

## Proposed Revisions of the M'Naghten Rule

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# PROPOSED REVISIONS OF THE M'NAGHTEN RULE †

A CONTROVERSY OF LONG STANDING in the administration of justice has been the defense of insanity in criminal law. Re-examination of the law in this area was recently stimulated in New York State by a conference held under the auspices of the Department of Mental Hygiene to consider and make recommendations to the legislature as to the retention or amendment of the pertinent section of the Penal Law.<sup>1</sup>

As the test to determine whether a defendant, alleged to have been insane, should be held responsible for his criminal act, New York has statutorily embodied the *M'Naghten* rule<sup>2</sup> in Section 1120 of the Penal Law, the second paragraph of which reads:

A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as:

1. Not to know the nature and quality of the act he was doing; or
2. Not to know that the act was wrong.<sup>3</sup>

This test is generally referred to as the "right-and-wrong rule"<sup>4</sup> although the abbreviation is somewhat inaccurate. The *M'Naghten* rule was formulated in the course of an inquiry by the House of Lords in 1843 directed to the judges of England.<sup>5</sup> M'Naghten had been acquitted of the murder of the secretary to Sir Robert Peel on the ground of insanity and the judges were requested to clarify the law in this area by responding to five theoretical questions. The "test" has been adapted from the following passage:

... [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring 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.<sup>6</sup>

† Prepared by the St. Thomas More Institute for Legal Research.

<sup>1</sup> Berman, *Is It Time to Revise the McNaughton Rule Relating to the Defense of Insanity in Criminal Law?*, 29 N.Y.S. BAR BULL. 407 (1957).

<sup>2</sup> See *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

<sup>3</sup> N.Y. PEN. LAW § 1120.

<sup>4</sup> GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 403 (1952); Sobeloff, *Insanity and the Criminal Law: From McNaughten to Durham, and Beyond*, 41 A.B.A.J. 793 (1955). See, e.g., *Leland v. Oregon*, 343 U.S. 790, 800-01 (1952).

<sup>5</sup> *M'Naghten's Case*, *supra* note 2, at 202-03, 8 Eng. Rep. at 720.

<sup>6</sup> *M'Naghten's Case*, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843).

Of the cases which preceded *M'Naghten* in the development of the rule, *Rex v. Arnold*,<sup>7</sup> *Ferrers' Case*,<sup>8</sup> and *Hadfield's Case*<sup>9</sup> appear the most significant, although the general concept of exculpability on the ground of insanity goes far back in the common and civil law.<sup>10</sup> Knowledge of right and wrong in a general sense was established as a test at the time *Ferrers' Case* was decided in 1760.<sup>11</sup> The *M'Naghten* test, however, specifically calls for knowledge of right and wrong as to the criminal act with which the defendant is charged.<sup>12</sup>

Controversy over the form and substance of the rule ranges from the meaning of its key words to the very spelling of *M'Naghten*.<sup>13</sup> The use of the disjunctive "or," giving the rule its two branches, means simply that the defendant is excused either in the event that he did not understand the nature and quality of the act, or in the event that he did not know that the act was wrong.<sup>14</sup>

<sup>7</sup> 16 How. St. Tr. 695 (1724), frequently described as setting forth the "wild beast test" although the judge's remarks were not intended to be taken literally. S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 139 n.2 (1925); HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 495-97 (1947).

<sup>8</sup> 19 How. St. Tr. 885 (1760).

<sup>9</sup> 27 How. St. Tr. 1281 (1800), an aberrational case in which defendant's acquittal on the basis of insane delusion was largely attributable to Erskine's eloquence. S. GLUECK, *op. cit. supra* note 7, at 147-48; GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 152 (1952).

<sup>10</sup> See *People v. Schmidt*, 216 N.Y. 324, 331, 110 N.E. 945, 946-47 (1915); S. GLUECK, *op. cit. supra* note 7, at 123-25.

<sup>11</sup> S. GLUECK, *op. cit. supra* note 7, at 142, 144.

<sup>12</sup> *M'Naghten's Case*, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722-23 (H.L. 1843).

<sup>13</sup> See *Pigney v. Pointer's Transp. Services Ltd.*, (1957) 1 *Weekly L.R.* 1121, 1122 ed. n. (Assizes); Note, *The Real McNaughton*, 74 L.Q. REV. 1 (1958).

<sup>14</sup> *People v. Horton*, 308 N.Y. 1, 123 N.E.2d 609 (1954).

"Nature" and "quality" have been deemed synonymous and usually to mean no more than physical, sensate quality — not emotional appreciation of the significance or consequences of the act.<sup>15</sup> Some courts seem to hold that knowing the nature and quality of the act merely means knowing that the act is wrong.<sup>16</sup> "Wrong" in New York State means moral wrong,<sup>17</sup> not legal wrong as interpreted in some other jurisdictions.<sup>18</sup>

Near-unanimous acceptance was accorded the *M'Naghten* rule although it was early subjected to criticism.<sup>19</sup> It is the law in at least forty-four states and in most of the British Commonwealth.<sup>20</sup> As a modification, fourteen states have added the so-called "irresistible impulse" test.<sup>21</sup> In New Hampshire<sup>22</sup> and the District of Columbia<sup>23</sup> the *M'Naghten* test has been rejected — by the latter jurisdiction in 1954. New York State accepted the *M'Naghten* rule in *People v. Kleim*<sup>24</sup> in 1845; the legislature

<sup>15</sup> See HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 501 (1947).

<sup>16</sup> *Ibid.*

<sup>17</sup> *People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (1915).

<sup>18</sup> See, e.g., *McElroy v. State*, 146 Tenn. 442, 242 S.W. 883 (1922); *Harrison v. State*, 44 Tex. Cr. 164, 69 S.W. 500 (1902); *Regina v. Windle*, 2 Q.B. 826, 2 All E.R. 1 (1952).

<sup>19</sup> See, e.g., 2 STEPHEN, *HISTORY OF THE CRIMINAL LAW IN ENGLAND* 153 (1883).

<sup>20</sup> See ALI, *MODEL PENAL CODE*, Appendix A § 4.01, at 161 (Tent. Draft No. 4, 1955). The four exceptions are Rhode Island (probably adheres to *M'Naghten*), Georgia (delusional impulse test), Montana (test unclear) and New Hampshire (*Pike-Durham* "product" test, see text *infra*). *Ibid.* But see *State v. Kitchens*, 129 Mont. 331, 286 P.2d 1079, 1082 (1955), where the court indicated adherence to the *M'Naghten* rule.

<sup>21</sup> See ALI, note 20 *supra*.

<sup>22</sup> *State v. Pike*, 49 N.H. 399 (1869); *State v. Jones*, 50 N.H. 369 (1871).

<sup>23</sup> *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

<sup>24</sup> 1 Edm. Sel. Cas. 13 (N.Y. 1845).

codified it in 1881;<sup>25</sup> and the courts have applied it without modification. *M'Naghten* received detailed review in *People v. Schmidt*,<sup>26</sup> where Judge Cardozo noted the harsh criticism of the rule. More recently, Judge Van Voorhis' lone dissent in *People v. Horton*<sup>27</sup> decried the focus of the test upon intellectual disorientation.

### Treatment of the Rule in the Federal Courts

In the federal jurisdiction, the *M'Naghten* rule has been supplemented by the "irresistible impulse" test which received Supreme Court approval in *Davis v. United States*<sup>28</sup> in 1897. The military jurisdiction has also adopted this modification.<sup>29</sup> In *Leland v. Oregon*<sup>30</sup> the Supreme Court recently noted the strides of psychiatry but pointed out that its progress had ". . . not reached a point where its learning would compel [the Court] . . . to require the states to eliminate the right and wrong test from their criminal law."<sup>31</sup>

The history of *M'Naghten* was radically altered in *Durham v. United States*<sup>32</sup> by the Court of Appeals for the District of Columbia in 1954. The rule was specifically rejected as the sole criterion of criminal responsibility and the New Hampshire "product" test (considered *infra*) ordered applied as a substitute on retrial.<sup>33</sup>

Some indication of future treatment of

the *M'Naghten* rule in the Supreme Court of the United States may be gleaned from critical statements by two present Justices. Appearing before the Royal Commission on Capital Punishment, Justice Frankfurter did not ". . . see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated. . . ." <sup>34</sup> Justice Douglas opined in an article that ". . . the only warrant for the *M'Naghten* rule of insanity was tradition."<sup>35</sup>

### Criticisms of the *M'Naghten* Rule

What then are the essential criticisms of the *M'Naghten* rule? The crux of the complaint that *M'Naghten* is obsolete is that the rule fails to recognize the universally accepted principle that the human mind and personality are integrated as to the cognitive, volitive and affective capacities, and that these elements may not be compartmented. *M'Naghten*, it is claimed, is a product of a rationalist era, acknowledging only the cognitive or intellectual faculty and does not allow for the incapacity of the will or the influence of the emotions. While an individual may understand both the nature of his act and its wrongfulness (cognition), he may nevertheless, due to mental

<sup>34</sup> Royal Commission on Capital Punishment, 1949-53, REPORT, Cmd. No. 8932, at 102 (1953).

<sup>35</sup> Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485, 494-95 (1956). The Court's statement in the *Leland* case, asserting the right to change the law at some future time, represents a change from an earlier position. "For this Court to force the District of Columbia to adopt such a requirement [the New Hampshire rule] for criminal trials would involve a fundamental change in the common law theory of responsibility . . . Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District." *Fisher v. United States*, 328 U.S. 463, 476 (1946).

<sup>25</sup> Laws of N.Y. 1881, c. 676, as amended by Laws of N.Y. 1882, c. 384, § 21.

<sup>26</sup> 216 N.Y. 324, 338-39, 110 N.E. 945, 949 (1915).

<sup>27</sup> 308 N.Y. 1, 16-23, 123 N.E.2d 609, 616-21 (1954).

<sup>28</sup> 165 U.S. 373 (1897).

<sup>29</sup> MANUAL FOR COURTS-MARTIAL 200 (1951).

<sup>30</sup> 343 U.S. 790 (1952).

<sup>31</sup> *Leland v. Oregon*, 343 U.S. 790, 801 (1952).

<sup>32</sup> 214 F.2d 862 (D.C. Cir. 1954).

<sup>33</sup> *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

illness, be either unable to will to avoid it (volition), or be so emotionally deranged (affection) as to be irresponsible.<sup>36</sup>

To this criticism it may be answered that the rule is founded upon fundamental concepts of free will and individual responsibility which are basic to criminal law,<sup>37</sup> and was clearly not the whim of a particular era.<sup>38</sup> Overemphasis of the influence of the emotions or of the unconscious mind is regarded as tending toward determinism and undermining the paramountcy of the intellect.<sup>39</sup>

Another central objection to the rule is that it narrows the inquiry into mental disorder by its focus upon knowledge and thus hamstringing psychiatrists in their efforts to assist the court.<sup>40</sup> The question of "right

and wrong," some psychiatrists feel, has no meaning to their field since this is an ethical or metaphysical question and beyond their scope.<sup>41</sup> The very word "insanity" is a legal one and meaningless to the psychiatrist. When attempting, then, to analyze broadly a defendant's mental condition, the psychiatrist is abruptly restricted.

To the claim that insanity is inadequately, even ridiculously, defined, it is pointed out that the definition does not purport to be a medical one but is simply a criterion of responsibility.<sup>42</sup> The determination to be made by the jury is a legal, not medical, one.<sup>43</sup> Further, on the lexicographic question, the ultimate problem of responsibility is in fact a moral one — hence

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which he claims no expertness." Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793, 877 (1955). "A very large part of the confusion which almost invariably results in the trial of the criminal defendant alleged to be insane, lies in the fact that the law insists that the psychiatrist deal with mental states and conditions which do not exist save as legal conceptions." Dissent of Ch. J. Biggs in United States *ex rel. Smith v. Baldi*, 192 F.2d 540, 567 (3d Cir. 1951). See Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 329 (1955).

<sup>41</sup> See GUTTMACHER & WEIHOFEN, *op. cit. supra* note 37, at 406; Karpman, *On Reducing Tensions and Bridging Gaps Between Psychiatry and the Law*, 48 J. CRIM. L., C. & P.S. 164 (1957); "Many psychiatrists seem to resent a situation in which they are compelled to speak a language not their own. . . ." Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 380 (1952).

<sup>42</sup> ". . . [T]he Rules did not profess to define insanity but merely to define the condition of mind in which a person pleading insanity was to be regarded as absolved from criminal responsibility for his unlawful acts." Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 87 (1953).

<sup>43</sup> See Keady, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956, 993 (1952); *cf. Sauer v. United States*, 241 F.2d 640 (9th Cir. 1957).

<sup>36</sup> See S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 264-66 (1925); HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 492-99 (1947); Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 80 (1953); WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 409-10 (1933).

<sup>37</sup> GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 408 (1952).

<sup>38</sup> Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC U.L. REV. 25, 50 (1955); Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B.A.J. 917 (1956).

<sup>39</sup> Cavanagh, note 38 *supra*; McDonnell, *The Right-Wrong Test*, 21 J.B.A.D.C. 389 (1954); *Report of the Special Committee on the Rights of the Mentally Ill*, 70 A.B.A. REP. 338 (1945).

A psychiatrist writes: "The psychiatrist considers logical thinking one of the more secondary activities of the human organism, certainly exceeded in power by the emotions." Modlin, *The Position of the Psychiatrist in the Administration of the Criminal Law*, 4 KAN. L. REV. 350, 351-52 (1956).

<sup>40</sup> "The McNaghten rule requires medical witnesses to testify in terms that to them are artificial and confining. A doctor can offer expert judgment when he talks of illness, disease, symptoms and the like. When he is forced to adopt the vocabulary of morality and ethics, he is speaking in what to him is a foreign language and in an area in

concepts of right and wrong are essential.<sup>44</sup> To the contention that the psychiatrist cannot testify in meaningless, popular terms, the rejoinder is that the experts' polysyllabic patois<sup>45</sup> should be accommodated to the jury.<sup>46</sup> A suggested compromise is the trained jury or panel;<sup>47</sup> this meets, however, the general aversion to blue ribbon juries<sup>48</sup> as well as the particular difficulty of choosing from among psychiatric schools, or finding impartial psychiatrists.<sup>49</sup>

A third challenge to *M'Naghten* is the criticism of the use of any test or symptom to determine responsibility.<sup>50</sup> In medical

<sup>44</sup> "In our view the question of responsibility is not primarily a question of medicine any more than it is a question of law. It is essentially a moral question, with which the law is intimately concerned and to whose solution medicine can bring valuable aid, and it is one which is most appropriately decided by a jury of ordinary men and women, not by medical or legal experts." Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 100 (1953).

<sup>45</sup> "In light of the esoteric nomenclature used in the field, and the hypertechnical divergence between various schools of psychiatric thought, as well as because of the complexity and sheer uncertainty of the area under exploration, it can readily be imagined what wholesale want of enlightenment would eventuate from purely medical testimony from the witness-psychiatrist." *United States v. Smith*, 5 U.S.C.M.A. 314, 324, 17 C.M.R. 314, 324 (1954), *rev'd on other grounds sub nom. Reid v. Covert*, 354 U.S. 1 (1957).

<sup>46</sup> Judge Sobeloff concedes this: "If psychiatry is to provide maximum guidance and assistance to juries, psychiatric witnesses must learn to avoid technical jargon which baffles laymen." Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793, 879 (1955).

<sup>47</sup> Ehrlich, *Psychiatry v. McNaughton Formula*, 138 N.Y.L.J. No. 84, p. 4, col. 1 (Oct. 28, 1957), at No. 86, p. 4, col. 3 (Oct. 30, 1957).

<sup>48</sup> See, e.g., a New York bill to abolish blue ribbon juries. S. Int. No. 887 (1958).

<sup>49</sup> DAVIDSON, FORENSIC PSYCHIATRY 74-75 (1952), noted in Fay, *The Practical Role of Psychiatry in the Effective Practice of Law*, 29 TEMP. L.Q. 327, 328 (1956).

<sup>50</sup> This is the essential premise of the New Hamp-

practice the total condition of the patient, including all symptoms, is analyzed to determine the etiology and status of his illness. All evidence of his mental condition should similarly be introduced at a trial, particularly in recognition of the recent scientific use of electroencephalograms, spinal lumbar punctures and other media to study brain activity.<sup>51</sup>

The courts are skeptical of this argument since it, in effect, proposes to abolish a standard by which the jury may measure a defendant's responsibility.<sup>52</sup> To remove all tests leaves the jury on its own to evaluate conflicting testimony; admission of any evidence on mental disorder gives the psychiatric expert carte blanche to introduce any theory.<sup>53</sup> Scientific devices are largely use-

shire and *Durham* cases. See text *infra*.

<sup>51</sup> See *United States ex rel. Smith v. Baldi*, 192 F.2d 540, 565 (3d Cir. 1951) (dissenting opinion); Weihofen, *Crime, Law, and Psychiatry*, 4 KAN. L. REV. 377, 394-95 (1956). It has been charged that an inconsistency exists between use of scientific devices by the courts and the non-recognition of the field of psychiatry. Ehrlich, *supra* note 47, at No. 87, p. 4, col. 3 (Oct. 31, 1957).

<sup>52</sup> "The majority of witnesses, however, were opposed to the suggestion that the M'Naghten Rules should be abrogated and that the jury should be left to decide the issue of responsibility without the aid of any legal criterion." Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 97 (1953).

<sup>53</sup> "The critics of the M'Naghten Rules readily admitted the difficulty of deciding what should be put in their place. The majority considered that it would be unwise to dispense with any formula and simply leave the jury to determine on all the evidence whether the accused was insane or irresponsible. They felt that this would leave too difficult an issue to the jury, who would ask for further guidance and were entitled to receive it, and it would give too much latitude to psychiatrists. It was necessary to have some fixed standard which the jury could apply in face of 'the vagaries of a fluid and evolving science' and which would help to judge in charging the jury." *Id.* at 106.

ful only for analysis of physiological disorders—somatopsychic (organic psychoses) rather than purely psychic.<sup>54</sup>

#### Existing Modifications and Substitutes

The modification of the *M'Naghten* rule which has attained widest acceptance is the "irresistible impulse" test.<sup>55</sup> It recognizes impairment of the will, holding defendant not responsible, even though he knew the nature and quality of his act and its wrongfulness, if he was unable to resist it due to deprivation of will power.<sup>56</sup> The clarity of the term is open to some doubt: an irresistible act could never be resisted; impulse suggests momentary urge.<sup>57</sup>

This test is not a substitute for the *M'Naghten* rule but rather an additional exculpatory factor—a third branch to the rule. While approved in at least fourteen

<sup>54</sup> Most severe mental disorders are not organic in origin. CAVANAGH & MCGOLDRICK, *FUNDAMENTAL PSYCHIATRY* 31, 48 (1953); Karpman, *On Reducing Tensions and Bridging Gaps Between Psychiatry and the Law*, 48 J. CRIM. L., C. & P.S. 164, 166 (1957). See Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B.A.J. 917, 918-19 (1956). ". . . [C]linical analysis consists largely of case history, a reconstruction of the patient's experiences. The essence of this method is the use of empathy, the sensitive re-living of the patient's experience. It is widely recognized that such analysis would be grossly inadequate if the analyst did not attain considerable insight into the patient's scheme of values. This requires a reliving of his moral conflicts and evaluations, including their appraisal on moral grounds." Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 782 (1956).

<sup>55</sup> See Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956 (1952).

<sup>56</sup> *Smith v. United States*, 36 F.2d 549 (D.C. Cir. 1929).

<sup>57</sup> GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 410 (1952). Judge Biggs poses the problem differently: ". . . [I]t would seem that any impulse which is not resisted is by definition irresistible." *United States ex rel. Smith v. Baldi*, 192 F.2d 540, 568 (3d Cir. 1951) (dissenting opinion).

states and the federal jurisdictions,<sup>58</sup> there is no current trend toward wider adoption since it has been specifically rejected in several states.<sup>59</sup> In New York the statutory formulation of a test has precluded the use of any supplement.<sup>60</sup>

The "irresistible impulse" test was accepted in this country in Ohio in 1834<sup>61</sup> and was later more precisely set forth as exonerating the defendant where

. . . by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed. . . .<sup>62</sup>

An effective argument for the rule was set forth in the case of *Parsons v. State*.<sup>63</sup> The opinion indicated the two constituent elements of legal responsibility as capacity of intellectual discrimination and freedom of the will and concluded that the criminal insanity doctrine ought to include exoneration for impairment of the will caused by mental disease whereby one commits a crime he could not avoid. This supplementary test, which would seem to meet the central objection to the *M'Naghten* rule by its recognition of volitional impairment, has been criticized nevertheless from two aspects. One theory is that no impulse is truly incapable of being resisted and that the test represents the abnegation of will

<sup>58</sup> ALI, *MODEL PENAL CODE*, Appendix A § 4.01, at 161 (Tent. Draft No. 4, 1955). Additionally, it was approved by the Supreme Court in *Davis v. United States*, 165 U.S. 373 (1897).

<sup>59</sup> See Keedy, *supra* note 55, at 980-82.

<sup>60</sup> *People v. Silverman*, 181 N.Y. 235, 73 N.E. 980 (1905); *People v. Carpenter*, 102 N.Y. 238, 6 N.E. 584 (1886).

<sup>61</sup> *State v. Thompson*, Wright's Ohio Rep. 617 (1834).

<sup>62</sup> *Parsons v. State*, 81 Ala. 577, 2 So. 854, 866 (1887).

<sup>63</sup> 81 Ala. 577, 2 So. 854 (1887).

power.<sup>64</sup> The other view is that the test does not go far enough: the use of "impulse" excludes mental disorder typified by brooding and melancholia which may also impair the will to an extent where the act is unavoidable.<sup>65</sup> In New York, an example of this latter situation might be the *Horton* case.<sup>66</sup>

It has been suggested that an expression to cover volitional impairment, one that is both more accurate and useable, is "unresisted urge." Dr. Cavanagh believes the term "urge" to be medically correct, as well as wide enough to include non-impulsive but nevertheless insane behavior as above described.<sup>67</sup> For the military jurisdiction the *Manual for Courts-Martial* takes the broad approach in its version of the "irresistible impulse" gloss to *M'Naghten*:

A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right.<sup>68</sup>

A revolutionary event in the controversial course of the *M'Naghten* rule was the

<sup>64</sup> Baron Bramwell asked: "Would the prisoner have committed the act if there had been a policeman at his elbow?" S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 265 n.2 (1925); Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 103 (1953). This is a test of "irresistible impulse" in the military jurisdiction. See *United States v. Smith*, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954), *rev'd on other grounds sub nom. Reid v. Covert*, 354 U.S. 1 (1957); Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B.A.J. 917 (1956).

<sup>65</sup> *Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954) (dictum); GUTTMACHER & WEIHOFFEN, *PSYCHIATRY AND THE LAW* 410-12 (1952).

<sup>66</sup> *People v. Horton*, 308 N.Y. 1, 123 N.E.2d 609 (1954).

<sup>67</sup> Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC U.L. REV. 25, 42-43 (1955).

<sup>68</sup> *MANUAL FOR COURTS-MARTIAL* 200 (1951).

1954 *Durham*<sup>69</sup> case where the rule was rejected as the sole test of criminal responsibility for the District of Columbia.<sup>70</sup> Although the court referred to the "enormous development in knowledge of mental life" the rule it adopted was the eighty-year-old New Hampshire "product" rule:

It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect. We use "disease" in the sense of a condition which is considered capable of either improving or deteriorating. We use "defect" in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.<sup>71</sup>

The decision was acclaimed by psychiatrists generally and greeted skeptically by the legal profession. However, there were exceptions within both groups.<sup>72</sup>

<sup>69</sup> *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

<sup>70</sup> The *M'Naghten* rule had been adopted in the District of Columbia in *United States v. Guiteau*, 1 Mackey 498 (D.C. Sup. Ct. 1882), and later supplemented by the "irresistible impulse" test in *Smith v. United States*, 36 F.2d 548 (D.C. Cir. 1929).

<sup>71</sup> *Durham v. United States*, *supra* note 69, at 874-75.

<sup>72</sup> Legal comments ran from "careful and psychologically literate," Kalven, *Insanity and the Criminal Law — A Critique of Durham v. United States*, *Introduction*, 22 U. CHI. L. REV. 317, 318 (1955), to ". . . a legal principle beclouded by a central ambiguity, both unexplained and unsupported by its basic rationale . . .," Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 373 (1955), and ". . . the abdication of responsibility for determining the standard of criminal responsibility. . . ." *Sauer v. United States*, 241 F.2d 640, 647 (9th Cir. 1957). Dissents from a few psychiatrists described the opinion as "insufficient and on shaky ground," Wertham, *Psycho-authoritarianism and the Law*, 22 U. CHI. L. REV. 336, 337 (1955), and, somewhat more strongly, as "unadulterated nonsense," Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 COLUM. L. REV. 183, 190 (1958). See Morris, *Criminal Insanity*:



Since the *Durham* case represents the only significant judicial assault upon the *M'Naghten* rule, it deserves close consideration. There were several unusual aspects to the case: the crime involved was not homicide,<sup>73</sup> the court reversed on grounds other than the insanity test (which therefore appeared to be dictum but which it set down as the law prospectively), and the court utilized non-legal materials extensively. The district court had convicted Durham of housebreaking, Judge Holtzoff, applying *M'Naghten* with "irresistible impulse," having rejected the insanity defense at trial for failure of evidence of unsound mind at the time of the crime. The Court of Appeals for the District of Columbia reversed, holding that the lower court erred in failing to find some evidence to rebut the usual presumption of sanity. The court then specifically rejected *M'Naghten* as the sole test and ordered the application of the New Hampshire "product" rule on retrial.<sup>74</sup>

The controversy that subsequently arose highlighted the decision's liberality. Abolition of any legal test of criminal responsibility is at once the merit of the case, according to adherents, and its most deplorable aspect, according to critics. Judge Sobeloff praises it for permitting ". . . as broad an inquiry as may be found necessary according to the latest accepted scientific criteria."<sup>75</sup> Authorities on both sides agree

*The Abyss Between Law and Psychiatry*, 12 RECORD OF N.Y.C.B.A. 171 (1957).

<sup>73</sup> It has been pointed out that the insanity defense has been heretofore seized upon primarily by those accused of homicide. GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 414 (1952); Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 327 (1955).

<sup>74</sup> See *State v. Pike*, 49 N.H. 399 (1869).

<sup>75</sup> Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793, 795 (1955).

that the door is opened wide for psychiatric testimony running to the whole picture of the defendant's mental condition. The new rule allows evidence on all aspects of mental condition affecting behavior — impairment of cognition, volition, and affection and the influence of the subconscious. Testimony will be less restricted; psychiatrists may utilize concepts which are more meaningful to them.<sup>76</sup>

On the other side, it is claimed that too much power is given to the psychiatrist by the absence of any test for the jury. The overall effect is to reduce the judge's role and subject the jury to the experts' diverse theories.<sup>77</sup> Dr. Guttmacher admits that the New Hampshire "product" test, now referred to as the *Durham* rule, has ". . . the tendency to make the psychiatrist, in large measure, the arbiter."<sup>78</sup> Objection to the

<sup>76</sup> Zilboorg, *A Step Toward Enlightened Justice*, 22 U. CHI. L. REV. 331, 334 (1955).

<sup>77</sup> Professor Wharton's early appraisal of the New Hampshire rule pointed out that "mental disease . . . in fact is a term so indeterminate and vague, that to leave the question to the jury with the instruction here criticised is to leave it to them without any instructions at all." WHARTON & STILLE, 1 MEDICAL JURISPRUDENCE 178 (5th ed. 1905), as quoted by WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 82 (1933). See also *United States v. Smith*, 5 U.S.C.M.A. 314, 324, 17 C.M.R. 314, 324 (1954) (dictum), *rev'd on other grounds sub nom. Reid v. Covert*, 354 U.S. 1 (1957); de Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 345 (1955).

<sup>78</sup> Correspondence between Dr. Guttmacher and Professor Wechsler, ALI, MODEL PENAL CODE, Appendix C § 4.01, at 188 (Tent. Draft No. 4, 1955). But Judge Bazelon who enunciated the *Durham* rule has subsequently defended it from the charge of delegating too much authority to the experts. ". . . [W]hether petitioner was suffering from such 'mental disease' or 'mental defect,' . . . would be determined by the trier of the facts, not by the psychiatric witnesses. The witnesses' role would be to supply to the trier of the facts the data upon which the determination can be made." *Briscoe v. United States*, 248 F.2d 640, 643-44 (D.C. Cir. 1957).

increased influence of the psychiatrist ought not be passed over as merely fear of encroachment upon judicial prerogative.<sup>79</sup> While *Durham* emphasizes the "science" of psychiatry,<sup>80</sup> the admission that psychiatry is "more of art than of science"<sup>81</sup> is still conceded by psychiatrists and the psychiatrically oriented.<sup>82</sup>

The abolition of a norm and the increased influence of the expert witness would seem to lead to greater ad hoc determination of responsibility.<sup>83</sup> The jury would pass on the individual merits; psychiatry seems to favor this approach since punishment should fit the criminal, not the crime.<sup>84</sup> This is adverse, however, to the legal concept of a standard for all with, traditionally, punishment accorded to the crime.<sup>85</sup>

<sup>79</sup> See *Commonwealth v. Patskin*, 375 Pa. 368, 100 A.2d 472 (1953). Few, however, would voice their skepticism as trenchantly as one commentator: ". . . [T]he medical expert has become a stench in the nostrils of upright judges." Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285, 292-93 (1943).

<sup>80</sup> *Durham v. United States*, 214 F.2d 862, 871 (D.C. Cir. 1954).

<sup>81</sup> Sullivan, *Psychiatry*, 12 ENCYC. SOC. SCI. 578, 580 (1933).

<sup>82</sup> Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC U.L. REV. 25, 26 (1955); Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485, 494 (1956). See Menninger, "Psychiatry and The Law" — A Dual Review, 38 IOWA L. REV. 687, 701 (1953).

<sup>83</sup> Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 114-15 (1953).

<sup>84</sup> See Karpman, *On Reducing Tensions and Bridging Gaps Between Psychiatry and the Law*, 48 J. CRIM. L., C. & P.S. 164 (1957); Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378 (1952).

<sup>85</sup> "Equal protection of the laws' in turn includes the right to be tried and punished in the same manner as others accused of crime are tried and punished. . . ." *Lynch v. United States*, 189 F.2d 476, 479 (5th Cir.), cert. denied, 342 U.S.

A further objection posited to *Durham*, as a substitute for *M'Naghten*, is its elimination of the ethical concept. To the psychiatrist, this is medically sound if he believes that moral right and wrong are meaningless in the analysis of mental disturbances.<sup>86</sup> To critics this represents the elimination of the very basis of criminal responsibility.<sup>87</sup> This conflict is no newer than that over the historic rule itself.

Particular problems are introduced by the terminology of the *Durham* rule. Failure to define mental disease and mental defect increases the problem of drawing the line on responsibility. Realizing that from the medical viewpoint there are no black and white distinctions in this area, nevertheless, the criminal law demands that some grouping finally be made.<sup>88</sup> This is of little interest to the psychiatrist whose concern is treatment.<sup>89</sup> Psychiatrists will agree on only certain categorizations — e.g., psychotics will usually be criminally irresponsible, neurotics not so.<sup>90</sup> Between the

831 (1951); cf. Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 97 (1953).

<sup>86</sup> See, e.g., Karpman, *supra* note 84, at 164.

<sup>87</sup> Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B.A.J. 917-18 (1956).

<sup>88</sup> ". . . [T]o the psychiatrist mental cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused." *Holloway v. United States*, 148 F.2d 665, 667 (D.C. Cir. 1945) (dictum); Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 328 (1955).

<sup>89</sup> B. Glueck, *Changing Concepts in Forensic Psychiatry*, 45 J. CRIM. L., C. & P.S. 123 (1954); Karpman, *On Reducing Tensions and Bridging Gaps Between Psychiatry and the Law*, 48 J. CRIM. L., C. & P.S. 164 (1957); Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378 (1952).

<sup>90</sup> The Royal Commission found insanity regarded medically to mean that "the patient is suffering from a major mental disease (usually a psycho-

extremes lies the large shadow area of the social psychopath; the problem would be how to apply the *Durham* rule here.<sup>91</sup> Following the integration of personality theory, all behavior of the mentally disturbed seems influenced to some degree by their mental condition. If the burden is to be on the prosecution to prove beyond reasonable doubt that the criminal act was *not* the product of the mental disorder,<sup>92</sup> this becomes heavy indeed when we consider that mental abnormality differs from normality only quantitatively, not qualitatively.<sup>93</sup> In short, since the gradation is but a continuum from the merely eccentric to the psychotic, the *Durham* rule encourages use of the insanity defense.<sup>94</sup> The possibility of abuse is enhanced by the view of many psychiatrists that criminal behavior is evidence per se of mental abnormality.<sup>95</sup>

However, response to the *Durham* rule in the courts has been limited. In *Andersen v. United States*,<sup>96</sup> the United States Court of Appeals for the Ninth Circuit affirmed a counterfeiting conviction where the district

sis)." Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 73 (1953).

<sup>91</sup> "The so-called 'borderline cases,' the psychopaths and the severe character neurotics, will still prove to be the difficult cases under the new rule." Guttmacher, *supra* note 88, at 328.

<sup>92</sup> See *Briscoe v. United States*, 248 F.2d 640, 643 (D.C. Cir. 1957); GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 421 (1952).

<sup>93</sup> CAVANAGH & MCGOLDRICK, *FUNDAMENTAL PSYCHIATRY* 21-23 (1953).

<sup>94</sup> A judge in the District of Columbia warned: "The defense of insanity is going to be used by every other defendant who comes into this court." Schweinhaut, J., Washington Evening Star, Nov. 10, 1954, as quoted in Comment, 5 CATHOLIC U.L. REV. 63, 84 (1955).

<sup>95</sup> See Karpman, *On Reducing Tensions and Bridging Gaps Between Psychiatry and the Law*, 48 J. CRIM. L., C. & P.S. 164, 168 (1957); Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320 (1955).

<sup>96</sup> 237 F.2d 118 (9th Cir. 1956).

court had refused to charge the *Durham* rule to the jury, and cited the Supreme Court's approval of the *M'Naghten* rule with the "irresistible impulse" modification. The court refused to ". . . join the courts of New Hampshire and the District of Columbia in their 'magnificent isolation' of rebellion against M'Naghten. . . ." <sup>97</sup> In *Sauer v. United States*,<sup>98</sup> where the insanity instruction was the only ground of appeal, the same circuit extensively considered and reaffirmed its rejection of *Durham*. The Court of Military Appeals, in *United States v. Smith*,<sup>99</sup> indicated it would be hesitant to adopt the *Durham* approach for the military establishment. In *Howard v. United States*,<sup>100</sup> the United States Court of Appeals for the Fifth Circuit did not have the insanity test squarely before it. It noted, however, the Supreme Court's approval of the *M'Naghten* test and the *Durham* court's ". . . considerable degree of autonomy with respect to law enforcement in the District."<sup>101</sup> In the state courts, the *Durham* rule has thus far attracted little support. Maryland<sup>102</sup> and Montana<sup>103</sup> considered it and adhered to *M'Naghten*; Indiana<sup>104</sup> criticized *Durham's* vagueness on causality;

<sup>97</sup> *Andersen v. United States*, 237 F.2d 118, 127 (9th Cir. 1956). "Rather than stumble along with Pike, we prefer to trudge along the now well-traveled pike blazed more than a century ago by M'Naghten." *Ibid*.

<sup>98</sup> 241 F.2d 640 (9th Cir. 1957).

<sup>99</sup> 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954), *rev'd on other grounds sub nom.* Reid v. Covert, 354 U.S. 1 (1957).

<sup>100</sup> 232 F.2d 274 (5th Cir. 1956).

<sup>101</sup> *Howard v. United States*, 232 F.2d 274, 275 (5th Cir. 1956).

<sup>102</sup> *Thomas v. State*, 206 Md. 575, 112 A.2d 913 (1955).

<sup>103</sup> *State v. Kitchens*, 129 Mont. 331, 286 P.2d 1079 (1955).

<sup>104</sup> *Flowers v. State*, 139 N.E.2d 185, 194 (Ind. 1956).

in California,<sup>105</sup> where a statute is involved, the court directed proposals for change to the legislature.

### Proposed Substitutions for the *M'Naghten* Rule

The American Law Institute Model Penal Code proposes a test for criminal responsibility which strives for a middle ground between the *M'Naghten* and the *Durham* rules:

- 1) a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
- 2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.<sup>106</sup>

In attempting to take into account impairment of volitional capacity, the proposal rejects the "irresistible impulse" test on the usual criticism that it is ". . . inept in so far as it may be impliedly restricted to sudden, spontaneous acts as distinguished from insane propulsions that are accompanied by brooding or reflection."<sup>107</sup> The comments of the ALI accompanying the proposal conclude, however, that ". . . attacks on the *M'Naghten* rule as an inept definition of insanity or as an arbitrary definition in terms of special symptoms are entirely misconceived."<sup>108</sup> This is directed at the *Durham* position which found *M'Naghten* both an attempt to define insan-

ity and an incorrect definition in terms of a symptom. The ALI draft apparently accepts the *M'Naghten* rule as at least setting forth "minimal elements of rationality"<sup>109</sup> in the absence of which punishment would be unjust. It extends recognition to impairment of volition in the broad sense (*i.e.*, not limited to irresistible impulse).

A weakness of the proposal is that it seems to introduce the *Durham* rule's causality problem by its use of the term "result." A further difficulty, considered by the ALI reporter, flows from the nebulousity of "substantial impairment."<sup>110</sup> Between some impairment of cognition and volition and impairment sufficient to exculpate from responsibility a line must finally be drawn. In an effort to meet this problem, the alternative proposal of the ALI submits the general issue of justice to the jury:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible.<sup>111</sup>

This alternative test may be compared to the majority recommendation of the Royal Commission on Capital Punishment in this area.

A Royal Commission, created in England in 1949 to study the capital punishment question, extensively considered the *M'Naghten* rule.<sup>112</sup> Appropriately enough, the criminal responsibility aspect of its

<sup>109</sup> *Ibid.*

<sup>110</sup> *Id.* at 158-59. See Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793, 878 (1955).

<sup>111</sup> ALI, MODEL PENAL CODE § 4.01, alternative formulation (a) (Tent. Draft No. 4, 1955).

<sup>112</sup> Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932 (1953).

<sup>105</sup> *People v. Ryan*, 140 Cal. App. 2d 412, 295 P.2d 496 (1956).

<sup>106</sup> ALI, MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).

<sup>107</sup> ALI, MODEL PENAL CODE, Comments 157 (Tent. Draft No. 4, 1955).

<sup>108</sup> *Id.* at 156.

report, completed in 1953 and covering several related areas, brought forth its only dissents. The Commission's study assumes significance, not only because of its intrinsic merit, but also because of its influence upon the *Durham* case decided in the following year.

The eleven-member Commission, with one dissent, agreed that the *M'Naghten* test of responsibility ought to be changed. Of the ten favoring a change, abrogation was favored by a majority, an extension of the rule favored by a minority.<sup>113</sup> The majority felt it should be left to the jury ". . . to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible."<sup>114</sup> This proposal is similar to alternative (1) of the American Law Institute as set forth *supra*. The three-member minority of the Commission preferred to amend the rule by the addition of a third branch covering volitional impairment along these lines:

The jury must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind (or mental deficiency) (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it.<sup>115</sup>

The majority recommendation was criticized by the minority primarily for failure of evidence from the Commission witnesses in its support.<sup>116</sup> As a result it was felt that so crucial an issue needed ". . . weighty argument . . . to justify the adoption of a course which has found so few advocates

among those who give evidence to the Commission."<sup>117</sup> The minority found the arguments for abrogation insufficient:

From the difficulties of the matter we cannot infer that the law should be allowed to shirk its duty by requiring the jury to come to a decision without the guidance of a general principle or criterion. . . . The fact that the criterion of responsibility cannot be defined with complete scientific precision is not a sufficient reason for not defining it at all.<sup>118</sup>

The majority felt that the extension of the rule proposed by the minority would be inadequate in practice and focused its criticism on the difficulty of interpreting the words "incapable of preventing himself." A liberal interpretation of this phrase was held necessary —

. . . meaning not merely that the accused was incapable of preventing himself if he had tried to do so, but that he was incapable of wishing or of trying to prevent himself, or incapable of realising or attending to considerations which might have prevented him if he had been capable of realising or attending to them.<sup>119</sup>

A narrow approach, the majority feared, of the third branch recommendation of the minority, would not serve the purpose of the rule. As to the objection raised to the elimination altogether of a test for the jury of criminal responsibility, the majority view was that some critics made ". . . too low an estimate of the capacity and common sense of juries. . . ."<sup>120</sup>

As another possible modification of the *M'Naghten* rule, it has been suggested by a vigorous supporter of the test that its current terminology be retained but a wider

<sup>113</sup> *Id.* at 116.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Id.* at 111, 116.

<sup>116</sup> Memorandum of Dissent, Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 285 (1953).

<sup>117</sup> *Id.* at 286.

<sup>118</sup> *Id.* at 286-87.

<sup>119</sup> Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 111 (1953).

<sup>120</sup> *Id.* at 115.

interpretation given to the term "know" to connote "understand" and "realize."<sup>121</sup> This approach pursues the theory of integration of psychological functions:

. . . to know that an act is morally wrong means more than merely conventional or logical recognition of its immorality. It means that the knowledge is permeated by feeling, that a person has assimilated the knowledge into his self and not that, as an icy spectator or in mere lip-service, he acknowledges that he "knew," etc.<sup>122</sup>

### Conclusions

Most authorities, legal and medical, agree that a change in the *M'Naghten* rule is warranted. The controversy swirls about the extent and direction of the change and the spectrum of opinion is wide. At one extreme stand those favoring complete abrogation of the existing rule; this is the approach of New Hampshire, the District of Columbia, many psychiatrists and the Royal Commission majority. At the other extreme are adherents of the rule as a tried and adequate test, perhaps conceding a slight modification in interpretation; this is the approach of some courts and many prosecution officials. Between lie the modifications, primarily directed at extension of the rule to cover volitional and emotional impairment while retaining the concept of right and wrong and the emphasis upon rationality as the test's principal criterion.

The intensity of the controversy can be understood to some extent in the differences in training, viewpoint and objectives of the legal and medical professions. The law's societal approach is concerned with order in the community, with establishment of standards to which all citizens may look

<sup>121</sup> Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 781-82 (1956).

<sup>122</sup> Hall & Menninger, "Psychiatry and the Law" — *A Dual Review*, 38 IOWA L. REV. 687, 696 (1953).

— punishment therefore, according to the crime and as determined by the penal law. The psychiatrist's approach is individual-oriented — concerned with treatment of the patient in his particular physical or psychic disorder, and not with the organization of society as a group.<sup>123</sup> *The immediate issue, however, is fundamentally an ethical one and the test is of responsibility, not of medical insanity.*

The paucity of legal support for the *Durham* rule and the testimony taken in the United States and England by the Royal Commission<sup>124</sup> evidence preference for retention of the *M'Naghten* rule. This accords with the law's generally conservative approach.<sup>125</sup> Additionally, the courts retain doubts as to the approach of the field of psychiatry. Not only is divergence noted within the field itself, but the philosophic attitude of some of its spokesmen is, in its determinism and positivism,<sup>126</sup>

<sup>123</sup> *Id.* at 699; Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC U.L. REV. 25, 26 (1955).

<sup>124</sup> "Both the psychiatrists and the academic lawyers who gave evidence before us in the United States unanimously criticised the *M'Naghten* Rules as obsolete and inadequate. . . . The majority of the judges and practising lawyers, on the other hand, supported the *M'Naghten* Rules, on the ground that they were a good practical test and that it was not possible to devise a better one." Royal Commission on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 106 (1953).

<sup>125</sup> "The right and wrong test has withstood the onslaught of critics, not because it is scientifically perfect, but because the courts regard it as the best criteria [*sic*] yet articulated for ascertaining criminal responsibility which comports with the moral feelings of the community." *Sauer v. United States*, 241 F.2d 640, 649 (9th Cir. 1957).

<sup>126</sup> *E.g.*, "This philosophy is based on the concept of 'free will,' that man is free to exercise his will for good or evil. While there may be absolute values of good and evil in a moral sense, it is obvious that legally there cannot be such absolute evaluations, that good and evil are relative values,

repugnant to a legal tradition imbued with Christian concepts of free will and individual responsibility.

There is, nevertheless, general acceptance of the validity of the key complaint against the rule in its present form. Recognition should be made of impairment of the intellect by the emotional and volitional faculties due to mental disorder. It was in agreement that this deficiency existed that many states accepted the "irresistible impulse" doctrine, even in its inadequate scope and difficult application.

Amendment of the rule for this inclusion would be better accomplished by the addition of a third branch rather than by a revamping of the entire test. A total rewriting is not warranted by the need to recognize an additional exculpatory factor. The test has worked well — abandonment would be but concession to critics of "outdated concepts of right and wrong."

Recognizing volitional and emotional impairment in addition to intellectual disturbance has been the direction of nearly all proposed changes in the *M'Naghten* rule. This was the view of the *Parsons v. State*<sup>127</sup> decision, the objective of the ALI, and the twofold provision of several of the European codes.<sup>128</sup> The difficulty is in

and shift with the changes in social attitudes." B. Glueck, *Changing Concepts in Forensic Psychiatry*, 45 J. CRIM. L., C. & P.S. 123, 126 (1954). ". . . [D]eterminism as a framework for the criminal law appears to be scientifically more defensible than a framework of moral responsibility. . . ." Kaplan, *Barriers to the Establishment of a Deterministic Criminal Law*, 46 KY. L.J. 103, 111 (1957).

<sup>127</sup> 81 Ala. 577, 2 So. 854 (1887).

<sup>128</sup> The Royal Commission, in considering the addition of a third limb to *M'Naghten*, was impressed by some of the Continental codes, particularly the Swiss provision whereby a defendant is exculpated when ". . . incapable of appreciating the unlawful nature of his act or of acting in accordance with this appreciation. . . ." SWISS PENAL CODE art. 10, quoted in Royal Commission

formulating the addition. In effect, the *Durham* court and the Royal Commission capitulate to this inherent difficulty and abolish the standard outright in shifting the problem to psychiatric experts and jurymen. The ALI proposal, though purportedly striving for a middle course, rewrites the rule, beclouds it by substituting appreciation of the criminality of conduct for knowledge of the nature of the act and its wrongfulness, and, thereby, also rejects the New York concept of "wrong" from a moral viewpoint.

The addition to the existing rule of a third branch to cover volitional impairment is the course recommended by the Royal Commission minority. Substantively, it follows the reasoning of *Parsons v. State*,<sup>129</sup> but is broader than "irresistible impulse," and was the test adopted by New Mexico in *State v. White*<sup>130</sup> in 1954:

Assuming defendant's knowledge of the nature and quality of his act and his knowledge that the act is 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.<sup>131</sup>

Radical solutions to a problem which will always be difficult, such as the abolition of legal guides to jurors, or the wholesale introduction of treatment in lieu of punishment, will result in chaotic and ineffectual administration of criminal law. It would seem preferable to draft an addition along the line advocated which would meet much of the valid criticism of the current New York statute, and yet retain the fundamental ethical concepts embodied in the basic rule.

on Capital Punishment, 1949-1953, REPORT, Cmd. No. 8932, at 110, 413 (1953).

<sup>129</sup> 81 Ala. 577, 2 So. 854 (1887).

<sup>130</sup> 58 N.M. 324, 270 P.2d 727 (1954).

<sup>131</sup> *Id.* at —, 270 P.2d at 730.