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MENTAL DISEASE AND CRIMINAL RESPONSIBILITY— M'NAGHTEN VERSUS DURHAM AND THE AMERICAN LAW INSTITUTE'S TENTATIVE DRAFT

JEROME HALL†

Editorial Note

On April 5, 1957 a Conference Panel discussion on Mental Disease and Criminal Responsibility was held at the Harvard Law School during the annual meeting of the First and Second Circuits of the American Law Student Association. The participants were Professor Abram J. Chayes, Harvard, who had assisted in the preparation of the *Durham* opinion and who presented that view; Professor Herbert Wechsler, Columbia, Chief Reporter of the American Law Institute's Model Penal Code, who presented that view; and Professor Jerome Hall, Indiana, who presented the *M'Naghten* view. Professor Louis L. Jaffe, Harvard, presided. Unfortunately, Professor Chayes' and Professor Wechsler's discussions were not available for publication. The following is Professor Hall's discussion, prepared from a tape recording at the Conference. Excerpts from the *Durham* decision and the American Law Institute's Tentative Draft are included after Professor Hall's introductory remarks and he has added some footnotes to clarify the context of his discussion.

I.

Professor Hall's Opening Statement

The problem of criminal responsibility makes sense only if human responsibility makes sense. If there is any point in talking about the responsibility of a normal person, then there is point in the issues we discuss in criminal law. Thus our problem is an aspect of the central question in any human being's life, his stand *vis à vis* the world, especially whether moral obligation, freedom and responsibility have meaning for him. For many reasons and because of major changes in certain cultural currents which I cannot elaborate here, we face a mounting wave of irrationalism which threatens to put out the spark of human understanding or so depreciate it that the age-old conception, at least in the western world, of man as a rational free being would disappear, and new ideas of human nature and new implications for criminal law and much else would prevail.

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The growing cult of irresponsibility is an aspect of the current irrationalism. It finds expression in the "irresistible impulse" test and its recent reformulations which say substantially the same thing in terms of inability to conform to the law or to control one's conduct. This, I think, is the bond between my able opponents, so that while they may appear to have some differences among themselves, I believe the discussion will reveal that actually they stand on common ground in representing an extreme wing of modern psychiatry's case for irrationalism and the consequences that would follow from its adoption in our law.

There are, accordingly, at least three points to bear in mind throughout this discussion. First of all, please do not lose sight of the fact that the *M'Naghten Rule* is the rule of reason. It is stated, as you know, in two formulas and some of its critics would like to make a small thing or a technical thing out of it. But if you examine these formulas without bias, what do they say? One, that a test of insanity, *i.e.* psychosis, is—does the defendant have the competence to understand ordinary everyday things and actions and the ordinary consequences of these actions? This is what psychiatrists talk about in terms of "the reality principle." And the other wing of *M'Naghten* asks, does he have the competence to understand ordinary valuations which, in the criminal law, means, *e.g.* does he know that it is wrong to bash in somebody's head or to kill a human being? These are the simple formulations of the *M'Naghten Rule*. It was not an invention, as specious historians have said, of the legal mind of 115 years ago. Instead, it has persisted from the Middle Ages and the Ancient Greeks and it can be traced to the very dawn of civilization, during all of which time it was recognized that what distinguished men from other animals was human intelligence. Some of the experts prefer to talk in terms of "the reality principle" and other technical words. The plain *M'Naghten Rule* states the case in language that jurors and other laymen can understand, and that justifies its phraseology, even if it annoys some psychiatrists. As I have said, it is the test of reason. To be insane, to be psychotic, means to be irrational.

The second point that I think we must hold on to is the relationship between intelligence and the control of conduct. If we look about us and visualize the magnificent structures of science and legal systems and ethics, we attribute these great achievements to man's capacity for thought, to human understanding. Can we then allow psychiatrists or any other specialists to persuade us that human understanding has no effective relationship to the commission of the serious harms that are the concern of criminal law? It seems to me that we should ask for evidence and a great deal of evidence before we accept the irrationalism that one's

reason may be unimpaired and that nonetheless it exercises no control over such conduct. That is the simplest reduction of this extremely important issue.

I should like at this time to state a general qualification on what is said here. In a debate, one sometimes defends a more or less exaggerated version of his position, depending, of course, upon one's adversaries to do likewise by their views. Let me therefore say emphatically, since time won't allow me to develop this, that I believe psychiatry can make an important contribution to law. But what that contribution is, beyond its present service within the limits of *M'Naghten*—how it can be further used without destroying vital values which our legal system protects—has not yet been discovered and shown, at least to my satisfaction. We must, of course, press forward for justice to the individual and use all the knowledge that will help us to do a better job by the individual.

The plain fact, however, ladies and gentlemen (and this concerns my third point) is that man's tragedy is his ignorance and his impotence. We cry to high heaven for help, or we imagine that some men have the answers. But alas, there is no escape from many of the worst ailments that plague human beings. There is cancer and there are the psychoses, and no one can tell us what causes them or what will cure them and poor man must go on bearing the brunt of this. While we strive to alleviate our condition we must try to be brave enough and honest enough to recognize the limitations of human knowledge and human power. Otherwise, we indulge in wishful thinking or utopia or we surrender to the technologist, the psychiatrist or other would-be rulers who, by their own admissions, know nothing about values, decencies or moral responsibilities.

Now, my disadvantage in this debate, as I anticipate its unfolding, is that while my opponents know the answers, that is, they know there is substantial knowledge in psychiatry concerning "irresistible impulse," and I don't doubt that they will point to it, I am only a Hoosier schoolmaster. Although I have studied very hard for many years I do not know any such validated or verified psychiatric knowledge. Indeed, I do not know of any basic psychiatric truths which all psychiatrists accept. I am not alone in this, and in my later discussion I will say something more about it. But now, to conclude the preliminaries of getting this discussion started. My opponents, I suggest, should frankly tell us whether they are opposed to the rule of reason, whether they think it is a myth or vestige or some sort of superstition, and that they prefer a new world to come, perhaps that of 1984 or of other experts who exclude all blame and all praise from a mechanized world. Let them say that frankly and defend their position here. If they give lip-service to

the rule of reason but, in fact, want to junk the *M'Naghten Rule*, if they tell you, oh, no, they want to preserve that but they want "irresistible impulse" too, isn't it fair then that we should ask them certain questions? How do you reconcile these matters, gentlemen? What are the established truths of psychiatry? And how do you reconcile the psychiatry you accept with the rule of reason represented in *M'Naghten*?¹

II.

PROFESSOR CHAYES then criticized the *M'Naghten Rule* and discussed the *Durham Rule*. The following excerpts from *Durham v. United States* are relevant.

"By its misleading emphasis on the cognitive, the right-wrong test requires court and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility.

"The fundamental objection to the right-wrong test, however, is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation, but that it is made to rest upon *any* particular symptom. In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role, not merely one for which they have no special competence. As the Royal Commission emphasizes, it is dangerous 'to abstract particular mental faculties, and to lay it down that unless these particular faculties are destroyed or gravely impaired, an accused person, whatever the nature of his mental disease, must be held to be criminally responsible . . .' In this field of law as in others, the fact finder should be free to consider all information advanced by relevant scientific disciplines . . .

"Although the Smith case did not abandon the right-wrong test, it did liberate the fact finder from exclusive reliance upon that discredited criterion by allowing the jury to inquire also whether the accused suffered from an undefined 'diseased mental condition [which] deprive[d] him of the will power to resist the insane impulse . . .' The term 'irresistible impulse,' however, carries the misleading implication that 'diseased mental condition[s]' produce only sudden, momentary or spontaneous inclinations to commit unlawful acts. . . .

"We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic reali-

1. For a fuller discussion of the entire problem of mental disease and criminal responsibility, with considerable documentation and bibliographies, see the writer's *GENERAL PRINCIPLES OF CRIMINAL LAW*, c. 14 (1947) and his articles on *Psychiatry and Criminal Responsibility*, 65 *YALE L.J.* 761 (1957) reprinted in *HALL, STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* (1958); *Responsibility and Law*, 42 *A.B.A.J.* 917 (1956) and *Psychiatry and the Law*, 38 *IOWA L. REV.* 687 (1953).

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

"The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

"We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."²

PROFESSOR WECHSLER, who spoke next, criticized both the *M'Naghten Rule* and the *Durham Rule*. The following excerpt from the American Law Institute's Tentative Draft is relevant.

"The difficulty with this [*Durham*] formulation inheres in the ambiguity of 'product.' If interpreted to lead to irresponsibility unless the defendant would have engaged in the criminal conduct even if he had not suffered from the disease or defect, it is too broad: an answer that he would have done so can be given very rarely; this is intrinsic to the concept of the singleness of personality and unity of mental processes that psychiatry regards as fundamental. If interpreted to call for a standard of causality less relaxed than but-for cause, there are but two alternatives to be considered: (1) a mode of causality involving total incapacity or (2) a mode of causality which involves substantial incapacity. See Wechsler, *The Criteria of Criminal Responsibility*, 22 U. of Chi. L. Rev. 367 (1955). But if either of these causal concepts is intended, the formulation ought to set it forth.

"The draft also rejects the proposal of the majority of the recent Royal Commission on Capital Punishment, namely, 'to leave to the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible.' REPORT (1953) par. 333, p. 116."³

2. *Durham v. United States*, 214 F.2d 862, at 871-72, 873, 874, 874-75 (D.C. Cir. 1954).

3. The ALI Model Penal Code, Tentative Draft No. 4, 159-60 (April 25, 1955).

PROFESSOR WECHSLER discussed the rule proposed in the American Law Institute's Tentative Draft: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."⁴

III.

Professor Hall's Discussion

I want to take up two or three important issues on the premise, of course, that since all of you are rational persons, you will weigh the evidence and the arguments carefully at your leisure. We have been told that one truth of psychiatry is that psychotics are able to answer questions about what is right and what is wrong. There are, however, some very curious facts about this assertion. On the one hand, if psychotics are able to give more than verbal answers to such questions, they are able to do more than many psychiatrists profess to be able to do. If you will look at the *Report of the Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry*, published in 1954, you will find it stated there that a psychiatrist is not able to answer questions about what is right and what is wrong. But when psychiatrists are agitating for the adoption of the "irresistible impulse" rule it is a different story. Then they report that they asked a psychotic, "did you know it was wrong to bash in that fellow's head or to kill him?" Since the psychotic has heard, *e.g.* in his youth, that that is wrong, he says, "yes, I knew it was wrong." What is such evidence worth in determining his actual understanding? Can this sort of evidence establish the soundness of the "irresistible impulse" notion?

The point I have been laboring⁵ is that to know that an act is immoral is something quite different from knowing how to work an algebraic formula, that feeling and ability to identify are essential in moral knowledge, that the personality, in sum, is integrated. For example, if you walk out of here and see a big burly man beating a child or a woman, you think that is morally wrong while, at the same time, your blood pressure and your temperature rise and you want to do something about it. So it is that understanding a grossly immoral act, knowing it is wrong, is not the same thing as having a merely verbal knowledge of rules of morality.

4. *Id.* Art. 4, 4.01 (1) at 27.

5. See note 1 *supra*.

Now if it is a defect in the *M'Naghten Rules* that they do not permit a wide realistic interpretation of moral knowledge, although I don't think either of these gentlemen has shown that it is and I know no reason to believe, nor have I seen any evidence, that the *M'Naghten Rules* are interpreted differently in England than here, but if that be assumed, then, why not reformulate the *Rules* to retain the test of rationality and also indicate its wider meaning? In Canada they have done that,⁶ and I have suggested that in the *Yale* article, to which Professor Chayes referred,⁷ where I use the words "appreciate" and "realize" instead of "know."⁸ To meet the criticism by indulging in the irrationalism of "irresistible impulse" is to let the baby out with the bath. In other words, granting the validity of all the criticism of the *M'Naghten Rules* expressed by Professors Chayes and Wechsler (although I don't believe the transcripts of evidence and the cases and the actual functioning of the *Rules* will support them) does that warrant *abandonment* of the rule of reason? This is the ultimate question that must be faced, and I shall return to it.

There is another point of disagreement among your present panel. Professor Wechsler claims that the *M'Naghten Rules* require *complete* irrationality⁹ and he points out the absurdity of that by noting that even schizophrenics in hospitals understand some things and know something about what is right and wrong. Of course, they do. But I must emphatically disagree regarding Professor Wechsler's interpretation of the *M'Naghten* test, and if he has the cases to support it, I shall be greatly obliged if he will cite them. As I read the cases, the *Rule* requires serious mental abnormality, *i.e.* "normal" is the central guiding concept and there need only be a serious departure, *i.e.* going beyond mere neurosis. It seems obvious that a person may be psychotic by reference to that standard and still be far from being completely irrational. On the other hand, it is noteworthy that we were told very little about the cognitive faculties

6. Canadian Criminal Code (1954) Section 16.

7. Cited *supra* note 1.

8. "A crime is not committed by anyone who, because of a mental disease, is unable to understand what he is doing and to control his conduct at the time he commits a harm forbidden by criminal law. In deciding this question with reference to the criminal conduct with which a defendant is charged, the trier of the facts should decide (1) whether, because of mental disease, the defendant lacked the capacity to understand the physical nature and consequences of his conduct; and (2) whether, because of such disease, the defendant lacked the capacity to realize that it was morally wrong to commit the harm in question." *Id.* at 781.

9. *Cf.* "In addressing itself to impairment of the cognitive capacity, *M'Naghten* demands that impairment be complete . . . Nothing makes the inquiry into responsibility more unreal for the psychiatrist than limitation of the issue to some ultimate extreme of total incapacity. . . ." ALI Model Penal Code, Tentative Draft No. 4 at 158 (April 25, 1955).

of Professor Chayes' interesting pyromaniac¹⁰ nor were we informed that many psychiatrists believe them and kleptomaniacs to be neurotic,¹¹ not psychotic. If Professor Chayes' pyromaniac was merely neurotic, the Maryland court reached the correct decision. If he was psychotic his intelligence was seriously disordered despite his verbal acknowledgment of remorse and the like.

But I must bring you back for a minute or two to some fundamentals about psychiatry. In the principal lecture to a recent annual meeting of the American Psychiatric Association,¹² Dr. Percival Bailey, a distinguished neuro-surgeon, psychiatrist, and director of the Illinois State Psychopathic Institute, says that after years of studying psychiatry he finds himself in a state of grievous bewilderment. He examined what they do in shock therapy and finds there is nothing in that. Lately, he says, "the crowd" (of psychiatrists) has rushed to use a new series of drugs. But that has had no appreciable effect which a scientific doctor can discover. He says that psychiatry is "largely a matter of faith" and he states that many of Freud's speculations, including the theory of dreams, have been "severely battered." He says the attempts to prove that psychiatry is a science have not convinced him and have convinced very few careful observers. And he tells about being at a neurological meeting where they were trying to be scientific and one of the country's leading psychiatrists walked in, and, after listening for three or four minutes, said, "Oh, Bailey, I'm sick of this deadhouse stuff. I wish a pretty woman would come in and tell a dream." Perhaps the psychiatrists have a point there, ladies and gentlemen, but is it a scientific one? I could go on and on regarding the state of psychiatry and referring you to many other competent critics,¹³ but let me add only a final reference to Dr. Bailey's criticism. He says Freud completely ignored all spiritual values, he neglected the social nature of mankind, he neglected disinterested curiosity. He over-emphasized the unconscious as contrasted with G. H. Mead's emphasis on that intelligent conduct which is peculiarly characteristic of the higher forms of life, especially human beings.

10. Professor Chayes reported the case of a pyromaniac who had been repeatedly convicted and had even started a fire in jail. But the problems of treatment and punishment of neurotic offenders must be distinguished from that of criminal responsibility. Nothing in the present criminal law prevents the improvement of peno-correctional institutions and the writer has long urged that considerable progress can be made by improving their administration.

11. See, e.g. Davidson, *Irresistible Impulse and Criminal Responsibility*, 1 J. OF FORENSIC SCIENCES 1 (1956).

12. Bailey, *The Great Psychiatric Revolution*, 113 AMER. J. OF PSYCHIATRY 387 (1956).

13. See note 1 *supra*.

This is why I ask myself—if Percival Bailey and many other able experts after much study come to the above conclusions about psychiatry—I ask myself, where does that leave me? Am I to say that I understand psychiatry better than Dr. Bailey and the other expert critics, that they are wrong in their appraisal of the present state of psychiatric knowledge? Am I to swallow the claims of the other side? Or am I to appraise the various positions to the best of my ability from the viewpoint of what seems to me to be common sense and that living psychology which has survived through the ages and is expressed in our law as well as in my own experience? What are we to do as intelligent citizens and what are we to do as lawyers when experts support every imaginable fantastic theory about what is a psychosis? How are we to do our job by the community as custodians of laws that represent reason, experience and social judgment regarding what is a psychotic person? That is the problem we have to face as lawyers, and the psychiatrists are not expert in that. What is their opinion worth when the rule of law is involved, where the values of rule by law rather than by somebody's whim or specialty are the issue? And as regards the argument that since psychiatrists or most psychiatrists have always been and are now opposed to *M'Naghten*, therefore it is fallacious—I am afraid I see no merit at all in that notion. Socrates' opponents who saw nothing in morality except physical force have found eager supporters in all ages and they are well represented in current psychiatry.¹⁴

I should like to make some suggestions for your further thinking in this area in terms of six basic postulates which I hope you will consider carefully. Do you subscribe to them and if you do, what would be the effect upon them of the *Durham* rule and of the "irresistible impulse" proposal of the American Law Institute? The first, I have already touched on—the fact that man is a rational being. Of course, we know he is full of prejudice and emotions of every type, but the question is, is there a significant difference that is of ultimate importance? Second, does freedom of choice make sense? That it does is my second postulate. Third, is the moral responsibility of normal persons. Does that make sense? Fourth, is the rule of law versus totally unlimited authority. This is where I differ sharply from the *Durham* judgment. The issue, of course, is old, starting from Plato's *Statesman*, where he delineates an imaginary philosopher-king who could mete out exact perfect justice for each particular unique person and situation. Then he asks, where shall

14. Only a very small percentage of psychiatrists have ever expressed any opinion on these questions. See Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 762 and accompanying note 6.

we find the philosopher-king? Therefore, he concluded, the rule of law is the best insurance of the best justice we can actually get. Our problem, then, is how to utilize psychiatry and all other knowledge within the rule of law, *e.g.* within the safeguard of maximum sentences, and so on. In the protection of our liberties we need the rule of law. It might be revealing in this connection to ask a would-be psychiatrist-ruler to tell you exactly what he would do with particular human beings, that cannot be achieved under the rule of law.

I emphasize the rule of law because it guards against a human weakness. I find myself sometimes thinking in grandiose terms. I decide what should be done with a person in a particular case, then I defend the wisdom of my decree as a sort of "absolute." But I suggest to you that is an error. If we are to have a jury, if we are to have the quality of adjudication and the understanding that we get in the democratic process, all the while improving that, then we must make our decisions, we must find our position in those terms and on the premise of legality. We may then consider whether a rule of law that grew out of long experience, that grew out of hundreds of years of concentrated thinking, can be modified—perhaps as the Canadians have done and as I have tried to do—to make it easier for psychiatrists to bring their knowledge to bear without at the same time turning the jury loose on an unchartered sea where every opinionated psychiatrist with whimsical notions that there isn't any such thing as a psychosis or that all criminals are psychotic or that some gland or chemical is decisive, may take the stand and hold the jury at his mercy because they have no standard to help them appraise his testimony. Here I concur with Professor Wechsler that the *Durham* rule may turn out to be cruel rather than opening the door to more lenient consideration, but I also think the American Law Institute's proposed "irresistible impulse" rule is equally vague and defective. There is a fifth postulate, namely, the integration of the personality; and the final one is the democratic process with its implication that the expert be on tap, not on top. In the democratic situation you cannot turn over the vital decisions, the policy-making and the adjudication of criminal cases to experts. Why then should any intelligent person say to himself—all of my thinking, all my experience, the burdens, jobs and many tasks I have taken on and been responsible for—all this means nothing and I must defer to the opinion of certain experts?

There is a final point that needs to be made about "irresistible impulse" or the "inability to conform," as it is now phrased. This is a crucial point and I must try to get you to see what is involved here so that you do not accept the assertions of Professor Wechsler that what

the tentative American Law Institute Code does is to adopt the *M'Naghten Rule* and go along with that and, in addition, that it adopts the "irresistible impulse" test, that, in sum, it equals *M'Naghten* and something extra. If that is what the American Law Institute Draft pretends to do, I should like to tell you why I think it only seems to recognize rationality and responsibility in one breath and then actually disavows and disowns them in the next breath.

In the first place, you must keep before you always what the "irresistible impulse" postulates. The postulate and the meaning of "irresistible impulse," including its formulation by the American Law Institute, come to this—a person of normal intelligence, a person who understands what he is doing, who knows that he is committing a grossly immoral act, may nonetheless be unable to keep from doing it. If for an instant you lose sight of that meaning of the "irresistible impulse" test, that it presupposes and affirms normal understanding, then you are irretrievably lost. But if you do keep that in mind, I think you will agree when I suggest that the tentative Institute Code tries to mix oil and water. It presents contradictions and incompatible assumptions, and what must by its terms prevail is irrationalism. The American Law Institute Code does not *add* something to the *M'Naghten Rule*. It *substitutes* "irresistible impulse" in place of that rule of reason. It does not view mental disease from the perspective of control of conduct, but instead, it views control of conduct as unrelated to and wholly independent of intelligence. How can we be expected then to accept the assertion that this actually means approval of *M'Naghten* as far as it goes and merely adding to it? The fact that *M'Naghten* is included in the American Law Institute Code means nothing. What is relevant and meaningful is that the *M'Naghten Rule*, even in its wide, modern sense of genuine understanding of the relevant morality, may be and will be completely ignored. Since the "irresistible impulse" test is a complete, autonomous *alternative*, every defendant can say, "my understanding was normal but nonetheless my ability to control myself was so disordered that I was driven to kill or rape or rob." That is the irrationalism that cannot be accepted.

Let us consider this extremely important issue somewhat further. Although man is integrated and functions as a unit, the "irresistible impulse" test postulates separate faculties, else how could it be said that intelligence is normal and, at the same time, that volition is so disordered as to be a psychosis? It is sometimes argued, "well, since man is integrated and you therefore admit that volition is highly disordered in a psychosis, why do you object to viewing that alone?" One difficulty with that argument is that under the theory of integration, which every-

body accepts, you cannot view any function of the personality apart from its relation to the others without entertaining a fallacy, and one can hardly expect anything good to come from that.

Secondly, if you keep in mind what I have been emphasizing, *i.e.*, that the "irresistible impulse" test postulates normal intelligence, you will see what a terrible thing is asserted. What the proponents of "irresistible impulse" are in effect telling us is that the most distinctive and potent function on earth—human understanding in its full amplitude—can be normal but nonetheless impotent even as regards killing or raping or robbing. That is the thesis they are advancing and do not forget that. It can only mean that intelligence is unrelated to the control of human conduct.

Since the tentative American Law Institute Code permits every defendant to stand on "irresistible impulse" and to ignore *M'Naghten* completely, the Code is worth only what "irresistible impulse" is worth. I submit it must be judged in that light and on that ground; and the fact that it also and inconsistently makes it possible—but only by the defendant's choice—to invoke *M'Naghten* is irrelevant. We would not permit, at least, most of us would not permit, a defendant to plead successfully that he loves his mother or father too much and is therefore insane, or that he indulges in daydreams or his hormones are in imbalance or the chemistry of his blood is peculiar or his glands don't function like most other persons' or he has a violent temper or carbuncles—even though he has a psychiatrist in court who will testify that that condition is insanity. To be insane, *i.e.* psychotic, is not like having scarlet fever or small pox. A social norm and social estimate are involved. Moreover, if there is to be an enduring legal system, the law cannot be stultified by blind acceptance of authority. We should not, as lawyers, discard our knowledge or the distinctive character of our legal process and capitulate to the insistence of experts, however well-motivated they may be. The legal institution is our special responsibility, not theirs.

I cannot therefore understand why legal scholars accept the version of certain psychiatrists who represent extreme dogmatic analysis when there are distinguished psychiatrists who insist that there is no such thing as an "irresistible impulse" to commit a serious harm in the absence of very disordered understanding.¹⁵ Why should a lawyer accept an unproved hypothesis when there is competence and authority of the

15. It seems to be widely recognized by psychiatrists that there are compulsive, *i.e.* "irresistible," impulses to wash hands repeatedly, count windows, etc. The issue of the "irresistible impulse" test, however, concerns the commission of the serious harms where the defense is insanity.

highest order which support a psychiatry that is compatible with the living psychology of the law, thoughtful experience and important values?¹⁶ This is a mystery to me and I should be very much obliged to be enlightened here regarding it. Where is the evidence which supports the "irresistible impulse" notion? Where are the reports of the clinical or other data? Where are the findings, monographs, books or articles, consisting of something other than unsupported assertions and patent contradictions, which lend sufficient weight to that view of human nature to warrant abandonment of the psychology of our law and its rule of reason?

It should be noted, finally, that there is very little, if any, difference between the positions of my opponents. Can anyone make sense out of *Durham* except that, as Professor Chayes has shown, it opens the door to anything and everything?¹⁷ It throws everything into a scrap-bag and bars law entirely. First, they threw reason out and substituted "irresistible impulse." Then they "recalled" *M'Naghten* and avowed they were for morality and all that, but, of course, nothing must limit what any psychiatrist tells the jury, and we must also allow the jurors to believe anything, on the premise that no law can give them any guidance.¹⁸ The American Law Institute Code also adopts the "irresistible impulse" test and the causal connection between conduct and harm is therefore rendered equally vague and fictitious. I see no difference, except a verbal one, between the two positions.¹⁹

16. For citations see note 1 *supra*.

17. The writer has discussed the *Durham* decision in the A.B.A.J. article cited *supra* note 1.

18. The *Durham* decision has not, to the writer's knowledge, been adopted in any other jurisdiction, and it has been rejected in the following cases: *Anderson v. United States*, 237 F.2d 118 (9th Cir. 1956); *Sauer v. United States*, 241 F.2d 604 (9th Cir. 1957); *United States v. Smith*, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954); *People v. Carpenter*, 11 Ill.2d 60, 142 N.E.2d 11 (1957); *Flowers v. State*, 139 N.E.2d 185 (Ind. 1957); *Thomas v. State*, 206 Md. 575, 112 A.2d 913 (1955); *Sollars v. State*, 316 P.2d 917 (Nev. 1957); *State v. Collins*, 314 P.2d 660, 665-68 (Wash. 1957).

19. The American Law Institute Draft rejects the first preference of the majority of the Royal Commission on Capital Punishment 1949-1953 Report (see *supra* p. 216); but the Institute Draft may be compared with the majority's second preference, which was also the minority's first choice, stated in the following:

"The proposal of the British Medical Association (paragraph 264) is that the *M'Naghten* Rules should be enlarged by adding to the existing tests the test whether the accused was labouring, as a result of disease of the mind, under 'a disorder of emotion such that, while appreciating the nature and quality of the act, and that it was wrong, he did not possess sufficient power to prevent himself from committing it' . . . We think that the purport of the Association's formula would be adequately expressed more shortly in the following terms:—

"The jury must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind (or mental deficiency) (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of

There are great issues here, it seems to me, if one considers criminal responsibility in relation to the important postulates I outlined previously. Professor Wechsler states that they have nothing to do with criminal responsibility which is only a practical problem. But there are many ways of thinking about such problems. I hope you will agree with me that far from being technical or practical in a narrow sense, no less than the foundation of our ethics, law and legal methods is deeply involved. Some people say it makes no difference what rules are adopted since the juries decide without being influenced by the instructions. Even if that is true, the crucial differences concern the testimony, the role of experts and, even more, what do the trained and disciplined thinkers of the law, the lawyers and judges, support, and what represents the community's values, thought and experience on these questions of paramount importance? I hope you will carefully consider the full significance of criminal responsibility. It is a large question and we have only scratched the surface.²⁰ Finally, may I say again that I believe psychiatry has much to contribute to law and its administration. But there must be a great deal of study before we can determine what is valid and how to use the insights and discoveries of clinical work effectively without destroying the values represented in our law.

preventing himself from committing it.'” Royal Commission on Capital Punishment #317, pp. 110-11 (1953).

Neither recommendation has received official approval in Britain.

20. See note 1 *supra*.

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