1956

Responsibility and Law: In Defense of the McNaghten Rules

Jerome Hall
Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Criminal Law Commons, and the Law and Psychology Commons

Recommended Citation
https://www.repository.law.indiana.edu/facpub/1438

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
Responsibility and Law:

In Defense of the *McNaghten* Rules

by Jerome Hall • *Professor of Law at Indiana University*

In the September, 1955, issue of the Journal, we carried an article by Solicitor General Simon E. Sobeloff (now a Judge on the Fourth Circuit Court of Appeals) proposing that the traditional legal test for insanity—the *McNaghten* rule—be abolished on the ground that it is obsolete and unscientific. Professor Hall disagrees sharply with Judge Sobeloff arguing that the “right and wrong” test, far from being obsolete, is fundamental in our standards of morality.

In his recent article in this *Journal*, Judge Simon E. Sobeloff reveals a humanitarian concern regarding the issue of insanity under present rules and a commendable desire to adopt reforms in accordance with the progress of science. It is evident, however, that the position taken by the then Solicitor General rests entirely upon the dubious theories of certain psychiatrists who have long been extremely hostile critics of criminal responsibility. The issues thus raised extend far beyond the boundaries of the criminal law—important as those are. In fact, they challenge the very foundation of Anglo-American law.

The *McNaghten* Rules . . .

A Restatement of Old Law

The core of the *McNaghten* rules is that, “to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.”

What are the criticisms of these rules which the extremist psychiatrists, whose theories are accepted by Judge Sobeloff, have vigorously urged? First, the rules are said to be the product of an age of unsound, rationalistic psychology. That psychiatry has contributed much to the knowledge of human nature during the past seventy-five years may be readily granted. But the *McNaghten* rules, far from being a creation of the nineteenth century legal mind, were a restatement of very old law—the novelty being merely the restriction of the test to the particular conduct in issue. The test of rationality expressed in the rules can be traced to the thirteenth century legal treatise by Bracton, and thence ultimately to the ancient Greeks, especially to Aristotle and Plato. When Judge Sobeloff echoes a psychiatrist’s ridicule of an eighteenth century judge’s reference to a “wild beast test” of whether the defendant had normal human intelligence from instinctive animal behavior. The enduring elements in the long tradition, which the *McNaghten* rules preserve, may be briefly indicated. The first wing of the rules, that which concerns knowledge of the nature and quality of the act he was doing, refers to normal functions of perceiving and interpreting ordinary phenomena as a test of normal competence. The emphasis is factual—in his relation to the things and persons about him, does the defendant have the normal capacity to understand their principal characteristics and the consequences of ordinary actions? These rational functions are also dealt with in psychiatry in terms of the “ego” and the “reality principle”, but few systematic studies on the “cognitive functions of the ego have as yet been published. . . .”

3. For a fuller discussion of the issues concerning mental disease, together with documentation and citations supporting the foregoing analysis, see the writer’s *General Principles of Criminal Law*, Chapter 14 (1947), and his articles, *Psychiatry and the Law*, 58 Iowa L. Rev. 687 (1963) and *Psychiatry and Criminal Responsibility*, 45 Yale L. Jour. 761 (1956).
The second half of the McNaghten rules, which concerns the capacity to understand that “he was doing what was wrong”, is also of ancient origin. But throughout history, from Socrates’ opponents to the recent Vienna positivists, sophisticates have opposed the very possibility of sound moral decision, stigmatizing that and all relevant standards as mere pretense, self-deception and sheer “nonsense”. It is possible here only to note, as any reader may verify, that the attack of extremist psychiatrists on the “right and wrong” test reflects that philosophy. In sharp contrast, the work of the most profound thinkers through the ages as well as common sense and the legal order, especially of democratic societies, make very much sense of morality. They affirm and exemplify the validity of thoughtful moral decisions. In sum, what must be held in view is that the McNaghten rules specify normal rational functions regarding certain conduct as a test of serious mental disease—to be insane is to be irrational.

Judge Sobeloff is persuaded that this test of insanity is quite fallacious. He asserts, “This test, known familiarly as the ‘right and wrong’ test, turns on a specified and very limited symptom of insanity, which science no longer deems necessarily or even typically associated with most serious mental disorders.” Elsewhere in his article the Judge confidently asserts that “science”, “scientific facts” and “the latest knowledge of human behavior” have demonstrated the invalidity and irrelevance of the McNaghten rules.

**Science and Psychiatry . . . Psychology of American Law**

Now, we are accustomed in this country to accept and use science. We have the most highly developed technology the world has seen; indeed, the genius of American culture consists largely in a willingness, perhaps zealansusy, to make the maximum use of science. Lawyers and the legal order reflect these national traits. Patent lawyers and many others draw daily upon physics and chemistry. Blood analysis, the identification of fingerprints, ballistics and countless other scientific facts are unhesitatingly relied upon by the courts. It is a very serious matter, indeed, if in trials where life and liberty are at stake, lawyers and judges stupidly cling to unsound archaic notions when scientific knowledge is available.

What then, are these “science”, these “scientific facts” and that “latest knowledge of human behavior” to which Judge Sobeloff has access? His favorable comments on the opinions of certain psychiatrists and his hearty approval of the Durham decision, which relied upon these and other psychiatrists, reveal what he referred to when he used those impressive terms. Of what do the contributions of these psychiatrists consist, and how can they be correctly appraised?

“Science” has definite meaning when applied to such fields as physics and chemistry. It designates certain descriptive propositions or laws (e.g., gases expand directly in proportion to increase in temperature and inversely as to increase in pressure) which (1) generalize beyond all the examined facts, (2) are verified by definite evidence, (3) express a covariation of variables, e.g., as the gas expands, the temperature rises, and (4) are organized into a system so that scientists can manipulate them deductively. Psychiatry is certainly not “science” in this rigorous sense. But, although the meaning of the word need not concern us further, it is important to know enough about the status of psychiatric knowledge to assess pretentious claims and, at the same time, avoid the equal fallacy of dismissing all psychiatry as fiction.

It may be hazarded that a defensible hierarchy of the various branches of knowledge on the basis of widely accepted criteria would probably locate psychiatry far from rigorous science and much closer to the kind of knowledge found in art and history. Moreover, psychiatry is in a formative, uncertain period of development and almost every conceivable theory finds support in respectable psychiatric circles. This is not deprivation of psychiatry by a lawyer. For example, “The best psychiatry is still more of art than of science”; wrote a distinguished psychiatrist. “There are, in fact, many methods, standpoints, views and convictions which are all at war with one another”, states Jung. “Psychopathology is a speculative subject. . . . There is much division of opinion among psychopathologists on basic principles.” A competent practitioner admits “the debatable character of many theories”, while a forthright investigator holds that “no critically minded person practiced in scientific research or in disciplined speculation can accept psychoanalysis . . .” And a psychologist, after a careful study, concludes: “So many and so flagrant have been the unscientific theorizing and practices of psychoanalysts during the past 50 years that many critics of analysis have become quite disillusioned and have begun to see science and analysis as antithetical . . . [O]rthodox analytic theory is itself so formulated that a premium is often set on preconception and prejudice, while objectivity and open-mindedness on the part of analytic interpreters is made most difficult to achieve and retain. . . . Analytic theory has frequently managed to get so far away from factual referents that analysts easily fall into the habit of evolving such clever, complex, and almost fiendishly astute hypotheses that they neglect entirely to look for . . .

5. “When a psychiatrist is forced to adopt the vocabulary of morality and ethics, he is speaking in what to him is a foreign language. . . .,” Sobeloff, op. cit. supra note 1 at 871.
objective data with which to support them. . ."13

Accordingly, even if lawyers were wholly uninitiated into the psychology of human beings, they could hardly be expected to accept all the findings of psychiatry, including the theories which flatly contradict everything lawyers know or believe about human nature. It happens, however, that lawyers are highly trained professional persons whose function in society is precisely to deal with human problems. This profession, which has studied the conduct of human beings in very many situations and accumulated this knowledge in countless records, is now presumed to know so little about commonplace facts of human nature that it is asked to accept the opinions of certain psychiatrists as science, regardless of the conflicts among these experts and the obvious uncertainties in this developing field.

It is hazardous to appraise the competence of one's own profession; and in any case it is preferable to recall the observation of one of our most eminent psychologists that, "dealing as it does mainly with human behavior, the law very likely has more to teach psychology than to learn from it".14 Another distinguished psychologist, after reviewing the principal schools of psychology, including psychiatry and his own position, raised the pertinent question, how are lawyers to choose among them? And he gave some very sound advice—the lawyer should not try to choose among the experts. He should "become his own competent critic on matters of psychological theory. There is no easy way. There are no official guides to lead him through the shifting controversies and to pick out for him just those elements of psychological theory which he can adopt with safety . . ."15

The above criticism does not imply that there is no valid knowledge in psychiatry. Nor does it imply that anyone—lawyer, psychiatrist or layman—can espouse any conceivable psychological theory with as much warrant as any other person may claim for his view of psychology. There is valuable knowledge in psychiatry which, if carefully selected with reference to what is important in law and critically appraised, can be extremely helpful. For example, psychiatry has uncovered hidden recesses in the personality and, even though therapy has lagged far behind diagnosis, psychiatry can reveal much regarding motivation, disguised drives, the actual meaning of surface rationalizations and the emotional conflicts which have influenced the commission of serious harms. Psychiatry can also throw light on the origin and development of abnormal personality; and it can discover many facts which reveal to jurors that a person who seems to be normal, actually thinks, feels and acts very abnormally. This knowledge can be put to excellent use in the administration of the law and in the rehabilitation of offenders.

On the other hand, there is the living psychology of the law, indicated above, which has endured through the ages, modified and deepened by the progress of psychology, but has retained basic insights regarding the principal characteristics of normal and insane behavior. This psychology should be improved in the light of psychiatric and other advances, but no reason or evidence has been adduced to warrant its abandonment, at least as regards knowledge of ordinary mental functions which concern individual responsibility. More specifically, in the light of existing knowledge and experience, lawyers, judges and intelligent laymen cannot be expected to accept the notion that a rational person may be insane. Yet, as will shortly be shown, that is precisely the objective of the extremist criticism of the McNaghten rules.

Responsibility . . .

A Matter of Common Sense

If one considers the meaning of the legal tests of rationality in relation to criminal responsibility it becomes clear that the assault on the McNaghten rules implies much more than the presumption that lawyers are amateurs in the field of human psychology. Ultimately, it is an attack on experience and common sense. It assumes that even the most thoughtful layman's experience with his fellow men and his sensitive insight into the functioning of his own personality in elementary acts for which persons are held responsible, are wholly fallacious.

It is not easy to define "responsibility" in a few words, but its import and role in daily life are recognized by everyone except those who assume special, sometimes necessary, perspectives. We speak of a lawyer's responsibility to his clients, a father's responsibility for the welfare and education of his children, the responsibility to perform one's contracts and other promises, the responsibility of this generation to succeeding ones as regards the conservation of scientific knowledge. . . ."16

(Continued on page 984)

13. Ellis, An Introduction to the Principles of Scientific Psychoanalysis, 41 GENETIC PAT-


In Defense of the McNaghten Rules

Vation of resources and the freedom of future Americans. There is also—need it be added?—the responsibility for murder, rape, robbery and breach of the other simple duties enjoined in criminal law, which any normal youth or adult can easily understand.

The soldier and the policeman on guard in the night as well as daily experience in countless other situations also indicate the central meaning of responsibility and its vital functions in our society. What is this meaning and what have rational mental functions, as stated, e.g., in the McNaghten rules, to do with responsibility?

To be responsible means (1) to be able to recognize and discharge various duties and (2) to be morally censurable for the voluntary breach of those duties and legally liable if their violation is forbidden by law. The criminal law is concerned with the voluntary commission of legally forbidden harms, i.e., with conduct in which intelligence participates. It is therefore concerned to determine whether persons who commit such harms are normal or psychotic, that is, whether they are responsible in the sense of being competent to understand the simple moral duties enjoined by criminal law in the way normal persons understand them. The McNaghten rules provide tested criteria of normal competence—and thus of responsibility.

Only when responsibility is held in view, with its implications of moral obligation and the significant, if limited, capacity of free choice by normal persons, can the meaning and grounds of punishment be grasped. In this context it makes sense to hold that a normal offender should be punished—e.g., because he voluntarily killed a human being. The voluntary commission of a harm is met by an appropriate social response whose meaning necessarily differs from that of rewards for service well done. The punishment of a voluntary harmdoer is thus a rational expression of the community's values. If the ethics of responsibility had no place in this, there would be nothing to mitigate the imposition of any punishment, however severe, that would actually deter convicted and potential offenders regardless of their mental condition.

One does not recognize the full impact of Judge Sobeloff's position upon the psychology and ethics of responsibility until he realizes that it represents not only the rejection of irrationality as an essential element of insanity but also acceptance of the "irresistible impulse" theory as well as the abandonment of the rule of law in the determination of insanity.

In order to understand what is involved in these important issues, it is essential to keep in mind that the "irresistible impulse" test is a complete alternative to the McNaghten rules. It must not be confused with the inability to control conduct which co-exists with and results from disordered intelligence—that is quite within the McNaghten rules. Under the "irresistible impulse" test it is necessary to instruct a jury that even though the defendant knew the nature and consequences of his conduct and also knew that it was morally wrong, nonetheless he must be acquitted if his volition was so diseased that he was "irresistibly impelled" to commit the harm in issue.

The "irresistible impulse" test has been rejected in England and a very large majority of American states, but it is accepted in about ten states and by some federal courts. It is sometimes asserted that there have been no ill effects in the states which recognize the test but, in fact, no study of the operation of the test has been made. Nor is it known to what extent judges and jurors nullify the test or limit its significance by introducing common sense notions of human behavior and the substance of the McNaghten rules. What can be said about the "irresistible impulse" test which is beyond controversy is, that it originated a century or more ago in a very rudimentary psychology which included speculative notions of "moral insanity" and such curiosities as the belief that an unseen ligament might be pressing on the mind. This confirms Dr. Frederic Wertham's statement that "... the conception of irresistible impulse ... is a throwback, to, rather a survival of, the previous 'philosophical psychological' era ... . It forms no part of and finds no support in the modern dynamic psychoanalytic study of mental processes." 19

Since the 1953 Report of the Royal Commission, many, perhaps most, psychiatrists who formerly accepted the formula, "irresistible impulse" test, have decided that those words are improperly restrictive because, as Judge Sobeloff states it, instead of impulsive action, there may be "long and sustained brooding". These psychiatrists now prefer to speak in terms of being "incapable of preventing himself from committing" the act. 20 But this does not in the least imply any abandonment of the "irresistible impulse" test or theory. On the contrary, an examination of the

16. The Judge's assertion that "Only the drooling idiot can be said to have no knowledge of right and wrong ..." (op. cit. page 785) is a wholly incorrect interpretation of the McNaghten rules. The rules require such a serious, substantial departure from the normal to constitute insanity. The standard of "normality", though admittedly vague at the periphery, is employed in law, psychiatry and many other fields as an essential notion. Cf. 2 Stephen, History of the Criminal Law of England 183 (1883).

17. Judge Sobeloff refers to Persons v. State, 81 Ala. 577, 2 So. 854 (1887) as "one of the most rewarding pieces of literature. ..." (op. cit. supra note 1, p. 784). Judge Somervill, who wrote that opinion, held that there may be "insane persons, of a diseased brain, who, while capable of perceiving the difference between right and wrong, are, as matter of fact, so far under the duress of such disease as to destroy the power to choose between right and wrong" (579). Judge Sobeloff's view is also so shown in his complete endorsement of the Durham decision, where it was said: "... In 1929, we ... added the irresistible impulse test. ..." 214 F. 2d 872-873.

18. In some of these states, there are very few recent decisions reported in these are scant. It cannot be said that there is a substantial, well-considered body of law which supports the "irresistible impulse" test.


Lost Evidence

Much evidence is often lost when a transcript is made containing reference to a blackboard sketch which no longer exists.

With the Oravisual Easel you need not wipe out valuable evidence or information presented at a court trial. Just turn the page of your large writing pad to a new clean sheet. You retain the used sheets for further reference. VISUAL AIDS in court trials can help you:

1. Focus and hold attention
2. List facts and statistical data which people can grasp at a glance and then retain as vivid mental impressions
3. Clarify, emphasize and speed understanding

ORAVISUAL EASELS are available in a variety of sizes and styles. All are made of light weight and durable aluminum. Some are portable for easy carrying, while others (equipped with casters and magnetic chalkboards) are designed principally for one-location use.

Write for free 16 page illustrated catalog.

ORAVISUAL CO., INC.
General Office & Factory
Box 609A, St. Petersburg 2, Fla.

STENOTYPE REPORTERS
HARRY UNGARSOHN
Certified Stenotype Reporter and Staff, Notaries Public. Private deposition suite available.
145 Nassau St., N.Y.C.
WORTH 4-7589

Report of the Royal Commission and of relevant cases reveals that dropping the term “impulse” is either a merely verbal change, or that the new formula is so vague as to amount to no rule at all.1 What the new formula actually signifies is that the psychiatrists who take that stand insist on the unlimited application and validity of “irresistible impulse.” They take a bolder sweeping position to the effect that many persons whom they classify as psychotic have normal intelligence. That the Durham decision also went farther and deeper in the direction of the “irresistible impulse” theory is clear from its complete acceptance of the majority’s recommendations in the Report of the Royal Commission.2 This position has been aggressively publicized in this country. Hence, it is not surprising that a number of busy lawyers and judges, and even some scholars, seeking to improve the law, should readily find books and articles which support the incompatibility of the theory with current principles of right and wrong by psychotic persons, that provides no support of assertions that they understand moral obligations in the way normal persons understand them.

This leads to a crucial question—whether the normal personality operates as a unit, as a coalescence of the various functions, how is it possible that an essential phase of it, i.e., volition, can be very seriously diseased while, at the same time, intelligence remains normal? The writer has raised this question many times without receiving an adequate reply.26

In addition to the fact that some of the most distinguished forensic psychiatrists oppose the “irresistible impulse” theory, and apart from the incompatibility of the theory with that of the integration of normal tendencies to take appropriate action are also involved. If disintegration or “dissociation” occurs, the intelligence is no longer normal. Accordingly, when lip service is paid to common principles of right and wrong by psychotic persons, that provides no support of assertions that they understand moral obligations in the way normal persons understand them.

23. For references to the publications of these psychiatrists, consult the citations given in footnote 3 supra; also footnote 24.
26. See 65 Yale L. Jour., 775-776.
A new book by
William H. Kupper, M.D.

WE CAN'T ALL BE SANE!

A critical, witty book about the daily comedy and tragedies of psychiatry.

"In short graphic language—and it is impossible to mistake or misunderstand what he means about anything—he tells how the patient got that way and what at least can be tried to help him."—Long Beach, Calif. Press-Telegram

220 pages
Cloth $3.50 Paper $1.75

THE COLT PRESS

Paterson 3, New Jersey

The Judge not only accepts the enlarged version of the "irresistible impulse" theory which the Durham decision adopted; like that opinion, he also insists that even that is not enough to satisfy "science" and the "latest knowledge of human behavior". He advocates adoption of the "historic" New Hampshire decision of 1869, which was not recognized by any other jurisdiction until 1954 when the District of Columbia, in the Durham case chose it. "We do not insist on a legal formula in diagnosing other diseases; why in this instance? It is a question of fact like any other, to be decided after hearing the explanations of the experts." If the issue concerns the fracture of a bone or whether someone had typhoid, he continues, it would be absurd to specify the symptoms of fractures or typhoid in a legal rule. Insanity is a disease. Is it not absurd to specify its symptoms in a rule of law? And the Judge concludes his appeal for no law by a curious reliance upon a very "historic" New Hampshire decision of 1869, which was not recognized by any other jurisdiction until 1954 when the District of Columbia, in the Durham case chose it. "We do not insist on a legal formula in diagnosing other diseases; why in this instance? It is a question of fact like any other, to be decided after hearing the explanations of the experts." If the issue concerns the fracture of a bone or whether someone had typhoid, it would be absurd to specify the symptoms of fractures or typhoid in a legal rule. Insanity is a disease. Is it not absurd to specify its symptoms in a rule of law? And the Judge concludes his appeal for no law by a curious reliance upon a very questionable jurisprudence. For example, he asserts, without documentation, that "Judges and lawyers boast that there is no definition of fraud... Its very vagueness is said to be a source of strength..." What could be fuzzier than the so-called definition of negligence? The "reasonable man" is but "a chimerical creature" and such standards as "due process", "unfair competition", "cruel and unusual punishment" "are all as capable of expansion and contraction as the subjective judgment of those who interpret them." Hence, he concludes, the sound thing is not to define insanity in any rule of law. That is the Durham holding.

It is submitted, with deference, that the above argument contains some very serious fallacies. Almost every legal system in the world specifies essential elements of insanity in legal rules and does not do so that with reference to other diseases. One reason for this practically universal stipulation of essential criteria of insanity is that, life and liberty depend upon the determination of the existence of this disease. The separation of normal criminals from irresponsible sick persons goes to the root of even primitive legal systems. No such ultimate value is involved in the legal determination of fractures or typhoid.

Second, Judge Sobeloff's distrust of legal rules to aid "the enlightened understanding of the special facts of each case" suggests a preference for unfettered power rather than the sovereignty of law. This impression is strengthened by his skeptical criticism of "due process" and other standards, noted above, despite the fact that numerous cases specify and limit their meaning, and by his disregard of the feasibility of more specific definition in other areas. His opinion is also to be sharply contrasted with that of Justice Devlin, a leading English jurist, who emphatically rejected that same proposal to abandon the McNaghten rules, when it was recommended in Britain by a Royal Commission in

27. Cf. State v. White, 58 N.M. 324, 259, 270 P. 2d 727, 727 (1954): "It impresses me that... they have for all practical purposes embraced the doctrine of 'irresistible [sic] impulse' as a defense in criminal cases" (dissenting opinion).


It is not necessary to insist here that whatever position a psychiatrist or criminologist urged, a lawyer might be expected to place a heavy burden of proof upon those who would abandon the rule of law, especially in the field of criminal liability.

Third, a rule of law specifying the essential elements of insanity is not only important and desirable for the above reasons. It is also warranted on factual grounds because intelligent laymen, rather than psychiatrists, are the best judges of what is normal and what is abnormal conduct, and the legal tests reflect the layman’s experience. That is not true of bone fractures or typhoid which are marginal and brief. But normal mental functioning is daily functioning; and serious mental disease—with the aid, sometimes, of the expert’s description of the defendant’s actual personality—can be recognized in the light of, and by contrast with, daily normal functioning. One should not here confuse identification of the fact of insanity with the psychiatrist’s special methods of discovering it or his expert knowledge of the origin and therapy of it. Nor should one be misled by the vehement criticism of the legal tests by clinical psychiatrists who have rarely studied psychoses in social contexts which are important in law. The functions of law include the social assessment of responsibility for certain conduct, and there is no scientific or other reason which invalidates the definition of serious mental disease (“psychosis”) from that point of view. On the contrary, there are many good reasons to do that.

It is significant in this regard that even the most vehement critics of criminal responsibility do not advocate that the fact-finding of mental disease should be taken from the jury and assigned to experts. But if insanity is so elusive in its essential characteristics that it cannot be recognized by intelligent laymen even after the experts have described it in detail, as manifested in the personality of the defendant, the logical conclusions are to permit only psychiatrists to decide this question and merely inform the court and the community of their disposition of the accused persons. If intelligent lay jurors can do a better job of the necessary fact-finding than the experts, that same lay experience, refined by legal and medical opinion, can stipulate essential criteria of insanity in legal rules.

When the method and guidance of long-established rules of law are abandoned, very serious problems arise. The Durham holding “is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.” And the court added, “We use ‘disease’ in the sense of a condition which is considered capable of either improving or deteriorating.” On the premise that the McNaghten test is not “even typically associated with most serious mental disorders” and in the absence of any other legal test, how is a judge or jury to determine whether a given act was “the product of mental disease”? In Anglo-American law, criminal liability is imposed for the intentional or reckless commission of forbidden harms. In other words, a criminal harm is produced by a defendant if he voluntarily committed it; and voluntary conduct is “the active aspect of intelligence.” Under the Durham holding, with its acceptance of the enlarged version of “irresistible impulse,” it is quite possible, indeed there will be encouragement, to admit the normality of the defendant’s intelligence and nonetheless to defend on the ground of a mental “disease”. In reaching its verdict, the jury is to exclude the normal intelligence of a defendant from its consideration, determine whether the defendant had a mental “disease” (as defined above by the court?) and, finally, decide whether the harm he committed was “the product” (in what sense?) of that “disease”. But if that is the process of fact-finding, what is there, except blind faith in experts (which ones?), to support a finding that there is a causal connection between the act and the “disease”? And, especially when there is a sharp conflict among the experts, on what grounds and in the light of what knowledge will a judge or any other person be able to appraise the validity of any verdict?

The Durham opinion asserts that “The jury’s range of inquiry will not be limited to, but may include... whether an accused . . . did not know the difference between right and wrong... the jury [will] perform its traditional function... to apply ‘our inherited ideas of moral responsibility to individuals prosecuted for crime . . .’ Judges will continue to make moral judgments...” Judge Sobeloff also uses reassuring language: “The right-wrong test is...
not completely abandoned; it is merely dethroned from its exclusive preeminence.\textsuperscript{37} In appraising these assertions, the reader will recall the statement that the McNaghten rules are no longer "even typically associated with most serious mental disorders", the "irresistible impulse" theory in its approved unlimited version, the Judge's reference to the New Hampshire decision, which represents his proposed reform, as "sweeping aside the McNaghten rule".\textsuperscript{38} Other similar statements, and his acceptance of the "scientific" psychiatrist's self-imposed limitations on his testimony, shown, e.g., in the exclusion of "morality and ethics . . . what to him is a foreign language . . ."\textsuperscript{39} The reader may then decide for himself whether the above assurances are worth something or whether they are merely verbal, wholly unwarranted conclusions from premises which point in the very opposite direction.

With reference to the insistence that the present rules exclude important evidence of insanity, it should be noted, first, that not the slightest proof has been adduced to support that claim; on the contrary, it is admitted even by opponents of the rules that the courts interpret them very liberally. Second, in view of the fact that the control of voluntary conduct depends upon normal intelligence, there is no reason under the McNaghten rules to exclude evidence of impulsive or other irrational behavior. Third, while the view that a normal personality functions as a unit implies that evidence of disordered volition as well as of disordered intelligence should be admitted, it is inconsistent to advocate the inclusive admission of evidence regarding all the principal phases of personality and, at the same time, accept the "irresistible impulse" theory in any of its formulations.

If the purpose of the Durham decision was to admit all evidence and all theories of insanity, it should not have approved the "irresistible impulse" test. It should have adopted, instead, a neutral position—that some psychiatrists hold thus and so while others are opposed and hold this and that; hence, admit everything and leave the entire question to the jury without any authorized instruction. That, however, while avoiding the confusion of the Durham decision, would represent not only the abandonment of law but also a confession of complete ignorance and the utter repudiation of the knowledge and experience of lawyers, judges and intelligent laymen as well as of the position of distinguished forensic psychiatrists whose work is compatible with legal values and methods. Actually, as Professor Robinson pointed out, there is no defensible escape from the task of deciding what is sound psychiatry with reference to legal problems and objectives.

**Beyond Durham . . . A Tyranny of Experts?**

The title of Judge Sobeloff's article includes the words "From McNaghten to Durham, and Beyond", which suggests that other changes in that direction are to follow. In terms of the Western tradition, the alternative to and aftermath of the abandonment of law is tyranny; and the history of criminal law in recent and current dictatorships, with their typical espousal of "science", does not encourage the concentration of power over life and liberty in the hands of psychiatrists.\textsuperscript{40} The Judge's discussion of what lies beyond Durham reveals a strong preference for rehabilitation and serious doubts regarding punishment. Presumably, most thoughtful persons prefer corrective methods over merely punitive ones. But such a general disposition or preference does not aid solution of the specific complex problems arising from the various objectives of criminal law. Besides, everything depends on the primary questions, who is to decide whether the accused is normal or psychotic and by what methods shall that be determined? Intelligent fact-finding, guided and limited by the rule of law and the advice of experts, not the unfettered power of the latter, is the tried, humanitarian method of securing the best results.

If no rule of law specifies essential criteria of insanity, the door is thrown wide open to serious abuse. There may be nothing then to restrain an expert, e.g., where community feeling is aroused or a powerful complainant is interested, from testifying, or to keep a jury from being led to believe, that a definitely psychotic defendant is sane.\textsuperscript{41} Nor is it a disservice to the many conscientious psychiatrists who testify in court to recall Professor Edmund Morgan's observation that "In litigation involving . . . alleged mental irresponsibility and the like, the medical expert has become a stench in the nostrils of upright judges . . ."\textsuperscript{42} If, more often, the abandonment of legal tests would facilitate the acquittal of normal serious offenders, that would undermine the legal order, which cannot retain the influence necessary to protect the innocent if it is impotent to cope with major, normal criminals.

\textsuperscript{37} Op. cit. 796.
\textsuperscript{38} Op. cit. 794.
\textsuperscript{39} Op. cit. 877.
\textsuperscript{40} See Dr. Wertham's article, Psychoauthoritarianism and the Law, 22 U. Cin. L. Rev. 336 (1953).
\textsuperscript{41} See Note, 30 Ind. L.J. 184, 204 note 59 (1955).
\textsuperscript{42} Morgan, Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence, 10 U. Cin. L. Rev. 292-293 (1941).
it is safe to predict that the abandonment of legal tests in other areas would encourage attempts to acquire the property of alleged "incompetents" through the nefarious use of psychiatric testimony.43

Accordingly, although the writer endorses Judge Sobeloff's suggestion that "Means must be found to bring the legal and medical professions together on common ground", it is clear that some of the proposed means cannot lead to that goal. Certainly, there is no reason why, when a lawyer turns to a field like psychiatry, he should abandon his knowledge and critical faculties and assume that everything there is science. Nor is it necessary to jettison the rule and method of law in order to make use of psychiatry. There are areas of psychiatry which can immediately be made the basis of fruitful co-operation among the professions, e.g., the theory of the integration of normal personality, which supports a wide definition of the term "know" in the McNaghten rules. A leading psychiatrist has appraised this avenue to co-operation as "impressive" and "helpful", emphasizing that "When no longer dismembered and falsified in one-dimensional aspect, but considered in all that we sometimes imply by 'appraisal', 'realization', 'normal evaluation', 'adequate feeling', 'significant and appropriate experiencing', etc., the term 'knowing' does not restrict us solely to a discussion of the patient's reasoning abilities in the abstract."

Accordingly, although the courts actually interpret "know" widely, a revision of the McNaghten rules which included references to conduct and used the terms "understand" and "realize", would retain the test of rationality and also provide more appropriate terms from a psychological viewpoint.45 This might also lead to a critical re-examination of the "irresistible impulse" test in the states which now permit it, and to a consequent revision of the law. It should not be assumed that the co-operation of the legal profession with psychiatrists precludes such reforms. Indeed, the best evidence that the two professions were co-operating would be joint efforts to improve the law in the states and districts which now apply the "irresistible impulse" test. There are other avenues to co-operation which would preserve the distinctive functions of law and at the same time make use of the progress of psychiatry and other empirical knowledge.

In such efforts, it must never be forgotten that very important values are involved, especially that it is the function of the legal order to maintain and encourage—not to undermine—personal responsibility. The responsibility of lawyers is to support and improve the law—not to abandon it and allow power to be concentrated in the hands of experts.

The 1956 Ross Essay

(Continued from page 938)

statute, among other things, afforded no protection against the use of compelled testimony to search out other evidence to be used against the witness. And more recently, this concept of testimony once removed was given specific recognition by a district court in a case not involving an immunity statute.81 Finally, in a dissenting opinion in the Emspak case Justice Harlan recognized the concept of an incriminating answer as follows:

The concept of an incriminating answer includes not only those answers which constitute an admission of guilt, but also those which may furnish evidence of guilt or merely supply a lead to obtaining such evidence. Counselman v. Hitchcock 142 U.S. 547 (1892).82

Following the concept of a link in a chain to its logical conclusion, the answer to the most innocuous question could conceivably tend to incriminate. However, the Supreme Court in Hoffman v. United States83 gives us this test:

To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence". See Taft, J., in Ex parte Irvine, 74 F. 954, 960 (C. C. S. D. Ohio, 1896).84

The setting or circumstances in which a particular question is asked seems to be of utmost importance when a question innocent on its face

---

44. Cleckley, MIND AND BEHAVIOR (2d ed. 1950); Hall, Psychiatry and the Law, 28 IOWA L. REV. 516 (1953).
45. E.g., "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." This is discussed in 65 Yale L. Jour. 761-762.