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The M'Naghten Rules and Proposed Alternatives

Responding to overt and implied criticism of the M'Naghten Rules for determining legal insanity to excuse criminal responsibility, Mr. Hall proposes a national seminar or study by judges of the diverse and perplexing problems they must face in deciding issues in this field. He thinks that M'Naghten needs repair rather than replacement and that a rough consensus might be attainable.

by Jerome Hall • Distinguished Service Professor of Law, Indiana University

In the March, 1963, issue of the American Bar Association Journal, Justice William J. Brennan, Jr., after stating that he would not even “by the slightest intimation suggest” which insanity test he thought preferable to the M'Naghten Rules, “if indeed it has yet been proved that any one of them is better”, proceeds directly to express some very definite preferences on this subject.1

Thus, evidently referring to those who defend the M'Naghten Rules, he asks a startling and illuminating question: “How valid is the assumption that morality and safety require punishment . . . of mentally ill people?” This is startling because it seems to suggest that defenders of the M'Naghten Rules wish to have psychotic persons punished. It is illuminating because it indicates a lack of awareness of the fact that the principal problems in this area concern the meaning of “mentally ill”, the “knowledge” by reference to which this is to be determined, and how mental illness can best be decided in a democratic society when the issue is criminal responsibility.2 One's concern is heightened by the justice's confidence in “medical assessment” as a condition of release from imprisonment and by his evident opinion that there is an obvious answer to the question whether “mentally ill offenders” should be sent to a hospital or a penal institution.

The M'Naghten Rules were propounded by English judges in 1843 in Daniel M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718, in response to inquiries from the House of Lords. They hold that “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 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”. This test has been and is followed (with some glosses) in almost all American jurisdictions, except New Hampshire, Vermont and perhaps Illinois. In New Hampshire, for instance, in State v. Pike, 49 N. H. 399 (1869), the Supreme Court of that state formulated a test holding that an accused is not criminally responsible “if the [unlawful act] was the offspring or product of mental disease . . . .”

Durham Case Arouses Interest in Insanity Rules

The present interest in insanity as a defense in trials of criminal responsibility was aroused by the decision of the United States Court of Appeals for the District of Columbia Circuit in 1954 in Durham v. United States, 214 F. 2d 862, in which the court held that a defendant was not criminally responsible “if his unlawful act was the product of mental disease or mental defect”.

The Court of Appeals for the Third Circuit has refused, as have many other courts, to follow the Durham rule, stating: “We are of the opinion that the following formula most nearly fulfills the objectives just discussed: The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.”3

Another alternative to the M'Naghten Rules is proposed in the Model Penal

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2. These questions are discussed in Hall, General Principles of Criminal Law 449-529 (2d ed. 1960).
Justice Douglas Thinks
Durham Is Improvement

In a lecture a few years ago to a group of psychiatrists, Justice William O. Douglas hailed the Durham rule as a great improvement on the "rigid", the "arbitrary, fixed" M'Naghten Rules. He first attributed the M'Naghten test to political pressure, public clamor and newspaper publicity, but later he said: "The only warrant of the M'Naghten rule of insanity was tradition. "To most psychiatrists", he continued, the Durham decision "was a break with legal tradition that was long overdue." It has the great advantage of permitting the psychiatrist to "speak to the court and to the jury in the language of his discipline", he declared.

Justice Douglas, in my opinion, was seriously mistaken in every one of these statements. Not the least significant evidence of this is that an overwhelming majority of the judges who have had an opportunity to pass on the question have rejected the Durham rule and the psychiatry summoned in support of it. The irony of these implied and expressed criticisms of the M'Naghten Rules is that these justices, especially sensitive to the protection of civil liberties, do not realize that if the M'Naghten Rules are abandoned, the consequence will probably be a "tyranny of experts". The vaunted "humanitarianism" of some psychiatrists contemplates the long-term incarceration of vast numbers of persons who have violated no law, as well as the detention of thousands of petty offenders for as long a time as the so-called experts withhold their favorable prognosis. It is unfortunate that these justices do not raise a question regarding the touted claim that adequate knowledge exists to discharge the above vital functions fairly and with warranted assurance in the validity of the "experts'" decisions.

What is especially significant is the probability that if judges as able and conscientious as Justices Brennan and Douglas lack the knowledge required to deal soundly with this problem, then many other judges and lawyers are in a similar situation. In sum, we face a complex twentieth century problem whose solution requires much more than sympathy with unfortunate persons charged with the commission of crimes.

Informed Discussion
Shouldn't Be Curtailed

Can anything be done to remedy this situation, especially in its relation to issues of the gravest importance that will no doubt be presented in due course to the Supreme Court? Certainly it would be a mistake for judges to refrain from public speaking and printed publication, for then important potential contributions would not be made and the occasional need for further study would be unknown.

It may be suggested, in the first place, that when a judge delivers a public lecture and has it published in a widely read journal, it is both fair and necessary that the views he expresses be subjected to the same sort of searching criticism as the published views of others. But objectivity is very difficult to maintain when a justice of the United States Supreme Court is concerned.

Moreover, one can hardly ignore the fact that although we avow a free market in ideas as the best test of truth, the heads of well-financed psychiatric institutions and powerful officials enjoy strategic positions in the formation of public opinion. The implications are alarming when a justice of the Supreme Court appears to have accepted certain philosophical versions of psychiatry.

It would, of course, be absurd to imply that either Justice Brennan or Justice Douglas would approve any philosophy that depreciated human freedom. What troubles one is their apparent failure to recognize the relationship to human freedom of the thesis that everyone or that every criminal is "mentally ill". What troubles, also, is the apparent acceptance of the extremely broad meaning of "mental illness" propagated by psychiatrists whose philosophy is, quite consistently, the utter repudiation of freedom, re-
The Mobilized Reservist

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Responsibility and other basic values of democratic society. It is hardly possible to avoid the conclusion that what is plainly needed is further study of this difficult problem by judges and practicing lawyers so that at least the cogent questions can be raised.

National Seminar Is Proposed

Can anything be done to facilitate this and to assure a fair and informed hearing of these problems? Given competent guidance, it would be possible for an able lawyer or judge to acquire a significant degree of critical competence in this area in a year of carefully planned reading and bimonthly discussions. This could be done in seminars or round-table discussions in which the M'Naghten adherents were given a role and an opportunity equal to that of the critics of the prevailing law. Newspaper reporting and other interference with dispassionate study and uninhibited discussion, such as stenographic or other recording, would be barred. Efforts should be made to avoid the connotations of "work"; instead everything should be done to make the study enjoyable. The company of the judges interested in this particular problem might be augmented by the admission of thoughtful laymen, legal philosophers, other scholars and friends, so that a congenial atmosphere conducive to discussion prevailed.

The Great Books method of study depends on a discussion leader who carries the major burden, and it allows a larger number to participate than is possible in a seminar where each participant is expected to report in some detail on a particular problem. On the other hand, in a discussion group, one would participate only to the extent he desired. In a seminar which met bi-monthly for ten months, twenty participants would probably be the maximum number that could be accommodated.

Ten major phases of a basic problem, such as that noted above, could be studied, one each month, with two participants reporting each session, preferably on opposed sides. The other members would prepare for these meetings by reading from a carefully selected bibliography in order to participate meaningfully in the discussion of their colleagues' reports. Each participant would also be preparing his own report.

A small, able research staff would be a valuable adjunct to the seminar or discussion group. It might limit its function to reporting on specific questions, e.g., how many psychiatrists are there in this country, how many of them have criticized the M'Naghten Rules, what studies have been made to determine whether psychiatric testimony is at present restricted.

Some Subjects for Discussion

The following program of a seminar or discussion group is suggested as illustrative. No preference is implied as to the order of studying the various problems and their formulation is not wholly neutral since my purpose is, also, to raise questions regarding current criticism of the M'Naghten Rules.

1. What are the principal meanings of "disease"? Is mental illness like physical illness, or is it so different from it that even a very wide analogy is misleading?

2. What is "science"? Is there an intermediate type of knowledge between science, rigorously defined, and common sense? Where should psychiatry be placed, e.g., what of statements by leading psychiatrists to the effect that psychiatry is an art? What evidence is there that psychiatrists (a) cure mental illness, (b) diagnose it correctly, (c) can recognize that persons who have not committed any harm are socially dangerous and (d) can accurately predict that certain individuals will commit crimes if they are released from hospitals or penal institutions?

3. What is an expert, e.g., does that term imply that there is a body of knowledge with reference to which all or most "experts" agree? What is the basis of the position taken by some social scientists that psychiatry has not yet developed to the point where psychiatrists should be permitted to testify in court as experts? What are the principal types or schools of psychiatry, and what is the significance of divergent theories and divergent diagnoses? What does this imply regarding the common assumption that psychiatrists are expert in classifying certain persons as "psychotic" or "insane"? If these terms mean extreme and irrational deviation from social norms, for instance, being a social nuisance, is such labeling by a psychiatrist more or less sound than that by an intelligent jury?

4. Does psychiatry include expert skill in elucidating such terms as "right," "freedom," "justice," "punishment" and "responsibility"? What is the special competence of psychiatrists? What is the significance of a deterministic premise when employed (a) in physical science, (b) in psychiatric research, (c) in therapy, (d) in deciding whether a person should be held criminally responsible for a harm he committed?

5. The history of legal tests of insanity should be explored to ascertain their relationship to the contemporaneous medical and psychiatric knowledge, moral ideas and views of "human nature" and, also, to evaluate certain recent statements, e.g., that the M'Naghten Rules were merely the product of political pressure, that a "wild beast" test was ever actually a rule of law in England in the implied literal sense, and that lawyers have usually impeded
the march of scientific progress while doctors have facilitated it.

6. Important, also, is a comparative study of American, English and Continental law, especially with reference to the "irresistible impulse" test as a complete alternative to the cognitive (M'Naghten) test. On what grounds has the Report of the Royal Commission, 1949-1953, so highly praised in this country by critics of M'Naghten, been criticized by English judges, for instance, Justice Devlin? In the study of Continental codes, the meaning of the word "or" needs to be scrutinized to determine whether its significance is disjunctive or conjunctive. Continental cases should be studied to determine whether the position so vigorously urged here by very articulate psychiatrists—that a person's cognitive faculties may be quite normal or even superior but, nonetheless, he may be unable to keep from committing the most serious harms—is actually accepted in European law. If it is found to be recognized to some extent, is this the effect of the early nineteenth-century psychology of separate faculties, which has been everywhere discarded, or is it currently supported by able European psychiatrists?

7. In the study of such social problems, the most difficult question often is: What is the question or the proposal that is made? This requires logical analysis of various arguments. For example, is it consistent with the psychology of integrated personality (that man functions as a unit) to argue that M'Naghten should be abandone? Is it consistent with that theory of psychology to argue that the volitional function can be seriously disordered but, at the same time, the cognitive functions remain normal? Is it consistent to assert that psychiatry does not deal with human freedom, right and wrong, responsibility, and justice, and to assert also that the right-and-wrong test is a vestige of superstition and that psychotic persons understand the difference between right and wrong? Logical inquiry can also disclose the areas where no assured answer can be given to certain questions, e.g., whether punishment deters, whether psychiatrists can rehabilitate criminals, and so on. If "experts" in behavioral disciplines and psychiatrists do not have all the desired answers, what is the role of intelligent laymen in dealing with such problems, and what of the legal and ethical standards developed by thoughtful persons in the course of many centuries?

8. The characteristics and requirements of a democratic legal order should be studied especially in relation to the role of unfettered officials, unfettered experts and unfettered juries. Are the prevailing conceptions of human nature, individual responsibility, freedom, right and wrong, as traditionally expressed in the rules of law which guide judges and juries, to be subordinated to the theories of psychiatrists and, if so, to which ones—Freudian, neo-Freudian, anti-Freudian, Jungian, Adlerite, existentialist, organist, neurologist, Reikian, Frommian, or eclectic? 8 Should the selected experts be permitted to present any theories or opinions to juries who receive no guidance from judges or laws?

9. There are still unsettled questions about "punishment" to be studied; they involve questions of public policy, ethics and free discussion. There are distinctions to be drawn between reforms, utopias and the relation of punishment to freedom and social responsibility. There are issues which concern hospitalization and punishment, e.g., when is a "hospital" a penitentiary? And again, if we cannot determine whether punishment deters or whether experts can rehabilitate offenders, what is the status of so-called "retributive" punishment?

10. Finally, efforts might be made to formulate conclusions reached at the end of the inquiry, which, presumably, would correctly and precisely reflect the various positions held at that time. Evidently, also, some of the topics and some of the methods of analysis indicated above would be dealt with or employed at several meetings.

Study Has Values Even Without Answers

There is, of course, no certainty that a general agreement will be reached on these difficult questions even after a year's study; it is possible that one's ultimate premises, one's "can't helps", as Holmes put it, will persist to the very end. But this does not imply that painstaking inquiries are illusory or mere "ideologies". The more defensible view is that such study takes one closer to the relevant truths as well as to a fuller appreciation of opposed positions. Certainly the direction and degree of tolerable compromise could be more clearly discerned, and in the practical realm of daily life in a democracy, that may suffice.

For me the existence of a significant degree of human freedom is a "can't help", as it is, no doubt, for Justices Brennan and Douglas and the vast majority of thoughtful Americans. So, too, as regards moral values, e.g., that after thinking about a problem it makes sense to speak of "right" and "wrong" actions. But human freedom and moral values depend upon understanding—they imply the reasoning, generalizing, cognitive functions of the human mind. "Mental illness" in at least some of its meanings deeply affects the validity of these postulates and their implications.

Seen in relation to these basic postulates, the M'Naghten Rules are neither a political contrivance nor a mere tradition. They may be faulty in their formulation, in emphasis on one phase of personality and in connotating the one-sidedness of the supporting psychology of the times. But despite its defects, M'Naghten incorporates the most important function of human personality in terms of criteria with which a civilized body of criminal law must be concerned.

M'Naghten Needs Repairs, Not Abandonment

For that reason, what is relevant is not the abandonment of M'Naghten, but only its repair. Just as the Venus de Milo is not neglected because an arm is missing, just as the Winged Victory holds the place of honor in the world's greatest art museum despite its

8. "We are forced to conclude that the psychologically minded psychiatrist and his organist colleague, though often members of the same professional organizations, do not talk the same language and do not have the same interests. It is not surprising, then, that they have nothing good to say to each other, and that when they do communicate it is only to castigate each other's work and point of view." SZASZ, THE MYTH OF MENTAL ILLNESS 53 (1961).
The M'Naghten Rules

glaring defect, so, too, reform of the present law should preserve what is essential in the M'Naghten Rules. This means the avoidance of completely autonomous alternatives such as the Durham rule, the American Law Institute's alternative proposal in terms of lack of "substantial capacity . . . to conform" and other forms of the "irresistible impulse" hypothesis. A test solely in terms of "control of conduct" is ambiguous because it is silent on the crucial question: whether understanding has anything to do with conduct. To preserve the sound core of M'Naghten requires that the rationality of the human mind (understanding, knowledge, appreciation) be included in the proposed test, in which case it may, of course, and probably should be, joined to other major functions of the personality.9

There is sufficient acceptance of these basic premises to warrant the expectation that a very substantial agreement can be reached on their application to criminal responsibility, including the problem of mental illness. The hazards are the traditions which envelop and condition our attitudes towards the judiciary and the possibility that powerful judges will be called on to render extremely important decisions before they have studied this difficult subject. American realism, resourcefulness and candor should be able to meet this challenge.

9 Hall, op. cit. supra at 521-522.

Activities of Sections

Tracy H. Ferguson

Section of Labor Relations Law

The Section of Labor Relations Law conducted spirited meetings at the Association's 86th Annual Meeting, with an extensive three-day program.

Supreme Court Associate Justice Arthur J. Goldberg, a former member of the Council of the Section, was a featured speaker. His remarks will appear in a later publication of the Section.

Reports of the various committees of the Section were presented and three received extended attention.

The Committee on National Labor Relations Board Practices and Procedure, headed by Edward Schneider of Boston, Massachusetts, and J. Albert Woll of Washington, D.C., reported recent revisions in the National Labor Relations Board Rules and Regulations, terming the changes a "substantial improvement". The Committee reported that its liaison relations with the board were improved and cordial, though there are still some areas of disagreement.

Two committee reports provoked floor debates. The ad hoc committee known as "Gulf-Warrior" presented majority and minority reports on a resolution to amend Section 301 of the Taft-Hartley Act to overturn the rules set forth in United Steelworkers of America v. Warrior & Gulf Navigation Company, 363 U.S. 574 (1960). After debate, the minority report, which favored amendment, was adopted by a vote of 62 to 49.

Another ad hoc committee—this one known as "Atkinson-Sinclair"—presented three reports, one representing a neutral position. The resolution proposed amendment of the Norris-LaGuardia Act in the light of Sinclair Refining Company v. Atkinson, 370 U.S. 195 (1962), to permit issuance of an injunction in violation of a no-strike provision of a labor contract. The resolution was amended to provide that no injunction may be issued except on notice and hearing and as amended was adopted, 63 to 30.

A paper on "Labor Law Decisions of the Supreme Court, 1962 Term" was given by Clyde W. Summers of New Haven, Connecticut. At the annual luncheon meeting, Arnold Ordman, newly appointed General Counsel of the National Labor Relations Board, was the principal speaker.

Guests of the Section at the meeting were Frank W. McCulloch, Chairman of the N.L.R.B., and John H. Fanning and Boyd Leedom, members of the board. Charles Donohue, Solicitor of Labor of the United States Department of Labor, participated in the workshop session on fair labor standards.

The Membership Committee report, submitted by William F. Joy and Robert M. Segal of Boston, Massachusetts, Cochairmen, indicated a substantial growth in the Section, with a membership now of 2,400.

The meeting concluded with the election of new officers and council members. Tracy H. Ferguson of Syracuse, New York, was elected Chairman and Louis Sherman of Washington, D.C., Vice Chairman. Robert F. Koretz, who is Professor of Law at Syracuse University, is the new Secretary of the Section. New members of the Council are Frank A. Constangy of Atlanta, Georgia, and David Previant of Milwaukee, Wisconsin.

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