BOOK REVIEWS

The Criminal Mind. By Philip Q. Roche. New York: Farrar, Straus and Cudahy, 1958. Pp. xi, 299. $5.00.

Of ll the problems in the administration of the criminal law, perhaps the most difficult is the determination of responsibility for criminal acts. Many of us who practice and teach that law are dissatisfied with existing tests of responsibility. We seek more adequate tests as well as procedures for determining responsibility. The literature of psychiatry is not very helpful. Herbert Wechsler, Chief Reporter of the American Law Institute Model Penal Code Project, was moved to say in a recent speech before a group of psychiatrists: "Why should the literature of law and psychiatry be so polemical . . . ? One reason I believe is that the literature is, if I may say so, often merely ritual in character. . . . When I say ritual I mean it literally—a kind of religious rite that consists mainly of giving law and lawyers hell."[1]

So we turn with eagerness to the work of a recipient of the Isaac Ray Award given annually by the American Psychiatric Association to the person deemed most worthy by reason of his contributions to the relations of law and psychiatry. This is especially true when the book bears the imposing title and subtitle, *The Criminal Mind—A Study of Communication between Criminal Law and Psychiatry.*

It is distressing to have to report that *The Criminal Mind* is merely another addition to the familiar ritual literature referred to by Professor Wechsler—a work devoted mainly to giving the law and lawyers hell without even a morsel of constructive criticism. Doubtless, before this review is finished, I will have yielded to a strong temptation to reply in kind.

In spite of the subtitle of this book, it is definitely not concerned with communication between lawyers and psychiatrists. For the most part it is written in technical psychiatric language which makes it difficult for a lawyer to get the gist of what Dr. Roche is trying to say. I doubt that very many lawyers not under the impetus of a promise to write a book review will fight their way to the end.

The problem of the lawyer-reader can best be illustrated by a quotation in which the author tries to explain the difference between the legal and psychiatric concepts of intent. He brushes off the former with a statement that when the law says absence of intent renders one incapable of committing a crime, it really means that the triers are incapable of attaching guilt. He goes on:

[1] Wechsler, Law, Morals and Psychiatry: Old Problems and Recent Reassessments, Address at 37th Annual Meeting of the New York Society for Clinical Psychiatry, New York City, Jan. 15, 1959.

Let us turn to the mentally ill person and to a psychiatric view of the workings of intent. In the model of dynamic psychology intent refers to all structural, instinctual impulses which are carried with a centrifugal force to the conscious periphery with or without verbal counterpart. In this view, the essential elements that shape behaviour are not only the primary instinctual drive or the formed intent alone which defines the goal of behaviour, but also the secondary elements acquired from the conditionings of child rearing. These are referred to as the patterns of control which are interposed between the stimulus and response. In psychiatry we speak of them as the ego and super ego; the former, the executor of behaviour, the latter, the evaluator. In health and maturity the ego and super ego stand in the way of intent, to stay it, if it is not in conformity with moral and realistic standards. We think of ego and super ego not as personifications, but as neutral patterns of feedback responses built into the nervous system and acting in large degree automatically and beyond conscious awareness. Mental life is a continuous flow of psychic forces arising from the organic matrix of the body, directed as adaptive responses to the outside world, and modified more or less in conformity with the symbols of the environment [pp. 87–88].

This sort of language, which is typical of much of the book, makes me conclude that the book is not intended for lawyers, at least not for those without fair amount of psychiatric background. This statement should be qualified since Dr. Roche has interposed at various places fascinating case studies which are designed to illustrate the inter-working of law and psychiatry. In spite of occasional technical psychiatric comment, these cases are worth-while reading for the lawyer.

Dr. Roche makes an extensive attack on the trial phase of criminal justice. Only by using samples of his language can I give an adequate impression of the nature of this attack. He says:

Criminal justice is an institutionlized exteriorization and extension of the child rearing operation. . . . Child rearing does not stop when the individual ceases to be a child. The law takes over where the parent leaves off [p. 66]. [I]t articulates a religious meaning—it mediates an inner conviction of divine intervention in earthly affairs, *ex ore Dei* [p. 72].

[T]he criminal trial is an operation having a religious meaning essential as a public exercise in which the prevailing moral ideas are dramatized and reaffirmed. The religious meaning is the adjusting of tensional moral conflict within the law-abiding. The conflict is materialized in the actions of the criminal, and dissipated in the ritual of guilt fastening, condemnation and punishment. . . . [I]t has the function of public edification rather than that of welfare of the individual wrong-doers who pass over its stage in an endless procession. . . . [I]t is an end in itself, and . . . any attempt to bring a scientific discipline into ritual has been and will be met with resistance that flows from a sense of profanation . . . [pp. 245–46].

[I]t simultaneously provides subjectively a theater for the repetition of crime and the undoing of it in fantasy with mass participation and also provides an arena of conflict on another level on which the triers contend with each other in a highly stylized game within a game [p. 246].

What should be the function of the psychiatrist in such a trial? Again let us refer to the words of Dr. Roche.

> My emphasis on the emotional and ludic elements of the public-centered phase of criminal justice is submitted in the interest of my thesis that within the present restrictions imposed by legal procedure only a psychiatry of a kind could be introduced. It is a "legal" psychiatry founded on the static, elementalistic class theoretical concept of human behaviour couched in terms of the M'Naghten rule of right and wrong. A dynamic psychiatry of field-theoretical concepts purporting deterministic necessity could not be articulated in this medium [p. 75].

He seems to be attempting to say something like this: "I emphasize the emotional and ridiculous aspects of the criminal trial for a reason. In such a trial only an emotional and ridiculous psychiatry can be introduced. There is no place in such a trial for a deterministic psychiatry." He goes on to conclude that at such a trial the psychiatrist is a kind of scapegoat, "a functionary on whom the guilt can be sympathetically displaced" (p. 107).

Dr. Roche, like many of his brethren, has no sympathy for the criminal law notion of responsibility. In his inimitable language he says:

> Responsibility is an Idol of the Theater with which the psychiatrist in court is faced, but for which he has neither comprehension nor concern. Responsibility in the sense that the criminal law employs it as a mystical property possessed by some and not by others, as something that can be reckoned to a scale of *none* to *total*, divisible and variable in time and place, is derived from the primitive organization of the mind which magically equates injury in the talion principle. It is one of the "subjective adherences" having no existence other than in the minds of those who talk about it [p. 170].

To me this quotation illustrates complete unawareness of the real problem of responsibility. Responsibility is no mythical property. It is a short-hand term for the process of deciding whether the defendant will be subjected to treatment in a penal institution or treatment in a mental hospital.

Dr. Roche offers no constructive criticism of the criminal trial. Rather, the psychiatrist's role in the trial must be re-examined in order to separate the "higher thought" of the psychiatrist from the "magic" of the criminal trial. "Until the psychiatrist's role in the public drama of criminal justice is clearly defined and acknowledged, he will continue to be suspect" (p. 79). The psychiatrist must therefore limit himself to testimony concerning medical facts.

These views can be examined more concretely in the light of the *M'Naghten* tests.[2] What can a psychiatrist do when faced with the *M'Naghten* formula? He may be asked hypothetically or directly whether the defendant was suffering from such a defect of reason that he was not able to understand the nature or quality of his act, and whether at the time it was committed he knew that it was wrong.

[2] 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

Dr. Roche does not want to answer the *M'Naghten* questions because *M'Naghten* "imposes upon medical men answers to a question of insanity, a legal matter, rather than upon a judge or jury who are charged with making legal decisions" (p. 103). This, Dr. Roche says, the psychiatrist cannot do.

> The method of determining such knowledge [right and wrong] is not taught in medical schools. Science provides no method for equating mental illness with innocence . . . [p. 107]. The psychiatrist is asked to examine the accused and he does. He collects medical data which relates to the relationship of the accused to his social environment. He decides that the accused was or was not suffering with a mental illness, having some temporal connection with his unlawful act. Actually this is as far as he can go. . . . How can he ascertain directly the defendant's knowledge responsive to the M'Naghten questions? Not from his medical data . . . [p. 108].

Dr. Roche is not disturbed if the *M'Naghten* questions are put to the jury. He says:

> Psychiatrists would not complain of the M'Naghten formula if it were put exclusively to the jury, which, with the medical facts in evidence, in all probability would do no better or no worse with it than the expert. In sum, the psychiatrist is not opposed to any legal test as long as it is put to the right people. He is not opposed to any test which is a medical desideratum and within his competence. The M'Naghten test is not a medical desideratum and it is outside his competence [p. 173].

In other words, Dr. Roche feels that the psychiatrist can do no more than give his views as to the existence of a mental disease having some contemporary connection with the defendant's act. If he goes on and gives moral opinions he is testifying as a man and not as a psychiatrist. The jury should make the moral decision. Making the psychiatrist answer the *M'Naghten* questions is conferring on him more than a clinical function or even an intuitive function. It is endowing him "with an expertness which can be none other than a higher order of clairvoyance" (p. 108).

This should not be too disturbing to lawyers. Merely because the answers to the *M'Naghten* questions are outside the expert competence of a psychiatrist does not mean that the jury cannot answer them. Let the psychiatrist testify as to the mental illness of the defendant, whether it was temporal to the criminal act, and what sort of things may be expected from one suffering from the particular form of mental illness. Let the lay witnesses testify as to the actual appearance and activities of the defendant. Then let the jury draw the necessary inference as to whether the defendant should be treated as responsible.

By this time, doubtless, the reader wonders whether Dr. Roche would find the *Durham* test, or, for that matter, any test more to his liking than the *M'Naghten* test. In *Durham*, the Court of Appeals for the District of Columbia found the *M'Naghten* and irresistible impulse tests to be inadequate. It said: "an accused is not criminally responsible if his unlawful act was the product

of mental disease or mental defect."[3] Subsequent decisions have made it clear that *Durham* is not the exclusive test. Instructions to juries in suitable cases can still include *M'Naghten* and the irresistible impulse tests.[4] Furthermore, the court has clarified somewhat the ambiguity of the word "product." It has emphasized the requirement that the relationship between the disease and the act must be critical, decisive, determinative, causal. The court has said: ". . . we mean to convey the idea inherent in the phrases 'because of', 'except for', 'without which', 'but for', 'effect of', 'result of', 'causative factor'. . . . They mean that the facts concerning the disease and the facts concerning the act are such as to justify reasonably the conclusion that 'But for this disease the act would not have been committed.' "[5]

Under the current version of *Durham*, what is the function of the psychiatrist? Judge Prettyman has said: "The problems of the law in these cases are [1] whether a person who has committed a specific criminal act . . . was suffering from a mental disease . . . ; [2] whether there was a relationship between that specific disease and the specific alleged criminal act; and [3] whether that relationship was such as to justify a reasonable inference the the accused would not have committed the act if he had not had the disease."[6] Speaking to the respective functions of the psychiatrist and the jury, he went on: "The law wants from the medical experts [1] medical diagnostic testimony as to a mental illness, if any, and [2] expert medical opinion as to the relationship, if any, between the disease and the act of which the prisoner is accused. The conclusions, the inferences, from the facts are for the trier of the facts."[7]

Dr. Roche is unwilling to go as far as Judge Prettyman would have him go; he would limit the testimony of the psychiatrist to the giving of opinions as to the existence of mental illness. He says the psychiatrist properly must always answer the causation or product question in the affirmative. He has never encountered a case where outward behaviour was unrelated to inward mental life. If he answers the question in the negative he is doing the same thing he does with the *M'Naghten* questions. Dr. Roche explains that the product test is a subjective determination upon which is pivoted the question of moral responsibility, which the court or jury should resolve. He submits: "if the product question is withheld from the expert and confined to the triers, psychiatry can function properly. The jury can decide the matter under applicable law as instructed by the court, since it is determining a moral (legal) issue on its own terms. In this insulation of the psychiatrist from the 'product' question we are

[3] Durham v. United States, 214 F.2d 862, 874–75 (App. D.C., 1954). Durham himself finally pleaded guilty on the eve of his third trial. See United States v. Fielding, 148 F.Supp. 46, 51 n. 6 (D.D.C., 1957).

[4] Douglas v. United States, 239 F.2d 52, 58 (App. D.C., 1956).

[5] Carter v. United States, 252 F.2d 608, 617 (App. D.C., 1956).

[6] Ibid.

[7] Id., at 617–18.

keeping our symbols straight and pure" (p. 266). He suggests that the product question be answered by the jury in the language of arbitrary relations in the manner that they ponder such concepts as negligence, fraud, hot blood, and other legal concepts.

In summary, Dr. Roche says: "The withdrawal of the 'product' wing of Durham from the expert witness will complete the work of liberating medical testimony from the ghost of M'Naghten, and there will remain the foundations for a rational manipulation of mentally ill persons who commit unlawful acts" (p. 272).[8]

One proposal for solution of the responsibility problem which has substantial support from lawyers is that of the Model Penal Code. The Code excludes responsibility where the defendant, as a result of mental disease or defect, "lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."[9] The provision is designed to correct the main defects of *M'Naghten* and the irresistible impulse test. It recognizes that the actor may know what he is doing and that it is wrong, but still be unable to control his conduct. It rejects the implied restriction of the irresistible impulse test to sudden spontaneous conduct. Both *M'Naghten* and the irresistible impulse test require complete impairment that seldom exists. The Code provision is phrased in terms of "substantial" lack of capacity.

Dr. Roche's discussion of the Model Penal Code is sketchy, but he finds it no more satisfactory than *Durham* or *M'Naghten*. He thinks it highly improbable that any mentally disordered person who commits a criminal act is substantially unappreciative of its criminality. "M'Naghten's Cheshire Cat has vanished but the grin lingers" (p. 181).

This review is already too long, but mention should be made of the fact that *The Criminal Mind* includes short discussions of the pre-trial and post-trial phases of criminal justice. In these areas Dr. Roche finds himself more content with the current role of the psychiatrist than in the trial area. In fact, he indicates briefly in closing that eventually he would like to see the role of the psychiatrist in the trial eliminated altogether, with the defense of insanity raised in a separate administrative proceeding after the trial.

Dr. Roche does not discuss the question of whether psychiatry has reached the stage where it is ready for such a system. In a recent case eleven court-appointed and government agency psychiatrists testified. Five thought the mental disorder of the defendant dated back to his crime. Six either did not or

[8] The reluctance of psychiatrists to answer the product question is illustrated by Wright v. United States, 250 F.2d 4, 8 (App. D.C., 1957), where medical witnesses were asked whether the defendant's act was the product of the illness. The replies included, "Yes," "Could very well be," "Likely," "Surely possible," with two replying that they had insufficient data to support an opinion. One of the latter explained that the causal connection between an individual's mental illness and his act "requires very intensive investigation and examination of the person."

[9] Model Penal Code § 4.01(1) (Tent. Draft No. 4, 1955).

were unable to express an opinion. We can readily agree with the conclusion of Judge Miller that "the fact that six of the eleven psychiatrists could not diagnose Wright's mentality as of June 20, 1951, on the basis of examinations made long thereafter, while from similar data the other five professed to be able to do so, demonstrates a serious conflict in the medical testimony. It doubtless caused the jury to wonder how, and to question whether, the five could actually do what the other six equally qualified experts said they could not do. . . ." "About all the medical testimony in its entirety proved to a certainty is that psychiatry is not an exact science."[10] Perhaps there are advantages to leaving final determination of questions of responsibility to the good judgment of a judge and jury, thereby permitting Dr. Roche to keep his "symbols straight and pure."

REX A. COLLINGS, JR.*

[10] Wright v. United States, 250 F.2d 4, 15 (App. D.C., 1957) (dissenting opinion).

* Professor of Law, University of California, Berkeley.

Federal Tax Fraud Law. By Ernest R. Mortenson. Indianapolis: The Bobbs-Merrill Company, 1958. Pp. vi, 312. $12.00.

Tax fraud cases combine problems which lawyers encounter separately in fraudulent financial schemes, criminal prosecutions, and tax litigation. Since the same lawyer is rarely experienced in unthreading all three types of fabric, a treatise which comprehensively treats the total problem is a welcome addition to the library of all whose clients might some day receive a visit from a special agent.

Mr. Mortenson's *Federal Tax Fraud Law* is of inestimable value to tax specialists, general practitioners, and accountants alike, for it does more than discuss the litigation aspects of tax fraud cases: it also tells the whole story of a fraud case, from the beginning of the investigation to the trial of the case and the subsequent assessment and collection (or compromise) of the civil penalties. Mr. Mortenson's fruitful career in the Tax Division of the Department of Justice and the Chief Counsel's office of the Internal Revenue Service, preceded and followed by a considerable period of private practice, makes him a fit portrayer of the inception and development of a tax fraud case both from the vantage point of the government people who gather and evaluate the facts and from the viewpoint of the taxpayer's representative.

The hypothetical report of a special agent (pp. 34–43) is worthy of careful study, because it throws considerable light on the thought processes and investigative procedures of the agents, and reveals the reasons for some of the inquiries they make. It also shows the importance of developing facts favorable to the taxpayer as early in the investigation as possible. The practitioner who understands the type of report which an agent writes, and knows that alleged