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COLUMBIA LAW REVIEW

VOL. XLV

SEPTEMBER, 1945

NO. 5

MENTAL DISEASE AND CRIMINAL RESPONSIBILITY

JEROME HALL*

The literature on insanity in relation to criminal responsibility is replete with paradox. The rules are of the simplest formulation: a harm committed as a result of serious mental disease is not a crime; yet their meanings have been disputed more than any other in the penal law. Many psychiatrists are very harsh critics of the rules, yet they attack each other's theories even more vehemently. In this country they seem to present a united front in a sweeping condemnation of the criminal law, but English psychiatrists usually praise their law and its administration. There is an almost universal belief that insanity can be recognized by ordinary laymen, yet experts disagree in many cases—all the while insisting that they, alone, are qualified to decide this question. The psychological theories adduced are said to be discoveries of the present century, yet they bear a curious proximity to very ancient ideas concerning the human mind. In this abundant realm of polemics, progress, and confusion, where it is literally true that any position can be supported by learned treatises, it is impossible to arrive at definitive results. It is possible, however, to understand what is involved in an adequate analysis of the problem, and thus to achieve a valid appraisal of the relevant rules of law. We shall omit consideration of those lesser rules that postpone the trial and the execution of the sentence, for the problems they raise are not difficult ones, despite the fact that occasional sophisticates have ridiculed delaying execution of a penalty until the restoration of sanity—they have not understood the moral import of the criminal law. The major problems concern criminal responsibility, *i.e.*, mental disease at the time a harm was committed.

The logic of the insanity plea in this connection is simple enough, and it was clearly restated by Coke:¹ the implication of *mens rea* is *mens*

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*The writer is pleased to acknowledge the very helpful research of Ruth Smalley, Student Research Assistant, Indiana University Law School.

1. *Beverley's Case*, 4 Co. 123b, 124b, 76 Eng. Rep. 1118, 1119 (K. B. 1603); *cf.* *PULTON, DE PACIS REGIS ET REGNI* (1609) No. 36 at 125b; and *State v. Noel*, 102 N. J. L. 659, 680, 694, 133 Atl. 274, 285 (1926).

sana; if the defendant is "insane" the requisite of criminal intent can not apply. It is apparent, therefore, that insanity as a defense to a criminal charge raises important questions of fact. Among the facts described in the hypotheses (behavior-circumstances) of the rules are those concerning the person of the actor; specifically relevant are those facts that concern his mental "capacity" and, therefore, his being held legally accountable. There are no peculiar "legal" theories regarding the facts that are significant in these connections. Instead, traditional, common-sense ideas and judgments are represented in the legal rules. Thus, too, the criminal law does not embody distinctively legal ideas regarding the psychology of mental disorder. The rules refer to certain factual situations; the meanings of these situations are determined by reliance upon various types of empirical knowledge.² When such knowledge becomes "sufficiently" established to warrant this dependence is obviously indefinite, hence debatable. For reasons usually accepted, the official tendency has been one of hesitation and delay—it is hardly the function of this institution to embrace the newest discoveries. But, on the whole, the judicial practice in this respect, though overly cautious, is essentially that of scientists themselves: a consensus of the experts is the criterion of truth (or of its recognition, if one prefers).

The M'Naghten Rules

An analysis of this problem requires a critical appraisal of the major decisions in the light of relevant empirical knowledge—especially psychology. In all common law jurisdictions it is agreed that *The Queen v. M'Naghten*³ is easily the most important case on the subject. In 1843, immediately after the acquittal, on the ground of insanity, of M'Naghten, who had been tried for a sensational murder, a number of questions concerning this defense were addressed to the Lord Justices. After lengthy debate, they arrived at certain conclusions regarding the relevant substantive and procedural law.⁴ With minor modifications, these rules have continued to this day to comprise the most important part of the law on insanity in relation to criminal responsibility. Of the several rules then published, the most important one, countlessly reiterated in succeeding decisions, is the following:

"... 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

2. Judge Doe's opinion in *State v. Pike*, 49 N. H. 399 (1870), though questionable in other respects, is still one of the best judicial discussions of this problem.
3. 10 Cl. and F. 200, 4 St. Tr. (N.S.) 847, 8 Eng. Rep. 718 (1843).

4. On the whole decision see Dr. Sheldon Glueck's detailed study, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925). This treatise may be profitably consulted on the entire problem indicated in the title.

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 he was doing what was wrong."⁵

It is this doctrine that raises the fundamental questions concerning the relation of mental disease to the criminal law.

The judges who formulated the M'Naghten Rules did not regard them as innovations; rather they were published as "restatements" of law long in vogue in England as well as in this country.⁶ To laymen as well as to the vast majority of lawyers, the Rules have seemed sound and efficient instruments to determine the important issues involved. Their survival for more than a century in many countries is a further index of their validity. Yet, almost from the day they were published the Rules have been subjected to an unremitting criticism by medical men and psychologists. This criticism reached its peak in this country in the present century as a phase of the rise of psychoanalysis. Although those of its exponents who have concerned themselves with the criminal law constitute only a small percentage of their profession, and a still smaller one of general practitioners and psychologists, yet they are specialists of high competence whose opinions deserve careful consideration. A brief survey of their criticism will reveal not only the gap between the existing law and certain expert opinion; it will also indicate the chief issues to be analyzed.

From the practically limitless outpouring of such criticism, it will suffice to select that of three of the most representative psychiatrist-

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5. 10 Cl. and F. 200, 210, 8 Eng. Rep. 718, 722 (1843).

6. The M'Naghten Rules were a synthesis of *Rex v. Arnold*, 16 How. St. Tr. 695 (1724); *Ferrers' Case*, 19 How. St. Tr. 886 (1760); *Hadfield's Case*, 27 How. St. Tr. 1282 (1800); and *Bellingham's Case* (1812) 1 COLLINSON, A TREATISE ON THE LAW CONCERNING IDIOTS, LUNATICKS AND OTHER PERSONS NON COMPOSES MENTIS (1812) 636. In *Ferrers' case* the Solicitor General, purporting to summarize Hale, stressed: "a faculty to distinguish the nature of actions; to discern the difference between moral good and evil. . . ." *Id.* 948. In *Hadfield's case*, Erskine minimized the "right and wrong" test and emphasized knowledge of the nature of the act. In *Bellingham's case*, Mansfield said: "If a man were deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law." 1 COLLINSON, *op. cit. supra* at 671. It will be noted that the M'Naghten Rules modified this by focussing the test on the particular harm committed, rather than on knowledge of right and wrong "in general." Cf. "To excuse a man in the commission of a crime, he must at the period when he committed the offence, have been wholly incapable of distinguishing between good and evil, or of comprehending the nature of what he was doing. . . ." *Id.* at 474. Cockburn's argument in defense of M'Naghten contains an excellent summary of the earlier leading cases and of the medico-legal treatises. 4 St. Tr. (N.S.) 872-892. Shortly after the M'Naghten Rules were announced, and apparently without having seen them, Shaw, C. J., held: "In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty." *Commonwealth v. Rogers*, 7 Metc. 500, 502 (Mass. 1844).

critics of the criminal law. One of these, a pioneer in criminal psychiatry and one of Freud's first American disciples, was the spearhead of a strident attack on the criminal law. "Here," he wrote "it [psychiatry] meets with antiquated, outworn, archaic ways of thinking that have been crystallized in the statutory law . . . ;⁷ the criminal law and methods of legal procedure are based upon concepts which are largely obsolete from his [the psychiatrist's] point of view. . . . The right and wrong test . . . represent antiquated and outworn medical and ethical concepts, . . . whereas the question of responsibility carries with it a metaphysical implication. . . . The remedies [especially punishment] upon which the law seems to repose its faith are hangovers, as it were, from old theological and moral ideas that have survived their period of usefulness in this twentieth century civilization."⁸ In his first major publication in this field, this psychiatrist asserted that the law "persistently refuses to acknowledge the existence of actual facts, . . . it continues to operate as if those facts really did not exist at all."⁹ In this grave charge of stubborn neglect of fact and scientific knowledge, he was joined, among others, by a prominent psychiatrist of the same persuasion, who, after like criticism of neglect of "recognized knowledge," observed reassuringly that "There is, however, no reason to expect the law to ignore entirely facts of science which are widely accepted by those familiar with the data."¹⁰ On another occasion the latter attacked "that hoary old legal dogma, the presumption of sanity;"¹¹ and he concluded that "the framework of the criminal law still savors too much of the medieval to be brought readily into rapport with psychiatric concepts of the present day."¹² These criticisms have been often repeated, recently by a psychiatrist who, taking up the same cause, also finds it "thoroughly illogical" to entrust the determination of the issue of insanity to laymen.¹³ This most recent, prolific exponent of these views summarized the general position of his school of psychiatry thus: "We all seem to agree that the law as it stands is bad. Its deficiencies are obvious even to its enlightened technical defenders."¹⁴ Reverting to the

7. WHITE, *TWENTIETH CENTURY PSYCHIATRY* (1936) 110.

8. White, *The Need for Cooperation between the Legal Profession and the Psychiatrist in Dealing with the Crime Problem* (1927) 7 AM. J. PSYCHIAT. 493, 494, 495.

9. WHITE, *INSANITY AND THE CRIMINAL LAW* (1923) 99.

10. Overholser, *Psychiatry and the Law—Cooperators or Antagonists?* (1939) 13 PSYCHIAT. Q. 622, 625.

11. Overholser, *The Place of Psychiatry in the Criminal Law* (1936) 16 B. U. L. REV. 322, 329.

12. *Id.* at 343.

13. ZILBOORG, *Legal Aspects of Psychiatry*, in *ONE HUNDRED YEARS OF AMERICAN PSYCHIATRY 1844-1944* (1944) 513.

14. Zilboorg, *Misconceptions of Legal Insanity* (1939) 9 AM. J. ORTHOPSYCHIAT. 540, 543.

M'Naghten Rules in an indulgent, imaginary lecture to lawyers, he counselled: "abandon your formalistic and tenacious adherence to this principle."¹⁵

It is obvious that the above sharp criticisms challenge not only well-established doctrines regarding the rules on insanity but also fundamental principles of penal liability. These views, expressed with complete certitude by recognized specialists, have greatly impressed many persons, including, not least, legal scholars who, in praiseworthy efforts to improve the criminal law, have accepted them as scientific knowledge. It is essential, therefore, to evaluate this criticism. It is necessary to inquire into the nature of the intellectual arsenal commanded by these doughty psychiatrists, in short, to appraise the discipline they represent.

The evaluation of the "status" of any discipline in the hierarchy of empirical knowledge is not an arbitrary matter; there are definite criteria that determine the validity of such judgments. Thus it could be shown by analysis of the literature comprising psychology that that discipline is certainly not a science in any even moderately rigorous sense.¹⁶ This, however, is not a significant criticism of a social science,¹⁷ though it may be noted when false and honorific presumption is encountered. More to the point is that even when appraised by reference to standards that are relevant to its subject matter, much of current psychology falls far below reasonable expectation—as may be shown briefly by persuasive secondary criteria: the lack of agreement among psychologists on almost every important question, the existence of many "schools" of psychology, the

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15. ZILBOORG, *MIND, MEDICINE, AND MAN* (1943) 279. This same writer, in his *HISTORY OF MEDICAL PSYCHOLOGY* (with Henry) (1941), fills many pages devoted to conflicts between physicians and "the law," in which the latter is invariably cast in the role of an evil, malicious spirit barring the psychiatrists' road to progress. But if one reads this book carefully, it appears that not only lawyers but the vast majority of medical men were also opposed to the new discoveries. Thus the criticism is reduced to strident complaint of the Bar because it did not lead the medical profession on questions in the latter's own special field. To this, as a further correction should be added, *e.g.*, the graphic first-hand account of Dr. Hill regarding his struggle to stop chaining and other barbarous treatment of the insane. Writing on his efforts to reform, he states: "... I had the whole medical world against me. ... At length Mr. Sergeant Adams came to the rescue as my advocate, and by his powerful aid ... the system was no longer a dream but a success." HILL, LUNACY (1870) 43-44. Knowledge of such contributions by lawyers to many fields of learning, and especially to psychology (which could be multiplied indefinitely) provides corrections that are needed not only for valid appraisal of the legal process, but, even more, as a prerequisite to the establishment of decent conditions of collaboration between the professions. More adapted to attain that very important goal, *cf.* "... as doctors we have been needlessly unjust, and have not sufficiently taken into consideration the fact that the lawyers in stating their case and opinion have based it on the medical knowledge of the period." Henderson, *Psychiatry and the Criminal Law* (1930) 4 *PSYCHIAT. Q.* 103, 104-5. Also see *id.* at 109.

16. *Cf.* MICHAEL AND ADLER, *CRIME, LAW AND SOCIAL SCIENCE* (1933) 55-65.

17. See the writer's chapter, *Criminology*, in *TWENTIETH CENTURY SOCIOLOGY* (Gurvitch and Moore, Eds. 1945).

inability of any one of these to win very wide support among competent persons outside psychology, and the persistence in informed circles, of a traditional, though changing body of psychological thought. These generalizations merely summarize the views of competent psychologists, themselves.¹⁸

But many of the most important advances have been made in psychiatry, which is especially important in the criminal law. Dissension here, however, is more acute than elsewhere, and the validity of this branch of psychology is no less challenged. "The best psychiatry is still more of art than of science," writes a recognized expert.¹⁹ "There are, in fact, many methods, standpoints, views and convictions which are all at war with one another," states Jung;²⁰ and these limitations are regularly reflected in enormous divergencies in diagnosis.²¹ A competent practitioner admits "the debatable character of many theories,"²² while a forthright investigator concludes that "no critically minded person practiced in scientific research or in disciplined speculation can accept psychoanalysis on the basis of the writings of Freud or of any of his followers. The presentation of facts is inadequate; the speculation is irresponsible; verifications are lacking; conclusions are hastily arrived at, and concepts are hypostatized."²³ Finally, it is admitted that, with some exceptions, "there has been no real psychiatric insight into criminalistic behavior."²⁴ In such circumstances one can hardly conclude that

18. Thus: "It would be gratuitous to pretend that psychologists as a body are agreed on many fundamental issues." OGDEN, *THE MEANING OF PSYCHOLOGY* (1926) xx. A continental scholar: "No other science is so 'problematic' as psychology. There is, in fact, almost no question in psychology which is settled in the way that many questions in mechanics or in biology, for instance, are settled." DRIESCH, *THE CRISIS IN PSYCHOLOGY* (1925) ix. Cf. Scheler, quoted in CASSIRER, *AN ESSAY ON MAN* (1944) 22. And a leader in American psychology also concludes that "... while controversies and debated questions are frequent in all the sciences, schools such as we have been considering seem almost peculiar to psychology." WOODWORTH, *CONTEMPORARY SCHOOLS OF PSYCHOLOGY* (1931) 214. See also, HEIDBREDER, *SEVEN PSYCHOLOGIES* (1933) 3,425; and especially, the excellent summarization by GRIFFITH, *PRINCIPLES OF SYSTEMATIC PSYCHOLOGY* (1943) vii-viii.

19. Sullivan, *Psychiatry* (1934) 12 *ENCYC. SOC. SCI.* 580.

20. MODERN MAN IN SEARCH OF A SOUL (1939) 33. Cf. "Psychopathology is a speculative subject, whose limits remain undefined. . . . There is much division of opinion among psychopathologists on basic principles." Coleman, *Psychopathology* (1944) 90 *J. MENT. SCI.* 152.

21. E.g., "Whereas Dr. Adler finds only twelve cases of 'mental disease . . . out of 413 individuals examined at the Pontiac Reformatory, Dr. Hickson finds 240 cases of mental disease . . . out of 464 cases examined in the Chicago morals court. . . . Curious, too, are the figures from Philadelphia's morals court. About the same time that Dr. Hickson was finding 50% of his street-walkers afflicted with dementia praecox, Dr. Leopold, in Philadelphia, could unearth less than 1/2 of 1% from his 1924 examinations." Hussey, *Psychiatrists in Court* (1931) 22 *AM. MERCURY* 342, 346.

22. HORNEY, *NEW WAYS IN PSYCHOANALYSIS* (1939) 8.

23. Murray, *Psychology and the University* (1935) 34 *ARCH. NEUROL. AND PSYCHIAT.* 803, 809.

24. ABRAHAMSEN, *CRIME AND THE HUMAN MIND* (1944) 26.

psychiatrists who summarily dismissed well considered criticism²⁵ have exemplified the best scientific procedure. If these psychiatrist-critics of the criminal law would recognize the serious limitations of their discipline they might be induced to study the criminal law regarding mental disorder.

In any event, if the conditions of scientific knowledge are understood, there is no reason to repudiate the above estimate of the present status of psychiatry. The limits of precision and the criteria of validity of empirical knowledge are determined largely by the nature of the subject matter. That which is common to both law and most psychologies includes various "inner states" such as thinking, feeling, wishing, deciding, and the like—and these are not easily explored. Only the external movements are observed; the relevant mental states are "induced" as necessary, and they are validated collaterally, *e.g.*, by introspection, by their probability in relation to what is observed, by various techniques of testing and by psychoanalysis. In most psychologies such internal states comprise highly important data; in psychiatry they concern the central problems—most mental diseases reveal no somatic pathology but are wholly functional. These data are relatively uncertain; they are discoverable only by indirection, and some of them, *e.g.*, "the unconscious," require very elaborate techniques to become known.

The severe criticism of the criminal law by various psychiatrists has spread the illusion that the chief difficulty, the major obstacle in the way of adequate adjudication, is a traditional legal indifference to Science. But the plain fact is that the chief limitation on any solution of the problems arising from mental disease is the lack of medical and psychiatric knowledge of mental disease. The criminal law can do no more than utilize the best psychology available concerning the relevant facts. This means that there is an inevitable margin of error in administration of the criminal law, and that the most important way to improvement of it is to improve psychiatry. Certainly no one who has studied the problem of mental disease in relation to criminal responsibility can be content with either the present rules or their administration. But wisdom in this matter inheres not in strident criticism of the rules, but in an acute awareness of their dependence on empirical knowledge and of the uncertainties that abound when the object of that knowledge is the human mind.

Closely related to the above are certain aspects of the language problem, especially the frequent criticism by psychiatrists of legal terminol-

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25. See Overholser, *supra* note 11, at 328, for remarks on Professor Michael's thoughtful criticism; and on Professor Dession's sympathetic and informed analysis, see Overholser, *Some Possible Contributions of Psychiatry to a More Effective Administration of the Criminal Law* (1939) 17 CAN. B. REV. 638, 653.

ogy. This is said to be vague and ambiguous; particularly is it complained that the terms do not refer to data and theories with which the psychiatrist deals—hence he is handicapped in assisting at the trial of the insanity issue. The first criticism need not be considered—it concerns an inevitable consequence of the nature of the subject-matter and of the imprecision of psychology. As regards the latter criticism, various problems are raised, including the function of technicality in any discipline and the presence there, also, of accumulated professionalisms. The above criticism can be discussed here only with reference to the specific ground relied upon to support it. Thus a psychiatrist who is a frequent critic of legal terminology insists that the “rules are unintelligible to me. . . .”²⁶ He adds: “When they [lawyers] ask me whether the defendant in the dock is in my opinion insane, I must candidly state, if I am to remain true to my professional knowledge and faithful to my oath, first, that I do not understand the question, and second, that since I don’t understand the question I do not know whether the defendant is insane or not.”²⁷ The like alleged inability to understand what is meant by “responsibility” and other legal terms is often met in similar writing.

The sophistry of such criticism is indicated in the prevailing practices of numerous psychiatrists who have participated in the trial of insanity cases for a great many years. They have regularly “translated” the legal terms into the language of their discipline, and they have also restated their expert opinions in the usage of the courts. Thus they have understood that the rules refer to (a) certain mental disorders of accused persons, (b) the medico-psychiatric knowledge regarding them, and (c) relevant directions regarding what must be done by officials. The speciousness of the above criticism of legal terminology is further disclosed if one considers the direct substitution of the language of psychiatry for that now employed in the rules. Here, too, one meets both ambiguity and technicality—but with a difference! Thus, on the one hand, there is surely no term in penal law that approximates the ambiguity of “psychopathic personality,”²⁸ the commonest coin in the entire psychiatric exchange; and there are many other terms almost equally ambiguous that are regularly used in psychiatry. As regards technicality, a much more glaring evil is encountered. Imagine that, instead of a judge’s instruction in terms of the prevailing rules, he said “. . . essential to the psychopathic personality may be a defective or-

26. ZILBOORG, *MIND, MEDICINE, AND MAN* (1943) 274.

27. *Id.* at 272.

28. “The only conclusion that seems warrantable is that, at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character.” Curran and Mallinson, *Psychopathic Personality* (1944) 90 J. MENT. SCI. 278.

ganization of the autotely . . . and an unsatisfactory adjustment to the heterotely. . . ."²⁹ If, instead of "knowledge" or "understanding," "control" and "act", the language of the law ran in terms of *id*, *ego*, and *super-ego*, the psychiatrists would understand; but would many lay persons be much enlightened even after they were informed that the "*id*" is "the true unconscious;" that the "*ego*" is that part of the mind that "is regulated by the reality principle"; and that the "*super-ego*" is "a sort of inner monitor, synonymous with conscience . . ."³⁰

The claim of inability to collaborate because of language difficulties arises from an obvious error—the assumption that rules of law, to be adequate, must be stated in terms of the various sciences and disciplines primarily concerned with the relevant factual knowledge. It is only necessary to recall that any language exists for the purpose of communication (the "emotive" function may here be ignored) to apprehend the fallacy underlying the claim of any specialist that legal rules should be couched in his particular vocabulary. Legal rules and principles are intended primarily for the guidance of laymen and officials—of the former not only as citizens but also as triers of facts in litigation. The auxiliary jurisprudential analysis and the rules of procedure are exclusively the lawyer's instruments. Even if the former limitation on the use of technical language could be ignored, it would still be necessary to use terms that lawyers understand—it happens that the job in hand is theirs and not the psychiatrists'. Certainly it must be recognized that the quality of adjudication depends, in part, on the contribution of psychiatry; but this does not indicate the desirability of formulating the rules of law in the language of that discipline. It merely requires some effort by the experts to define certain legal terms in meanings of their own specialities.³¹

Thus the prerequisite to any valid criticism of the law on mental disease and penal responsibility is an understanding of the difficult nature of the factual data involved, of the limitations of available empirical knowledge, and of the consequent imprecision of the relevant language. In light of the perspective thus attained, it is possible to arrive at definite conclusions regarding the solution of the instant problem.

Of first importance is that the legal scholar can not accept any psychology "on authority"; he can not escape the arduous task of forming his own judgment regarding the "best" psychology—as is recognized by psychologists, themselves, who, on rare occasion, have studied

29. KAHN, *PSYCHOPATHIC PERSONALITIES* (1931) 57.

30. KAHN, *PSYCHOLOGICAL AND NEUROLOGICAL DEFINITIONS AND THE UNCONSCIOUS* (1940) 98, 86, 136.

31. Cf. Linton, Foreword to KARDINER, *THE INDIVIDUAL AND HIS SOCIETY* (1939).

the distinctive tasks of adjudication.³² Thus he must remember, as some legal scholars seem not always to have done, that the legal system is itself a vast reservoir of invaluable psychology—perhaps of the soundest psychology available.³³ Nextly, and closely related to the above, is that considerable body of psychology that has survived and changed through the ages, the psychology of common intelligence and experience, the "living psychology," as it has been happily termed,³⁴ as distinguished from that of the laboratories and the text-books. Finally, but by no means of any lesser importance, are the current technical psychologies, especially, psychiatry. For it would be indefensible to permit the misplaced importunities of psychiatrist-critics of the prevailing law to engender a reciprocal mistake. Psychiatry can make a very considerable contribution to the criminal law on mental disease and responsibility; any adequate analysis of the problem must devote careful attention to the relevant knowledge that is there provided.

In these circumstances, the seeker after psychologic truth will do well to turn briefly, at least, from the conflict of the contemporary schools to the past, where ". . . for centuries, long before 'scientific' psychology had reduced man to a purely rational puppet, religion and philosophy had represented the real psychology of people and individuals."³⁵ Especially as regards obvious mental abnormality the history of psychology dates from the earliest records;³⁶ we learn from Westermarck of the practically universal recognition of serious mental disorders among primitive peoples.³⁷ These crude beginnings should not be ignored, but from a modern critical viewpoint, the contributions of the Greeks are of major importance. Indeed, with Plato the ultimate psychological notions that have guided the succeeding development of the discipline become definitely formulated. Perhaps the most fundamental and enduring of these is the division of human nature (or conduct) into the "rational" and the "irrational." This was Plato's primary classification;³⁸ but he also established the tripartite division of psy-

32. The legal scholar must "throw himself into psychology completely enough to become his own competent critic on matters of psychological theory." ROBINSON, *LAW AND THE LAWYERS* (1937) 111.

33. "Dealing as it does mainly with human behavior, the law very likely has more to teach psychology than to learn from it. The law has had a long history and very able students and practitioners." THORNDIKE, *MAN AND HIS WORKS* (1943) 133.

34. RANK, *BEYOND PSYCHOLOGY* (1941) 27.

35. *Id.* at 34.

36. *E.g.*, "David changed his behavior before them, and feigned himself mad." For other Biblical references see MAUDSLEY, *RESPONSIBILITY IN MENTAL DISEASE* (1874) 51. Cf. 2 *ANCIENT LAWS AND INSTITUTES OF ENGLAND* (Thorpe ed., 1840) 236, 237; and *DIGEST* 1.18.14.

37. 1 WESTERMARCK, *ORIGIN AND DEVELOPMENT OF THE MORAL IDEAS* (2nd ed. 1912) 269-277.

38. *REPUBLIC*, 439.

chology, corresponding to cognition, conation and feeling (intelligence, volition, emotion).³⁹ This division was not rigorously adhered to by Plato and it would be futile to consider to what extent his exposition is equivalent to the apparently corresponding ones of modern psychology. More significant is Plato's insistence that the rational principle ought to rule the passions.⁴⁰ He recognized that such control was the normal state, hence his exculpation of madmen from penal, but not civil, liability.⁴¹ Aristotle's psychology is much more complex and systematized.⁴² He viewed the human "soul" ("mind" or "self") as a unitary being, functioning in certain modes—the nutritive, sensitive, conative, locomotive, and rational.⁴³ In Aristotle, also, the rational powers are held paramount, and this view of human nature, both as actual and as ideal, became the central thesis of mediaeval psychology, culminating in Aquinas.⁴⁴ This tradition, emphasizing certain attributes of human conduct, and underlining the supremacy of intelligence has endured to the present day.⁴⁵ There have been many changes in terminology and a vast increase in factual knowledge. But these have, for the most part, deepened and extended the traditional psychology, not invalidated it.⁴⁶ Thus, *e.g.*, Freud's clarification of the conflict between instinct and *super-ego* implements the perspective achieved by Plato; on the other hand, where his doctrines have been most seriously attacked, where, indeed, psychoanalysis has been definitely repudiated in the past decade, one recognizes the perdurance of the essential principles of the traditional psychology.

A few specific theories of this "living psychology," simplified for convenient handling and relevant to both legal exculpation and mitigation, are: (a) the various functions of the mind (or "self") are actually integrated, hence the tripartite and other classifications of the mental

39. For a brief summary, see Shorey, *The Unity of Plato's Thought* (1903) 6 CHIC. DEC. PUB., 1ST. SERIES, 42-43; and 1 JOWETT, *DIALOGUES OF PLATO* (3rd ed. 1892) 410.

40. REPUBLIC, 441; LAWS, bk. v, § 734. "A modern writer treats this tension as a relation between inherent impulses and acquired forms of restraint. The Greek formulates this condition as a conflict between desire and reason, but the difference in meaning is not great." BRETT, *PSYCHOLOGY ANCIENT AND MODERN* (1928) 107.

41. LAWS, bk. ix, § 857-859.

42. See HAMMOND, *ARISTOTLE'S PSYCHOLOGY* (1902).

43. DE ANIMA, 414 at 31-32.

44. See BRENNAN, *THOMISTIC PSYCHOLOGY* (1941).

45. "If we open almost any modern text-book of psychology, we shall find mind divided into 'Intellect, feeling, and will' . . ." Nichols, *Origin of Pleasure and Pain* (1892) 1 PHILOS. REV. 404. ". . . the three aspects of all mental process—the cognitive, the affective, and the conative aspects; that is . . . a knowing of something or object, a feeling in regard to it, and striving towards or away from that object." McDougall, *INTRODUCTION TO SOCIAL PSYCHOLOGY* (4th ed. 1911) 26-27. Cf. as representative of contemporary psychology, BENTLEY, *THE NEW FIELD OF PSYCHOLOGY* (1934).

46. See notes 40 *supra* and 50 *infra*.

processes are analytical devices; (b) the central problem of human conduct results from a never-ceasing battle between the blind drives of instinct and intelligence; (c) within limits and "normally," intelligence prevails; and (d) mental disease involves the impairment of the rational functions. In terms of these traditional theories, supplemented by the critical insights of contemporary psychology, the rules of penal liability have taken form and are interpreted and administered. Thus the rules imply that in "normal" adults intelligence controls instinctual drives—at least to the extent of effecting avoidance of serious harms; that there is a moral and legal obligation to exercise such control; but that such control may be lost or impaired by strong passion or by various types and degrees of mental disease—hence the sanctions ranging from mitigation (manslaughter instead of murder; lighter penalties for the "semi-responsible") to complete exculpation (defense of insanity). With some fair appreciation of the enduring psychology represented in the criminal law for many centuries; in light of the fact, occasionally recognized by distinguished psychologists,⁴⁷ that the process of adjudication has involved detailed case-studies and acute critiques of contemporaneous psychology by highly competent observers to whom many records of like proceedings have been available; and, finally, by aid of the knowledge supplied by expert witnesses representing various current psychologies, it is possible to appraise the general arguments of the psychiatrist-critics of the criminal law, set out above.

To come directly to close grips with that criticism we may note the specific issues raised in a report by a Committee of the American Psychiatric Association, thus: "Various curious tests then had to be decided upon to determine the 'responsibility' of persons suspected of 'insanity' (*i.e.*, of an 'irresponsible insanity'). Once they were compared in appearance and conduct with wild beasts, later with the mentality of a 14-year-old child. This was actually the criterion of 'responsibility' in use in courts not so many years ago. Current even today in many states is the slightly less hoary 'right and wrong' test. . . ."⁴⁸ That these views comprise an indiscriminating depreciation of earlier psychology, including that represented in classical legal treatises and judicial decisions, can easily be shown. Admittedly, a valid historical criticism can not be achieved without effort, *e.g.*, Hale's belief in witchcraft is joined to a very shrewd appraisal of theories of mental disease; popular demonology is countered by important insights into the nature of insanity; an age of enlightenment condones a vicious, barbaric treat-

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47. THORNDIKE, *supra* note 33.

48. Menninger, *Medicolegal Proposals of the American Psychiatric Association* (1929) 19 J. CR. L. & CRIMINOL. 374.

ment of mentally diseased persons in institutions that make the penitentiaries mild by comparison. But the need of painstaking historical exploration to discover accurate, significant findings on these matters does not condone gross distortion.

The first "curious" test of insanity noted above is the so-called "wild beast test." This language was employed by Bracton in the 13th century, and his remarks on the subject were quite brief. "A madman," he said, "is one who does not know what he is doing, who is lacking in mind and reason, and who is not far removed from the brutes." In dealing with the civil obligations of such persons, he said, "a madman is not of sane mind, so that he cannot discern or has no discretion at all. For such persons do not differ much from brutes who are without reason. . . ." ⁴⁹ Certainly a schizophrenic is not a wild beast; but neither did Bracton allege that he was. He was simply repeating, in a literary phrase, the doctrine that man is distinguishable from other animals by his intelligence. The above caricature of Bracton's usage is typical of a like, common distortion of the psychology of his time. ⁵⁰ That, at least from the 13th century onwards, there was considerable knowledge of mental disease represented in the criminal law, is apparent from *The Mirror*, ⁵¹ the statute *Praerogativa Regis* ⁵² and the classical law writers. ⁵³ This is especially true of Hale, whose discussion is both well-informed and critical. ⁵⁴ Following Bracton, he wrote that insane persons cannot be guilty "for they have not the use of understanding, and act not as reasonable creatures, but their actions are in effect in the condition of brutes;" the metaphor became common. ⁵⁵ Disregarding this back-

49. 6 BRACTON, DE LEGIBUS (Twiss ed.) f. 420b, 321.

50. Some fair insight into the bizarre historicism of the contemporary critics of the criminal law may be attained in a brief glance at the contributions of a contemporary of Bracton—the Monk, Bartholemeus Anglicus who wrote *De Proprietatibus Rerum* about 1240. Concerning his discussion of mental disease, an American psychiatrist, who took pains to inform himself, writes: "One is struck by the modernity of his viewpoint. . . . If one transposes some of the words into modern terms, there results a statement which reads like a discussion encountered in a modern textbook of psychiatry. . . . The treatment that Monk Bartholemew prescribed was equally rational. . . . His portrayal of the depressive patient is quite accurate according to present-day clinical standards." BROMBERG *THE MIND OF MAN* (1937) 39-40, 40, 41.

51. SELDEN SOC. (1895) 136.

52. Circa 1324. See 1 POLLOCK AND MATTLAND, H. E. L. 481.

53. See, generally, Crotty, *The History of Insanity as a Defense to Crime in English Criminal Law* (1924) 12 CALIF. L. REV. 105.

54. E.g., after noting Fitzherbert's tests of idiocy (inability to count to 20 or recognize parents or tell one's age) he adds circumspectly, "These, tho they may be evidences, yet they are too narrow and conclude not always; . . ." 1 HALE, P. C. 29.

55. *Id.* 31-32. Cockburn, in his defense of M'Naghten, spoke of "that disease . . . which deprives man of reason, and converts him into the similitude of the lower animal. . . ." Queen v. M'Naughton, 4 St. Tr. (N.S.) at 874 (1843). In a small treatise on the subject published in 1700 (BRAYDALL, *NON COMPOS MENTIS*) the professional literature up to that time is well reviewed. The author discusses

ground, the current psychiatrist-critics of the Rules in all solemnity lay the "wild beast test" at the door of Judge Tracy.⁵⁶ But any even casual examination of his opinion reveals how extreme has been the penchant for distortion of the psychology of the criminal law. The defendant shot a man without any rational motive. There was testimony strongly indicating serious mental disease, but there was also much evidence to support a contrary finding. Judge Tracy made a careful summary of the law and evidence, in the course of which he said:

"... that is the question; whether this man hath the use of his reason and sense? If he . . . could not distinguish between good and evil, and did not know what he did, . . . he could not be guilty of any offense against any law whatsoever; . . . On the other side, . . . it is not every kind of frantic humour or something unaccountable in a man's actions, that [exculpates]; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, or more than an infant, than a brute, or a wild beast, such a one is never the object of punishment; therefore I must leave it to your consideration, whether [the defendant] . . . knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did. . . ."⁵⁷

On conviction, the defendant was sentenced to be executed, but this was modified, and he was imprisoned for some thirty years until his death. The court's language may, no doubt, be criticized from a modern psychiatric viewpoint, but it should not be pretended that the arbitrary literalism regarding a wild animal represents the meaning actually conveyed or that this was really an 18th century test of insanity.

It would be easy to describe the judicial use of other criteria such as the "14-year-old test;" but the facts thus established would merely be cumulative. They reveal, among other important knowledge, a clear recognition of serious mental disease, that the distinction between the feeble-minded and the psychotic is a very old one, and that various attributes, persuasive to intelligent laymen and supported by the contemporary medical psychology, were selected to guide judgment. But we must attend in some detail to the criteria presently employed in the two major clauses of the M'Naghten Rules; and firstly to that which the above report of the Committee of the Psychiatric Association termed "the slightly less hoary right and wrong test."

That the "right and wrong" test⁵⁸ is a vestige of a naïve psy-

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the now familiar grounds for exculpation: that the punishment of an insane person "cannot be an example to other;" and, also, on legal principle, the harm was committed "without a felonious intent or purpose." *Id.* at 75.

56. *Rex v. Arnold*, 16 How. St. Tr. 695 (1724).

57. *Id.* at 764-765.

58. This test is commonly said to have been originated by Hawkins who wrote of "a natural disability of distinguishing between good and evil, as infants under the

chology, that psychiatrists "do not believe it helps to call an act . . . bad . . .,"⁵⁹ that "such knowledge [of morality] is not an important factor in deciding a question of mental illness . . ." are representative opinions of the psychiatrist-critics of the Rules. They are commonly supported by the claim that "any number of the obviously and unquestionably mentally ill and insane have a keen perception of right and wrong; in fact, frequently a perception more keen and more puritanical than that of the average run of normal people."⁶⁰ It is important to note, at once, the sharp dissent from this appraisal by other psychiatrists. Thus one of the leaders of modern psychiatry insists that "The moral attitude is a real factor in life with which the psychologist must reckon if he is not to commit the gravest errors."⁶¹ In this position, he is supported by a steadily increasing number of psychiatrists.⁶²

The above criticism of the "right and wrong" test, though stressing other aspects of conduct, parallels the atomistic psychology of "moral insanity" introduced into English psychiatry by Prichard,⁶³ and in the United States by Ray.⁶⁴ That theory signified that certain individuals were completely lacking in "conscience" but were otherwise unimpaired. A very extensive literature was devoted to minute analyses of these "amoral" persons. After a careful survey of these studies, Healy, in the light of his own investigations, concluded that "we have been constantly on the look-out for a moral imbecile, that is, a person not subnormal and otherwise intact in mental powers, who shows himself devoid of moral feeling. We have not found one . . . the person who failed to appreciate his moral duties was the person who had not intelligence enough to realize what was best for even himself as a social being . . . if the 'moral imbecile' exists who is free from all other forms of intellectual defect, he must indeed be a *rara avis*."⁶⁵ Healy's findings are not only persuasive in terms of the theory of "integration of the self",⁶⁶

age of discretion, ideots and lunatics" (1 P.C.1-2), but it is evident that Hawkins merely received this from Hale (1 P.C. 25) who, himself, probably took it from a much older literature.

59. White, *supra* note 8, at 502.

60. McCarthy and Maeder, *Insanity and the Law* (1928) 136 THE ANNALS 131.

61. JUNG, *op. cit. supra* note 20, at 224.

62. E.g., KAHN, *op. cit. supra* note 29, at 65; and see *infra* p. 713 *et seq.*

63. A TREATISE ON INSANITY AND OTHER DISORDERS AFFECTING THE MIND (1835).

64. A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY (1838). Cockburn, in his defence of M'Naghten, drew heavily on Ray, pronouncing his book ". . . the most scientific treatise that the age has produced upon the subject of insanity in relation to jurisprudence. . . ." Queen v. M'Naughton, 4 St. Tr. (N.S.) 878 (1843).

65. HEALY, THE INDIVIDUAL DELINQUENT (1927) 783, 788. So, also, LOWREY, *Delinquent and Criminal Personalities*, in 2 PERSONALITY AND THE BEHAVIOR DISORDERS (ed. Hunt, 1944) 801.

66. See *infra* pp. 707-710, 717-718.

they also implement the M'Naghten Rules. This view of the participation of the rational functions, including evaluation, in normal conduct does not imply any depreciation of the role of the instincts. For, consistently with this theory, one asserts the fusion of the various aspects of the self. This means that moral judgment ("knowledge of right and wrong") is not reified as an outside, icy spectator of a moving self; on the contrary, the corollary is that value-judgments are permeated with the color and warmth of emotion—as is evidenced by the usual attitudes of approval that coalesce with right decisions.⁶⁷ Indeed all action, especially that relevant to the penal law, involves a unified operation of the personality, *e.g.*, a normal person who fires a bullet into the body of a human being knows simultaneously what he is doing and that it is highly immoral. The M'Naghten Rules provide an analytical device for dissecting this action.

But, primarily, this clause of the Rules reflects the traditional, common-sense doctrine that man is a moral being, that he is "sufficiently" autonomous to render moral judgments by him and about his conduct defensible and useful. Certainly so far as the criminal law is concerned, this ethical theory is readily validated. For there (and especially regarding those wrongs where the defense of insanity is raised) no niceties are involved. Only the elementary social interests are in issue. The conclusions that emerge from the above analysis of the "right and wrong" test are that man exhibits his distinctive nature not only in the abstractions he creates and in the symbolic form he gives to them but also that the most characteristic of all his generalizations is the moral judgment. Accordingly, this clause in the M'Naghten Rules represents neither a "hoary superstition" nor an adventitious phrase, spontaneously coined, but an abiding insight into what is paramount in human nature. As will appear shortly, the criticism of the "right and wrong" test by the above psychiatrist-critics represents a phase of modern Positivism, and it also involves the "irresistible impulse" test. The above analysis of that criticism of the "right and wrong" test will be supplemented by placing it in the indicated broader context where the implications of such criticism for criminal law theory are easily revealed.⁶⁸

The other major clause of the M'Naghten Rules refers to "knowledge," "nature" and "quality." These terms represent not only ultimate ideas of epistemology; they also designate primary common-sense notions of daily life. While the philosophers have discussed these ideas

67. Cf. Karpman, *Criteria for Knowing Right from Wrong* (1941) 2 J. CRIM. PSYCHOPATH. 377, 379, 386; Prideaux, *The Criminal Responsibility of the Alleged Insane* (1923) 1 CUMB. L. J. 319, 320-321. Also, see citations in footnotes 176-181 *infra*.

68. See *infra* pp. 710-717.

with vast erudition and in technical vocabularies, the judges have talked about them very simply. Their expositions have relied, partly, on specific illustration usually based on the facts in issue, *e.g.*, Judge Darling's observation, "He knew the nature and quality of his act; for he knew that he was shooting, and that this shooting would kill her."⁶⁹ They have also substituted terms which they regarded as synonyms, *e.g.*, for "know": "appreciate," "comprehend rationally," "judge," "understand," "perceive," "be aware of," "conscious of," and the like. The opinions have dealt more fully with the other terms—"nature" and "quality"⁷⁰—and the chief issue has been whether they are synonymous or distinguishable.⁷¹ It has been held that "in using the language 'nature and quality' the judges were only dealing with the physical character of the act, and were not intending to distinguish between the physical and moral aspects of the act."⁷² But some American courts have so distinguished the two terms.⁷³ In support of this view, it has been argued that the judges who formulated the M'Naghten Rules "could not have intended two different words to mean exactly the same thing."⁷⁴ But most judges have not even tried to distinguish the terms. Attempts at elucidation have been largely confined to the substitution or addition of such words as "consequences," "character and consequences," "effect," "implications," or "significance." This treatment of the two terms as synonymous is defensible on practical grounds inasmuch as the other principal clause of the Rules, discussed above, deals explicitly with moral judgment. It would therefore seem to facilitate interpretation of the Rules if evaluation were restricted to that clause and not also identified with "quality" in the other one. But this argument and the prevalent, general holdings are implications of a basic fallacy; namely, that understanding the "nature" of an act is actually a separate process from knowing that it is right or wrong. In fact, these two forms of understanding coalesce.

69. *Rex v. Pank*, London Times, May 22, 1919, p. 9, col. 3, quoted by DAVIS AND WILSHIRE, *MENTALITY AND THE CRIMINAL LAW* (1935) 95-96.

70. Cockburn said, "What is meant by 'the nature and quality of the act' I really do not know." Letter to A.-G. on Draft Code of 1879 quoted (1943) 21 (CAN. B. R. at 431. Cf. WEIHOFFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* (1933) 43-44; GLUECK, *op. cit. supra* note 4, at 215-216; Barnes, *A Century of the McNaghten Rules* (1944) 8 CAMB. L. J. 300, 303.

71. Oppenheimer argued that neither word ought "to be rejected as mere surplusage." He distinguished the terms on the ground that "nature" refers to the physical character; "quality" to the "social and legal character;" "wrong" or "criminality," to the "legal significance of the act." *THE CRIMINAL RESPONSIBILITY OF LUNATICS* (1909) 142-148. Cf. Foote, K. C., for the appellant in *R. v. Codere*, 12 Cr. App. R. 21, 24-25 (1916).

72. Reading, J., in *R. v. Codere*, 12 Cr. App. R. 21, 26-27 (1916).

73. *E.g.*, Schwartz v. State, 65 Neb. 196, 91 N.W. 190 (1902); cf. DAVIS AND WILSHIRE, *op. cit. supra* note 69, at 113.

74. *Id.* at 95-96.

It is impossible here to engage upon any extended discussion of the meanings of these ultimate notions that comprise the subject matter of half a philosophical library. But we may glance briefly in two significant directions which are closely related to the instant problem—to psychoanalysis and to common sense. Psychiatrists who profess inability to understand what is meant by “knowledge of the nature and quality of the act” accept, as a criterion of normality, the “correctness of the reality-testing.”⁷⁵ The reference is to the important Freudian “reality-principle.”⁷⁶ It is possible to equate this principle with the legal test. Thus both the M’Naghten Rule and the Freudian “reality-principle” assume the existence of an outer world.⁷⁷ Both assume “nature events” and “social events” which occur in that world.⁷⁸ Both assume the possibility of knowledge of that world.⁷⁹ Both correlate these relationships and functionings with “mental abnormality.”⁸⁰ Both imply that there are methods by which the “knowledge of the outer world” can be

75. See Hacker, *The Concept of Normality and Its Practical Significance* (1945) 15 AM. J. ORTHOPSYCHIAT. 47, 52.

76. “This more far-seeing attitude of controlling intelligently the instinctual demands in accordance with the requirements of the given external situation is the reality principle.” ALEXANDER AND HEALY, *ROOTS OF CRIME* (1935) 276. Cf. “A loss of reality must be an inherent element in psychosis; . . . the new phantastic outer world of a psychosis attempts to set itself in place of external reality.” 2 FREUD, *COLLECTED PAPERS* (1924) 277, 282.

77. “Let us, moreover, bear in mind the great practical importance there is in the capacity to distinguish perceptions from mental images. . . . Our whole attitude toward the outer world, to reality, depends on this capacity so to distinguish.” 4 FREUD, *COLLECTED PAPERS* (1925) 147; See also, BRILL, *FREUD’S CONTRIBUTION TO PSYCHIATRY* (1944) 139; HINSIE & SHATZKY, *PSYCHIATRIC DICTIONARY* (1940) 460.

78. For the recognition given to the social event as distinguished from the nature event, see, e.g. Sterba, *Introduction to the Psychoanalytic Theory of the Libido* (1942) 68 NERVOUS AND MENTAL DISEASE MONOGRAPH SERIES 69; Alexander, *The Psychoanalysis of the Total Personality* (1930) 52 NERVOUS AND MENTAL DISEASE MONOGRAPH REVIEW 125-126; Laforgue, *The Relativity of Reality* (1940) 66 NERVOUS AND MENTAL DISEASE MONOGRAPH SERIES 4, 37, 39, 49-50.

“In a way, the ego pursues the same aims as the id, but by virtue of its knowledge of the outer world, it takes account of its lawfulness and regularity, and instead of permitting the id to run blindly into dangerous situations, the ego interposes reason between the desire and the act.” BRILL, *op. cit. supra* note 77, at 155; cf. 2 STEPHEN, *HIST. CR. L. OF ENG.* (1883) 174. See also, 4 FREUD, *COLLECTED PAPERS* (1934) 18.

79. See BRILL, *op. cit. supra* note 77. “. . . we use the term *ego* where is commonly meant the intellect.” Laforgue, *supra* note 78, at 37. Similarly, Ferenczi, *Stages in the Development of the Sense of Reality* in *CONTRIBUTIONS TO PSYCHOANALYSIS* (1916) 233-234.

80. “Schizophrenics see the world differently; our notion of reality is not theirs. We call them ‘crazy’ because they see and perceive things we do not see and which to us appear absurd.” Laforgue, *supra* note 78, at 40; “. . . neurosis does not deny the existence of reality, it merely tries to ignore it; psychosis denies it and tries to substitute something else for it.” 2 FREUD, *COLLECTED PAPERS* (1933) 279. See also, *id.* at 250-51, 277.

tested⁸¹ and that this is the function of intelligence.⁸² The "reality-principle" has been defined in almost the very words of the legal Rule, as "the apprehension of the true nature of an object. . . ."⁸³ Indeed a reading of Erskine's argument in the *Hadfield Case* reveals the practical identity of the legal and psychiatric principles.⁸⁴ But even a slight acquaintance with the literature of philosophy will persuade almost anyone that the authors of the M'Naghten Rules achieved a vast improvement over both Erskine and Freud, in avoiding the term which has as good a claim as any other to being the vaguest of all words—"reality." It is therefore not unlikely that most modern scholars, knowing that term to be pregnant with the limitless equivocations of hundreds of years of speculation, would prefer the simpler language of the judges.

Despite their uncertainty (which, concerning common transactions, is often very desirable), the basic terms that comprise the M'Naghten Rules have a core of univocal meaning and an underlying consistency that are adequate in daily life. The accepted premises of rational action include a concept of causal connections between events and the naming of the events in specific ways.⁸⁵ "Awareness" of the event-sequence presupposes generalization on action, projecting into the future the regularities of the past.⁸⁶ The standard for verification is external and implies social conformity in the relevant areas. Thus the Rules refer to the elementary relationships of man to his environment; they pose, on the simplest level, the relationship of knower to known. And they say, in effect, that when a person's mind is so diseased that his powers of sensation, perception and abstraction function very defectively, he is not responsible. The import of this judgment is most readily seen in connection with perception. If, after checking against error of various sorts, an adult does not correctly perceive such objects as a gun, knife,

81. ". . . the ego takes a perception for real if its reality is vouched for by the mental faculty which ordinarily discharges the duty of testing the reality of things." FREUD, *GROUP PSYCHOLOGY* (1922) 77. See also, Schilder, *Introduction to a Psychoanalytic Psychiatry* (1928) 50 *NERVOUS AND MENTAL DISEASE MONOGRAPH SERIES* 19.

82. ". . . intelligence is the capacity for acquiring, absorbing and using knowledge of reality." Podolsky, *Psychoanalytical Views of Intelligence* (1941) 28 *PSYCHOANAL. REV.* 359.

83. Wälder, in 20 *IMAGO* (1934) 467.

84. *E.g.* The disease consists "in the delusive sources of thought; all their deductions within the scope of the malady, being founded upon the *immoveable* assumption of matters as *realities*, either without any foundation whatsoever, or so distorted and disfigured by fancy. . . ." He spoke of delusions as "where imagination . . . holds the most uncontrollable dominion over reality and fact. . . ." 27 *How. St. Tr.* 1281, 1313 (1800). He distinguished *Hadfield* from *Ferrers' Case*, 19 *How. St. Tr.* 886 (1760)—the latter exhibited "violent passions and malignant resentments, acting upon real circumstances. . . ." *id.* at 1314; cf. POPE, *A TREATISE ON THE LAW AND PRACTICES OF LUNACY* (2d ed. 1890) 2.

85. Cf. 1 KANTOR, *PSYCHOLOGY AND LOGIC* (1945) 187.

86. See BRIDGMAN, *THE INTELLIGENT INDIVIDUAL AND SOCIETY* (1938) 41.

human being, etc., he is grievously disordered. But it is clear that the rule is not limited to perception of external objects; it also includes the various other characteristics of intelligent functioning,⁸⁷ especially understanding of ordinary relationships and of the usual consequences of simple actions.

"Irresistible Impulse"

Viewed historically, there can be little doubt that the M'Naghten Rules represented an intellectualistic psychology.⁸⁸ In addition, a fallacious "faculty psychology," ably expounded by Cockburn,⁸⁹ the defendant's counsel, was reflected in the disjunctive statement of the two principal clauses of the Rules. The psychiatrist-critics of the law, uninitiated into the processes and techniques whereby the legal system changes and is improved, have assumed that the Rules fully represent the present law. Actually, what has happened is that modern psychiatry has been greatly utilized in adjudication, its findings being held relevant to the given legal formulas; in short, the M'Naghten Rules have been "liberally" interpreted in recent years⁹⁰—hence the rather general approval of them by English psychiatrists who have studied their operation.⁹¹ It is conceded, however, even by the staunchest supporters of the M'Naghten Rules, that their defense requires much reliance on the actual practices of the courts as well as on executive review and modification of sentences. This implies that the Rules can be substantially improved.

The major questions regarding reform of the Rules have become centered on the theory of "irresistible impulse." That theory does not coincide with the rise of modern psychiatry; it is said to have been "fully

87. See STODDARD, *THE MEANING OF INTELLIGENCE* (1943) 4.

88. The dominant general psychology was represented by MILL, *ANALYSIS OF THE PHENOMENA OF THE HUMAN MIND* (1829). The word, "emotion," or any equivalent term hardly appears in that work; it presents, on the whole, a severely rationalistic psychology.

89. 4 St. Tr. (N.S.) 847, 887 (1843).

90. "It seems true to say that in cases where there is evidence of real mental disease, antecedent to the commission of the alleged crime, and there is no evidence of a motive which might influence a sane person, juries have no difficulty in finding either that the prisoner did not appreciate the nature of his act, or that he did not know that it was wrong." Hewart, 57 H. L. DEB. (5th Ser. 1924) 468. See *H. M. Advocate v. Sharp*, S. C. (J.) 66 (1927).

91. "Various attempts have been made to modify in some way or other the M'Naghten rules, but I do not believe that any better criterion has ever been formulated, provided these rules are interpreted in a broad and liberal spirit, as is mostly the case today." Henderson, *supra* note 15, at 115. So, too, East, *Delinquency and Crime* (1944) 90 J. MENT. SCI. 391; EAST, *INTRODUCTION TO FORENSIC PSYCHIATRY* (1927) 73-74; MacNiven, *Psychoses and Criminal Responsibility in MENTAL ABNORMALITY AND CRIME* (Radzinowicz and Turner eds. 1944) 9, 70; for a like view by American psychiatrists, see McCarthy and Maeder, *supra* note 60, at 132, and CLECKLEY, *THE MASK OF INSANITY* (1944) 288-289.

and clearly stated by Weyer" in the 16th century.⁹² For the psychological foundation of the present controversies, the work of certain French physicians in the early 19th century is most important. Pinel, one of these pioneers of modern psychiatry, diagnosed cases of *manie sans délire* where he found no loss in the functioning of perception or intelligence but, nonetheless, a compulsion to violence, even homicide. His theory was first repudiated in England, Dr. Burrows characterizing it as "both absurd and dangerous . . . absurd, because he who can perpetrate such acts, and yet be in possession of all these faculties, is neither in a delirium nor mad. . . ."⁹³ But the "irresistible impulse" theory gained ground, aided in England by Prichard's diagnosis of "moral insanity" which, he reported, left the reasoning faculties unimpaired,⁹⁴ and, in the United States, by Ray's like position.⁹⁵ Based upon this theory, shortly after the M'Naghten Rules were published, a detailed argument advocating their reform concluded that ". . . this should be the test for irresponsibility—not whether the individual be conscious of right and wrong—not whether he had a knowledge of the consequences of his act—but whether he can properly control his action!"⁹⁶ The greatest influence on the general attitude of psychiatrists on this question, as well as that of many lawyers, was probably Maudsley, who presented his diagnosis of "impulsive insanity" so persuasively as to enlist a support that has grown to this day.⁹⁷ The current psychiatrist-critics of the law, finding the above theory quite congenial to their views of human behavior, especially regarding the pervasive, dominating drive of the instincts, made it the rallying-point of their attack on the Rules.

To understand what is involved in the proposed "irresistible impulse" test it is essential to keep definitely in mind the supporting psychological theory that many insane (psychotic) persons, while understanding the significance of their conduct and knowing what is immoral, are, nonetheless, unable to control their actions; they are "irresistibly impelled" to certain conduct. The important implications of this hypothesis as regards the prevailing law are manifest; they constitute a radical challenge by asserting that many persons (some psychiatrists say most persons) who are indubitably insane do not fall within the orbit of the M'Naghten Rules. Ultimately, therefore, the question turns on the validity of the psychological theory of "irresistible impulse."

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92. ZILBOORG AND HENRY, A HISTORY OF MEDICAL PSYCHOLOGY (1941) 243.

93. BURROWS, COMMENTARIES ON INSANITY (1828) 267.

94. *Op. cit. supra* note 63.

95. *Op. cit. supra* note 64.

96. KNAGGS, RESPONSIBILITY IN CRIMINAL LUNACY (1854) 69.

97. MAUDSLEY, RESPONSIBILITY IN MENTAL DISEASE (1874) 133 *et seq.* After one of the cases described by him, he concluded: "In face of this example of uncontrollable morbid impulse, with clear intellect and keen moral sense, what becomes of the legal criterion of responsibility?" *Id.* at 136.

It is futile to attempt to decide the issue by authority, for the specialists disagree; the Freudians support Maudsley and his predecessors;⁹⁸ other psychiatrists strongly oppose this view;⁹⁹ and still others hold that the problem lies outside the scope of their discipline. Even the Freudians disagree among themselves at important points. Thus most of them accept the hypothesis of a "sense of guilt" as comprising or giving rise to a compulsion to commit a harm in order to be punished,¹⁰⁰ but others insist that this is not supported by "clinical material."¹⁰¹ Any independent effort to determine the validity of the theory of "irresistible impulse" encounters the sort of difficulty discussed above, *i.e.*, "there appears to be no clear-cut agreement as to its exact meaning . . . the impulse is in most instances capable of being resisted. . . ."¹⁰²

The problem may be more accurately formulated by an examination of relevant judicial opinion. The leading early cases in the United States, that are frequently cited as representative of the above test, are *Commonwealth v. Rogers*¹⁰³ and *Commonwealth v. Mosler*.¹⁰⁴ In the *Rogers Case*, Chief Justice Shaw stressed both the intellectual and the volitional aspects of conduct. Though his language is ambiguous,¹⁰⁵ it is clear enough to indicate definitely that he did not adopt the "irresistible impulse" test.¹⁰⁶ He not only stressed disorder of reasoning as well as knowledge of right and wrong but, in addition, when he did speak of impulse, it was always in its relation to disease of the intelligence.¹⁰⁷ In the passage which is sometimes relied upon to show his adoption of the "irresistible impulse" test, he said, "the question will be, whether the

98. *E.g.* ZILBOORG, *op. cit. supra* note 26, at 273. But *cf.* this same psychiatrist's discussion of "knowledge," citation in note 158 *infra*.

99. "It is impossible to say, in any particular case, that an impulse was irresistible; all that can be said is that the impulse did not appear to have been successfully resisted." HAMBLIN SMITH, *PSYCHOLOGY OF THE CRIMINAL* (2d ed. 1933) 179. *Cf.* ". . . the difficulty of distinguishing between uncontrollable impulse and the impulse which is not controlled would make too fertile a dialectical field." Henderson, *supra* note 15, at 114.

100. *E.g.* ABRAHAMSEN, *CRIME AND THE HUMAN MIND* (1944) 32.

101. Karpman, *Criminality, The Super-Ego and the Sense of Guilt* (1930) 17 *PSYCHOANALYT. REV.* 280, 288; *cf.* Nunberg, *The Sense of Guilt and the Need for Punishment* (1926) 7 *INT. J. PSYCHOANAL.* 420.

102. Spirer, *The Psychology of Irresistible Impulse* (1943) 33 *J. CR. L. & CRIMINOL.* 458.

103. 7 Metc. 500 (Mass. 1844).

104. 4 Pa. 264 (1846).

105. See Professor Keedy's excellent analysis of it in *Insanity and Criminal Responsibility* (1917) 30 *HARV. L. REV.* 724, 725-729.

106. Dr. Glueck, an advocate of the "irresistible impulse" test, concedes that the decision "might therefore, be distinguished from the usual version of the irresistible impulse test. . . ." Glueck, *Psychiatry and the Criminal Law* (1928) 14 *VA. L. REV.* 155, 163.

107. *E.g.*, ". . . if his reason and mental powers are either so deficient that he has no will . . ." *supra* note 103, at 501. See also his general statement of the test, *supra* note 6.

disease existed to so high a degree, that for the time being it overwhelmed the reason, conscience, and judgment, *and* whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse. . . ."¹⁰⁸ If the meaning of the "irresistible impulse" test, stated above, is referred to this passage and to the broader context of the entire opinion, it is abundantly clear that the advocates of that test can derive no comfort from the *Rogers* decision.

But the *Mosler* case did adopt the "irresistible impulse" theory. In his decision, Justice Gibson strongly supported the psychology of separate faculties, including the theory of "moral insanity" that had recently been expounded by Ray.¹⁰⁹ But he cautioned the jury so vigorously regarding it: that it is "dangerous" and "can be recognised only in the clearest cases,"¹¹⁰ that a conviction of murder in the first degree was returned. Thus the full, official imprimatur of the "irresistible impulse" test in this country was not signalized until many years later, by Judge Somerville's opinion in *Parsons v. State*.¹¹¹ Here the theory was presented in detail and strongly endorsed.

To what extent the "irresistible impulse" test has been adopted in this country cannot be stated with any assurance. It has been claimed that 17 American states have adopted it¹¹² but an examination of cases cited in support¹¹³ definitely indicates that this is highly questionable. Many of these cases are of the same type as *Commonwealth v. Rogers*, *i.e.*, they reveal not adoption of the independent "irresistible impulse" test as a sufficient alternative to the M'Naghten Rules, but, instead, holdings that ability to control conduct is a phase of normal intelligence.¹¹⁴ It

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108. *Id.* at 502. Italics added. This same theory of integration is repeated. *Id.* at 503.

109. "Insanity is *mental* or *moral*; the latter being sometimes called homicidal mania. . . . But there is a *moral* or *homicidal* insanity, consisting of an irresistible inclination to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion, which, while its results are clearly perceived, is incapable of resistance." 4 Pa. 264, 266-267 (1846).

110. *Id.* at 267.

111. 81 Ala. 577 (1886). So, too, *State v. Green*, 78 Utah 580, 6 P.(2d) 177 (1931).

112. WEIHOFFEN, *op. cit.* *supra* note 70, at 44.

113. *Id.* The States are listed *id.* at 16 n. 6.

114. *E.g.*, the earliest cases cited (*id.* at 46-47) as adoptions of the "irresistible impulse" test: *State v. Thompson*, 90 Wright Ohio Rep. 622 (1834) and *State v. Clark*, 12 Ohio Rep. 483, 495 (1843). In the former, Judge Wright's instruction identified "the power of discriminating" good from evil with the power to control. In the latter case, there is language which, taken from its context, could support the claim. But, interpreted in its context, it is clear that Judge Birchard's views were in accord with his predecessor's. The plain implication again was that the answer to the question regarding control by the defendant was included in the answer to the question, did the defendant know right from wrong? It is clear that his instruction did not contemplate an affirmative answer to the latter question and a negative one to the question on control. If there were any doubt regarding the meaning of hi-

is also frequently asserted that European codes invariably recognize the "irresistible impulse" test. But this, too, is very doubtful despite the fact that the language of some codes supports such a view.¹¹⁵ For the courts have frequently interpreted the provision concerning "freedom of will" as an implicate of normal intelligence.¹¹⁶ Many European penal codes were enacted in the early 19th century; hence those which do recognize the "irresistible impulse" test reveal the continuing influence of Pinel's outmoded theory. As regards these, it appears, *e.g.*, by reference to recent English administration of the Rules, that this is an instance of the superiority of case-law.

The entire problem of insanity in relation to criminal responsibility received careful analysis thirty-some years ago by a distinguished Committee¹¹⁷ which proposed legislation to substitute for the M'Naghten Rules, the lack of "the necessary criminal intent" by reason of insanity. The recommendation thus stressed impairment of intelligence as the paramount criterion of mental disease,¹¹⁸ the Committee believing that "irresistible impulse" could be subsumed under the proposed formula.¹¹⁹ But this would not be acceptable to those who urge the adoption of a separate "irresistible impulse" test since that test assumes concomitant unimpaired intelligence. More recently, however, the trend in the literature on this problem has gone strongly in favor of adoption of the "irresistible impulse" test¹²⁰—a tribute, no doubt, to the influence of the Positivist School of Criminology in this country, as well as of the prestige of psychoanalysis here. But there is little evidence that more than a few courts have repudiated the traditional Rules; instead, the tendency has been to interpret them more soundly in reliance upon such valid psychiatry as has been available.

The English experience regarding the "irresistible impulse" test has paralleled the American—with certain striking differences. There has

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instruction, the questions he asked the witnesses would be conclusive as to this interpretation. *State v. Clark*, *supra* at 485. (In 70 A. L. R. 659 at 676, Ohio is classified with states which do not recognize the "irresistible impulse" test, the *Clark* case cited.)

115. See OPPENHEIMER, *op. cit. supra* note 71, Ch. 2.

116. *Id.* at 88. Thus Mannheim, who apparently supports the "irresistible impulse" test, reports that in 1929, the German Supreme Court held, "The free determination of the will is excluded when, as a consequence of mental disturbances, certain ideas and feelings or influences dominate the will to such a degree as to exclude the possibility of determining the will through reasonable considerations." Mannheim, *The Treatment of Mental Disorders and Mental Deficiency in Continental Criminal Law* (1938) 84 J. MENT. SCI. 526.

117. Of the American Institute of Criminal Law and Criminology, Edwin Keady, Chairman. The first report was published in (1910) 1 J. CR. L. & CRIMINOL. 354; reprinted, (1917) 30 HARV. L. REV. 536.

118. *Id.* at 523-524.

119. See *id.* at 546-550.

120. GLUECK, *op. cit. supra* note 4, at 479; WEIHOFEN, *op. cit. supra* note 70, at 410.

been much less judicial support of that test in England; moreover, English psychiatrists who have had experience in administration of the criminal law are opposed to the adoption of the "irresistible impulse" test.¹²¹ One finds, to be sure, the same sort of wishful interpretation—that many English judges have adopted the "irresistible impulse" test.¹²² Thus, even *Hadfield's Case* is cited as an example.¹²³ But there was not the slightest mention of that test in the decision, and Erskine actually restricted the possibility of using it by his approval of the decision in *Ferrers' Case*. His great contribution was a clarification of the meaning of delusion—and thus of the importance of disease of the intelligence, to which almost his entire argument was confined. So, too, a phrase in Denman's opinion in *Oxford's Case*¹²⁴ is clipped from its context and interpreted as the adoption of the "irresistible impulse" test.¹²⁵ But there can be no doubt on any reading of Denman's opinion that it does not contain the slightest support of that interpretation. Instead "the power of controlling himself" is equated with or subsumed under the possession or power of reason. A definite adoption of the irresistible impulse test, indeed one of the very few unequivocal ones, is found in McCardie's instruction in the trial of *True's Case*,¹²⁶ but this was disapproved on appeal;¹²⁷ it was shortly afterwards repudiated as utterly "fantastic."¹²⁸ Thus, so far as English judges are concerned, it is a fair characterization to say, as Hewart, C.J., put it, that they have "but coquetted with that proposal."¹²⁹

In contrast to the judiciary, various Commissions have been favorably inclined toward adoption of the "irresistible impulse" test.¹³⁰ The last of these was Lord Atkin's Committee. Its report¹³¹ reveals a curious difference of opinion between the legal members, the representatives of

121. *E.g.*, MACNIVEN, *op. cit. supra* note 91, at 71, and HENDERSON, *op. cit. supra* note 15. There is also a substantial body of like expert opinion in the United States. See note 145 *infra*. But it has been so little emphasized in recent years that the field here seems to be entirely occupied by the proponents of the test. The present American situation, of harsh criticism of the criminal law, is reminiscent of the English one at the time of Maudsley. It seems a fair inference that the current happier English situation has resulted, in part, from the fact that English psychiatrists have taken pains to understand the criminal law and its administration.

122. *E.g.*, Barnes, *supra* note 70 at 316-317.

123. *Id.* at 316.

124. 9 C. & P. 546, 173 Eng. Rep. 950 (1840).

125. Barnes, *supra* note 70, at 309.

126. Quoted *id.* at 317. Another like instance is Judge Bray's decision in *Rex v. Fryer*, 24 Cox C. C. 403, 405 (1915). Oppenheimer quotes from two unreported English cases where, apparently, the "irresistible impulse" test was adopted. *Op. cit. supra* note 71, at 27.

127. 16 Cr. App. R. 164 (1922).

128. Hewart, C. J., in Kopsch, 19 Cr. App. R. 50 (1925).

129. 57 H. L. DEB. (5th ser. 1924) 466. See STROUD, *MENS REA* (1914) 200-206.

130. The history and recommendations of these commissions is summarized by Davies, *Irresistible Impulse in English Law* (1939) 17 CAN. B. REV. 147.

131. (1923) Cmd. 2005.

the Medical Association and those of the Medico-Psychological Association—the lawyers going farther in the way of proposed reform than the doctors but not so far as the psychiatrists. The Committee's chief recommendation was to add to the M'Naghten Rules a provision recognizing "irresistibility" of conduct "when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of any power to resist."¹³² This proposal, despite its ambiguity, was interpreted, as it was probably intended to be, as representing the "irresistible impulse" test (*i.e.*, "mental disease" was probably intended to refer only to the volition, the intelligence being assumed to remain unimpaired). Shortly thereafter, an appropriate bill was introduced and argued in the House of Lords,¹³³ where it was committed to a swift demise and withdrawn. In the debate, participated in by such notable judges as Haldane, Hewart, Darling and Dunedin, the arguments against the "irresistible impulse" test, long crystallized by then, were vigorously put. They were: an "irresistible impulse" does not and cannot exist concomitantly with unimpaired knowledge of right and wrong.¹³⁴ Next, it was argued that even if it be assumed that such an impulse existed, it could not be distinguished from a resistible, but unresisted impulse. Further, the difficulty of proof, particularly before a jury, was noted. Important questions of policy were also stressed, *e.g.*, "insanity" was characterized as a rich man's defense. "Almost invariably" an expert could be found who would testify that an impulse was irresistible. The test would therefore become a subterfuge, hence its adoption would be dangerous to the public safety. Finally, it was urged, "If you pass this . . . you will make irresistible an impulse which now is resistible and resisted because of the penal law."¹³⁵ The above issues of fact and policy, comprising a summary of the questions raised by the proposed "irresistible impulse" test, must be carefully appraised.

The argument that experts could invariably be employed to testify that an impulse was "irresistible" might seem to cast aspersions upon an honorable profession. But it is probable that the Judges were not raising any question of integrity, but were instead considering the uncertainties of psychiatry and the existence of many "schools" as major factors in the availability of such testimony. Supplementing the writer's discus-

132. *Id.* at 21.

133. 57 H. L. DEB. (5th ser. 1924) 443.

134. *Cf.* "For myself I cannot see how a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through irresistible innocent impulse." Brannon, J., in *State v. Harrison*, 36 W. Va. 729, 742, 15 S. E. 982 at 990 (1892).

135. Cave, 57 H. L. DEB. (5th ser. 1924) 476. *Cf.* Keedy's summary of the reasons for American courts' opposition to the "irresistible impulse" test in (1917) 30 HARV. L. REV. 536, 546-548.

sion above concerning these matters, it is significant to consider the avowed attitude regarding "irresistible impulse," held by certain prominent psychiatrists, one of whom wrote, "From the psychological point of view, the impulse could not have been resistible, since the act was carried out in accordance with the impulse. It is difficult for me to conceive of an impulse which is resistible but not resisted."¹³⁶ Obviously such a theory would lead precisely to the situation regarding expert testimony, which the Judges sought to avoid.¹³⁷ It may be urged that the availability of expert testimony is not peculiar to the defense of "irresistible impulse" but applies generally. In a sense this is certainly correct, but it is nonetheless also true that the dangers are greatly magnified as regards "irresistible impulse" because of the nature of the proof. With reference to the issues formulated by the M'Naghten Rules, collateral evidence regarding the defendant can be shown whereby the experts' opinions can be evaluated. But in this respect, there is a very serious limitation on the "irresistible impulse" test.

The opposition to the "irresistible impulse" test on this ground has been countered by insistence that "*it is no less difficult to prove lack of knowledge*,"¹³⁸ but the supporting argument for reliance on the experts¹³⁹ reveals that the problem of proof of "irresistible impulse" has not been sufficiently clarified by either side. In order to state the issues precisely, it is essential to keep in mind that the "irresistible impulse" test postulates the concomitant unimpairment of the intelligence. Only then can one appraise the contention that proof of "irresistible impulse" must rest on a distinctive foundation, and that the existence of such a compulsion is very difficult, perhaps impossible, to establish. The reason is only

136. ZILBOORG, *op. cit. supra* note 26, at 274.

137. See, in this connection, the interesting article by Karpman, *Widening the Concepts of Insanity and Criminality* (1942) 4 J. CR. PSYCHOPATH. 129, the import of which can only be suggested here. The author, a recognized psychiatrist, relates that a certain lawyer wished to retain him (having heard that he was "extreme") to testify in behalf of a client charged with bigamy. "He told me that he had consulted other psychiatrists but that they had refused to take the case as they did not believe the man was insane." The accused, a married man and a repeated offender, had married a girl who was "a high grade mental defective" because she was the daughter of a very wealthy man. The psychiatrist interviewed the accused. He writes: "... after examining him I could not find, according to his narrative, a single thing wrong with him. . . . However, after a number of interviews, it became apparent . . . that I was dealing with an undoubted case of . . . constitutional psychopathy. . . . I went to court and testified on his behalf. I pleaded before the jury that the term 'insanity' should be understood in its widest sense, as related to problems of misconduct and maladjustment over which the individual has no control . . . because he is emotionally so confused [The instant case showed a calculated courtship by an experienced confidence-man.] that even though he knows intellectually the difference between right and wrong, and indeed is most anxious to do the right instead of wrong, yet is driven by peculiar derangement of his emotions to do the wrong (neuroses)." *Id.* at 129-131. The inept jury found the accused "guilty"!

138. GLUECK, *op. cit. supra* note 4, at 233-234.

139. *Id.* at 235.

suggested in pointing out that reliance must be placed very largely upon the testimony of the accused, and that his own account of his condition would, at best, be self-serving; it would, besides, be highly inadequate—if Freud's theory of the unconscious is valid. But the principal difficulty in the way of such proof is a logical one. "Irresistible impulse" is said to denote a disease of the volition, the only evidence of which disease is an act whose import constitutes the chief issue. Thus, a certain act (commission of the harm charged) is alleged to have been irresistibly impelled; but if the evidence of its irresistibility is inquired for, all that can be adduced, on the necessary postulate of concomitant unimpaired intelligence, is the act, itself.

It is usual to rely on kleptomania as the chief support¹⁴⁰ of the validity of the "irresistible impulse" theory as well as to establish the feasibility of proof, but it is plain on examination of the cases, that such dependence is invalid. For the cases which seem to treat kleptomania as a form of "irresistible impulse" reveal that invariably there was evidence of numerous prior like acts. In no case was "a single instance" of a theft held the manifestation of an "irresistible impulse." On the contrary, as Judge Gibson perceived long ago, "It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance."¹⁴¹ But mere repetition tends to prove habit, not abnormality. Accordingly, a much more important consideration is that the cases that recognize kleptomania as a defense include, also, substantial evidence of disease of the intelligence.¹⁴² Even if it be assumed that the theory of "irresistible impulse" were valid (so that proof of diseased intelligence could be dispensed with) it could only be established after a series of like compulsive acts had occurred. In terms of practicability, this would mean the exclusion of "irresistible impulse" from application to the very crimes where the insanity plea is most frequently raised; even if it were possible for a multiple killer to avoid apprehension for his earlier homicides, the most ardent proponent of "irresistible impulse" would hardly

140. *E.g.*, *id.* at 43, 304.

141. *Com. v. Mosler*, 4 Pa. 264, 267 (1864); *cf.* *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982 (1892).

142. Compare the evidence supporting the defense of kleptomania when acquittals were obtained: repeated thefts and concealment of women's shoes, previous head injury, insanity in family—a typical "symbolic fetish" case, *People v. Sprague*, 2 Park. Crim. Rep. 43 (N. Y. 1849); "ungovernable habit from boyhood of taking things," *Looney v. State*, 10 Tex. App. 520 (1881); a period of notorious pilfering following a serious illness, *Harris v. State*, 18 Tex. App. 287 (1885); three prior convictions for larceny, behavior "peculiar," much stolen property in possession, idiocy among siblings, *State v. McCullough*, 114 Iowa 532, 87 N. W. 503 (1901). When convictions were obtained: defendant took eggs, grain, turkey, and colt before instant theft of money, *State v. Riddle*, 245 Mo. 451, 150 S. W. 1044 (1912); no evidence of prior instability, alcoholism, or previous thefts, *State v. Berry*, 179 Mo. 377, 78 S. W. 611 (1904).

relish the task of obtaining an acquittal by *sole* reliance on a series of past murders. Thus, solely on practical grounds, the claim of diseased motor or inhibitory functions requires the support of evidence that is relevant to the M'Naghten Rules.¹⁴³ In the absence of such proof of concomitant diseased intelligence, it is impossible to distinguish the kleptomaniac from the habitual normal thief because the mere repetition of harmful acts can not sustain any inference as to mental abnormality. For these reasons of advocacy and logic, it is common to support the claim of irresistibility by showing that the act was spontaneous, *i.e.*, without deliberation, that it was not motivated rationally, that it was committed under great likelihood of being detected, in short, by showing a severe impairment in intelligence.

But the ultimate challenge to the "irresistible impulse" theory is the direct and complete denial of its validity on empirical grounds. Although, as seen, expert opinion is here divided¹⁴⁴ it is probable that most psychiatrists reject the "irresistible impulse" theory.¹⁴⁵ There are important reasons for crediting their skepticism. We need not stress the usual grounds for such opposition, *i.e.*, the uncertainties of both facts and relevant knowledge, but may attend more profitably to that phase of the theory that postulates concomitant, unimpaired intelligence. It is probable that this hypothesis, long entertained by many psychiatrists, results from their observation of many psychotics, especially of their apparent logical skill, mental astuteness and the like. If these psychiatrists have been mistaken in their diagnosis, a fundamental revision of the prevailing psychopathology is required. One step in the direction of such revision was taken by Healy and others who destroyed Prichard's theory of "moral insanity."¹⁴⁶ If it should also be shown that the psychotics who have been diagnosed as emotionally unbalanced, "impulsive" but intellectually sound are, in fact, also seriously impaired in their rational functions, then the general foundation that has supported the theory of "irresistible impulse" would be seriously breached. Now it is precisely this sort of evidence that has recently become available. Certain researches on the intelligence of schizophrenics and other psychotics have revealed that although these patients were normal in their concrete responses, "the

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143. Recent Irish decisions are based on the ground that no evidence of "irresistible impulse" was introduced. See *Attorney General v. O'Brien*, [1936] Ir. R. 263, *Attorney General v. Boylan*, [1937] Ir. R. 449, 456 and *People v. Fennell*, [1940] Ir. R. 445, 449.

144. See notes 98, 99 and 102 *supra*.

145. See note 99 *supra*. For other summaries of, and citations to, expert opinion opposed to the "irresistible impulse" theory, see Waite, *Irresistible Impulse and Criminal Liability* (1925) 23 MICH. L. REV. 443, 455-456, 466 fn., 468; and Whitman, *Capital Punishment and Irresistible Impulse as a Defense* (1929) 5 NOTRE DAME LAWYER 188, 195.

146. See *supra* p. 691.

characteristic defect . . . was an impairment of the capacity for . . . 'abstract behavior.'"¹⁴⁷ These discoveries support other like findings of recent psychiatric mental testing.¹⁴⁸ These clinical studies have shown, moreover, that the deterioration in thinking is unrelated to the education of the patient.¹⁴⁹ Other clinical data support the view that in so-called "irresistible impulses," the compulsive acts are symbols of certain obsessions—hence they occur at moments of severe lack of correct "reality-testing."¹⁵⁰ Particularly as regards kleptomania, recent studies have shown that the claim of concomitant unimpaired intelligence is fallacious. Thus a clinician reports on his studies of kleptomaniacs: "One thing is certain. Every patient who has been investigated extensively showed some faults in critical appreciation of the factors of reality."¹⁵¹ It is plain that these recent discoveries are of the utmost significance since they indicate (and give promise of definitely establishing) that the traditional diagnosis that the intelligence remains unimpaired in most psychotics is untenable. Plainly these discoveries implement the M'Naghten Rules, just as they provide an additional ground for exclusion of the "irresistible impulse" theory.

Thus an analysis of the literature on the "irresistible impulse" test discloses prevalent particularistic fallacies. Many, like Judge Somerville, who would adopt that test, quite properly insist that responsibility rests on "free will" (the power of "self-control"; normal inhibitory functions); hence they argue that a volition so diseased that it cannot control impulse excludes the conditions of liability. A strictly analogous position has been advanced by psychiatrists predominantly interested in the instincts and emotions as the sole source of the criteria of abnormal behavior. On the other hand some extreme defenders of the M'Naghten Rules, who see only subterfuge¹⁵² and fantasy in the proposed test, are apt to ignore or minimize the affective and conative sides

147. Bolles and Goldstein, *A Study of the Impairment of "Abstract Behavior" in Schizophrenic Patients* (1938) 12 PSYCHIAT. Q. 65. Commenting on their conclusion, Stoddard states: "Such a defect is a tremendous failure in intelligence!" STODDARD, *THE MEANING OF INTELLIGENCE* (1943) 26.

148. E.g., cf. Vigotsky, *Thought in Schizophrenia* (1934) 31 ARCH. NEURO. & PSYCHIAT. 1063.

149. Boles and Goldstein, *supra* note 147 and see their references at 63-64.

150. Both psychiatrists and judges have neglected "temporary insanity" occurring when the harm was committed. If it be agreed that, however brief the duration of the psychosis, if it covered the time of the act, it should be recognized as a defense, then the condition of the rational functions during that crucial period must be closely examined.

151. Lorand, *Compulsive Stealing* (1940) 1 J. CR. PSYCHOPATH. 247; cf. ". . . compulsion neurosis is an intellectual disease *par excellence*. . . ." Guthell, *The Criminal Complex in Compulsion Neurosis* (1941) 3 J. CR. PSYCHOPATH. 253.

152. "Impulsive insanity is the last refuge of a hopeless defence." Darling, J., in Wright, 7 Cr. App. R. 37 (1911).

of human nature. The former groups rely on untenable faculty psychologies, whereas the latter "solves" the problem by ignoring the facts.

Opposed to these views and avoiding their particularistic fallacies is the theory of the "integration of the self," which has been suggested above¹⁵³ and implied in much of the discussion. In terms of this theory, any inter-action with the environment is integrated in the sense that the various functions of the personality coalesce and act as a unit.¹⁵⁴ Although it is useful to distinguish the important "modes" or attributes of such action, the various functions are not actually separate. On the contrary, the affective, the cognitive, and the conative functions, as well as all the others, inter-penetrates one another. Thinking (knowing, understanding) *e.g.*, fuses with tendencies to action and it is permeated also, in varying degrees, by the warmth of the emotions. Inevitably, therefore, serious mental disease impairs all aspects of the psychological organism. Hence it is arbitrary and formalistic to assert that the psychotic's rational functions, including his knowledge of right and wrong, are unimpaired. There is only a certain awareness, a bare calculation, unsupported by the strong pillar of sensitivity that, in normal adults, effects identification with a prospective victim, or stimulates a vivid imaging of other consequences of the intended behavior; in short, the psychotic's conduct is unaccompanied by actual understanding of the moral significance of his action.¹⁵⁵

In the context of this psychology, it is important to clarify certain questions concerning the volitional phases of conduct, especially the nature of action alleged to be irresistibly caused. The relevant psychological problem may be restated thus: we observe certain behavior, but not any mental state. On the basis of such observation as well as of introspection, other experience, the needs of intelligibility, and for purposes that are relevant to the legal rules, we characterize the behavior as voluntary, involuntary or non-voluntary; each of these is given distinctive treatment in the criminal law. For present purposes, we emphasize that voluntary conduct (action) is a movement of the (whole) self in which intelligence has participated,¹⁵⁶ that involuntary conduct involves coercion

153. Beginning with the reference to Aristotle's "unitary" theory of the soul, *supra* pp. 687-688 and especially, p. 691.

The range of the integration theory is very extensive in modern thought. Those phases of it that are immediately relevant to the instant problem include, of course, Gestalt Psychology—see A SOURCE BOOK OF GESTALT PSYCHOLOGY (Ellis Ed. 1938), and the works of Sherrington, Child and Lashley; see GOLDSTEIN, *THE ORGANISM* (1939). Of special interest, also, is Commins, *Some Early Holistic Psychologists* (1932) 29 J. OF PHILOS. 208.

154. For a brief statement, see Glueck, *supra* note 106, at 167.

155. See Zilboorg's excellent discussion, *supra* note 14, at 552-553.

156. "The term 'will' has come to stand for the sum total of processes which operate within the individual in reaching a decision or making a choice." SKAGGS, *THE MAJOR FORMS OF INHIBITION IN MAN* (1931) 85.

and is a "mixed act," whereas non-voluntary behavior denotes movement caused solely by physical force. Considerable uncertainty regarding the theory of "irresistible impulse" has resulted from confusing conduct relevant to it with non-voluntary behavior. It is essential that the two be distinguished if the meaning of the legal rules is to be understood. Non-voluntary behavior is seen in simple reflex action—the knee-jerk, shutting the eyelids on any contact, the functioning of the salivary glands and the like; it is more frequently noted in legal cases with reference to facts showing that the defendant's body was used as a physical instrument by another, who, *e.g.*, pushed him against someone—here the common language of law and ethics is that the defendant has not "acted" at all.¹⁵⁷ Clearly the movements alleged to represent "irresistible impulses" (*e.g.*, kleptomania) are not non-volitional. They are not automatic responses referable to simple, fixed patterns of behavior. Instead, the diagnoses are in terms of emotional disturbance, lack of moral attitudes, disassociation of the affective and rational functions, and the like. Nor is conduct under "irresistible impulse" an internal counterpart of external physical force, as, *e.g.*, certain cases of epileptic seizure. The theory is, on the contrary, that the volition functions but does so abnormally—due to a disease of the inhibitory apparatus, alone. But if the integration theory is valid, the correct inference is the concomitant, severe impairment of the intelligence.

The integration theory is strongly affirmed by psychiatrist-critics of the present Rules,¹⁵⁸ and this presents a very curious situation. For the psychological hypothesis that is the foundation of the "irresistible impulse" test cannot be maintained simultaneously with the theory of "the integration of the self." The latter implies that there can be no variation in any essential element without effecting a major change in the system. Only if persons "irresistibly impelled" to certain conduct remained "normal" could it be contended that "irresistible impulse" was consistent with the integration theory. But the claim is precisely the opposite; these persons are diagnosed as psychotic. The error consists not in the recognition of disintegration (or disassociation) in psychotics but in the contention that the pathology does not affect the total system. On the premise of integrated personality, this contention is clearly fallacious. Actually the proponents of "irresistible impulse" forget their general acceptance of the integration theory when penal responsibility is

157. These cases and the above conceptions have been discussed at length in the writer's forthcoming article, *Necessity and Coercion in the Criminal Law*.

158. *E.g.*, Overholser, *The Role of Psychiatry in the Administration of Criminal Justice*, (1925) 93 J. A. M. A. 831. Zilboorg gives an excellent interpretation of this viewpoint in his discussion of "knowledge," "understanding" and "defect of reason" in terms that are directly important for the criminal law. Zilboorg, *supra* note 14, at 552-553. So, too, Prideaux, *supra* note 67, at 320-321.

involved, and they then argue on the opposite hypothesis: intelligence, volition, and emotion are hypostatized. This inconsistency is further revealed by comparison of their respective arguments concerning delusion and "irresistible impulse." The usual praise of Erskine's speech in *Hadfield's Case* is tempered by criticism of his adherence to a faculty psychology. There is also, and properly, severe criticism of the M'Naghten Rules on partial insanity and delusions. Here integration of the mind is uniformly opposed to the atomistic psychology originally represented in the Rules. The fallacy of the view that a person is insane in one intellectual function without being, at the same time, generally disordered is uniformly emphasized by psychiatrists. But when the issue is "irresistible impulse," those who would amend the prevailing law by adding this to the M'Naghten Rules as a sufficient alternative test, forget their earlier insistence on integration. Now they insist that many psychotics understand the nature and quality of their conduct fully, that they are sometimes even more sensitive than normal persons regarding ethical principles; yet they were "irresistibly impelled" to commit the harm charged against them. There is no escape from the above dilemma except by consistent application of the psychological theory adopted. That postulating the integration of the self represents, at once, one of the oldest ideas of western civilization and one of the few theories that continues to be widely approved by psychologists generally. The essential, specific consequence, in terms of the instant problem, is that diseased volition does not exist apart from diseased intelligence. This was also the conclusion reached above on the basis of recent mental testing of psychotic persons.

Although impulsive acts cannot, alone, establish mental disease, they may be evidence of it, if supported by facts tending to show such illness, *e.g.*, disordered reasoning (incorrect "abstract behavior"), acceptance of absurd premises, grossly fallacious interpretations of the environment, insensibility to the suffering of close relatives, serious social maladjustment, and the like. This limitation would not work hardship; if the accused is psychotic, a spontaneous harmful act will have been preceded by a long period of mental disease.¹⁵⁹

This sounder psychological theory is far from being unknown in the criminal law, *e.g.*, the traditional handling of sudden, motiveless acts as indicative of disordered intelligence. Among modern writers, this theory was very well stated by Stephen, but his analysis shows hesitation and confusion, resulting from his having been greatly influenced by

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159. "It is rare to see true cases of mental disorder where a crime has been the first evidence of it. In practically every bona fide case there is a history pointing definitely to mental disturbance over a considerable period of time previous to the criminal act." Henderson, *supra* note 15, at 113.

Griesinger and Maudsley; hence he advocated reform of the Rules by the addition, in the disjunctive, of the "irresistible impulse" test.¹⁶⁰ But almost simultaneously, he argued that "the absence of the power of self-control would involve an incapacity of knowing right from wrong. . . . It is as true that a man who cannot control himself does not know the nature of his acts as that a man who does not know the nature of his acts is incapable of self-control."¹⁶¹ Thus he did not press this valuable insight to the point of recognizing that the theory of "irresistible impulse" was definitely inconsistent with it; he merely expressed doubts regarding his proposal to add that test as a sufficient alternative.¹⁶² In an American opinion, written shortly after the publication of Stephen's *History*, Judge Brannon repudiated Stephen's proposed reform but recognized the significance of his discussion of the integration theory.¹⁶³ A number of recent opinions reveal a like understanding. One of the most apt of these was Justice Greer's statement in the appeal of *True*: "What I really told the jury was that the definition of insanity in criminal cases was the one laid down by the judges in *McNaughton's Case*, but that men's minds were not divided into separate compartments, and that if a man's will power was destroyed by mental disease it might well be that the disease would so affect his mental powers as to destroy his power of knowing what he was doing, or of knowing that it was wrong."¹⁶⁴ The importance of this approach to amendment of the Rules has been recognized.¹⁶⁵ In order, however, to understand the problem of reforming the Rules it is necessary to place the theories of the psychiatrist-critics of the law in a more general context, and thus facilitate a valid application of the conclusions reached in the above analysis.

Psychological Determinism and Penal Responsibility

It has been suggested above that the ultimate basis of the criticism of the criminal law by certain psychiatrists is not any established body of empirical knowledge but is, instead, a philosophy whose chief tenet

160. 2 H. C. L. (1883) 148-149.

161. *Id.* at 171. Oppenheimer regarded "Stephen's attempt to read the latter faculty into the term 'knowledge' . . . a hopeless failure." OPPENHEIMER, *op. cit. supra* note 71, at 142, 33. It is thus evident that Oppenheimer misunderstood the integration concept. Stephen nowhere equates "knowledge" with "control," nor does he say that the latter is a form of the former. His argument was that the two powers were integrated, so that one could not be essentially disturbed without impairment of the other.

162. 2 H. C. L. (1883) 149; DIGEST OF THE CRIMINAL LAW (1887) Art. 27.

163. *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982 (1892).

164. *Rex v. True*, 16 Cr. App. R. 164, 167 (1922). Similar views were well expressed in a recent Australian case, *Sodeman v. The King*, 55 C. L. R. 192 (1936) among them, Evatt, J.: "It is quite out of accord with modern research in psychology to assert an absolute gap between cognition and conation." *Id.* at 227. See Barry, *Insanity in the Criminal Law in Australia* (1943) 21 CAN. B. REV. 427, 435, 437.

165. DAVIS AND WILSHIRE, *op. cit. supra* note 69, at 113.

is determinism. As to this, there need not be the slightest conjecture; the writings of these critics speak abundantly to the point: "It [psychiatry] is dominated by a belief in psychological determinism, in other words, by the belief that in the psychological sphere, as well as in the purely physical, whatever takes place can be explained by what went before and out of which it developed."¹⁶⁶ Conforming to this doctrine, another vigorous psychiatrist-critic of the criminal law denies the responsibility of any criminal; he considers any crime a "pathological phenomenon."¹⁶⁷ In elucidation of this position, a distinguished psychiatrist said:

"I cannot do better than to quote Rosanoff to summarize the views held by our American psychiatrists. He states: 'The phenomena of the will like other natural phenomena are subject to natural laws and are determined by antecedents; . . . responsibility, therefore, . . . does not exist scientifically in any case, sane or insane. . . . The scientific point of view presupposes an irrevocable commitment to the concept of determinism in nature, as an article of faith.'" And he adds: ". . . I accepted the view of psychic determinism 'as an article of faith. . . .'" His conclusion is that, "In place of guilt and responsibility, we should have the concept of causal responsibility. . . . The determinist can make no distinction between the killing of a human being through criminal violence or through the toxins of a tubercle bacillus."¹⁶⁸

It is obvious that we here confront a definite philosophy, indeed, that the Positivism of Lombroso and Ferri has been explicitly embraced by these rigorous psychiatrist-critics of the criminal law even more ardently than it was by criminologists in the recent past. It is equally plain that this theory is even less defensible in psychology than it was in sociology.

In considering the theory of psychological determinism, it should be noted, firstly, that its proponents are less consistent in its espousal than in any other phase of their work. Thus, typically, a Committee of the American Psychiatric Association, after asserting that "the psychiatrist cannot, however, make affirmations or denials with respect to metaphysical . . . matters ['responsibility'] concerning which he does not have scientific information," nonetheless proceeded in its very next sentence to define this unknown "metaphysical" term.¹⁶⁹ So, too, a

166. WHITE, *op. cit. supra* note 9, at 27.

167. ZILBOORG, *op. cit. supra* note 26, at 282. Cf. "Man is pre-destined by anthropological, social, and physical causes to violate the law. . . ." Belbey, *Psychoanalysis and Crime* (1943) 4 J. CRIM. PSYCHOPATH. 639, 647.

168. Brill, *Determinism in Psychiatry and Psychoanalysis* (1938) 95 AM. J. PSYCHIAT. 597, 600, 609.

169. "This probably means the capacity to change one's conduct in response to the direction of certain painful associations and the legal notion implies a power of volitional reasoning with respect to a contemplated act and the capacity to withhold from that act when and because it is known to be considered wrong legally and morally." Menninger, *supra* note 48, at 374.

distinguished psychiatrist, quoted above, while advocating the "discarding of the concept of responsibility" as meaningless when he discussed the criminal law,¹⁷⁰ did not hesitate elsewhere to attempt a detailed explanation of its meaning.¹⁷¹ A single specific instance of a typical occurrence illustrates the tangled web of sophistry woven by psychiatrists whose criticism of "responsibility" purports merely to represent a necessary scientific postulate. In a report on Robert Irwin, tried for a triple murder in New York, a Commission of three highly qualified psychiatrists presented their conclusion in language relevant to the rules on penal responsibility, thus indicating, incidentally, that they could understand the legal terminology in its references to psychiatry and could restate it in simple language.¹⁷² This collaboration aroused the ire of one of the vigorous psychiatrist-critics of the law. He criticized his confreres very severely because they had used the language of "judicial casuistry, their criteria are those the letter of the law. . . ."¹⁷³ Then this unrelenting critic of penal responsibility said, "It is obvious that the responsibility is that of the jurist and not of psychiatry; psychiatry cannot share this responsibility. . . . Therefore, in the discharge of his medical . . . duties, the psychiatrist is within his moral and scientific right to disregard the psychiatric excursions of the law. . . ."¹⁷⁴ Thus "responsibility," reduced to a futile, metaphysical archaism when employed in the criminal law, in a sense as old as western civilization, is resurrected and embraced when the critics forget their special pleading!¹⁷⁵ Rather obviously it has never occurred to them to "determine" what determines their Determinism, or to consider whether any significance whatever could be attached to their criticism of the criminal law or, for that matter, to any other problem-solving, if that dogma were consistently maintained.¹⁷⁶

170. White, *supra* note 8, at 504.

171. WHITE, *op. cit. supra* note 9, at 98.

172. "It seems clear to the Commission . . . that Irwin not only knew and understood the physical nature and quality of his acts when he took the lives of his victims, but knew that the acts were forbidden by law and had sufficient intelligence and understanding to know and did know that the murder of a human being was forbidden by accepted standards of human conduct and morality." *Report of Commissioners in Lunacy* (1938) 95 AM. J. PSYCHIAT. 219, 224.

173. Zilboorg, *supra* note 14, at 548.

174. *Id.* at 541.

175. Cf. this same "determinist's" description of the medical profession: ". . . we physicians . . . do not defend . . . a remedy which has outlived its usefulness. We reject it; we substitute it by others; we try new remedies, revive and modify old ones if necessary. We are singularly radical and free. . . . I must admit that we are the freest group in the world. . . ." ZILBOORG, *op. cit. supra* note 26, at 279.

176. Accordingly, if the psychiatrist-critics of the criminal law assert that their chief objective has been to demonstrate the invalidity of the fundamental principles of that law, and especially those concerning responsibility, this may be granted. But it is obvious that these principles represent basal value-judgments, and that, consistently with their own philosophy, these psychiatrists can do no more than assert that they prefer their own "attitudes"—they cannot, on their premises, even attempt to invalidate the ethical principles that support penal responsibility.

The psychiatrist-critics of criminal responsibility are ardent Freudians, and Freud's system, built on biological theories of the past century, purported to be rigorously scientific. The formation of the instinctual drives, the pleasure-pain principle, the conflict between *id* and *super-ego*, repression and sublimation, *etc.* were all conceived as operating in accordance with universal laws of causation. In the recent past many psychiatrists have repudiated the naturalistic dogmas of Freud. As noted above, in analysis of the "right and wrong" test, they disagree especially with the Freudian disparagement and neglect of the moral judgment.¹⁷⁷ Jung was among the first of the psychoanalysts to stress the paramount importance of moral attitudes for any sound psychology.¹⁷⁸ Another critic writes that "Freud's causal interpretation of the analytical situation . . . amounts to a denial of all personal autonomy in favor of the strictest possible determinism, that is to say, to a negation of life itself."¹⁷⁹ A very scholarly psychiatrist censures Freud "for having attempted to swallow up morality in psychotherapy, and for thus coming to maintain that energy and will have no place in the *total* conduct of the normal man."¹⁸⁰ As to Freud's rejection of a "capability of discriminating between good and evil," this distinguished critic emphasizes that "This denial amounts to the destruction of reason. It is inconceivable that one can deny that man, *from the mere fact that he uses his intelligence*, is capable of perceiving that two different types of conduct have a different value."¹⁸¹ The Freudian system, applied uncritically in condemnation of penal responsibility, depreciates rational conduct, partly by stressing the primacy of instinctual drive, partly by admitting only expediency as a conditioner of the *libido*. Such a dogma

177. For a recent presentation of this naturalistic viewpoint, see Schroeder, *Attitude of One Amoral Psychologist* (1944) 31 PSYCHOANAL. REV. 329-333.

178. Jung gives as a specific reason for breaking with Freud, his (Jung's) perception that "behind the confused deceptive intricacies of neurotic phantasies, there stands a *conflict*, which may be best described as a *moral* one." JUNG, ANALYTICAL PSYCHOLOGY (trans. Long 1922) 242.

179. RANK, BEYOND PSYCHOLOGY (1941) 278; *cf. id.* at 34. *Cf.* "As a matter of fact, when he calls psychoanalysis a re-education Freud contradicts his own ideal, succumbing to the illusion that education is conceivable without at least implicit moral measuring rods and goals." HORNEY, NEW WAYS IN PSYCHOANALYSIS (1939) 297; *cf. id.* at 10-11, 237, 292-293.

180. 2 DALBIEZ, PSYCHOANALYTICAL METHOD AND THE DOCTRINE OF FREUD (1941) 265. And he adds, ". . . we may search in vain for the will in the picture of the psychism which he has sketched for us. . . . [yet] The end of treatment is the return to normality, to the possibility of using the will." *Id.* at 295.

181. *Id.* at 301. So, too, KARDINER, THE INDIVIDUAL AND HIS SOCIETY (1939) 407; ALLERS, THE SUCCESSFUL ERROR (1940) 111-112; and note the remarks by Schilder, Altschuler, and Alexander in reply to Brill's exposition of determinism, *supra* note 168, at 617-619.

A recent biographer of Freud reports that he had a very high appreciation of moral values, but that they were "self-evident"; that man also had instinctual drives was what needed telling. WAELDER, THE LIVING THOUGHTS OF FREUD (1941) 16-18. Such a gap between the man and the scholar's publications is not uncommon; in the present instance this merely re-enforces the above criticism.

is not only incompatible with the enduring truths embodied in the M'Naghten Rules; it is also inconsistent with the implications of the vast structure of science and the theories of the psychoanalysts, themselves.¹⁸²

Although Freud insisted on absolute conformity to the "scientific outlook on the world"¹⁸³ and expressed "sharpest opposition" to the "illusion of psychic freedom,"¹⁸⁴ he realized, as many of his followers have failed to appreciate, that scientific explanation broke down even in diagnosis. "So long," he wrote, "as we trace the development from its final stage backwards, the connection appears continuous. . . . But if we proceed the reverse way, if we start from the premises inferred from the analysis and try to follow these up to the final result, then we no longer get the impression of an inevitable sequence of events that could not be otherwise determined. We notice at once that there might have been another result. . . ."¹⁸⁵ This presents the precise question of fact upon which legal responsibility turns; the jury is compelled to face this very question of the condition of the defendant at the time he committed the harm. They must view the problem neither as historians, tracing a chronology between given points nor as analysts interested in the step-by-step process from a given maladjustment to various preceding events, viewed as causes; the judge and jury must look forward from a point immediately preceding the commission of the act, and decide, as best they can, those factual questions that are relevant to the adjudication. Such an appraisal, however informed by case histories, always involves the tenable assumption that, for normal persons, the commission of a harm was not unavoidable. Certainly errors are committed in the determination of these questions, but the same difficulties limit the validity of psychoanalytic therapy. It is the disparity between the psychiatrist-critics' tolerance of vast uncertainty in psychiatry and their simultaneous assumption that "the law" can, nonetheless, become quite certain, that is unfortunate.

It is when they concern themselves with punishment that the psychiatrist-critics of the law disclose their philosophical predilections most definitely. Here the claim of scientific indifference to justice¹⁸⁶ is forgotten, and the psychiatrist of this persuasion sallies forth as the most confident and aggressive of contemporary social positivists. The slogans are the familiar ones: The criminal law represents "vengeance [which]

182. Freud himself wrote: "The voice of the intellect is a soft one, but it does not rest until it has gained a hearing." FREUD, *THE FUTURE OF AN ILLUSION* (1928) 93. See, also Alexander's article, entitled "*The Voice of the Intellect is Soft . . .*," (1941) 28 *PSYCHOANAL. REV.* 12.

183. *INTRODUCTORY LECTURES ON PSYCHOANALYSIS* (1920) 38.

184. *Id.* at 37-38.

185. Quoted in 2 DALBIEZ, *op. cit. supra* note 180, at 299-300.

186. ". . . the psychiatrist is not in the least interested in justice, and perhaps even doubts its existence. . . ." Menninger, *supra* note 48, at 372.

still functions but under a disguise, namely the disguise of deterrence. . . .¹⁸⁷ All crime is a "pathological phenomenon";¹⁸⁸ hence "the time will come when stealing or murder will be thought of as a symptom, indicating the presence of a disease. . . ."¹⁸⁹ An obvious corollary is that "all moral issues should be discharged from consideration . . . anti-social conduct should be considered as dispassionately as a broken leg. . . ."¹⁹⁰ Lombroso is hailed for his "epoch-making work," especially for his substitution of "social defense" for punishment.¹⁹¹ "Dangerousness" must replace "the vague concept of the magnitude of the guilt" and it "alone should be the standard for the kind, and duration of the treatment."¹⁹²

This theory of punishment has been analyzed elsewhere by the writer.¹⁹³ In the present context, it should be added, firstly, that the above positivistic theory of "treatment" does not represent the views of psychiatrists who have had experience in the administration of the criminal law.¹⁹⁴ Of greater interest from a theoretical viewpoint is that psychoanalysis has shown rather persuasively that punishment is necessary for the "public sense of justice," *i.e.*, to preserve the delicate balance between instinctual drive and the *super-ego*.¹⁹⁵ This supports the theory that punishment reinforces the moral attitudes, as well as Stephen's insight into the function of the criminal law as a salutary channel of ret-

187. White, *supra* note 8, at 502.

188. ZILBOORG, *op. cit. supra* note 26, at 282.

189. Menninger, *supra* note 48, at 373.

Cf. "Leaving to one side such uninformed judgments as those proclaiming that all criminals are insane or feeble-minded, or that criminality is a diseased condition of the human character, or that the criminal is a psychopath whose dominant passion is to commit a crime, it has been found that some of those who commit crimes are mentally disordered." Lowrey, in *supra* note 65, at 805.

190. White, *supra* note 8, at 503.

191. Overholser, *supra* note 158, at 830, 834.

192. Brill, *supra* note 168, at 609-610.

193. *E.g.*, *Nulla Poena Sine Lege* (1937) 47 YALE L. J. 165, 182-185; *Criminal Attempt* (1940) 49 YALE L. J. 789, at 828-831; and *Criminology* in 20TH CENTURY SOCIOLOGY (Gurvitch and Moore eds. 1945). In these discussions, it was emphasized that: it is fallacious and unreal to deal with "justice," "deterrence," and "rehabilitation" as mutually exclusive objectives of the criminal law of advanced systems; but if distinctions are made for purposes of analysis, then justice is plainly the paramount objective. Deterrence, alone, is barbarism—it would punish the insane in complete disregard of their being grievously ill—as Bramwell admitted ("I am not aware of any justice in this matter *ultra expediency*." Quoted by Davies, *supra* note 130, at 151). Treatment designed solely to reform is also unjust if the innocent are not excluded, if it frees those who have committed major crimes or if it incarcerates for long periods those who have repeatedly committed only petty transgressions. It also involves the untenable assumption that adequate empirical knowledge is available to rehabilitate or, even, to recognize with assurance those who can and those who cannot be reformed.

194. Campbell, *Crime and Punishment from the Point of View of the Psychopathologist* (1928) 19 J. CR. L. AND CRIM. 244, 251.

195. ALEXANDER AND STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* (1931) 210-221.

ributive emotion. From the viewpoint of a theory of just punishment such arguments are inadequate; but the psychiatrist-critics of the law are hardly among those able to defend their position on such grounds. Hence they should explain how they are able to manage simultaneously both (a) the theory that punishment is needed to maintain the public "sense of justice," and (b) the theory that criminal behavior is always pathological, hence any punishment is merely vengeance.¹⁹⁶ Moreover, in appraising the arguments of psychoanalysts regarding treatment of offenders, it can hardly be overlooked that psychoanalysis has been conspicuously weakest in its therapy.¹⁹⁷ Its limitations as a practical adjunct to the administration of the criminal law have been established.¹⁹⁸ Psychiatrists experienced in criminal law administration have long recognized the very restricted utility of psychotherapy in actual practice.¹⁹⁹

If an adequate theory of punishment is to be established, the imperious need is to understand the complexity of the criminal law and its administration, where norms of justice coalesce with the objective of deterrence and an unremitting search for rehabilitation. The notion that it is possible to administer medical and psychological treatment without, at the same time, applying punishment would disappear on any acquaintance with even the best asylums for mentally diseased offenders—confinement and close supervision are punitive regardless of the attitude of the attendants.²⁰⁰ Just as treatment is to some extent punitive, so punishment, if wisely administered, also rehabilitates. This perspective does not simplify the problems of criminal law administration, but it does aid sound solution of them. Once the complexity of modern penal law and its administration is recognized, it becomes possible to criticize any present defect in that law more pointedly. So, too, with the elimination of formalistic interpretations of reform, much of the present

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196. It should be added that Alexander's position is much more defensible than is that of the psychiatrists discussed above—e.g., he recognizes a large class of "normal criminals" and the propriety of punishing them. See *id.* at 209.

197. Cf. Myerson, *Error in Psychiatry* in *THE STORY OF HUMAN ERROR* (ed. Jastrow 1936) 412; cf. Kessel and Hyman, *The Value of Psychoanalysis as a Therapeutic Procedure* (1933) 101 J. A. M. A. 1612.

198. Professor Dession quite properly stresses the inadequacy of facilities to implement the reforms advanced by psychiatrists and his discussion also clarifies the distinctions between psychiatric functions and social and legal policies. Dession, *Psychiatry and the Conditioning of Criminal Justice* (1938) 47 YALE L. J. 319; cf. "But psychoanalytical treatment demands months, sometimes even years." Freud, *Basic Concepts of Psychoanalysis*, in WAELDER, *THE LIVING THOUGHTS OF FREUD* (1941) 41.

199. "Psychotherapy is, and is likely to remain, a specialised method of treatment usefully applied to but a comparatively small number of disorders." East and Hubert, *Report on Psychological Treatment and Crime* (1938) quoted in (1939) 103 J. F. 280, 296.

200. Cf. CLECKLEY, *THE MASK OF SANITY* (1941) 285.

agitation, even regarding "irresistible impulse," would become insignificant. For, in the philosophy of just punishment, the influence of strong temptation, neurotic constitution, and unfortunate environment are potent reasons for considerable mitigation of punishment. The probability is, therefore, that many desirable reforms, now delayed because they are coupled with fallacious theories that challenge the very foundations of criminal responsibility, could be achieved in large measure if they conformed to basic legal principles.

Conclusion

The correct avenue to reform is not by way of repudiation of the M'Naghten Rules, nor by the addition, as a sufficient alternative to them, of an "irresistible impulse" test. It is assuredly not to be found in an assault on the basic values embodied in and implemented by the criminal law, nor by a formalistic pseudo-humanitarian plea to substitute "treatment" for punishment and, along with the abolition of the latter, to remove the protection which any individual now derives from the legal limitations on what officials can do to him. A sound grasp of what cannot or should not be attempted carries definite implications for, and aids to, the achievement of valid reforms.

The major, relevant conclusion of the above analysis is that the M'Naghten Rules are sound and essential principles of penal responsibility. This is an implication of the theory of the integration of the self; so long as that theory stands, the only possible criticism of the Rules is that, though valid and necessary, they are not sufficient. Indeed, it is also implied in that psychological theory, that the M'Naghten Rules are defective in lacking any reference to the emotional and volitional aspects of conduct. This has long been recognized. The Rules should therefore be amended to include explicitly what is now stated in instructions—but only inadequately and occasionally by informed judges.²⁰¹ The amended Rules should include the present tests, but these should be in significant juxtaposition to a simple description of the integration of the various functions of the personality. Such amended Rules would continue the present emphasis on irrationality as the principal criterion of insanity, but the formulation suggested above, implemented by an informed administration of the law, would provide a new interpretation of that criterion, which would probably be approved by most psychiatrists.²⁰² Thus, no more than do the present Rules, would the amended ones refer to all the facts that are important in the diagnosis

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201. See *supra* p. 710.

202. "Irrationality is still accepted as a criterion of severe mental illness. . . ." Zilboorg, *The Sense of Reality* (1941) 10 *PSYCHOANAL. Q.* 183, 184.

of psychoses—*e.g.*, they would obviously exclude those concerning the origins or causes of such mental disease. Nor would they comprise a general description of it—although data concerning all of these matters might, of course, be relevant to the determination of questions regarding the criteria of insanity that are included in the Rules because they refer to facts that are of direct, legal significance.

It is apparent that an adequate administration of such an amended Rule depends on the efficient collaboration of lawyers and psychiatrists. To effect such cooperation, certain doctrines need correction—those urging the substitution of the axioms of psychiatry for basic principles of criminal law have been stressed. On the other hand, however, proponents of the prevailing Rules have sometimes argued that “responsibility” is solely a legal principle, and that psychiatrists are therefore incompetent to contribute to its sound determination. Responsibility, meaning liability to punishment provided by law, is indeed, a legal-ethical question; but it also and equally involves certain questions of fact—especially the absence of serious mental disease. In the determination of this question of fact, psychiatry is of the utmost importance. For the Rules are meaningful only when related to facts, and they are adequate and well administered only when the best available knowledge is employed to explain the facts. The contributions of psychiatry to criminal law are now considerable; they could be greatly increased by an understanding of the distinctive functions of each discipline. No wiser steps can be taken in the required direction than those suggested by an awareness of the limitations of each field. Thus, while doctrinaire psychoanalysis ignores autonomous action entirely, the history of the criminal law reveals an over-reliance on “freedom of the will” and an indifference to important limiting conditions, both organic and environmental. If many psychoanalysts recognize only egoistic adaptations to instinctual drives, it is true, also, that judges neglect the enormous influence of the irrational in human behavior. Psychiatry can reveal a wealth of detail regarding the development of the defendant’s psychic constitution, the coordination or imbalance of his various functions, the tensions and conflicts manifested in his conduct. It can disclose segments of motivation and feeling, of which the accused was unconscious—facts that lawyers are unable to discover. At the same time, it should not be forgotten that, as regards penal responsibility, the obligation to discover the best available knowledge, to appraise it carefully with reference to the solution of the relevant legal problems and to use it correctly to that end does not rest ultimately on the psychiatrist. Here again, in sum, the wise injunction is to keep the expert “on tap, but not on top.” When this is done, there is no incompatibility between the basic principles of the law on penal responsibility and a maximum utilization of psychiatry or any other empirical knowledge.