been criticized as ambiguous in that it is not stated whether this applies to "legal wrong" or "moral wrong."⁷¹

The general assumption underlying the insanity defense is that it enables society to distinguish between the cases "where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind that law should allow."⁷² In this way, society has drawn a dividing line between the criminal and the insane. The question Virginia must face is whether the M'Naghten-irresistible impulse approach is an appropriate method for determining this fine line. In light

67. Dearman, *supra* note 3, at 1394. In discussing the problems the Durham rule or product test (see note 26 *supra*) were designed to reach, the court noted that psychiatrists were often called as expert witnesses for their special knowledge of the problem of insanity and often felt they were obliged to reach outside of their professional expertise in order to answer questions of the traditional rules of M'Naghten. *United States v. Brawner*, 471 F.2d at 976.

68. *Alternatives*, *supra* note 26, at 97 (citing S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW*, at 187, 217, 226); see A. GOLDSTEIN, *supra* note 16, at 45-58.

69. See, e.g., G. MORRIS, *supra* note 8, at 12.

70. See, e.g., *Id.* Judge Bazelon has noted:

There is something quite curious about the manner in which both the M'Naghten and irresistible impulse rules have been construed by the courts. Neither has been used creatively in the manner we like to think represents the "genius of the common law." Despite potential breadth of a word like "know" in the M'Naghten rule, for example . . . no court has read it to mean more than "intellectually comprehend." And this although we have long known that even the best intentioned of men often find themselves acting in ways and for reasons they cannot justify in rational terms.

S. GLUECK, *supra* note 4, at 46-47.

71. See, e.g., G. MORRIS, *supra* note 8, at 13.

72. MODEL PENAL CODE § 4.01, comments at 156 (Tent. Draft No. 4, 1955).

of the fact that there are so many psychiatrists in disagreement with it and legal scholars criticizing its foundations and precepts, the inevitable conclusion is that the time for reform is past due.

IV. PROGRESS IN THE FEDERAL COURTS

Virginia has undergone so little change in the defense of insanity that it is necessary to examine other jurisdictions which have searched for an effective method of determining when criminal responsibility can be said to exist.⁷³ Traditionally, the federal courts applied M'Naghten exclusively,⁷⁴ and later supplemented it with the irresistible impulse test.⁷⁵ The federal courts then directed their attention to the so-called Durham or product rule⁷⁶ as a result of the highly controversial *Durham* decision.⁷⁷ Currently, all the circuits, except the First Circuit which has not spoken, have rejected M'Naghten and the irresistible impulse test in favor of modifications of the American Law Institute's formulation in the Model Penal Code.⁷⁸

The most representative federal court on the issue of a proposal for Virginia's insanity defense is the prestigious District of Columbia. The District of Columbia traditionally had an approach to the insanity defense similar to that of Virginia. The 1886 case of *United States v. Lee*,⁷⁹ together with the 1929 case of *Smith v. United States*,⁸⁰ stated the test of insanity in terms of right and wrong and the irresistible impulse. Due to the dissatisfaction of this approach, Judge Bazelon in the landmark opinion of

73. For the purposes of this article, the federal circuits will be examined since they have progressed through various stages to reach their current approaches. Consequently, they offer more practical knowledge in the effectiveness of the various tests.

74. Note, *Modern Insanity Tests - Alternatives*, 15 WASHBURN L.J. at 96 n.92 (citing *Lee v. United States*, 91 F.2d 326 (5th Cir. 1937)).

75. *Id.* at 96 n.93 (citing *Merrill v. United States*, 338 F.2d 763 (5th Cir. 1964)).

76. See note 26 *supra*.

77. 214 F.2d 862 (D.C. Cir. 1954). The federal courts have generally rejected the product test. See *United States v. Malafonte*, 357 F.2d 629 (2d Cir. 1966); *Carter v. United States*, 332 F.2d 728 (8th Cir.), cert. denied, 379 U.S. 841 (1964); *Snider v. Smith*, 187 F. Supp. 299 (E.D. Va. 1960), *aff'd*, 292 F.2d 683 (4th Cir. 1961).

78. See note 26 *supra*. Those circuits either applying the proposed or modified version of the ALI test are as follows:

United States v. Kohlman, 469 F.2d 247 (2d Cir. 1972); *United States v. Currens*, 290 F.2d 751 (3rd Cir. 1961); *United States v. McGirr*, 434 F.2d 844 (4th Cir. 1970); *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969); *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968); *United States v. Sennett*, 505 F.2d 774 (7th Cir. 1974); *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967); *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970); *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963); *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

79. 15 D.C. (4 Mackey) 489, 496, 54 Am. Rep. 293 (1886).

80. 59 App. D.C. 144, 36 F.2d 548 (1929).

*Durham v. United States*⁸¹ adopted the "product" rule which exculpates from criminal responsibility those whose forbidden acts were the product of a mental disease or defect.⁸² In answer to the severe problems of the "product" rule, the District of Columbia abandoned this rule in 1972⁸³ noting that despite its problems it had made a positive contribution to jurisprudence. "The rule [M'Naghten] as reformulated in *Durham* permitted medical experts to testify on medical matters properly put before the jury for its consideration, and to do so without the confusion that many, perhaps most, experts experienced from testimony structured under the M'Naghten rule."⁸⁴ The court in *Browner* viewed *Durham* as an attempt to alleviate problems stemming from the older tests and, in considering the advantages of the ALI proposal,⁸⁵ adopted a modified version of it.⁸⁶

81. 214 F.2d 862 (D.C. Cir. 1954).

82. The *Durham* rule had many unforeseen problems. Psychiatrists favored the decision for expanding the area of inquiry and communication of the medical expert as a witness. Lawyers, however, criticized the *Durham* rule as being a "non-rule." The test does not direct the jury to pathological factors that are of concern to the law: impairment of reason and of control. G. MORRIS, *supra* note 8, at 14-15 (citing W. LAFAVE AND A. SCOTT, HANDBOOK ON CRIMINAL LAW 288 (1972)); see Roche, *Criminality And Mental Illness - Two Faces Of The Same Coin*, 22 U. CHI. L. REV. 320, 324 (1955). Consequently, this rule was not widely accepted. For purposes of this discussion, we must conclude that the problems developing from the *Durham* rule were substantial and, therefore, this rule should not be considered in Virginia.

83. *United States v. Browner*, 471 F.2d 969 (D.C. Cir. 1972).

84. *Id.* at 977. The court noted that this positive aspect of *Durham* was retained when the American Law Institute undertook to analyze the problem and proposed a different formulation. *Id.*

85. The *Browner* court considered *amicus curiae* briefs on behalf of the following:

- (1) The American Civil Liberties Union Fund of the National Capital Area.
- (2) National Legal Aid and Defender Assn.
- (3) The National District Attorneys Assn.
- (4) Public Defender Service and The Georgetown Legal Intern Project
- (5) American Psychiatric Assn.
- (6) Professor David L. Chambers, III
- (7) American Psychological Assn.
- (8) The Bar Assn. of the District of Columbia.

86. *United States v. Browner*, 471 F.2d at 973. The *Browner* court stated:

The law provides that a jury shall bring in a verdict of not guilty by reason of insanity if, at the time of the criminal conduct, the defendant, as a result of mental disease or defect, either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct.

. . . .
. . . .

Mental disease [or defect] includes any abnormal condition of the mind, regardless of its medical label, which substantially affects mental or emotional processes and substantially impairs behavior controls. The term "behavior controls" refers to the

The American Law Institute developed a rule which has become the dominant force in the law pertaining to the defense of insanity and is destined to be viewed as a sensible compromise between those favoring the traditional rules and those who favor the "radical-appearing" Durham rule.⁸⁷ Members of the ALI indicated the difficulties or harshness of the M'Naghten rule and the irresistible impulse test can and must be corrected. "The law must recognize that when there is no black or white, it must content itself with different shades of gray."⁸⁸ "The ALI rule is eclectic in spirit, partaking of the moral focus of M'Naghten, the practical accommodation of the 'control rules' [a more exact term for irresistible impulse rules] and responsive, at the same time, to a relatively modern, forward-looking view of what is encompassed in 'knowledge.'"⁸⁹ Dean Goldstein explains the ALI test:

This test is a modernized and much improved rendition of M'Naghten and the "control" tests. It substitutes "appreciate" for "know," thereby indicating a preference for the view that a sane offender must be emotionally as well as intellectually aware of the significance of his conduct. And it uses the word "conform" instead of "control," while avoiding any reference to the misleading words "irresistible impulse." In addition, it requires only "substantial" incapacity, thereby eliminating the occasional references in the older cases to "complete" or "total" destruction of the normal capacity of the defendant.⁹⁰

Chief Judge Haynsworth of the Fourth Circuit accepted the ALI rule as the preferred formulation⁹¹ on the basis of the balance between cognition and volition. This balance demands an unrestricted inquiry into the whole personality of a defendant. "Its verbiage is understandable by psychiatrists [sic]; it imposes no limitation upon their testimony, and yet, to a substantial extent, it avoids a diagnostic approach and leaves the jury free to make its findings in terms of a standard which society prescribes and juries may apply."⁹²

processes and capacity of a person to regulate and control his conduct and his actions.

In considering whether the defendant had a mental disease [or defect] at the time of the unlawful act with which he is charged you may consider testimony in this case concerning the development, adaptation and functioning of these mental and emotional processes and behavior controls.

Id. at 1008 (Appendix B). For an intensive discussion of the specific elements of the ALI modification adopted see *id.* at 990-95.

87. A. GOLSTEIN, *supra* note 16, at 93.

88. MODEL PENAL CODE, *supra* note 72, at 158.

89. *United States v. Brawner*, 471 F.2d at 979.

90. G. MORRIS, *supra* note 8, at 17 (quoting A. GOLSTEIN, *supra* note 16, at 87).

91. *United States v. Chandler*, 393 F.2d 920, 926 (4th Cir. 1968).

92. *Id.* Judge Murrah of the Tenth Circuit stated that the ALI rule should go far in bridging

Circuit Judge Leventhal in the *Browner* opinion stated that the ALI test retained the core requirement of a meaningful relationship between the mental illness and the incident charged. The language of the test is sufficiently common to both professions [psychiatry and law] so that its use in the courtroom or in preparation for trial permits communication between judges, lawyers, experts, and jurymen. The parties can communicate without the use of a "vocabulary that is either stilted or stultified, or conducive to a testimonial mystique permitting expert dominance and encroachment on the jury's function."⁹³ Commentators also have expressed favorable views on the ALI formulation.⁹⁴

The ALI draft has had its critics, too.⁹⁵ Some have contended that the important words in the ALI test such as "substantial" and "appreciate" are vague and undefined. Judge Bazelon, in his concurrence and dissent in *Browner*, stated that the problem with the word "product" in the Durham rule may not be solved by using the word "result" in the ALI test.⁹⁶ Others fear that the requirement of less than total incapacity expands the number of insanity acquittals which tends to counteract society's interest in crime deterrence.⁹⁷ Dean Goldstein also points to the danger and probability that lawyers and judges will "continue to put only conclusionary questions to experts, usually cast in the words of the insanity test itself."⁹⁸ Experts will come to believe the court is not interested in a detailed description of the defendant's mental state but only in the answers to the test questions. Dean Goldstein, therefore, argues that there is a high probability that the problem of presenting expert testimony in a limited manner is likely to remain.⁹⁹ In fact, Chief Judge Bazelon, author of the *Durham* opinion, agreed that the Durham test should be abandoned, but ques-

the gulf between psychiatry and the law as well as giving the trial judge a definition which he can articulate to the lay jury. *Wion v. United States*, 325 F.2d at 430.

93. *United States v. Browner*, 471 F.2d 983.

94. Wechsler, *Codification of the Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968); Diamond, *From M'Naghten to Currens, and Beyond*, 50 CAL. L. REV. 189, 191 (1962); Bennett, *The Insanity Defense - A Perplexing Problem of Criminal Justice*, 16 LA. L. REV. 484, 490-91 (1956).

95. *United States v. Browner*, 471 F.2d at 1010-39 (Bazelon, C.J., concurring in part and dissenting in part); Goldstein, *The Browner Rule - Why? or No More Nonsense on Non Sense in the Criminal Law, Please!*, [1973] WASH. U.L.Q. 126; Kuh, *The Insanity Defense - An Effort to Combine Law and Reason*, 110 U. PA. L. REV. 771, 797-99 (1962).

96. G. MORRIS, *supra* note 8, at 17; see *United States v. Browner*, 471 F.2d at 1010-39 (Bazelon, C.J., concurring in part and dissenting in part).

97. *Wade v. United States*, 426 F.2d 64, 75 (9th Cir. 1970) (Trask, J., with whom Chambers, Barnes, Koelsch, Carter, and Kilkenny, J.J. joined, dissenting).

98. A. GOLDSTEIN, *supra* note 16, at 94.

99. *Id.*

tioned whether the adopted formulation would be able to solve the problems.¹⁰⁰ Several states have expressly rejected the ALI test.¹⁰¹

V. PROPOSAL: LEGISLATIVE INVOLVEMENT

Arguments have been made against legislative enactment of any specific insanity test. The arguments against legislative enactment of any specific insanity test that have generally been based on the suggestion that the problem of the mentally ill offender is "not soluble through manipulation of the legal rules of responsibility."¹⁰² Indeed, in light of the issues underlying the determination of criminal responsibility,¹⁰³ it appears that the problems of criminal responsibility cannot be completely dissolved by adopting any particular insanity test. A perfect test may be impossible at this stage of our jurisprudence. Chief Judge Bazelon stated in *Brawner* that it was fine if the adoption of the ALI test produces some improvement in the quality of adjudication of the responsibility issue, but pointed to far more important practical questions which should not be buried in the search for the perfect word choice.¹⁰⁴

These limitations should not be viewed as sufficient to prevent legislative action in Virginia. Reasons abound for the formulation of a new test for the insanity defense. The American Bar Foundation asserts:

Granting that the "modern" tests of criminal responsibility indeed fail to lead to a socio-legal "promised land," the problem with such observations is that they often become the parlance of those who are unwilling to advocate or even entertain the thought of any "real change" in our conceptions and institutions such as might bring the criminal justice system closer to ideals

100. *United States v. Brawner*, 471 F.2d at 1010-39. "We are unanimous in our decision today to abandon the formulation of criminal responsibility adopted eighteen years ago [in *Durham*] . . . But on the whole I fear that the change made by the Court today is primarily one of form rather than of substance." *Id.* at 1010. He also was critical of the fact that the ALI formulation continued to require that the accused have a "mental disease" as a prerequisite condition of non-responsibility. He argued the term "mental disease" is too entangled with the medical model to be useable as a legal concept. *Id.* at 1028.

101. Some of these include: *State v. Malumphy*, 105 Ariz. 200, 461 P.2d 677 (1969); *State v. Harkness*, 160 N.W.2d 324 (Iowa 1968); *State v. Lucas*, 30 N.J. 37, 72, 152 A.2d 50, 68-69 (1959); *State v. Reece*, 79 Wash. 2d 453, 486 P.2d 1088 (1971).

102. G. MORRIS, *supra* note 8, at 25 (citing *Diamond*, *From Durham to Brawner, A Futile Journey*, [1973] WASH. U.L.Q. 109).

103. See notes 16 and 23 *supra* and accompanying text.

104. *United States v. Brawner*, 471 F.2d at 1039 (Bazelon, C.J., concurring in part and dissenting in part). These practical questions speak to the procedural problems involved; specifically, the capabilities of the judge, jury and expert in arriving at desired results in a fair and rational manner while functioning within the legal framework. *Id.*

of consistency and rationality, and tend to justify the principle of inertia, espousing old rules and formulations by default.¹⁰⁵

Critical decisions affecting the lives of criminal defendants face the court everyday. These decisions cannot be postponed. "They cannot await an indefinite future time when a standard for personal blameworthiness might be scientifically established. Any legislative judgment improving the administration of criminal justice, even to a minor degree, is warranted now."¹⁰⁶

This article calls for reform in the approach of the insanity defense and the determination of criminal responsibility. The emphasis is on change, no matter whether initiated by the Virginia courts or legislature. The controversial insanity defense has seen little change over the years; consequently, precedent is weighted heavily against reform. For these reasons Virginia courts will likely look to the legislature.¹⁰⁷ Hence, the Virginia General Assembly will probably have to initiate the necessary reform.

Current deficiencies of the Virginia system would be greatly remedied by the adoption of a modified formulation of the ALI test. The *Brawner* court conducted an exhaustive survey of the relevant psychiatric and legal considerations¹⁰⁸ and was unanimous in its decision to abandon the Durham rule. Virginia should look for a modification of the ALI test which addresses the problems noted in Chief Judge Bazelon's dissent.

105. G. MORRIS, *supra* note 8, at 25, 26 (quoting American Bar Foundation, *The Mentally Disabled and the Law* 392 (rev. ed., Brakel and Rook 1971).

106. G. MORRIS, *supra* note 8, at 26.

107. Several jurisdictions have adhered to the M'Naghten rule, despite legal criticism, believing a change of this nature is properly made by the legislature. *People v. Nash*, 52 Cal. 2d 36, 338 P.2d 416 (1959); *People v. Johnson*, 169 N.Y.S.2d 217, 13 Misc. 2d 376 (1957). *But see People v. Drew*, 149 Cal. Rptr. 275 (1978). In this recent decision (Sept. 26, 1978), Justice Tobriner stated that California would reject the M'Naghten test used for over a century in favor of the American Law Institute's test. "The deficiencies of that test have long been apparent, and judicial attempts to reinterpret or evade the limitations of M'Naghten have proven inadequate." *Id.* The only barrier to the adoption of the manifestly superior ALI test was the "repeated judicial declarations that any change in the M'Naghten rule requires legislative action." *Id.* at 282. The court disagreed with the "concept that an extended line of judicial decisions, accompanied by legislative inaction, can freeze the evolution of judicial principles, divesting the courts of authority to overturn their prior decisions" and stated that the judiciary has the responsibility for legal doctrine which it has created. *Id.* at 282.

The power of the court to reshape judicial doctrine does not authorize us to overturn constitutionally valid statutes. But as Justice Mosk explained in his concurring opinion in *People v. Kelly* . . . the M'Naghten rule is not an integral part of the statutory structure of California criminal law. The Legislature has never enacted the M'Naghten rule as a test of insanity . . . Thus replacement of the M'Naghten rule with the ALI test will not contradict or nullify any legislative enactment.

Id. at 283.

108. *United States v. Brawner*, 471 F.2d at 975-89.

It is hereby proposed that Virginia adopt the following modification of the ALI test put forth by Grant Morris in 1975:

A person is not criminally responsible for his conduct if, as a result of impairment of his mental or emotional processes or behavior controls, he lacked, at the time of such conduct, substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.¹⁰⁹

One of the major criticisms of the formulation adopted in *Browner* was that because the model was cast in medical model terminology, i.e., "mental disease or defect," the legal determination to be made by the jury is, in fact, made by the psychiatrists. The psychiatrist actually makes the decision through his medical determination of mental illness or disease. So, the defendant's responsibility seems to turn on whether or not the experts have called his condition a specific disease. But, "[t]here is no reason to tie the legal concept of responsibility to the medical model of mental illness, especially when the validity of that medical model is seriously questioned by some eminent psychiatrists"¹¹⁰ The proposal eliminates the medical model, substituting in its stead the words "if, as a result of impairment of his mental or emotional processes or behavior controls." This should permit a jury to consider impairment arising from physiological, emotional, social or cultural sources.¹¹¹ Morris argues that this language will still permit psychiatrists to testify on the accused's mental condition using their own nomenclature, yet in conjunction with trial court instructions juries can be informed that determination of criminal responsibility involves more than blind acceptance of psychiatric opinion.¹¹²

Adoption of this formulation will retain advantages the ALI official proposal has over the traditional M'Naghten - irresistible impulse approach¹¹³ currently in use in Virginia and will also improve the inherent problems between the jury determination and the tendency for the psychiatric expert to dominate this decision.

109. G. Morris, *supra* note 8, at 27. For a thorough discussion of the word choice see *id.* at 28-31. Paragraph (2) of the ALI test (*see* note 26 *supra*) which excludes "socio-paths" is rejected since by current psychiatric knowledge it is not clear whether they are included in the definition of insanity. It is suggested that each case be tried on an individual basis with psychiatric and lay testimony heard by a jury.

110. G. MORRIS, *supra* note 8, at 28 (*quoting* United States v. Eichberg, 439 F.2d 620, 626 (D.C. Cir. 1971)(Bazelon, C.J., concurring)). The possible deference to psychiatric judgment is unwise for psychiatrists themselves do not agree on what constitutes mental illness. G. MORRIS, *supra* note 8, at 28.

111. *Id.* at 29.

112. *Id.* at 29, 30.

113. *See* notes 51 & 88 *supra* and accompanying text.

VI. THE FUTURE OF THE INSANITY DEFENSE

Although the proposal of this article is a necessary change in Virginia law, one which the legislature should address, honesty requires it to be viewed as an essential short-run improvement. Obviously, the ALI has some problems which have been adequately criticized by those who have experience in the search for a perfect test.¹¹⁴ It should be stressed at this point that although these criticisms suggest the test is not perfect, by no means is the criticism sufficient to support legislative inaction and the resultant adherence to an archaic Virginia test. The Virginia legislature, in adopting this proposal, should take careful notice of Chief Judge Bazelon's advice: "But we cannot allow our search for the perfect choice of words to deflect our attention from the far more important practical questions."¹¹⁵ The ultimate solution is going to require looking at the criminal procedure involved in the insanity defense and perhaps may require a change of attitude in determining where and how society wants to draw the line in criminal responsibility.

It has been said that "[u]nder present legal arrangements, the point at which the theoretical debate over criminal responsibility becomes operative in the real world is the point at which it makes a difference to the jury."¹¹⁶ Certainly, a major area of dissatisfaction in all insanity tests proposed has been that it does not remedy the problem of the expert witness and his interaction with the jury. The interaction required in this context is unique from other uses of expert testimony. A medical expert certainly is not forced to entangle his expertise with such difficult moral questions. Once a test has been adopted which adequately utilizes current psychiatric knowledge, as the proposed test should do, attention will be focused on the apparent weak link in this unique legal setting. As the system stands today, the courts may be asking too much from the jury.

The Simon studies regarding juror's responses to mock trials applying the insanity defense¹¹⁷ have given some insight into the capabilities of

114. See note 94 *supra*.

115. *United States v. Brawner*, 471 F.2d at 1039. (Bazelon, C.J., concurring in part and dissenting in part).

116. R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 67 (1967).

117. *Id.* Rita Simon's study of 1967, like similar studies involving jurors has some weaknesses in design and technique due to the difficulty in recreating the jury trial setting over many test runs and juror samples. The use of recorded trials has been criticized as well as the fact that the jurors were informed at the outset of the experiment that their verdicts would not affect the defendant's fate. All evidence of the experimenters that the verdicts of experimental juries are comparable to the verdicts that real juries would reach in similar situations is indirect. *Id.* at 34-42. It should also be noted that these studies require careful reading. Apparently, those conducting the study did not interpret their data in such a clear cut fashion as some commentators have noted. At most the test should lead to further inquiry.

jurors in the insanity defense. This study together with two other studies in this area¹¹⁸ have been interpreted to demonstrate:

[T]he jury (1) does not understand the code of the psychiatrist, (2) does not understand the legal framework, and (3) applies its own reasoning to the case to the extent of regarding its own fears as more important than the elaborate judicial system. In other words, the layman, the juror, puts his own "value" on the asocial behavior.¹¹⁹

Assuming these to be true, the conclusion that the method for determining criminal responsibility is haphazard, at best, may be reached.

By adopting the proposed insanity defense, Virginia will achieve a great substantive improvement. Any criticisms are likely to call for tailoring the new test to the jury. This has been the approach in the past. In the future, we may see a shift in this emphasis by accommodating the psychiatric profession in their much needed assessment with increased focus on tailoring the jury to this specific procedure. This long-run procedural solution will not be addressed in this article. However, a number of proposals forecast the search for something beyond the articulation of an insanity test. Such proposals include abolishing the insanity defense¹²⁰ and adopting instead either a bifurcated trial procedure with the jury determining who did the act in the first phase and either a judge or panel of experts making the disposition determination in the second phase,¹²¹ or establishing educative programs for prospective jurors to aid them in this unique determination.¹²²

118. Arens, Granfield, and Susman, *Jurors, Jury Charges and Insanity*, 14 CATH. U.L. REV. 1, 11 (1965); James, *Status and Competence of Jurors*, 65 AM. J. SOC. 563, 565 (1959).

119. Comment, *The Psychiatrist's Role in Determining Accountability for Crimes: The Public Anxiety and an Increasing Expertise*, 52 MARQ. L. REV. 380, 390 (1969)(footnotes omitted).

120. See Goldstein & Katz, *Abolish the "Insanity Defense" - Why Not?*, 72 YALE L.J. 853 (1963); Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist Views Durham and Brawner*, [1973] WASH. U.L.Q. 87, 105-08. But see Brady, *Abolish the Insanity Defense - No!*, 8 HOUS. L. REV. 629 (1971).

121. See Second Circuit Annual Judicial Conference, Panel Discussion, *Insanity as a Defense*, 37 F.R.D. 365, 369-75 (1964); Thompson, *The Future of the Insanity Defense in Illinois*, 26 DEPAUL L. REV. 359 (1977); Shwedel and Roether, *The Disposition Hearing: An Alternative to the Insanity Defense*, 49 J. URB. L. 711 (1972).

122. Any change in this regard will bring some difficult problems to the surface: (1) The potential constitutional violation of due process and the right to trial by jury on each and every element of the crime.

(2) The symbolic importance of allowing the jury as representatives of society to make the responsibility determination. See Comment, *Due Process and Bifurcated Trials: A Double-Edged Sword*, 66 NW. L. REV. 327 (1971).

VII. CONCLUSION

Current Virginia law on the test of insanity poses major problems in determining criminal responsibility by a fair and rational process. Legal scholars, as well as psychiatrists, have severely criticized the M'Naghten and irresistible impulse approach in determining criminal responsibility. This approach has been shown to be unrealistic in the light of present day knowledge of medical psychology and suspect in terms of recent scholarly opinions on the foundations of criminal law. In seeking truth in the area of criminal intent and the defense of insanity, Virginia must determine criminal responsibility on a basis which is more in tune with the realities of human behavior as demonstrated by the psychiatric fields. For it is only in this way that Virginia can hope to achieve justice in punishment or treatment.

The reform necessary in Virginia merits legislative action because criminal responsibility is, and should be, a matter which raises serious moral questions. In the search for an improved test, the Virginia legislature should consider progressive jurisdictions such as the federal circuits which offer a great deal of experience in the law of the insanity defense. An appraisal of these jurisdictions, specifically the District of Columbia, has resulted in this comment's proposal that Virginia adopt a modification of the American Law Institute's Model Penal Code formulation. This approach is a modern attempt to draw a sensible compromise between the various traditional tests. Adoption of the formulation presented in this comment will go a long way in solving Virginia's problems in determining criminal responsibility. The proposed test is not a perfect one and it will, no doubt, have its critics. However, the advantages of this test over the current Virginia test indicate that these criticisms are not sufficient to support legislative inaction.

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