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Criminal Law - Chriminal Responsibility - The Defense of Insanity

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NOTES

CRIMINAL LAW—CRIMINAL RESPONSIBILITY—THE DEFENSE OF INSANITY.—"Probably no branch of criminal law has been the subject of so much criticism and controversy as the defense of insanity."[1]

The most repeated criticism is that the existing legal "tests" which are used to determine whether a person is responsible for his misdeeds are not in accord with modern psychological and psychiatric knowledge.[2] Our courts are continually urged to liberalize an existing test or to adopt a new one. The law has remained adamant in its rejection of suggestions that it should expand or discard available tests. The rare instance in which a court responds to the plea by extending an old test or adopting a new one is worthy of comment.

In *Durham v. United States*,[3] the Circuit Court of Appeals for the District of Columbia re-examined the conventional tests of insanity and concluded that a broader test should be adopted, while in *State v. White*[4] the Supreme Court of New Mexico determined that a limited extension of the test applied in that state was desirable. These decisions are significant, but to enable the reader to view them in proper perspective a discusson of the historical development of the defense of insanity is necessary.

The mental state of the defendant has not always been a factor in determining his responsibility for a criminal act. In early English law an individual was held strictly liable for his actions, irrespective of mental illness.[5] At some later date it became the practice to bring a special verdict that the defendant was mad, whereupon the king would grant him a pardon. By Edward III's reign (1326-27), absolute "madness' had become a complete defense to a criminal charge.[6] Once the law admitted insanity as a defense it became necessary to define what mental condition would constitute insanity in the legal sense. That the problem was not easily solved is evidenced by the many tests that were developed, used and discarded as unsatisfactory over the next five-hundred years.[7] The

1. Weihofen, Mental Disorder as a Criminal Defense 1 (1954).
2. *Id.* at 2.
3. 214 F.2d 662 (D.C. Cir. 1954).
4. 58 N.M. 324, 270 P.2d 727 (1954).
5. See 2 Holdsworth, History of English Law 50-54 (3d ed. 1923).
6. 3 Holdsworth, History of English Law 372 (3d ed. 1923).
7. Among those discarded were the "wild beast test", the "good and evil test", the "fourteen year old test", and the "twenty pence test". They are discussed in Glueck, Mental Disorder and the Criminal Law c.5 (1925).

basis of present day tests was conceived in the 1843 trial of one Daniel M'Naghten.[8]

THE M'NAGHTEN RULE

Daniel M'Naghten shot and killed the private secretary of Sir Robert Peel believing him to be Sir Robert. M'Naghten labored under the insane delusion that he was being hounded by his enemies and the prime minister was one of them. Medical evidence tended to prove that the defendant was affected by morbid delusions which carried him beyond the power of his own control, leaving him unable to distinguish right and wrong, and that he was incapable of controlling his conduct in connection with the delusion. The jury found him not guilty by reason of insanity.

Much popular interest was generated by the case, undoubtedly due to the prestige of the deceased and the intended victim, and the acquittal on the grounds of insanity. The House of Lords decided to investigate the verdict and ". . . the question of unsoundness of mind which would excuse the commission of a felony of this sort".[9] The judges of England were summoned to the House of Lords and were asked five hypothetical questions regarding the law of insanity. Embodied in their answers to the second and third question is the M'Naghten Rule or "right-wrong" test. The judges felt ". . . that to establish a defense on the grounds of insanity, it must be clearly proved that, at the time of committing 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".[10] The test has met wide judicial acceptance and it is the sole test of irresponsibility in England and in twenty-nine American states.[11] In six states,[12] including North Dakota,[13] the

8. Daniel M'Naughten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843).
9. *Id.* at 202, 8 Eng. Rep. at 720.
10. *Id.* at 209, 8 Eng. Rep. at 722. The specific questions to which the above answer was given were: Question 2, "What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with an insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defense?" Question 3, "In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time the act was committed?"
11. Weihofen, *op. cit. supra* note 2 at 51.
12. Weihofen, *op. cit. supra* note 2 at 51, n. 4. They are: Louisiana, Minnesota, New York, North Dakota, Oklahoma, and South Dakota.
13. N.D. Rev. Code §12-0201(4) (1943) provides that among those incapable of committing crime are "Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness".

right-wrong test has in substance been enacted into law by statute.

Notwithstanding its popularity with the courts, the test has been vehemently criticized by legal writers, psychologists and psychiatrists.[14] Much of the criticism is directed at the psychology on which the rule is based. The psychological theory in vogue when the rule was laid down was called "faculty psychology" and is now outmoded.[15] Basically, proponents of the theory claimed that there were only three aspects to all mental processes: the cognitive, *i.e.* knowledge or the capacity for it; the conative, *i.e.* will or volition; and the affective, *i.e.* emotion reflected by a feeling toward an object.[16] They further maintained that the three facilities functioned independently;[17] therefore, it was possible that mental disease could strike one of the faculties while leaving the others unimpaired.

The right-wrong test is based solely on the cognitive aspect of this psychology.[18] The emphasis placed on the knowledge phase of mental activity is not unique to the M'Naghten rule but may be found in the law as early as the 13th century.[19] However, the idea that the brain is divisible into various compartments and that an individual may be insane in some respects while remaining sane in other respects has been discarded by the medical profession.[20]

Another oft-voiced criticism is that the questions presented to the judges in the *M'Naghten Case* were intended to cover only a single psychosis of which a delusional manifestation is the most striking symptom.[21] The law, however, has extended the test indiscrimi-

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14. See Glueck, *op. cit. supra* note 7, at 166-186; 2 Stephen, *History of the Criminal Law of England* 154-160 (1883); Zilboorg, *The Psychology of the Criminal Act and Punishment* 10 (1954). Zilboorg states ". . . the M'Naughten rule is substantially the guiding principle of our criminal jurisprudence whenever psychiatric issues are raised. As such it stands immutable; it is the impenetrable wall behind which sits entrenched the almost unconquerable prosecutor; it is the monster of the earnest psychiatrist which prevents him from introducing into the courtroom true understanding of human psychology and of the psychology of the criminal act."

15. The father of "faculty psychology" was Christian Wolff. His original classification included only the intellect and the will, but his disciple, Tetons, added emotion to these thus completing the tripartite division. See Muller-Freienfels, *The Evolution of Modern Psychology* 293 (1935).

16. See Hall, *Principles of Criminal Law* 492 n. 45 (1947) citing McDougall, *Introduction to Social Psychology* 26-27 (4th ed. 1911).

17. Muller-Freienfels, *op cit. supra* note 15 at 293.

18. *See* Durham v. United States, 214 F.2d 862, 871-2 (D.C. Cir. 1954) citing Glueck, *Psychiatry and the Criminal Law*, 12 Mental Hygiene 575, 580 (1928).

19. Knowledge was one part of the "wild beast test". Thus a madman was one who did not know what he was doing, and who was not far removed from the brutes. This is pointed out by Glueck, *op. cit. supra* note 14 at 126-27.

20. See Davidson, *Forensic Psychiatry* 18 (1952); Perkins, *Partial Insanity*, 25 J. Crim. L. & Criminology 175,176 (1934).

21. Dorland, *The American Illustrated Medical Dictionary* (22d ed. 1951) defines psychosis: "1. Formerly, a generic name for any mental disorder. Specifically, the deeper and prolonged behavior disorders such as *dementia praecox* and *manic-depressives* . . .". "Manic-depressive psychoses are essentially benign, affective psychoses, chiefly marked by emotional instability, striking mood swings, and a tendency to recurrence . . .".

nately to cases involving types of mental disorders with respect to which it's use is inappropriate. There are other criticisms of the rule but these two are among the most important.[22]

THE IRRESISTIBLE IMPULSE TEST

Fifteen states hold the right-wrong test inadequate as a criterion of responsibility unless it is supplemented by an additional test.[23] The commission of a crime is excused in these states even if the accused knew that what he was doing was wrong, provided that as a result of mental disease he lacked the power to resist the impulse to commit the act. This is commonly called the irresistible impluse test and it is derived from the conative or will power aspect of "faculty psychology".

The foregoing test is at least as old as the M'Naghten rule. In fact, traces of it can be found in early common-law. "An involuntary act," wrote Blackstone, "as it has no claim to merit, so neither can it induce guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human action either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act."[24]

The irresistible impulse test found its first judicial expression in an early Ohio case in which the judge told the jury that knowledge of right and wrong *and power to forbear or to do the act* was the test of responsibility.[25] It has also been stated that under the rule the defendant must have been a "free-agent" before he can be held criminally responsible.[26]

Courts have rejected the irresistible impulse test for many reasons. Some writers say that an irresistible impulse does not exist and that the term actually means "unresisted" impulse, the failure to resist resulting from habit or lack of self-restraint.[27] Psychiatrist critics

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22. See note 14 *supra*.
23. Weihofen, *op. cit. supra* note 11, at 51. Professor Weihofen states that fourteen or more states have adopted irresistible impulse as a test, but since his book went to press New Mexico has adopted the test also. See note 31 *infra*.
24. 4 Bl. Comm. 21.
25. *See* State v. Thompson, Wright's Ohio Rep. 617, 662 (1834).
26. *See* Clark v. State, 12 Ohio Rep. 483, 494 n. *a* (1843). Discussing the wording of a statute, Judge Birchard said: "*Purposely* implies an act of will; an intention; a design to do the act. It presupposes the free agency of the actor." The free agency wording was also used in Boyle v. State, 229 Ala. 212, 154 So. 575, 584, 586 (1934).
27. See Glueck, *op. cit. supra* note 19, at 235; Keedy, *Irresistible Impulse As a Defense In The Criminal Law*, 100 U. of Pa. L. Rev. 956 at 987,988 (1952); Moreland, Law of Homicide 284 (1952).

insist that this objection completely ignores scientific findings.[28] Difficulty and impracticality of proving or disproving the defense is another reason advanced for rejecting the test. It is difficult to accept this objection because the law is called upon to decide many things that are incapable of precise determination, and yet the law must perform the task. One writer has suggested that this is really only a "lazy argument".[29] An objection that has much popular appeal is that if the test is adopted it will result in an increase in crime, presumably because adoption of the test would appear to sanction the idea that criminal impulses need not be resisted. However, no statistics have been submitted to show that the administration of justice has broken down in those states where the defense is allowed.[30] In *State v. White* the New Mexico court adopted the irresistible impulse test.[31] The fact that this was the first time in twenty-three years that a court has adopted the test is indicative of its judicial unpopularity.

THE NEW HAMPSHIRE RULE AND THE RULE IN THE DISTRICT OF COLUMBIA

Because of the similarity of the rules in these jurisdictions they will be discussed together. New Hampshire resolves the problem by saying that there is no legal definition of insanity; that the question of what constitutes insanity is one of fact to be decided by the jury alone. This idea is based on a fundamental principle of criminal law, *viz*; one is not responsible for his acts if he lacks the required criminal intent. In one New Hampshire case the jury was instructed to decide whether the defendant had a mental disease and if he had, to determine whether the disease was of such character or was so far developed as to take away capacity to form or entertain the criminal intent. Commenting on the instructions, Justice Doe said, "Tried by the standard of legal precedent the instructions are wrong; tried by the standard of legal principle, they are right."[32]

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28. Hacker and Frym, *The Legal Concept of Insanity and the Treatment of Criminal Impulses*, 37 Cal. L. Rev. 575, 583-4 (1949).

29. *Ibid.* See Goodhart, Essays in Jurisprudence and the Common Law 47 (1931).

30. See Glueck, *op. cit. supra* note 27, at 238; Hacker and Frym, *supra* note 28, at 585; and Weihofen, *supra* note 23, at 98.

31. *See* 58 N.M. 324, 270 P.2d 727, 730 (1954). The court approved the following extension of the M'Naghten Rules, "Assuming defendant's knowledge that the act was wrong, if, by reason of disease of the mind, defendant has been deprived of or lost the power of his will which would enable him to prevent himself from doing the act, then he cannot be found guilty."

32. State v. Pike, 49 N.H. 399, 429 (1869). The instructions were reaffirmed one year later in State v. Jones, 50 N.H. 369, 399 (1871).

The rule adopted in the *Durham* case is not unlike that followed by the New Hampshire court.[33] The new test is simply that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect".[34] There is one fundamental difference between the *Durham* rule and the New Hampshire rule. The New Hampshire rule is based on the principle that to impose guilt, it must be shown only that the accused had the mental capacity to form the intent to commit the crime. There is no mention of this principle in the *Durham* rule. Presumably, whether the defendant entertained the intent or not, if his act was the product of a mental disease or defect, he is not responsible under this rule. It becomes important then to determine what the court meant by "product" and "mental disease or defect". The word "product" is used in the sense of a causal connection between the act and the disease or defect. The court defined "disease" as ". . . a condition which is considered capable of either improving or deteriorating." A "defect" is ". . . 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."[35]

The wording of the test and the definitions of its terms are so broad that almost any mental disorder could qualify as a defense under it. Language employed elsewhere in the opinion indicates that the court intended that only major psychoses should qualify as defenses. Many factors point to this conclusion. The defendant had been diagnosed as suffering from psychosis with psychopathic personality. The court quoted a section of the Royal Commission Report which tells of the personality change that takes place in a person suffering from melancholia, schizophrenia, and paranoid psychoses,[36] all examples of major psychoses. In addition, the court found the irresistible impulse test inadequate because it gives no recognition to mental disease characterized by brooding and reflection,[37] symptoms of some major psychoses.

Basing irresponsibility on the presence of a psychosis was advocated by the Royal Commission on Capital Punishment.[38] Sub-

33. *See* Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954).
34. *Id.* at 374-5.
35. *Id.* at 875.
36. *Id.* at 873-4.
37. *Id.* at 874.
38. See Weihofen, *op cit. supra* note 30 at 116 citing the Royal Commission on Capital Punishment Report 116, 275 (1949-1953).

stantially the same position has been taken by other writers on the subject.[39] The *Durham* rule will undoubtedly be more acceptable to psychiatrists because it brings the law into accord with medicine on the subject of mental illness and at long last gives legal recognition to the achievements of psychology and psychiatry.[40]

It was previously pointed out that the psychology underlying the old tests is outmoded. Psychiatry today has advanced beyond the point where the addition of the irresistable impulse test would be considered adequate to remedy the deficiencies of the right-wrong test.[41] Contemporary psychology views the individual as a completely integrated person. "The mind does not function, either in health or disease, in parts, but as a whole."[42] Both the right-wrong test and the irresistible impulse test fail to recognize this basic psychological concept. Disorders of the mind that principally involve the affective-emotional phase of mental activity are as important in criminal acts as are defects which mainly effect the knowledge or conative phase; but, neither the right-wrong test nor the irresistible impulse test when strictly applied will sanction excusing acts caused by disturbances of this type. Examples of those suffering from such illnesses are the manic-depressives and the schizophrenics. Persons afflicted with such disorders may coldly calculate the criminal act and yet it is the act of a madman.[43] The new rule is broad enough to include an illness of this type as a defense.

In all future cases in the District of Columbia and New Hampshire, the jury, with the aid of expert testimony, will decide the question of irresponsibility unhampered by the narrow limitations of the right-wrong test and the irresistible impulse test. It has always been the province of the jury to make this determination but, it has been argued that the law must set the limits within which the jury will be allowed to perform this function. Thus, Professor

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39. See Ploscowe, *Suggested Changes in the New York Laws and Procedures Relating to the Criminally Insane and Mentally Defective Offenders*, 43 J. Crim. L. & Criminology 312, 314 (1952), Stevenson, *Insanity as a Criminal Defense: The Psychiatric Viewpoint*, 25 Can. B. Rev. 731, 733 (1947).

40. See *Time*, LXV (Feb. 14, 1955), 62 for the psychological theory of a contemporary school. *Time*, LXV (Mar. 7, 1955), 63 for a discussion of the startling progress being made in treating manic-depressives and schizophrenics. Francis Bello, New Light on the Brain, *Fortune*, (Jan. 1955), 104 *et seq.* contains a revealing discussion of the progress being made in understanding how man's mind functions.

41. Stevenson, *op. cit. supra* note 39, at 731; Weihofen, *supra* note 38 at 85.

42. MacNiven. Psychoses and Criminal Responsibilty in two English Studies in Criminal Science 52 (1944).

43. *See* Durham v. United States, *supra* note 33 citing the Royal Commission on Capital Punishment Report 110 (1949-1953).

Wharton pointedly criticized the New Hampshire practice of allowing the jury complete freedom in the matter for three reasons:[44] (1) The jury does not form a continuous body prepared for its task by prior study; (2) reasons for its decisions are not given and so do not control future decisions, and (3) there is no supreme jury to correct and systematize the decisions. The second and third objections could be considered advantages of the new rule. Mental disease may be classified for purpose of analysis and study but mental disease takes infinite forms and therefore should not be stereotyped. As for the first objection, it was pointed out in the *Durham* case that the jury is as capable of determining whether a mental disease exists as it is to determine a claim under a total disability clause of an insurance policy when the medical testimony is obscure or in conflict.[45]

CONCLUSION

Western civilization recognizes that those who commit crime because of insanity should not be held responsible. The difficulty arises in determining what mental state will render a defendant irresponsible at law. The judicial system, charged both with the duty of protecting society and of protecting the insane from unjust punishment, has chosen to define rather rigidly the degree of mental derangement that is a defense for a criminal act. In so doing they have based the test of irresponsibility on one or two aspects of mental activity which only partially recognize modern knowledge of mental processes. The contention is that even where the right-wrong test has been supplemented by the irresistible impulse test, the criteria for determining legal irresponsibility are inadequate when analyzed in the light of modern psychiatric discoveries.[46] Thus, occasionally we see individuals with major mental disorders, such as manic-depressives and schizophrenics, being tried and convicted for criminal acts for which they should not be held responsible. To excuse a person whose mental disorder happens to fit the legal test while convicting an equally blameless individual whose disorder does not fit the test is an indefensible practice. Such a result is much less likely under the new rule,[47] for the jury will not be limited by the old tests, even though it may consider them in determining responsibility. There are two safeguards available to

44. 1 Wharton and Stille, Medical Jurisprudence 180 (5th ed. 1905).
45. Durham v. United States, *supra* note 33.
46. See notes 40 thru 43 *supra* and text thereto.
47. See notes 35 thru 39 *supra* and text thereto.

prevent anyone acquited under the new rule from becoming a menace to society. In the District of Columbia, it would seem that an accused person who is acquitted by reason of insanity is presumed insane,[48] and may be commited to a hospital for the insane for an indefinite period.[49] In addition, if the new rule should prove too broad in practice, presumably the court may define more rigidly the type of mental disorder that is to be a defense.

The *Durham* rule brings the law into harmony with prevailing medical concepts. It provides the psychiatrist with the "fuller hearing by the law" which was asked for recently.[50] At last they have an opportunity to prove to the law that society may be as well, if not better protected by the "treatment" of the mentally ill offender as it is by punishing him. When the proof is made it is hoped that other courts will follow the fine example set for them by the Court of Appeals for the District of Columbia.

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EVIDENCE—LEGALITY OF WIRETAPPING—DIVULGENCE IN COURT.—Long a storm center of legal controversy, the question of wiretapping has more recently been the subject of extensive comment. A clarification of the admissibility of evidence obtained through wiretapping and a workable solution to problems stemming from the practice of wiretapping are issues of pressing importance. In medieval times when most criminals were members of a loosely knit mob without means of speedy communication, society held a great advantage over them. In the twentieth century, conspiratorial crime carried on by use of the telephone has made surveillance over the criminal more difficult. As a counter-balancing power, the authorities have resorted to wiretapping. This article will attempt

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48. *See* Barry v. White, 64 F.2d 707, 708 (D.C. Cir. 1933).

49. D. C. Code §24-301 (1951) provides: ". . . if an accused person shall be acquitted by the jury on the ground of insanity, the court may certify the fact to the Federal Security Administrator, who may order such person to be confined in the hospital for the insane, . . .".

50. Zilboorg, *op. cit. supra* note 14, at 122. The psychiatrist of today finds himself in great need of a fuller hearing by the law. He has more to say and to reveal about those who commit crimes than he is allowed to say and reveal. He is eager to convince the court and the jury that mentally sick criminals deserve an opportunity to live, if not the opportunity to get well. He wants to convince the court and the jury that our knowledge as to who is mentally ill, and as to who knows without really knowing, and as to who acts seemingly rationally but actually not reasonably, has grown to such an extent during the past fifty or seventy-five years that the law must find ways and means of admitting the psychiatrist's views into open court."