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With the advances being made in modern psychiatric treatment resulting in an increasing awareness of the subtleties of the human mind, it has become fashionable to renounce the M'Naghten Rule as archaic. Dr. Robitscher takes a refreshingly different approach by defending the rule. We are reminded of the history underlying the rule and asked to view the rule for what it is: a test of legal responsibility not "medical" insanity. With these factors in mind, the author proceeds to justify the rule from both a legal and medical standpoint.

TESTS OF CRIMINAL RESPONSIBILITY: NEW RULES AND OLD PROBLEMS

*Jonas B. Robitscher**

WE are aware as we have never been before that change is not necessarily progress and that overturning the old order does not always lead to a millennium. This may be a good time to stand up for *M'Naghten*,¹ in the face of all those who have chosen newer positions. We can start with three propositions:

(1) The *M'Naghten Rules* accomplished what they were intended to accomplish;

(2) During the course of time they went through an evolutionary process which reflected changes in social and psychiatric thought; and,

(3) They are capable of still further modifications which could make them as satisfactory as any other rule since adopted or suggested concerning the plea of criminal insanity.

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1. *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

These are three statements which many would challenge. For many years now, it has been popular to point up the short-comings of the *M'Naghten Rules* and the intellectual limitations of the men who devised them, to see them as harsh and cruel rules which treat insane people as if they were sane and prohibit psychiatrists from testifying as they would like, and to indicate that any future progress in the field of determination of criminal responsibility can only come through the development of new rules and new formulas.

But if my three theses are correct—if the *M'Naghten Rules* accomplished what was intended, if they were modifiable to meet changing thought, and if they were capable of still further growth and development—then it follows that much of the time and effort that has been spent in devising new rules has been wasted.

In the process of defending the *M'Naghten Rules*, we can only conclude that those who have been formulating new rules have not been fully aware of the background of *M'Naghten*, have been ready to discard the old without having taken the trouble to understand it, and—perhaps most serious—have been attempting to impose their own standards on the law without public discussion, legislative consideration, and other essentials of responsible government.

Psychiatrists generally have been anti-*M'Naghten*; lawyers have been more supporting. The encyclopedic *American Handbook of Psychiatry*, in an article written by Winfred Overholser in 1959, said, "When the Durham decision was announced there were cries of pain from the defenders of the *status quo*, but an interesting fact is that nearly all of the articles which have appeared in both legal and psychiatric journals have praised the Durham rule as sound psychiatrically and legally."² Since that was written we have seen dissatisfaction with *Durham*³ and the multiplication of rules but only a few voices raised to defend *M'Naghten*.

If we defend the Rules we will have to see them in historical perspective. It is tedious to once again review the history of *M'Naghten*, Queen Victoria, and the Law

2. OVERHOLSER, *Major Principle of Forensic Psychiatry*, AM. HANDBOOK OF PSYCHIATRY 1893 (1959).

3. *Durham v. United States*, 214 F.2d 862 (D.D.C. 1954).

Lords, but we must if we wish to answer those who see the Rules as stupid or psychiatrically unsound.

Perhaps while we review the history we can also be thinking of fishnets. In our society we are familiar with the processes of classifying and sorting, of culling. Whether we are sorting oranges or deciding who should be drafted and who deferred, we go through the same process of culling. Our decisions are meant to be practical; we set the openings on the orange sorting machine so that some oranges are boxed and others drop into the bin for juicing not because we think some oranges are commendable and other oranges are blameworthy but because we believe this is the way oranges can most effectively be marketed. We decide who should be drafted, who rejected, and who deferred for Army duty not on the basis of a moral judgment of the draftee—someone mentally deficient who is rejected is not necessarily “bad” and someone who meets Army requirements and is accepted is “good” but good only in the context we have chosen, usefulness in the Army. The public policy that decides who should be rejected and who accepted is like the private policy which determines the destination of the oranges. One of the main tasks of social policy has traditionally been to cull—we set policy on who should be encouraged to propagate, who should be given higher education, who should be classified as voters, who should be considered criminals; the list is endless. Sometimes moral judgments are included, but a main consideration is always what we think will best serve the kind of society we hope to achieve. The first primitive masters of the art of culling were fishermen ancestors who learned that in the process of weaving their fishnets they could determine which kind of fish they would catch. If they wove a fine net they would catch the big fish and the middle sized fish and the small fish and the flotsam and the jetsam; if they wished to concentrate on a special variety of fish they could weave a net with larger openings that would allow some fish to escape. The size of the net opening is the classifier: it decides that of the whole class fish there are some that we will retain and some that we will allow to pass through.

In criminal law we have long had the policy of allowing some defendants to pass through our net. As long ago as

1326, in the time of Edward II, the rule had been set forth that madness, which later the courts came to call "insanity", would relieve an accused criminal of the responsibility for his actions.⁴ The defense of insanity has been well recognized since that time in spite of the long centuries which lacked psychiatrists to assist in determination of who could plead the defense. Although the defense was well recognized, until the *M'Naghten Rules* there was little consistency in its application. Before then many whom we see as sick were seen as evil, possessed by witches, and many whom we would see as the most harmless of petty criminals were hanged or burned or beheaded, but the insanity defense continued to be erratically recognized although often the application of the defense was severely limited. Most eighteenth century authorities held the defense could only be used when the defendant had as little ability to use reason as a wild beast in the field or a suckling babe in his mother's arms. Law recognized that a guilty intent, the *mens rea*, was an essential ingredient of the crime, but only those who were completely incompetent or demented or wild were seen as lacking the ability to have a guilty intent. The fishermen wove a fine net, and few fish passed through.

In the early nineteenth century—when the winds of change were blowing—opinion swung back and forth about the degree of illness needed to permit the plea. In 1800 when James Hadfield was tried for an attempt on the life of George III, although he was clearly not within the bounds of the wild beast-babe in arms test the court allowed the insanity plea because of evidence of insane paranoid delusions.⁵ Twelve years later Bellingham, who had assassinated the Prime Minister, Spencer Perceval, based his defense on paranoid ideation which made violent revenge seem justifiable. The court narrowed the test, saying to make this defense Bellingham would have had to show he was incapable of distinguishing right from wrong.⁶ But the pendulum swung again, and in 1840 Edward Oxford, who had attempted to assassinate Prince Albert and Queen Victoria,⁷ and again in

4. J. BIGGS, *THE GUILTY MIND* 83 (1955).

5. *Hadfield's Case*, 27 State Tr. 1261 (1800).

6. G. KEETON, *GUILTY BUT INSANE* (1961). 1 J. COLLINSON, *LUNATICS* 656 (1812).

7. *Oxford's Case*, 9 C. & P. 525 (1840).

1843 Daniel M'Naghten, who made what he thought was an attempt on the life of the Prime Minister, Sir Robert Peel, and succeeded in killing Peel's secretary, were found not guilty on evidence of their paranoid delusions.

Queen Victoria was not amused. She was not capable of imagining that a man could go through all steps necessary for a predetermined crime, show signs of recognition of his own guilt—and then plead insanity as a defense. She relied on the distinction that Hale had first made 150 years previously between perfect insanity, also called total insanity, which allowed the plea, and partial insanity, which did not. (Lord Hale had the modern sounding view that most criminals suffered from mental illness: “. . . doubtless, most persons that are felons . . . are under a degree of partial insanity, when they commit these offenses.” Perfect insanity excuses, partial insanity does not, but “it is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by judges and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature;—or, on the other side, too great an indulgence given to great crimes.”⁸)

So the Queen, Oxford's intended victim, in a letter to her Prime Minister Peel, M'Naghten's intended victim, complained that the judges who tried these two men did “*allow and advise the Jury to pronounce the verdict of Not Guilty on account of Insanity—whilst everybody is morally convinced that both malefactors were perfectly conscious and aware of what they did.*” She asked for legislation which would take away from the Judges the discretion to interpret the law in their charges to the Jury according to varying precedents. “*Could not the legislation lay down the rule which . . . Chief Justice Mansfield did in the case of Bellingham; and why could not the Judges be bound to interpret the law in this and no other sense in their charges to the Juries?*”⁹

The House of Lords considered the question, found it too difficult, and asked the fifteen Law Lords—the Judges

8. M. HALE, *PLEAS OF THE CROWN* (posthumous work, in various eds. from 1678 to 1773).

9. A. BENSON, *1 LETTERS OF QUEEN VICTORIA 1837-1861*, at 581 (1907). (Emphasis supplied).

who were members of Lords—to submit an opinion. The Law Lords then formulated the *M'Naghten Rules*, requiring the defendant in order to plead the insanity defense to prove that at the time he committed the act he labored 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, he did not know that what he was doing was wrong.

The *M'Naghten Rules* were intended as a stringent test. A tighter mesh was woven, to let fewer defendants through, so that someone like M'Naghten—whose defense was not that he was totally insane but that he was partially insane, suffering from a homicidal monomania in which, acting under the influence of instinct, he was led on by delusions to commit the crime—could no longer escape the mesh, even if the escape was not to freedom but only from the noose; M'Naghten was promptly adjudged insane and spent the remainder of his life in a mental hospital. The Victorians wanted defendants who arranged well planned crimes to have the responsibility for their actions and to be the object of punishment which might deter others in spite of some degree or even a great degree of insanity; they did not doubt two principles which we have come to doubt, the principle of the responsibility of the individual for his actions and the principle of the effectiveness of punishment, particularly capital punishment, as a deterrent.

The concept that an insane individual could be responsible for criminal actions has been denounced as cruel and has been applied cruelly (although those who have led in the denunciation have often been those most anxious to argue the other side of the argument, that insane people have areas in which they function normally, when the civil rights of committed patients or the ability of an insane testator to write a valid will have been in question). The classic statement of this point of view was that of the Supreme Court of New Hampshire in 1871 in promulgating its own rule: No “ingenuous student of the law” could read the *M'Naghten* tests for the first time “without being shocked by its exquisite inhumanity. It practically holds a man confessed to be insane accountable for the exercise of the reason, judgment and

controlling mental power that is required of a man in perfect health."¹⁰

In British criminal law there are some clear examples of insane offenders who were convicted and executed. The 1863 case of *R. vs. Burton*¹¹ dealt with an eighteen year old boy we would almost certainly classify as schizophrenic. He committed a motiveless murder. He had felt an impulse to kill, sharpened a knife, and murdered the first boy he encountered. The defense argued that he was insane and part of his insanity was a desire to die by the hands of justice. This pre-Freudian invoking of masochism (the term had not yet been coined) did not appeal to Justice Wightman. In sentencing Burton to death, he told him, "It is stated that you laboured under a morbid desire to die by the hands of justice, and that for this purpose you committed the murder The consciousness on your part that you could effect your purpose by designedly 'depriving another of life . . . was, in truth, a further and may I say a deeper aggravation of the crime." Hearing his sentence, the prisoner replied, "Thank you, my Lord."¹²

As recently as 1950, in *R. vs Rivett*,¹³ four psychiatrists testified that the defendant, who had murdered his fiancee after intercourse and who showed no remorse, was schizophrenic; there was no rebuttal evidence from the Crown. Rivett was found guilty and hanged.

R. vs Straffen,¹⁴ in 1952, concerned a defendant who had been adjudged insane prior to the time he committed the act for which he was being tried. Straffen was a congenital defective who had previously murdered, was found insane on arraignment and was sent to Boardmoor, escaped, and killed again. He stood trial for the second killing and at that time the defense of insanity was rejected although it was not shown that his mental state was different than when he was first sent to Broadmoor as insane. Straffen was sentenced to death; the Home Secretary commuted his sentence and he was returned to Broadmoor.

10. *State v. Jones*, 50 N.H. 369 (1871).

11. *R. v. Burton*, 3 F. & F. 772 (1863).

12. H. MAUDSLEY, *RESPONSIBILITY IN MENTAL DISEASE* 157 (1874).

13. *R. v. Rivett*, 34 Cr. App. R. 87 (1950).

14. *R. v. Straffen*, 2 All R.R. 657 (1952).

In Australia and New Zealand the Rules have been interpreted much more liberally than in England. They have been interpreted to apply not only to knowledge of legal wrong but more broadly also to knowledge of moral wrong; a defendant may have known his offense was punishable by law but because of his insanity he may have thought the crime justified, which enables him to plead the insanity defense in Australia and New Zealand but not in England.

Also in Australia and New Zealand there is a tradition of allowing the issue of insanity to be presented to the jury; in England judges are more ready to rule there is no question of insanity, thus shutting the door on psychiatric testimony.

In the United States, there has never been uniformity on whether the *M'Naghten Rules* were to be interpreted liberally or narrowly. Judges and jurisdictions favoring a strict interpretation might hold insanity not to be an issue in a specific case where a psychiatrist might feel insanity was very much an issue; particularly when defendants were poor, ignorant, unable to pursue legal remedies, unrepresented by counsel or represented by disinterested counsel, or when they were the objects of judicial bias, as Negroes have been, the question of insanity was often ruled immaterial or never even considered. The testimony of psychiatrists was often limited to the narrow issue of the defendant's capacity to determine legal right and wrong; the testimony of the psychiatrist was restricted, given little weight, and sometimes was negated by a judge's instructions to the jury characterizing it as "opinion evidence" and therefore "low grade."¹⁵ The question of whether the *M'Naghten Rules*—and the plural should always be used to show that there are two separate tests involved—should be considered disjunctively or conjunctively has been settled narrowly in such jurisdictions as Alaska, Wisconsin, and Texas, where courts have ruled that a jury charge was proper in spite of the substitution of the conjunction "and" for the disjunction "or" between the two tests.¹⁶ (The *Rules* as promulgated by the Law Lords used "or" to give the defendant two chances to prove criminal insanity, (1) not knowing the nature and quality of the act,

15. *Commonwealth v. Woodhouse*, 401 Pa. 242, 164 A.2d 98 (1960).

16. 21 AM. JUR. 2D CRIMINAL LAW § 34, at 119 (1965).

or (2) not knowing he was doing what was wrong. Substituting "and" for "or" narrows the application of the *Rules* drastically.) The *Rules* are also given a much narrower interpretation in those United States jurisdictions, following the English view, where "wrong" is held to be knowledge of legal right and wrong, rather than the Australian view that the test concerns capacity to appreciate moral as well as legal right and wrong—a much broader concept; political assassins, for example, usually can be presumed to know they acted illegally, but it is not so easy to make the presumption that they knew they acted immorally.

Certain United States jurisdictions, then, narrowed the *Rules* to the utmost by excluding insanity as an issue or by severely restricting and downgrading psychiatric testimony if it was considered an issue, by stating that the *Rules* were a simple "right or wrong" test, and by considering legal right only, not moral right.

Other judges and other jurisdictions have been willing to interpret the *Rules* more broadly, to allow complete psychiatric testimony, to take cognizance of new psychiatric ideas, in particular the basic tenet of Freudian psychology, the importance of unconscious motivation.¹⁷ Liberal jurisdictions have been willing to allow an enlarged scope for the psychiatrist in the criminal trial for at least forty years, ever since Clarence Darrow was allowed wide latitude in producing psychiatric testimony concerning Leopold and Loeb (not to show that they were criminally insane, but to show that there were ameliorating psychiatric factors that argued for a sentence less severe than capital punishment).

So we can argue that the *M'Naghten Rules* are inhuman, and we can argue just as well that they are flexible and capable of evolution, just as other common law doctrines are flexible and capable of evolution. Judge Bazelon, in an Isaac Ray Lecture seven years after his *Durham* decision, recognized the potential for evolutionary changes in common

17. "To resolve the vital issue of criminal responsibility, it is necessary that the jury have the entire picture of the defendant. Insanity resulting in criminal acts is not a sudden growth The jury must be given an opportunity to evaluate the expert's conclusion by his testimony as to what matters he took into consideration to reach it." *State v. Griffen*, 99 Ariz. 43, 406 P.2d 397 (1965).

law doctrines: "There is something quite curious about the manner in which both the *M'Naghten* and 'irresistible impulse' rules have been construed by the courts. Neither has been used creatively in the manner we like to think represents the 'genius of the common law.'¹⁸ Although we can question the statement that there has been no creative development of law under *M'Naghten*, the ideas that *M'Naghten* was inflexible and that it was unduly cruel have been behind the drive to drop these *Rules* and substitute more modern tests. Yet there is little doubt that under the *Rules* judges and juries have been able to come to equitable decisions. As long ago as 1874 Maudsley said, "Of few insane persons who do violence can it be truly said that they have a full knowledge of the nature and quality of their acts at the time they are doing them."¹⁹ The Lord Chancellor, Viscount Haldane, said in 1924, "I have never heard of these Rules embarrassing any Judge who really had a case before him in which justice required an acquittal."²⁰ Wily and Stallworthy, New Zealand judge and psychiatrist respectively who have written extensively on the *Rules*, although urging that the *Rules* be amended because satisfactory results under them sometimes 'depend on stretching the interpretation of the *Rules* or on connivance between Judge and Prosecution, nevertheless state that conviction of those insane in the medical sense is rare even in England where the *Rules* are narrowly construed,²¹ although they do not concede as much for all United States jurisdictions.

The *Rules* must have ameliorated in other ways besides broad construction and creative evolution. The doctrine of irresistible impulse gives an additional ground for allowing the plea; although not recognized in England since *M'Naghten*, it has been added to the *M'Naghten* tests in 15 of our states, in Federal jurisdictions, in our military courts, and in a number of British Commonwealth jurisdictions.²² The most important amelioration of the *Rules* has been the doc-

18. D. BAZELON, EQUAL JUSTICE FOR THE UNEQUAL (ISAAC RAY LECTURESHIP AWARD SERIES 5-6 1961).

19. See H. MAUDSLEY, *supra* note 12.

20. Speech in the House of Lords, May 15, 1924, at the second reading of the Criminal Responsibility (Trials) Act.

21. H. WILY & K. STALLWORTHY, MENTAL ABNORMALITY AND THE LAW (1962).

22. J. ROBITSCHER, PURSUIT OF AGREEMENT: PSYCHIATRY AND THE LAW 59 (1966).

trine of diminished responsibility, originating in Scotland in the *Case of Dingwall* in 1867. This century-old principle of the law of Scotland allows the court to instruct the jury that within its discretion it can return a lesser degree than murder, culpable homicide, which does not carry with it the death penalty, if it believes the defendant's mental state would be adequate justification for the lesser verdict. Cases in which diminished responsibility has been allowed involve murder, by epileptics, mental defectives, alcoholics, and by persons suffering from conditions "bordering on insanity," but not by persons merely intoxicated.²³ The doctrine of diminished responsibility was made the law of England by the Homicide Act of 1957. The 1961 New Zealand Crimes Bill proposed the recognition of the defense of diminished responsibility, but this was withdrawn when the New Zealand Parliament abolished the death penalty for murder.²⁴ England, too, in 1965, approved an antihanging bill and this, together with the adoption of diminished responsibility, has quieted many of the objectors to *M'Naghten*. The main reason a defendant pleads not guilty by reason of insanity is to save his life; if his life is not at stake, the possibility of an indeterminate mental hospitalization, which often turns out to be permanent, does not seem preferable to a fixed prison sentence, often with the chance of time off for good behavior.

If United States critics continue to find *M'Naghten* old fashioned, what rule would be more modern? Since New Hampshire courts adopted the "product test" in 1871, it has been cited as a more modern and a more humane rule. The determination of mental illness is a matter for the jury, just as the presence of any other illness; psychiatric testimony can be complete; the judge cannot dismiss the issue of the lack of criminal responsibility; and the scope of the tests possibly is widened to include more defendants. All of these results are secured by a formula which allows the plea of not guilty by reason of insanity if the criminal action was the "offspring or product of mental disease."

It is well known that the New Hampshire doctrine was derived from the pioneer forensic psychiatrist Isaac Ray's

23. F. WHITLOCK, CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS, 94 (1963).

24. See H. WILY & K. STALLWORTHY, *supra* note 21, at 413.

Treatise on the Medical Jurisprudence of Insanity,²⁵ (an American work which was heavily relied on in M'Naghten's successful defense) and we know that the *Durham Rule* in turn was based on New Hampshire. It is equally widely accepted that Ray was as modern as the Law Lords were conservative, that Ray understood mental disease as the Law Lords did not, that Ray anticipated modern psychiatric thought in his book published in 1838, when he at the age of 31 was a general practitioner in a Maine fishing village with a population of less than 3,000. I do not think it is discredit to Ray, although perhaps it reflects on those who cite Ray to support sweeping changes in our criminal law without having digested his position, to point out that he was less modern, less scientific, less anticipatory of future developments in psychiatry—although certainly he was no less humane—than criminal law revisionists would have it. Lawyers, and psychiatrists too, have not been unknown to adopt any available printed authority that will support a proposed end without any great understanding of the author's position, and because Ray found the *M'Naghten Rules* cruel and wrote that they were cruel (and the Rules were cruel as they were applied in Ray's day), he is cited as scientific authority for the proposition that the *M'Naghten Rules* were based on medical misconceptions concerning the definition and nature of insanity.

Ray was a firm believer in phrenology, the science which correlated human qualities with bumps and prominences of the cranium, and just before he wrote his *Treatise* he had done extensive translation of two volumes of the six-volume work on functions of the brain by the author of phrenological theory, Francis Gall.²⁶ Phrenology leaves little room for the doctrine of individual responsibility: if a man's future can be predicted on the basis of palpating his cranium he clearly cannot be held to be responsible for his assets or deficits. Of phrenology, Ray wrote in his *Treatise* that it was "the only metaphysical system of modern times which professes to be founded on the observation of nature and which really does explain the phenomena of insanity with a clearness and a verisimilitude that strongly corroborate its

25. I. RAY, *TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* 1838 (1962).

26. *Id.* at xi.

proofs” He deplores the hostile reception of phrenological knowledge: “. . . In theory all mankind are agreed in encouraging and applauding the humblest attempt to enlarge the sphere of our ideas, while in practice it often seems as if they were no less agreed to crush them, by means of every weapon that wit, argument, and calumny can furnish.”²⁷

More important, Ray believed that all mental illness was accompanied by organic impairment, although he thought that sometimes the organic changes could not be demonstrated at autopsy because they were too recent in origin or too transient in character. He classified all mental disease as either falling in the categories of idiocy and imbecility, the result of want of the ordinary development of the brain, or of mania and dementia, the result of some lesion of the brain structure subsequent to its development. Since he saw mental illness as invariably the result of an organic condition, Ray was not willing to differentiate mental disease from any other disease as far as responsibility for the symptoms of the disease are concerned. The deranged defendant is no more responsible for his actions than a leper for his sores.

Ray was very convinced that the diseases he described were just as much organic diseases as typhoid, cholera, or smallpox. As proof of the organic basis of all mental illness he gave a circular argument which went from cause to effect and then from effect to cause, unaware that logicians have a special name for this kind of argument, “the fallacy of confirming the antecedent.” Said Ray, “. . . Derangement of the structure or of the vital actions of the brain must be followed by abnormal manifestations of the mind; and consequently, that the presence of the effect indicates the existence of the cause.”²⁸

We should note that in this strict adherence to an organic basis for all mental disease, Ray followed in the tradition of the great European psychiatrists of his period such as Pinel and Esquirol, whose works he drew on, and we should also note that modern psychiatry has many proponents for the theory of an organic cause, although a much more subtle type of cause than Ray and his contemporaries were postulat-

²⁷. See *supra* note 25.

²⁸. *Id.*

ing, for such diseases as schizophrenia and manic-depressive psychosis which most psychiatrists classify as non-organic, i.e. functional. Heath and his group at Tulane,²⁹ for example, believe that taraxein, a serum protein they have discovered, is the cause or a cause of schizophrenia; other investigators claim that a brain deficiency of serotonin, a hormone, causes schizophrenia; and other investigators implicate the catecholamines such as adrenaline and its derivatives. Some investigators, particularly those who favor a psychopharmacological approach to treatment, believe that other categories of psychiatric disorder now classed as functional—personality disorders, psychoneurotic disorders, and transient situational personality disorders—may also prove to have serum protein, hormone, enzymatic or other organic factors as their basis.

But the organic basis for what are now classified as functional psychiatric disorders has yet to be proven, and for our present purposes it is enough to point out that Ray's theories have little in common with Freud and his followers in modern dynamic psychiatry. They did provide a basis for his opposition to the Law Lords who had said that one could be insane and still be morally responsible for one's actions. This to Ray was like saying that a patient with smallpox was responsible for his spots.

One of Ray's most quoted arguments against *M'Naghten* involved the patients found in mental hospitals who were in hospitals because they were insane but who clearly could tell right from wrong and were often, in fact, scrupulously concerned with concepts of good and evil. These patients, said Ray, proved the inhumanity of *M'Naghten*, but he did not point out that the Law Lords were not considering the question of crimes committed by adjudged lunatics, they were considering the case of defendants living in society and not claiming to be ill or in need of special protection of the law until after they had committed a crime, at which time they first made a claim to insanity.

For 83 years from 1871 to 1954, the whole of the English speaking world continued to use the *M'Naghten Rules*, sometimes with modifications and additions, except for New

29. R. HEATH, SEROLOGICAL FRACTIONS IN SCHIZOPHRENIA, RESEARCH SYMPOSIUM (1963).

Hampshire which relied on the "product test". In 1954, with the *Durham* decision, the dike began to crumble, at first almost imperceptibly, recently more rapidly. The *Durham* decision, like other decisions promulgating new tests and rules, is based on the mistaken assumption that the Law Lords in *M'Naghten* defined insanity, and defined it rigidly and narrowly on the basis of their ignorance of the nature of insanity. So the *Durham* decision can state that the right-and-wrong test is "based on an entirely obsolete and misleading conception of the nature of insanity," and can quote Sheldon Glueck, legal scholar, as authority for the statement that it is unscientific to abstract "knowing", the cognitive ability, out of the total personality in which will and feeling are also elements. Simon Sobeloff, when Solicitor General of the United States, wrote: "Medical psychology teaches that the mind cannot be split into water-tight, unrelated, autonomously functioning compartments like knowing, willing, and feeling. These functions are intimately related and interdependent. We know today that the external manifestations of mental disease follow no neat pattern permitting pat legal definitions suitable for universal application," and he quotes Judge Doe, author of the New Hampshire rule, for the proposition that "the mistake of our predecessors" was adopting contemporaneous medical opinion as law.³⁰

We can only repeat that the Law Lords never attempted to define insanity, were not so stupid to think that their Rules separated the insane from the sane; all they attempted to do was to cull from the whole class of defendants pleading insanity those whose insanity was sufficient to rebut the presumption of guilty intent. It is easy to call the *M'Naghten Rules* stupid if one misrepresents them as a definition of insanity; it is harder to call them stupid if one states they stand for the proposition that even the insane are sometimes responsible for the consequences of their actions.

The *Durham* decision was hailed as progressive and enlightened by most psychiatrists and some lawyers, in spite of the fact that there has always been some question as to whether the *Durham* decision was the adoption of the New Hampshire rule in a Federal jurisdiction or was the formula-

30. Sobeloff, *From M'Naghten to Durham and Beyond*, 29 PSYCHIAT. QUART. 357 (1955).

tion of an entirely new test. Such noted commentators as Sobeloff and Overholser³¹ believe *Durham* is substantially the same as the New Hampshire rule; such noted commentators as Reid³² and Davidson³³ point out that the attempt in the New Hampshire rule was to do away with all tests on the basis that medical conditions cannot be encompassed in tests and to let the jury decide, but the *Durham Rule*, although in much the same words as the New Hampshire rule, does represent a medical test, a much broader medical test than any heretofore proposed. Not its vagueness but its breadth caused second thoughts about *Durham*; it soon became apparent that a test so broad is not a test at all and that to make it workable psychiatrists would have to testify authoritatively about matters which are still mysterious. Ray felt he could testify without equivocation about whether or not a disease was present; the jury could accept or reject his opinion; if it found a disease present it had to determine if the disease accounted for the crime. When we broaden our definition of disease to include all sorts of functional conditions which are not capable of being demarcated and diagnosed with the certainty of smallpox, which overlaps in their diagnostic classifications, which do not assuredly represent distinct entities, the psychiatrist is not able to testify with the assurance of a Ray—and who is left to guide the jury?

We have been told in *Time*³⁴ and other equally authoritative publications that the test for criminal responsibility of the American Law Institute's Model Penal Code³⁵ is a great advance over *Durham* and *M'Naghten* and that the decision of the United States Court of Appeals for the Second Circuit in the *Freeman*³⁶ case, which adopted the ALI test for the Second Circuit, is lucid and replete with psychiatric, legal, and historical scholarship. Says *Time*, "What Kaufman and his fellow judges liked about the new rule was that it was not only a giant step forward from *M'Naghten*

31. *Id.* See Overholser, *supra* note 2.

32. Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15, U. MIAMI L. REV. 14 (1960). See also, Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 357 (1960).

33. Davidson, *In defense of the M'Naghten Rule*, 1 PENN. PSYCH. Q. 20 (Spr. 1961).

34. TIME, Mar. 11, 1966, at 32.

35. MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962).

36. *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966).

but also a viable solution to the problems of *Durham*. Instead of 'knowing' the difference between right and wrong, the defendant is now subject to the subtler requirement of 'appreciating' it. Similarly, proving the act a 'product' of the disease now becomes the more reasonable task of showing that the disease resulted in a loss of 'substantial capacity' to obey the law.³⁷ The story of the Emperor's New Clothes comes to mind, but there are no small boys in the crowd to exclaim that the difference between "knowing" and "appreciating" may be no difference at all, no small boys to call Utopian the Freeman case's recommendation that those who cannot control their behavior should be "treated at appropriate mental institutions for a sufficiently long period to bring about a cure or sufficient improvement so that the accused may return with relative safety to himself and the community," no small boys to gasp when Judge Kaufman states that if there are insufficient hospital facilities and doctors to deal with criminals found to be incompetent under his formula, then "Congress, the state legislatures and federal and state executive departments should promptly consider bridging the gap."

A more recent issue of *Time* tells of two New York lawyers who failed to report respectively \$34,000 and \$119,000 of income to the federal government. The conviction of the first of these was reversed; while the defendant was on bail appealing his sentence the Freeman case abolished *M'Naghten* and thus has made the insanity defense a possibility; in the second case, tried under the ALI rule, the defendant got a hung jury after his psychiatrist testified he was not psychotic but had morbid depressions that inhibited him from finishing work. All of which proves that not all lawyers lack respect for psychiatric testimony.

What can a psychiatrist say about the multiplication of rules? In the first place, he can point out that under all the tests we have described courts repeatedly ask psychiatrists to make unpsychiatric determinations. Psychiatrists can describe, diagnose, and treat mental illness, but they cannot crawl into a defendant's cranium, see the world through his eyes, determine for the court such subjective

37. *TIME*, *supra* note 34.

information as whether he knew or appreciated the difference between right and wrong, whether the act was the product of his disease, whether he had a substantial capacity to conform. All of these concepts have more legal reality than psychiatric reality. A psychiatrist for example can give details of previous mental troubles, trace the course of a developing illness, demonstrate ego deficiencies—all of which may indicate a defendant might have found an impulse more irresistible than might a man with a stronger ego. But the point at which an impulse crosses the borderline from resistibility to irresistibility is not a determination for a psychiatrist; it can only be made in the abstract by a meta-physician and in the concrete by a judge and jury. Many years ago Zilboorg pointed this out by saying, "To force a psychiatrist to talk in terms of the ability to distinguish between right and wrong and of legal responsibility is . . . to force him to violate the Hippocratic Oath, even to violate the oath he takes as a witness to tell the truth and nothing but the truth."³⁸ The American Bar Foundation has said, "Since the psychiatrist cannot accurately determine the defendant's capacity to distinguish right from wrong on the basis of his medical expertise, his testimony on this issue is largely conjecture or a reflection of his own personal judgments of whether or not the defendant should be held responsible."³⁹ The same criticism should be made of a psychiatrist testifying that a crime is the product of a disease or that the defendant lacked substantial capacity to conform; the psychiatrist is a variety of medical witness, not a mind reader, fortune teller, or surrogate justice.

How can a psychiatrist help in the criminal trial process? He can help by presenting evidence which throws light on the background and mental state of the defendant, assuming he has not secured his information by any improper distortion of the doctor-patient relationship. (The psychiatrist interviewing a defendant must either act as a doctor in the interests of the defendant or, if he is in the employ of the courts or of the prosecution, inform the defendant that he is not serving in the function of the defendant's doctor.)

38. N. BUTTMACHER & H. WEIHOFFEN, *PSYCHIATRY AND THE LAW* 406 (1952).

39. F. LINDMAN & D. MCINTYRE, *THE MENTALLY DISABLED AND THE LAW, REPORT OF THE AMERICAN BAR FOUNDATION* 337 (1961).

Confessions secured by psychiatrists are not unknown to American courts.⁴⁰ Whatever the test, modern judges cannot attempt to understand defendants and deal with them rationally without as much help as psychiatrists can provide.

A psychiatrist can help by refusing to take on his shoulders legal determinations which are properly the function of judge or jury.

Perhaps he can help most by pointing out the neurotic quality of the quest for the definitive rule, the perfect test, the test which will do away with the painful soul-searchings of judge and jury. He can help by pointing out that it is the resultant of many factors—cultural, religious, ethical, emotional, practical—which determine the disposition of a defendant, not only the test employed. For documentation, see the growing body of decisions which indicate that even under a rule as liberal as *Durham*, decisions can be as harsh as they were in the heyday of *M'Naghten*. (One such case is *State v. Park*, 193 A.2d 1 (1963), in which a Maine court's conviction of a 15 year old boy was upheld.)⁴¹

The psychiatrist can point out that the defendant who pleads the insanity defense under any rule has committed an act that has harmed society and he is usually not safe enough or sane enough to be allowed freedom.⁴² Whether his detention is in a hospital or a jail, he will need psychiatric help—but he is not likely to get it. State hospitals, hospitals

40. See *Leyra v. Denno*, 347 U.S. 556 (1953). In this case, a state employed psychiatrist was introduced to the defendant as a doctor who would treat his attack of sinus. "Time and time and time again the psychiatrist told petitioner how much he wanted to and could help him, how bad it would be for petitioner if he did not confess and how much better he would feel, and how much lighter and easier it would be on him if he would just unbosom himself to the doctor." *Id.* at 559. A microphone had been hidden in the room, the state prosecutor and police officers were listening in another room, and the psychiatric interview was also taperecorded. For a treatment of the ambiguous position of a doctor whose employment is for purposes other than aiding the patient, see J. ROBITSCHER, *supra*, note 22, at 203.

41. See Reid, *supra* note 32, where it is pointed out that under the liberal New Hampshire test, the State Hospital which must submit a report on New Hampshire defendants has often used the "right-or-wrong" test, the narrowest application of the *M'Naghten Rules*, as its standard to determine if the crime was the produce of mental disease.

42. Some jurisdictions allow the jury to return an undifferentiated "not guilty" verdict which allows the defendant to go free, rather than the special verdict of "not guilty by reason of insanity" which requires or can require mental hospitalization. The undifferentiated verdict would have little to recommend it either from the point of view of the defendant who has claimed insanity and should be willing to accept help or from the point of view of society which has a right to be protected from irresponsible acts.

for the criminal insane, and prisons suffer equally from lack of man-power, lack of a climate in which psychotherapy can be attempted and in which the doctor-patient relationship is respected, and lack of public interest in providing better facilities and more services.

Even with the proper climate, enough manpower, proper facilities, the prognosis is poor; lawbreakers often lack to a large degree the desire to seek changes in themselves and the ability to trust a therapist, the chief factors of successful treatment. Even if the treating psychiatrist were not on the prison's payroll, responsible for parole recommendations, or were not on the hospital's payroll, having summary power over length of hospital stay, the prognosis would be guarded. In spite of this, the psychiatrist can still be most useful as a therapist after judicial determination, not as an expert witness in the course of a trial.

If the death penalty is abolished, if prison sentences are shortened to be consistent with deterrence and rehabilitation rather than revenge, and if psychiatric and other rehabilitation services are provided, it will not make any real difference if a disturbed person who has admittedly done an illegal act is treated in prison or in a mental hospital; in either case he will have problems of guilt, in either case he will feel he deserves punishment; in either case he will respond—if he responds at all—only to thoroughgoing and sincere efforts to help him whether the setting is called prison or hospital. (What we call our institutions is less important than what we do in them. It is time we recognized the inhumanity of indeterminate sentences, which represent a peculiar 20th century cruelty imposed on the pretext that we are therapists and not jailers, even when the prisoner-patient is not amenable to treatment. Psychiatrists must begin to speak up to protest the part they are expected to play in the disposition of those imprisoned or hospitalized under sexual psychopath laws, which allow men to languish in jail or mental hospital for a lifetime, awaiting their "cure", when their crime under less "modern" legislation might have merited comparatively minor punishment. It is time that lawyers speak up for these defendants whose rights to time-honored criminal trial procedures are stripped from them because

they are being removed from society for "therapy" and "not for reasons of punishment.")⁴³

Whatever our tests, we should recognize that the test is less important than the spirit and wisdom with which it is applied and the climate in which the determination is made, that the test should be capable of evolution, and that the test is of concern not only to lawyers, psychiatrists and malefactors, it is also a matter of public concern. The ultimate question is the extent to which the individual should be held responsible for his own actions, and that is important enough to be worthy of a great debate.

New problems on the horizon are ready to plague us in much the same way as *M'Naghten*, *Durham*, and our other points of dispute because they also reach the question of how much man is in control of his own destiny. The *Driver*⁴⁴ case and similar cases,⁴⁵ based on the very dubious finding that chronic alcoholism is a disease, state that certain products of chronic alcoholism cannot be considered a crime. In spite of the fact that no less an authority than the American Medical Association by decree has made alcoholism a disease, no real distinction exists between alcoholism and such other compulsive addictions as barbiturate addiction, amphetamine addiction, and narcotics addiction, which start out as functional illnesses and do not become organic diseases until fairly late in their course, nor are there major differences between the psychopathology of the alcoholic and such other repetitive antisocial defendants as the compulsive gambler, exhibitionist, homosexual. All these conditions and many more—including acute alcoholism, kleptomania, embezzlement, and repetitive criminal activity—represent emotional illness, but they are not diseases like cholera, multiple sclerosis, or diabetes.⁴⁶

43. See J. ROBITSCHER, *supra* note 22, at 153.

44. *Driver v. Hinnant*, 356 F.2d 761, (4th Cir. 1966).

45. *Easter v. District of Columbia*, 361 F.2d 50, 53 (D.D.C. 1966) which holds that "one who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public."

46. For a recent discussion of basic differences in the treatment of medical disease and emotional conditions susceptible to psychiatric intervention, see Pleune, *All Disease is Not Disease: a Consideration of Psychoanalysis, Psychotherapy and Psycho-social Engineering*, 46 INT. J. PSYCHO-ANAL. 358 (1965). Former Representative (later Senator) Kenneth Keating has inquired in Congress about the problems of dealing with a defendant whose only identifiable mental disease or defect is "a morbid propensity for crime." Rovere, THE NEW YORKER, Apr. 19, 1958, at 81.

The authors of the *Driver* and related decisions have opened a Pandora's box that makes any discussion of criminal responsibility centering around *M'Naghten* or *Durham* seem like a kindergarten exercise. The *Driver* case states that the alcoholic's drunkenness in public is not his act, for he did not will it, and that such conditions as alcohol addiction constitute a "status" and that such behavior as public intoxication an "involuntary symptom of a status." The decision does not annul the North Carolina statute against public drunkenness; it only states that a chronic alcoholic cannot be criminally guilty under the statute. Questions we may ask: is the distinction in the case between the chronic alcoholic and the merely excessive "steady or spree drinker" valid? Who determines and what criteria are used to determine whether an alcoholic falls within the category of addicted alcoholic or is merely an unaddicted alcoholic? Concerning cure, can the addicted alcoholic be cured within a reasonable period of time or will he have to spend the rest of his life in a treatment center? And is this preferable to ten days or even ten months for public drunkenness? Again, if public drunkenness is excusable in an alcoholic, is stealing to finance the drinking expedition also excusable? What about murder committed by an alcoholic? Is the inability to will rigidly confined to the act of drinking itself or does it extend into other areas? Finally, who will treat and cure the alcoholics? Most reputable psychiatrists would not be too helpful about the results of involuntary treatment. Where will the personnel be found to man treatment centers for hundreds of thousands of such patients, for if the District of Columbia, with a population of 750,000, has already 3,400 "card-carrying" alcoholics, certified as chronic alcoholics and given cards exempting them from arrest for drunkenness, we can extrapolate that the total in the whole country who might be awarded such cards is more than 900,000.

Are we prepared to undertake the cure of all these unfortunates? Not only the alcoholic but the addict and the arsonist and the exhibitionist is suffering from a disease, as is the delinquent, the child beater, and many more. If following *Driver* we drop all these crimes from our statute books, we will need mental hospitals with guards instead

of attendants and with wardens instead of physicians-in-chief to take care of the diseased in our midst.

Perhaps someday we will be ready to say that all criminal activity is the result of disease, as *Durham* and *Driver* encourage us to say; if so we should be prepared to take care of the deluge of sick people we will be called upon to treat and we should be drawing up blueprints for a new type of society in which individual responsibility has little or no place.

Logic and fairness tell us that not all defendants have equal abilities to control their own actions and to avoid anti-social activity. If you are born into certain conditions, suffer certain early cruelties and deprivations, are molded into certain patterns, experience certain tensions, then there is little chance that you will emerge as conflict-free, reasonable, amenable to the restrictions of the law. You will have more hatred, you will be more prone to violence, you will have less self control, you will not have the ties of loyalty and love that keep us from committing more and worse antisocial actions than we do. Sociologists have described slum families where the difficulty is not understanding why all children except one become criminals; the difficulty is understanding why one child escapes from the social pattern. Someday we may wish to discard the idea of individual responsibility, we may feel our futures are ordained by our environments and our chemistry, we may wish to scrap *M'Naghten*, to interpret *Durham* broadly, to apply *Driver* to every crime in the book. We should consider some of the recent work of psychologists such as Krech⁴⁷ who has found, working with rats, that permitting the young animal to grow up in a psychologically impoverished environment creates an animal with a relatively deteriorated brain—"a brain with a relatively thin and light cortex, lowered blood supply, diminished enzymatic activities, smaller neuronal cell bodies, and fewer glia cells. A lack of adequate psychological fare for the young animal results in palpable, measurable deteriorative changes in the brain's chemistry and anatomy. The

47. Krech, *In Search of the Engram*, MED. OP. & REV. 20 (Aug. 1966).

rat's brain does not live by chow alone."⁴⁸ Harlow⁴⁹ has demonstrated that rhesus monkeys isolated from their mothers at birth and brought up without contact with animals or humans continued to show, long after the end of the isolation, hostility, uncoordinated sexual behavior, reduced playful interaction, a high level of fear, and maladaptive aggression against both adults and infants. Dr. Grace Gregg recently told the American Academy of Pediatrics that only a small percentage of "battered children"—children assaulted and beaten by their own parents—show promise of becoming self-sufficient adults.⁵⁰

Someday we may well conclude that absence of the proper psychological climate during formative years may be the most important factor in predisposing humans to crime, and we will concern ourselves with massive programs of rehabilitation and prevention rather than deterrence and punishment. If and when we come to this conclusion we should have more knowledge than we do now about the therapy and rehabilitation of those whom we absolve of responsibility, we should have some concept of how to protect society from the effects of hostility and aggression, we should have some substitute for the power of punishment as a deterrent, we should know more than we do now about the effect on our entire social structure of the concept of individual responsibility.

Certainly it is within our power to dispense with the idea of responsibility; we can make a clean break with the tradition of the Law Lords; we can forego classifying and culling and wipe all crimes from the statute books. If we decide to abandon the concept of responsibility, let us do it knowingly, with thought and study and deliberation and public debate, not by the piece-meal undercutting of basic assumptions of a civilized society by ill-planned reforms which rely on a misreading of history as their rationalization and which depend on formulas, instead of plans of action, to solve social problems.

48. *Id.*

49. Harlow, *The Effects of Early Experience Upon The Personal-Social, Heterosexual, and Maternal Behavior of Rhesus Monkeys*, *Trans Amer. Neurol. Ass'n* 87 (1962). Harlow & Harlow, *Social Deprivation in Monkeys*, *Sc. AMER.* 207 (Nov. 1962).

50. Beck, "Battered" Children, *Philadelphia Inquirer*, Dec. 13, 1966, at 30.