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INSANITY AS A DEFENSE TO CRIME†

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It is easy to attack the *M'Naghten* Rules or the opinion in the *Durham*¹ case, or both of them; it is much more difficult to try to work out a reasonable rule. I do not imagine that I have accomplished that feat; this article merely re-examines the following facets of the problem:

I. Our attitude toward the criminal law, its function and its purposes, and our knowledge of the different types of persons with whom the criminal courts must deal.

II. Our knowledge of the nature of mental illness, and our attitude toward persons suffering therefrom.

III. The development of the prevailing legal rule; and the proposed alternatives, which should be considered in light of our present knowledge and of our present attitudes.

I.

To lawyers a "crime" is the omission of any duty commanded, or the commission of any act forbidden, by the applicable penal law. Most people, however, think of a "crime" as a gross violation of law and morality, as distinguished from a slight offense; the moral element is important. Those of us who make or administer the criminal law must keep this in mind, whether or not we agree with Mr. Justice Holmes that:

"The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong."²

All sorts of social and religious ideas about criminal acts have prevailed at various times and places, of which

† This article is the product of a talk delivered by the author to The Lawyers' Round Table on November 6, 1959.

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¹ Respectively, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843) and 214 F. 2d 862 (D.C. Cir. 1954).

² HOLMES, *THE COMMON LAW* (1881) 41.

the most influential has probably been the *Lex Talionis* — an eye for an eye, a tooth for a tooth. The desire, if not the need, for vengeance is deep rooted in human nature.

In early times, most wrongs were avenged privately. Blood feuds were common. The community intervened initially to persuade or compel the wronged person or his family or his tribe to abandon private vengeance and to accept compensation for the wrong. Later, as civilization advanced, people came more and more to rely on punishment as an instrument of deterrence.

Pollock and Maitland say:³

“On the eve of the Norman Conquest what we may call the criminal law of England (but it was also the law of torts or civil wrongs) contained four elements which deserve attention: its past history had in the main consisted of the varying relations between them. We have to speak of outlawry, of the blood feud, of the tariffs of *wer* and *wite*, and *bot*, of punishment in life and limb. As regards the malefactor the community may assume one of four attitudes: it may make war on him; it may have him exposed to the vengeance of those whom he has wronged; it may suffer him to make atonement; or it may inflict on him a determinate punishment, death, mutilation or the like.”

Until recent times, prisons were not places of punishment, but were used for detaining prisoners until they could be tried or executed. In the list of Roman penalties, which included death, exile and beating with rods, there is no mention of incarceration. A man who declared war upon society forfeited his right to belong to it and was better out of the way; society was not called upon to pay for maintaining him upon the doubtful chance that his nature might be regenerated. The idea of imprisonment may well have derived from the monastic system; the mediaeval church attached great importance to solitude as a first condition of penitence.

In the eighteenth century Beccaria published his treatise against arbitrary and savage penalties and insisted that punishments should be limited to what was necessary for the defense of the community. The Declaration of the Rights of Man, enunciated in 1789, contained the first suggestion of a methodical system of imprisonment, and such

³ History of English Law, quoted in ENCYCLOPEDIA BRITANNICA (14th ed.) 710, Vol. 6.

a system appeared in the French Code of 1791. During the nineteenth century, throughout Western Civilization, imprisonment became the principal punishment for major crimes.

Almost everyone now agrees that the protection of society is the primary purpose and function of the criminal law. The old talion principle of revenge for wrongdoing has faded into the background; the principles of rehabilitation, deterrence and incapacitation have come to the fore. A modern judge is apt to look at the problem as one of crime and correction rather than crime and punishment. Of course, in certain cases incapacitation of the offender by a long period of imprisonment, perhaps even by death, is necessary to protect society. But in most cases the judge is primarily interested in the rehabilitation of the offender. This can be accomplished in some cases by probation,⁴ in some cases by commitment to a reformatory or other penal institution, in some cases by a combination of the two.

The certainty of punishment is more important than its severity.⁵ Beccaria's emphasis, two centuries ago, on the deterrent effects of certainty of capture and certainty of conviction, is as sound today as it was then.

Studies of normal individuals have revealed a certain amount of aggression and hostility in everyone. The new born child is still as savagely amoral as the child produced by our neolithic ancestors. Socialization should proceed with physical growth. Unfortunately, we know that in many cases it does not, although we are likely to overlook those instances where the failure does not result in criminal conduct. Nonetheless, the psychological differentiation between the neurotic criminal, who persistently risks his freedom to acquire money illicitly, and the miser, who has a monument erected to his memory, may be very fine.

On the great issue of determinism versus free will, the views of psychiatrists usually differ profoundly from those of us who have been trained in the legal or correctional disciplines. In certain psychiatric groups, it is a sign of scientific maturity to go all out for determinism, to believe that man is a helpless victim of his genes and his environment. Some psychiatrists applaud the pronounce-

⁴ Often coupled with restitution or a fine paid over a period of time.

⁵ The principal value of a long sentence lies in the isolation of the criminal. Crimes of aggression are essentially crimes of youth. Seriously aggressive criminals tend to become less dangerous with advancing years. The improvement in the conduct of a delinquent after a long prison sentence may be a natural phenomenon rather than a specific response to his incarceration. Unreasonably long sentences tend to increase the offender's resentment toward society.

ment of Ernest Jones, who said, "[b]y accepting the legal view of free will [doctors] abandon the only fundamental canon of all science".⁶

On the other hand, the sager leaders of American psychiatry have accepted the fact that man is not without freedom of choice. Franz Alexander, who has been in the forefront of the psychoanalysts who have studied criminal behavior, recently said of the doctrine of strict determinism:

"The basic error in this whole reasoning is that it treats the conscious and unconscious portions of the personality as two completely isolated systems without any intercommunication, like the left hand not knowing what the right hand is doing. This assumption is contrary to our knowledge. * * * Not only do unconscious processes influence conscious processes, but also conversely conscious influence the unconscious. * * * Punishment of careless drivers, even if their accidents are the result of unconscious motives, will increase almost every driver's sense of responsibility and consequently his vigilance over his movements. To eliminate punishment for accidents would undoubtedly result in an increase in accidents."⁷

There is every reason to believe that income tax evasion, embezzlement, the sale of narcotics, and many other crimes would increase tremendously were it not for the possibility if not the probability of a prison sentence. Almost all of the judges who attended the Pilot Institute on Sentencing⁸ concurred in that conclusion.

In *Sauer v. United States*,⁹ Judge Barnes said:

"Modern psychiatry to the contrary, the criminal law is grounded upon the theory that, in the absence of special conditions, individuals are free to exercise a choice between possible courses of conduct and hence are morally responsible. Thus, it is moral guilt that the law stresses.

"At least one purpose of the penal law is to express a formal social condemnation of forbidden conduct, and buttress that condemnation by sanctions calculated to prevent that which is forbidden.

⁶ Quoted by Guttmacher in *The Psychiatric Approach to Crime and Correction*, 23 Law and Contemp. Prob. 633, 634 (1958).

⁷ *Ibid.*, 635.

⁸ Held this summer (1959) at Boulder, Colorado.

⁹ 241 F. 2d 640, 648 (9th Cir. 1957), cert. den. 354 U.S. 940 (1957).

"Much of the conflict over the rules of criminal responsibility is attributable to a basic misconception as to the nature of the problem. Criminal responsibility is a legal not a medical question. Involved is legal consequence, not medical diagnosis."

It is important, however, to consider the many different types of individuals with whom the criminal courts must deal. In a recent article,¹⁰ Dr. Manfred S. Guttmacher stated that although no classification of criminals is entirely adequate, he would suggest grouping them under the following categories:

"1. The normal criminal, the dysocial group made up of individuals who have identified with the asocial elements in our society, They compose seventy-five to eighty percent of criminals.

"2. The accidental or occasional criminal, the individual with an essentially healthy superego who has become overwhelmed by a special set of circumstances. This is a very small group. On the basis of claims made by offenders and their families, this group would appear to be much larger than it actually is. Nearly every mother whose youthful son becomes involved in criminal behavior asserts that he is a good boy, but the momentary victim of bad associates. On investigation, one generally learns that he had for years been a serious school behaviour problem and a well known client of the juvenile court.

"3. The organically or constitutionally predisposed criminal, forming a disparate group which constitutes a small portion of the total number of criminals and is comprised of numerous subgroups: the intellectually defective, the postencephalitic, the epileptic, the senile deteriorative, the posttraumatic, etc. Of course, the vast majority of persons with these maladies are noncriminal.

"4. The psychopathic or sociopathic criminal, the individual who is not psychotic (insane), but who indulges in irrational, anti-social behavior, probably resulting from hidden unconscious neurotic conflicts which constitute the driving dynamic force underlying his criminal conduct. This is a complex group, comprising ten to fifteen percent of criminals. Among them are to be found some of the most malignant and

¹⁰ *Supra*, n. 6, 637 *et seq.*

recidivistic offenders . . . [including] the sociopathic type. They have shown evidences of life-long social maladjustment reaching back into early childhood. English writers have designated these individuals 'moral imbeciles' or 'moral defectives'.

"They are often very bright, attractive, and superficially ingratiating. But this amiability is a skillful masking of an overwhelming hostility. They are socially irresponsible. Other persons are merely objects to be manipulated for their own hedonistic purposes. * * * They possess no loyalties and are suspicious of others. Indeed, this incapacity for establishing satisfying and meaningful relationships with other individuals is their nuclear defect. This makes psychiatric treatment so difficult, for psychotherapy — to be effective — requires that the patient establish a significant degree of identification with the therapist

"Sociopaths seemingly do not learn by experience, since despite admonitions and punishments, they continue their same pattern of objectionable conduct. This is one of the characteristics that suggests that their disorder is essentially neurotic, since the repetitive element is constantly present in disturbances that are neurotic in origin. Many of the check forgers, swindlers, and confidence men are recruited from their ranks.

"There are, of course, many other types of psychopathic offenders. Among them are the violently aggressive and sadistic criminals. In most instances they have been subjected to harsh cruelties during their formative years in the guise of parental discipline. Life is for them not a very precious commodity — neither their own nor that of other persons.

"Most sexual offenders, too, are neurotic criminals

"There is a subcategory of offenders whose crimes arise from what are known as personality trait disturbances, who also belong in the large, heterogeneous group . . . who occasionally, under apparently slight provocation, explode with volcanic force.¹¹

¹¹ Omitted are Dr. Guttmacher's discussion of the small groups (a) who engage in antisocial behavior in order to achieve punishment at the hands of the law, and (b) who appear to court capture by the authorities because they feel helpless before their own antisocial impulses and compulsions and have a real fear of them.

"5. The psychotic criminal, the individual whose antisocial behavior is a symptom of his insanity. He suffers from one of the major mental disorders. These insanities are marked by regressive behavior in which the ego is overwhelmed by primitive aggressive drives. These may be directed against himself or against others. As bizarre and as unintelligible as much of insane behavior appears to be, it has an economic utility for the individual. Were we wise enough, its meaning and significance could in every instance be deciphered.

"Only one and a half to two per cent of criminals are definitely psychotic. There is, of course, no sharp dividing line between health and disease. At what point the psychological disorganization of the individual reaches sufficient proportions to be designated a psychosis is a matter of judgment. This problem presents its greatest difficulty in cases of short-lived psychosis. There are cases of temporary insanity. Alcoholic deleria and confusional states associated with epilepsy are widely recognized as such. Combat psychiatrists saw men who succumbed under great stress for brief periods successfully mobilize their psychological defenses and rapidly regain their stability."

II.

The writers of the New Testament believed that persons suffering from various types of mental illness were possessed by the devil or by demons. On the other hand, the Romans recognized several different types of insanity.¹² The Arabs treated mental disease as such, but in Western Europe, during the Middle Ages, the New Testament ideas prevailed. Indeed, exorcism is still practiced by certain groups, and trials for witchcraft were held in New England and elsewhere as recently as two hundred years ago.

Early in the 16th Century, Paracelsus published two essays, "Fools" and "Afflictions Depriving Man of his Reason", which approached the problem in a scientific manner. A few others adopted a similar approach at the time of the Renaissance, but it was only toward the close of the 18th Century that mental disorder was scientifically studied.

¹² They called them: 1. alienatio mentis, aliena mens, alienatus mente; 2. amentia, amens; 3. dementia, demens; 4. furor, furiosus, the most common term in legal writings; 5. insania, insanus; 6. mente captus; 7. vesania, vesanus; 8. non compos mentis.

Since then a number of ideas have prevailed from time to time; emphasis has been placed on (a) organic changes in the brain; (b) psychogenic factors; and (c) biological and psycho-biological reactions. Modern psychological knowledge leads many to regard the problem as one of instinctive forces conflicting with environment and resulting in a failure of adjustment. In that view, the mental symptoms cannot be rightly spoken of as a disease but as types of reaction through the effort on the part of the individual to meet the conditions with which he is faced.

Before the advent of dynamic psychiatry, great stress was laid upon heredity. During the early decades of this century, sterilization laws for the mentally defective and certain groups of the insane, as well as for major recidivists and sex offenders, were passed in many states. With the development of modern psychiatry, however, the pessimistic fatalism toward insanity gave way to an overzealous optimism in regard to the treatment of mental disorders and an almost total disregard of heredity, since it does not lend itself to therapeutic efforts.

Although Dr. Guttmacher does not concur in the extreme view of some psychiatrists in opposition to the legal doctrine of free will, he does feel that ". . . everyone who has worked in psychiatry must have been impressed with the vastly unequal opportunities afforded individuals to develop healthy egos", and that ". . . the degree of mental health that the individual possesses bears a direct relationship to the freedom of choice which he is able to exercise."¹³ A daily awareness of these facts gives psychiatrists an unusual tolerance for the vagaries of human behavior, whether it be criminal or noncriminal. Dr. Guttmacher feels that "in psychiatry, one's orientations must, in large measure, be deterministic", but, he says:

"It is surely scientifically unsound to hold that men must be divided into two distinct categories, the responsible and the irresponsible. There must be degrees of responsibility. Yet, as residents of the world of reality, we have to admit that the vast majority of men must be held responsible for their behavior."¹⁴

Professor John Whitehorn, a leading eclectic psychiatrist, wrote in 1953:

¹³ Guttmacher, *The Psychiatric Approach to Crime and Correction*, 23 Law and Contemp. Prob. 633, 634 (1958).

¹⁴ *Ibid.*, 634.

“So far as I can see, there exists a range of freedom of choice between different possibilities in conduct or behavior. The range of freedom of choice appears to me to be much narrower than is implied in most of the exhortations to reform by ‘will power’, and the range of freedom of choice is particularly restricted in the condition that we characterize professionally as illness, but seldom if ever is the range of freedom reduced to zero, as is implied in a strictly deterministic view.”¹⁵

Although there has been no psychiatric study which gives us a true measure of the incidence of psychiatric morbidity in the criminal population, there have been statistical surveys which bear on the point. These surveys indicate that about 80% of criminals are psychiatrically normal. Nevertheless, some psychiatrists are loath to accept this conclusion, and prefer to believe that a large proportion of criminals are psychiatrically abnormal. Dr. Guttmacher suggests one answer to this view. In 1957, the homicide rate for Negroes compared to whites in Baltimore was eleven times their incidence in the population; but there is no study indicating that the psychiatric morbidity rate for Negroes is much higher than for whites.

It is difficult for doctors, lawyers, and laymen to understand each other when discussing insanity.¹⁶ Webster's New International Dictionary,^{16a} defining “insanity”, says:

¹⁵ *Ibid.*, 635.

¹⁶ The esoteric vocabulary of psychiatry is a serious stumbling block.

The *ENCYCLOPEDIA BRITANNICA* states: “Though it is true that different symptoms of insanity tend to arrange themselves into groups, we must bear in mind that the clinical pictures described under their special headings are not by any means clear-cut entities; they are not diseases in the strict sense of the term, but types of reaction. Yet, for descriptive purposes, some classification is needed, and though no classification is entirely satisfactory, the following will best meet our requirements:

1. Manic-depressive insanity; 2. Dementia præcox (Schizophrenia); 3. Paranoia group; (characterized by physical symptoms. No constant changes in brain yet established. Best understood of employment of psychological conception.)

4. Imbecility and idiocy; 5. Senile dementia; (characterized by qualitative defect of mental functions. Generally accompanied by observable defect or changes in the brain.)

6. Toxic insanity; 7. General paralysis of the insane; 8. Organic brain disease; 9. Epileptic insanity (Diseases of the brain invariably or mostly accompanied by mental symptoms.)

Since we are dealing only with insane states and not mental disorder, the neuroses and psycho-neuroses such as neurasthenia anxiety and compulsion neuroses and hysteria are not included.”

^{16a} 2nd ed., 1948.

"1a. Insanity is rather a social and legal term than a medical term, and implies mental disorder resulting in inability to manage one's affairs and perform one's social duties. The term has been variously defined by statutes and variously interpreted in the courts. It covers a variety of disorders, the principal forms being manic-depressive insanity, dementia precox,¹⁷ paranoia, general paralysis, and the alcoholic insanities. Mental deficiency, temporary delirious conditions, and trance are sometimes but not usually included. Psychoneuroses and psychopathic states are distinguished from insanity, but with no sharp line of demarcation. 2. For legal purposes, as sometimes essentially defined: Such unsoundness of mental condition as, with regard to any matter under action, modifies or does away with individual legal responsibility or capacity. The test of insanity for the determination of legal responsibility or capacity, criminal or civil, differs from that by which insanity is determined for medical purposes, with the result that various conditions which are medically recognized as insane are not considered as doing away with legal responsibility or capacity."

In recent years, however, the medical profession has shied away from the use of the word "insanity", many doctors claiming that it has no medical meaning. They prefer the terms "mental disease", "mental deficiency", or "mental disorder", and frequently use the term "mental illness" to include all the other terms.

Our knowledge of mental illness has increased greatly since the days of Bedlam, but we have been unwilling to provide adequately for the care or the cure of the mentally ill. The problem has now reached such proportions that we can no longer sweep it under the rug.

In 1957 the Legislative Council of Maryland appointed a Committee of distinguished doctors, judges, legislators and others to study the laws for the commitment of mentally ill persons, with Dr. Guttmacher as chairman.

The Committee filed a report in December, 1958, saying:

"It is the consensus of the Committee, that the philosophical concept of criminal irresponsibility because of mental disease is, from both a moral and social point of view, worthy of preservation. * * * It is generally believed that the threat of punishment has

¹⁷ Now usually called schizophrenia.

effectiveness in deterring the normal individual from engaging in antisocial behavior. However, such threats have little or no force in influencing the behavior of the mentally diseased individual. Furthermore, making an example of an insane offender by punishing him would have no deterrent influence on the general citizenry. Indeed, it would have a brutalizing effect and produce only disrespect for the Law."

In his opinion in *Sauer v. United States*,^{17a} Judge Barnes also said:

"Whatever we may conclude to be the objectives of the criminal law, one traditional result has been punishment. Functioning under such a system, our society does not assess punishment where it cannot ascribe blame. It is inimical to the morals and ideals of an organized social order to impose punishment where blame cannot be affixed."

III.

The prevailing test of responsibility did not spring full-panoplied from the head of Lord Chief Justice Tindal; it is the result of a long development.

Many ancient systems of law recognized a distinction between intentional and unintentional homicide, permitting compensation for the latter instead of the customary death penalty. Insanity usually was not a defense, although from about the time of Justinian it was recognized as a ground for executive clemency in the Roman Empire and in certain other areas. In England during the 13th Century, pardons for persons committing homicides while of unsound mind were not unusual. By Edward III's reign, in the 14th Century, complete madness was recognized as a defense to a criminal charge. In the early 17th Century, Sir Edward Coke, citing Littleton, said:

"... that it is a maxim of the common law, that the partie shall not disable himselfe. But this holdeth only in civil causes; for in criminall causes, as felonie, &c. the act and wrong of a madman shall not be imputed to him, for that in those causes, *actus non facit reum, nisi mens sit rea*, and he is *amens (id est) sine*

^{17a} 241 F. 2d 640, 648 (9th Cir. 1957).

mente, without his mind or discretion; and *furiosus solo furore punitur*, a madman is only punished by madness."¹⁸

Sir Matthew Hale (1609-1676), in his *History of the Pleas of the Crown*, said that "absolute madness", a "total deprivation of memory", would excuse a criminal act, for a person then cannot be deemed to possess the necessary "*animo felonico*". Partial insanity also could excuse, but "this", said Hale, "is a matter of great difficulty".

In *Arnold's case*,¹⁹ in 1723, after quoting Coke's and Hale's definitions, Judge Tracey harked back to a maxim of Bracton's and said that in order to avail himself of the defense of insanity "a man must be totally deprived of his understanding and memory, so as not to know what he is doing, no more than an infant, a brute, or a wild beast".

In *Hadfield's case*,²⁰ in 1800, where the great Erskine appeared for the defense, the evidence showed clearly that the defendant was under a delusion. The Chief Justice practically directed a verdict of not guilty because of insanity, concluding:

"I believe it is necessary for me to submit to you, whether you will not find that the prisoner, at the time he committed the act, was not so under the guidance of reason, as to be answerable for this act, enormous and atrocious as it appeared to be."

A few years later, in *Bellingham's case*,²¹ in 1812, Lord Chief Justice Mansfield is quoted as having said:

"The single question was whether, at the time this fact (sic) was committed, he [Bellingham] possessed a sufficient degree of understanding to distinguish good from evil, right from wrong, and whether murder was a crime not only against the law of God, but against the law of his country."

The famous *M'Naghten case*²² arose in 1843, when M'Naghten shot the secretary of Prime Minister Robert Peel, believing him to be Peel. The case aroused great public interest; Prince Albert sat with the judges part of

¹⁸ Quoted in BIGGS, *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* (1955) 85.

¹⁹ 16 State Trials 695 (1723), quoted by Biggs, *supra*, n. 18, 88.

²⁰ 27 State Trials 1281 (1800), quoted by Biggs, *supra*, n. 18, 90.

²¹ Quoted by Biggs, *supra*, n. 18, 91.

²² 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

the time. M'Naghten was undoubtedly under the influence of a mental disorder symptomized by delusions of persecution. At the end of the testimony and argument, the judges stopped the case, and the Solicitor General said:

"Gentlemen of the Jury, after the intimation I have received from the Bench, I feel that I should not be properly discharging my duty to the Crown and to the public, if I asked you to give your verdict in this case against the prisoner."

Lord Chief Justice Tindal then put to the Jury the question whether:

". . . on the whole of the evidence you have heard, you are satisfied that at the time the act was committed, for the commission of which the prisoner now stands charged, he had that competent use of his understanding as that he knew that he was doing, by the very act itself, a wicked and a wrong thing? If he was not sensible at the time he committed that act, that it was a violation of the law of God or of man, undoubtedly he was not responsible for that act, or liable to any punishment whatever flowing from that act . . . [and] . . . I cannot help remarking, in common with my learned brethren, that the whole of the medical evidence is on one side, and that there is no part of it which leaves any doubt on the mind . . . if on balancing the evidence in your minds, you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent and liable to all the penalties the law imposes. If not so, . . . then you will probably not take upon yourselves to find the prisoner guilty."^{22a}

The jury rendered a verdict of not guilty on the ground of insanity and M'Naghten was removed to a hospital.

The Queen was not pleased; she wrote a letter to the Prime Minister referring to the trials of Oxford and M'Naghten and noting that the judges

". . . *allow and advise* the Jury to pronounce the verdict of *Not Guilty* on account of *Insanity*, — whilst everybody is morally *convinced* that both malefactors were perfectly conscious and aware of what they did! It appears from this, that the force of the law is entirely

^{22a} Quoted by BRIGGS, *supra*, n. 18, 101.

put into the judge's hands, and that it depends merely upon his charge whether the law is to be applied or not. Could not the Legislature lay down that rule which the Lord Chancellor does in his paper, and which Chief Justice Mansfield did in the case of *Bellingham*; and why could not the judges be bound to interpret the law in *this* and *no other* sense in their charges to the Juries?"²³

The House of Lords, after debate, decided to take the opinion of the Common Law Judges, and propounded five questions. Lord Chief Justice Tindal answered for fourteen of the fifteen Judges. In the course of his opinion he said:

"... that the jurors ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know that he was doing what was wrong."^{23a}

This opinion was fully approved by the House of Lords.

The so-called *M'Naghten* Rules were generally adopted in the United States, except in New Hampshire. The leading case in Maryland is *Spencer v. State*,²⁴ where Chief Judge Alvey said:

"And according to the law, as we find it settled by the great preponderance of judicial authority, if the party accused be competent to form and execute a criminal design; or, in other words, if at the time of the commission of the alleged offense, he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understand the nature and consequences of his act, as applied to himself, he is a responsible agent, and amenable to the criminal law of the land for the consequences of his act."

In fourteen States and in the Federal courts the *M'Naghten* Rules have been supplemented by various

²³ Quoted by Briggs, *supra*, n. 18, 103.

^{23a} *Ibid.*, 105.

²⁴ 69 Md. 28, 37, 13 A. 809 (1888).

formulations of an "irresistible impulse" test. For example, in *Parsons v. State*,²⁵ the court said:

"No one can deny that there must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (1) Capacity of intellectual discrimination; and (2) Freedom of will. . . . If therefore, it be true, as matter of fact, that the disease of insanity can, in its action on the human brain through a shattered nervous organization, or in any other mode, so affect the mind as to subvert the freedom of the will, and thereby destroy the power of the victim to *choose* between the right and wrong, although he perceive it — by which we mean the power of volition to adhere in action to the right and abstain from the wrong, — is such a one criminally responsible for an act done under the influence of such controlling disease? We clearly think not. * * *

That formulation has been criticized as limited to spontaneous sudden feeling, whereas such urges may be the result of long periods of brooding and reflection. In his opinion in *Sauer v. United States*,^{25a} Judge Barnes recognized that "irresistible impulse" is perhaps an inept phrase, but he concluded that "it can be used until a better semantic handle has been created."

Maryland has refused to modify the *Spencer* rule by an irresistible impulse test.

The Federal courts, except the courts in the District of Columbia, must take account of *Davis v. United States*.²⁶ At the second trial of that case, the judge charged the jury as follows:

"The term 'insanity' as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise

²⁵ 81 Ala. 577, 2 So. 854, 859 (1887).

^{25a} 241 F. 2d 640, 650 (9th Cir. 1957).

²⁶ 160 U.S. 469 (1895) and 165 U.S. 373 (1897).

than voluntarily so completely destroyed that his actions are not subject to it, and are beyond his control."^{26a}

The Supreme Court held that the charge, "under the circumstances of this case, was in no degree prejudicial to the rights of the defendant."^{26b} The Supreme Court thus apparently approved the test as being either incapacity (resulting from some mental disease or defect) to distinguish between right and wrong with respect to the act, or the inability to refrain from committing the act. There is nothing in subsequent Supreme Court opinions on this question which casts doubt on this construction of the *Davis* cases. Indeed, they serve only to fortify the view here expressed. The Fifth Circuit and the Ninth Circuit are agreed that the Courts of Appeals are not free to revise the law of criminal responsibility even if they are disposed to do so.²⁷

In some respects the courts of the District of Columbia are like courts in the several states.²⁸ The District has its own criminal code, which includes a provision that a person found not guilty because of insanity shall²⁹ be committed to a mental hospital. There is no similar statute applicable to trials in other Federal courts.³⁰

In *Durham v. United States*,³¹ Judge Bazelon said:

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

"The rule we now hold must be applied on the retrial of this case and in future cases is not unlike

^{26a} *Davis v. U.S.*, 165 U.S. 373, 378 (1897).

^{26b} *Ibid.*, 378.

²⁷ *Howard v. U.S.*, 232 F. 2d 274, 275 (5th Cir. 1956); *Sauer v. U.S.*, 241 F. 2d 640, 643, 644 (9th Cir. 1957). The Eighth Circuit evidently agrees, *Voss v. United States*, 259 F. 2d 699 (8th Cir. 1958).

²⁸ *Fisher v. U.S.*, 328 U.S. 463, 476, 477 (1946).

²⁹ Until 1955 the commitment was discretionary. D.C. Code (1951) § 24-301.

³⁰ Nor is there any similar statute in Maryland.

³¹ 214 F. 2d 862 (D.C. Cir., 1954).

that followed by the New Hampshire court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

"We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."^{31a}

The *Durham* rule has been praised or condemned by many writers³² but has not yet been followed by any other court. Grave concern has been expressed over the interpretation to be given the words "disease", "defect", and "product".

The words "disease" and "defect" have been construed by many commentators, and by some judges in the District of Columbia, to include the conditions usually described as psychopathic. If this construction is correct, it means that a very large percentage of the most dangerous criminals would have to be found not guilty and set at liberty in other Federal courts and in Maryland.

Many judges have found the term "product of", as used in the *Durham* case difficult to understand and difficult to apply. For example, the United States Military Court of Appeals has said:³³

"In the first place, we are — it must be confessed — somewhat troubled by the uncertainty of the criterion set down in *Durham* to the effect that, to be exculpable, a criminal act must be the 'product' of mental abnormality. Indeed, there may be some controversy concerning the scientific validity of the premise that a criminal act may be committed which is *not*, in some sense, a product of whatever abnormality may coexist."

Judge Prettyman, speaking for the District of Columbia Court in *Carter v. United States*,³⁴ recognized these criticisms and said:

^{31a} *Ibid.*, 874.

³² Including Sobeloff, *From McNaghten to Durham, And Beyond — A Discussion of Insanity and The Criminal Law*, 15 Md. L. Rev. 93 (1955); same article entitled, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793 (1955).

³³ *U.S. v. Smith*, 5 U.S.C.M.A. 314, 322 (1954).

³⁴ 252 F. 2d 608 (D.C. Cir. 1957).

"When we say the defense of insanity requires that the act be a 'product of' a disease, we mean that the facts on the record are such that the trier of the facts is enabled to draw a reasonable inference that the accused would not have committed the act he did commit if he had not been diseased as he was. There must be a relationship between the disease and the act, and that relationship, whatever it may be in degree, must be, as we have already said, critical in its effect in respect to the act. By 'critical' we mean decisive, determinative, causal; we mean to convey the idea inherent in the phrases 'because of', 'except for', 'without which', 'but for', 'effect of', 'result of', 'causative factor'; the disease made the effective or decisive difference between doing and not doing the act. The short phrases 'product of' and 'causal connection' are not intended to be precise, as though they were chemical formulae. 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'."^{34a}

It is a matter of opinion how far this clarifies the matter.

One may agree that the criticism of the *M'Naghten* test is valid without accepting the *Durham* rule as a desirable substitute.

The indefiniteness of the term "product" lead the American Law Institute to reject the *Durham* test in its proposed Model Penal Code.³⁵ Tentative Draft No. 4, of that Code, Section 4.01, recommends the following test:

"(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 of his conduct or to conform his conduct to the requirements of law.

"(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

An alternative rule, favored by Professor Wechsler (the reporter) and a minority of the Institute, is as follows:

"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental dis-

^{34a} *Ibid.*, 617.

³⁵ See Wechsler, *The Criteria of Criminal Responsibility*, 22 *Univ. of Chicago L. Rev.* 367 (1955).

ease or defect his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible.^{35a}

Judges and jurors alike are inclined to apply this test, consciously or unconsciously.

The Maryland Committee, referred to above, recommends a test similar to the test recommended by the American Law Institute, but substituting the word "sufficient" for the word "substantial", which seems to me to be an improvement.³⁶

The Committee presented a number of objections to the rule in *Spencer v. State*.^{36a} The first objection was that the rule is unclear and ambiguous. The Committee referred to:

"... the difficulty that inheres in the ordinary meaning of the word 'know', as applied to persons suffering from serious mental disease. The fact that a defendant can verbalize, at the time of examination, the difference between right and wrong, may be wholly misleading. An individual, who is mentally seriously disordered, may have the hypothetical knowledge to make such a discernment but may be incapable of incorporating it into his own being, so that it becomes part of the system of values that directs his actions."

The Committee also noted that legal decisions as to the true meaning of the words "right" and "wrong" have been in conflict. Some have held that it is moral right and wrong that is under consideration, others that legal right and wrong is meant.

The Committee's second objection is that the *Spencer* Rule improperly confines the inquiry to the effect of mental disease upon the actor's cognitive or intellectual capacity. The *M'Naghten* Rule from which it was copied was devised more than a century ago, when the intellec-

^{35a} Model Penal Code, § 4.01 (Alternative Formulation a).

³⁶ See *supra*, p. 288. The statute recommended by the Committee would read as follows:

"Where the defense of not guilty by reason of insanity shall be pleaded in any criminal case in this State, the person making such a defense shall not be responsible for criminal conduct if, as a result of mental disease or deficiency of intelligence at the time of such conduct, he lacks sufficient capacity either to understand and appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The term 'mental disease or deficiency' as used in this section shall not include defective delinquents as that term is defined in Article 31B of this Code, title 'Defective Delinquents'."

^{36a} 69 Md. 28, 13 A. 809 (1888).

tual function of the mind was thought to be separate and distinct and wholly insulated from emotional impact or control. Modern psychology has disproved this belief.

The Committee opposes the use of the "irresistible impulse" device to remedy this weakness in the rule. The Committee feels that it is extremely difficult to determine when an impulse is irresistible or when it is merely not resisted. Nearly all of the antisocial acts carried out by a mentally diseased person can be temporarily postponed, so the word "impulse" has an erroneous connotation. In the opinion of the Committee, the concept of inability to conform one's conduct to the requirements of law far more effectively represents the type of mental disease in which disturbances of the will and the emotions are paramount symptoms.

Finally, the Committee notes that dissatisfaction with the knowledge of right and wrong test of responsibility among American and British psychiatrists is nearly unanimous. Recent polls of psychiatric opinion in this country have shown that less than ten percent of American psychiatrists believe them to be satisfactory. The Committee says:

"The psychiatrist in his daily work with his office or hospital patients is not called upon to determine whether they can distinguish right from wrong. This is completely outside of his area of consideration, and he feels no special competence in assisting the court in making such judgments. As one eminent psychiatrist expressed it, ' . . . the psychiatrist is prevented from using the language in which he has been trained to organize his thoughts and in which the meaning, the fringes of meaning and the implications of each term are familiar to him. Instead, he is forced to testify in a language not his own, and he cannot be sure of the implications which his words may seem to carry to the judge or the jury.' Most psychiatrists are loath to invade the guilt finding responsibilities of the judge and the jury. They do believe that they can determine the presence of mental disease and how it affects the defendant's judgment, social behavior and self control. They do not wish to go further. It is our belief that the formulation of the definition of responsibility which we have recommended more nearly meets these requirements than does the old Rule."

The Committee also noted that Maryland is one of the eight states that have the anomalous provision that a de-

fendant found not guilty by reason of insanity, and who has recovered by the time of trial, must forthwith be released. It is the view of the Committee that the community deserves the assurance that there will be no probable recurrence of the insane act, which can only be obtained by mandatory commitment and a period of observation in a psychiatric hospital.

“When a defendant has himself alleged that he was insane and irresponsible for a criminal act and has been so found, his release immediately after trial cannot help raising fears and doubts among the members of the community in which he lives. They are rightfully fearful lest a jury of twelve laymen may have acted imprudently on a complex technical issue, and they are apprehensive lest there be a recurrence of the mental disorder, even though it had apparently abated.”

The Committee favors the adoption of a law requiring one year's hospitalization.

A statute providing for the mandatory commitment of persons found not guilty because of insanity is a necessary concomitant of whatever test or rule is followed or adopted.

The criticisms of the *M'Naghten* and *Spencer* rules and of the irresistible impulse test, stated by the Maryland Committee, show the need for some modification of the prevailing rules. Judges and legislators should consider the present state of medical knowledge and opinion, and should attempt to work out a test under which the lawyers and the doctors will be able to ask and answer questions which will have meaning for both of them — and for the public.

Of course, criminal responsibility is a legal question. Professor Wechsler recently said:³⁷

“As courts and commentators have repeated to the point of tedium, the criteria are addressed to the question of when disorder or defect should be accorded the specific legal consequences of a defense to criminal conviction, with the special differences in dealing with the individual that this special legal consequence entails. Thus the criteria are not concerned with the indicia of diagnosis of disease; they are concerned with the effects that a disease must have in the defendant if it is to work the exculpation claimed.”

³⁷ 22 U. of Chicago L. Rev. 367, 373 (1955), quoted in *Sauer v. U.S.*, 241 F. 2d 640, 648 (1957).

What rule then should be adopted? It seems to the author to depend upon whether we are going to place our principal emphasis on the protection of society or on the proposition that society does not assess punishment where it cannot ascribe blame. The more conservative psychiatrists seem to agree that about twenty percent of all offenders are suffering from some type of mental illness which may be said to contribute to their delinquency to some degree. Included among the twenty percent are many of the most dangerous criminals — the psychopaths and the sociopaths. If the *Durham* rule were generally adopted and interpreted as it is in the District of Columbia, conscientious judges and jurors might well come to the conclusion that, if the defendant was suffering from any mental illness, the criminal act was in some sense a product of that abnormality.

It is said that the percentage of acquittals by reason of insanity has not greatly increased in the District of Columbia since the adoption of the *Durham* rule. There may be several reasons for that: the ordinary defendant may not yet have learned of his opportunity;⁸⁸ he may not be financially able to employ a battery of psychiatrists; lawyers and psychiatrists may be approaching the *Durham* rule in the same way that they are said to approach the *M'Naghten* rules; and judges and jurors may still be applying, consciously or unconsciously, the alternative American Law Institute test, and doing what they think is just. The University of Chicago group, in its research study of juries, has found that the results are pretty much the same, whichever test is used.

If our knowledge of mental illness were more exact; if honest psychiatrists generally agreed in their testimony to a greater extent than they now do;⁸⁹ if we had adequate facilities for the care and detention, if not the cure, of psychopaths and sociopaths; and if the laws were such and were so administered that the dangerous psychopath and sociopath, as well as the psychotic, would ordinarily be detained in custody unless and until cured; then, in that Utopia, we might safely apply the *Durham* rule. In the present kaleidoscopic state of psychiatric opinion, in

⁸⁸ He will learn quickly enough in almost any correctional institution.

⁸⁹ It has been suggested by a psychiatrist that you do not get greater disagreement as to diagnosis among psychiatrists than among many other physicians; that the disagreement comes when "legal diagnostic judgments" must be made by psychiatrists.

the world in which we live, the protection of society calls for a different rule.⁴⁰

The tests proposed by the American Law Institute and by the Maryland Committee have much to recommend them.⁴¹ They meet the principal criticisms of the right-wrong test. They also meet most of the objections to the *Durham* rule. They recognize the basic principle that the protection of society is the primary function of the criminal law. They should be given serious consideration by doctors, lawyers, judges and legislators.

⁴⁰ A statute recently adopted in England allows a defense of diminished responsibility due to abnormality of mind in cases of homicide; if the defense succeeds, a charge of murder is reduced to one of manslaughter. It will be interesting to see how this Act works out over a period of years.

⁴¹ See *United States v. Hopkins*, 169 F. Supp. 187, 190 (D.C. Md. 1958).