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THE RESPONSIBILITY OF THE MENTALLY ILL FOR CRIMINAL OFFENSES

JOHN R. CAVANAGH, M.D.*

SINCE THE DURHAM DECISION¹ on July 1, 1954, literally millions of words have been written on this subject, some wise, some erroneous, some unwise. Not much that is constructive has come out of all these words. Perhaps it has not all been wasted, however, because one year after the *Durham* decision there were only a few who were afflicted by its weaknesses and ambiguities. Now, four years later, many powerful voices are raised against it including that of the New York Governor's Conference on the Defense of Insanity and that of the American Law Institute, to mention only two. Now, however, when *Durham* is about to return to the quietude of the green hills of New Hampshire and remain in the memoirs of the Court of Appeals of the District of Columbia, it is time to take stock and see what there is of value we have discovered to improve our knowledge of the criminal responsibility of the mentally ill. If this subject is properly understood, radical changes in the existing statutes may not seem so necessary.²

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¹ *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

² Such opinions as this are quite common in regard to the *Durham* decision: "Observing this, one writer concluded that 'Durham then puts forth, in my opinion, a legal principle beclouded by a central ambiguity, both unexplained and unsupported by its basic rationale.' The need in this area is for more clarification, and the *Durham* instruction does not supply it. Judge Learned Hand put it this way: 'I have read the opinion that you mention, and perhaps it is all that can be said; but, frankly, it did not seem to me to give us any guidance that perceptibly would help.'" *Insanity as a Defense in Criminal Cases: The Durham Rule of the M'Naghten Rule in Illinois*, J. AM. MED. ASS'N 1491 (1957).

One of the greatest values which has come out of the discussion following the *Durham* decision is that many lawyers have learned more about psychiatry and psychiatrists have learned more about the law. If this is true, as I sincerely hope, we may soon be able to get down to hard cases. If our future laws are to be both scientific and just there are certain basic subjects which must be understood by those who frame them. These subjects will be discussed under the following headings:

- (1) The Need to Improve Communication
- (2) The Psychosomatic Unity of Man
- (3) Causality
- (4) Responsibility
- (5) Summary

The Need to Improve Communication

So much has already been said concerning the numerous semantic difficulties between psychiatry and the law that it seems there is little to be added. An excellent example of this semantic merry-go-round is the confusion over the relationship between the terms "psychosis" and "insanity."³ Psychiatrists have insisted that "insanity" is a legal term which they do not understand and, I may add, seem determined not to understand.⁴ This insistence, however, is of recent origin. Hinsie and Schatzky in their *Psychiatric Dictionary*, published in 1940, define fifty-two types of "insanity." "Insanity" has not always been a purely legal term.⁵ "Psychosis" is a term

which has greater meaning to the psychiatrist but it is one which the profession has had difficulty in defining.⁶ This term is not a synonym of "insanity." It would not, therefore, satisfy the legal requirements for the protection of the mentally ill and of society.

an individual case is attended with great difficulties, and this is so particularly because the *insane* frequently retain sufficient power of thought and will to completely conceal their altered condition in all ordinary social intercourse. Often the *insane* person really believes he is not sick; but even when he knows he is not well he endeavors to control himself so that no inopportune remark will escape him. Unfortunately even to-day all people look upon *insanity* as a disgrace and not as an affliction. Moreover, it is generally recognized that a person who is *insane* must be placed under control. No wonder then an *insane* person, so far as it lies in his interest, will concentrate his endeavors toward deceiving those with whom he comes in contact." JACOBY, *THE UNSOUND MIND AND THE LAW* 84 (1918) (emphasis added). Henderson and Gillespie in a standard psychiatric text published in 1951 used the word "insanity" frequently. "Confusional *insanity* is not a clinical entity on an unequal footing with the other categories of Part I.; it is nearly always, if not always, a symptom of some one of the other mental disorders." HENDERSON & GILLESPIE, *A TEXT-BOOK OF PSYCHIATRY* 21 (1951). "The tendency has been to speak of '*impulsive insanity*' as an entity whereas it is at most only a symptom." *Id.* at 110 (emphasis added). "Suggestibility plays a part, among other factors, in the genesis of folie a deux or '*communicated insanity*,' which is the term applied when two persons closely associated with one another suffer a psychosis simultaneously, and when one member of the pair appears to have influenced the other." *Id.* at 123 (emphasis added).

⁶ Cavanagh, *op. cit. supra* note 3, at 39. A satisfactory definition of psychosis is the following: Psychosis is ". . . either [a] temporary or prolonged grave deviation . . . from normalcy in judging, reasoning and willing which . . . [is] the result of the individual's failure to adequately solve his conflicts and which may result in disturbed or inappropriate emotions, delusions, seriously irregular conduct, and deep seated personality disorganization, and other symptoms." CAVANAGH & MCGOLDRICK, *FUNDAMENTAL PSYCHIATRY* 288 (1953).

³ See Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC L. REV. 25 (1955).

⁴ Psychiatry is therefore predestined to reject categories and preconceived notions and legal tests. ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 118 (1946).

⁵ The following would seem to indicate that as late as 1918 "insanity" was an acceptable term: "For the layman, the recognition of *insanity* in

It would be best if the legal aspects of mental illness were left to the lawyers, and the responsibility for treatment of the mentally ill were assumed by the medical specialists within the framework of "due process of law."⁷ Due process, as I understand it, is a course of procedure approved by the courts or by the legislature for a particular purpose. Some psychiatrists seem to feel that the requirements of due process are an infringement upon their prerogatives.⁸ This is not true. Actually, not many

⁷ A lawyer says: "Otherwise, we indulge in wishful thinking or utopia or we surrender to the technologist, the psychiatrist or other would-be rulers who, by their own admissions, know nothing about values, decencies or moral responsibilities." Hall, *Mental Disease and Criminal Responsibility - McNaghton Versus Durham and the American Law Institute's Tentative Draft*, 33 IND. L. REV. 212, 214 (1958).

Psychiatry says: "It may be that a sorry state of confusion will ensue. However, the prospect of a difficult adjustment does not do away with the desirability of dropping a procedure which we as psychiatrists know to be wrong. In the light of all our understanding of personality functioning today, it is impossible to defend a test of sanity based on knowledge of right from wrong. It has been repeated over and over again by psychiatrists that even the most deeply disturbed, the most typically insane persons, can 'tell the difference between right and wrong.'" *The Durham Decision, Psychiatry*, 18 J. FOR THE STUDY OF INTERPERSONAL PROCESSES (1955).

⁸ "We shall mention, but only to disregard, those within and without the profession who claim everything for psychiatry and look upon it as a cure-all, as the great remedy which will ultimately rid us of criminals, of Communism, of injustices social and personal. Such a world made safe for psychiatry would be a rather unsafe world, for there are so many things in this world about which psychiatry knows so much and is able to do so very little." ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 109 (1949).

"This hostility between psychiatry and the law is actually being displayed every day in front of juries, and the act can be fairly described as a display of mutual hostility no matter who gets the better of whom." *Id.* at 38.

psychiatrists are well-informed on medico-legal matters.⁹

It seems clear that there is confusion both in the psychiatric and legal minds about the distinction between "psychosis" and "insanity or unsoundness of mind."

"Psychosis" is defined in *Psychiatric Dictionary* as follows:

In current psychiatry, mental disorder of a more or less special kind, which may or may not be associated with an organic disease. It is not considered in keeping with the available facts to refer to a psychosis as a disease, since the term "disease" is traditionally identified with pathology of tissues. For want of a better term psychiatrists speak of mental "disorder" when they refer to the psyche.

A psychosis is usually a severer type of mental disorder in the sense that all forms of adaptation (e.g., social, intellectual, professional, religious, etc.) are disrupted. In other words, the disorganization of the personality is extensive. The principal psychotic syndromes are schizophrenia and manic-depressive psychosis. When the psychic disorder is associated with an organic disease,

⁹ Circular Letter No. 225 of the Group for the Advancement of Psychiatry reports the tabulation and preliminary impressions gained from a questionnaire on capital punishment, distributed to the membership of GAP, comprising 150 members of whom 86 made returns. From this sampling of North American psychiatry, the Committee on Psychiatry and Law was able to develop general conclusions of which several follow:

1. Only a few psychiatrists have an established competence in dealing with criminal matters.
2. American courts assume that any psychiatrist is qualified to testify affecting the disposition of an offender. A clearly defined and accepted standard of expertness is wanting.
3. Psychiatrists avoid giving testimony in criminal cases.
4. The psychiatric profession is in need of better definition of the actual role of the psychiatrist in the trial.

CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY, COMMITTEE ON PSYCHIATRY AND LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT NO. 26, 6 n. 20 (1954).

such as general paresis, brain tumor, etc., the term "organic psychosis" is used for the sake of convenience.¹⁰

If we compare this definition with that of "insanity" we can readily see the difference in meaning of the two terms.

"Insanity," although a term formerly used in medical literature, is now regarded by most psychiatrists as a purely legal term. In this use it has several quite definite meanings, e.g., in the District of Columbia, for purposes of commitment to a mental hospital, the term refers to the condition of an individual who ". . . is incapable of managing his own affairs, and is not a fit person to be at large or to go unrestrained, and if permitted to remain at liberty in the District of Columbia, the rights of persons and property will be jeopardized or the preservation of public peace imperiled and the commission of crime rendered probable and that he is a fit subject for treatment in a hospital by reason of his mental condition." In criminal cases the individual has been considered insane and not responsible for his offense if it was shown that "he was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act, or, if he did know it, that he did not know he was doing what was wrong."¹¹

The terms "unsound mind" and "insanity" should, therefore, be limited to those mental states which are sufficiently severe to require supervision and control in a mental hospital, even without the individual's consent, in order to protect him from himself or to protect others in the

community from the effects of his illness.

"Psychosis" and "insanity" are not, therefore, synonymous and cannot be used interchangeably. All "psychotic" individuals are not "insane," but all "insane persons" are "psychotic." This at least was the state of affairs before the *Durham* decision. Now, with the broadening of the legal meaning of the term "insanity" which came with that decision, it may mean that sociopathic personalities, neurotics or other individuals with non-psychotic disorders may be classed as "insane" if the jury finds them "not guilty by reason of insanity." The psychiatrist in testifying under the *Durham* rule may interpret this decision to characterize as mental illness any mental state from a mild neurosis to the severe psychosis. This is one of the greatest defects of the *Durham* rule.¹²

This distinction between the psychiatric and legal definitions is necessary because, although all physicians do not realize it, there is no law which requires an individual to accept treatment for disease. The mentally ill person is not committed to a mental hospital for treatment per se but only until he is no longer considered "insane," *i.e.*, no longer a danger to himself or society. This need for a legal definition of mental illness arises because the Fifth Amendment of the Constitution states that no one may be deprived of his liberty without "due process" of law. Due process is obviously a legal and not a psychiatric responsibility. This distinction between "psychosis" and "insanity" should help to clarify some of the issues between the professions if it is clearly understood.

Psychiatrists have praised the *Durham*

¹⁰ HINSIE & SHATZKY, *PSYCHIATRIC DICTIONARY* 446 (1947).

¹¹ Davidson, *ORIENTATION TO FORENSIC PSYCHIATRY*, 57 *ARCHIVES OF NEUROLOGY AND PSYCHIATRY* 730 (1947).

¹² See O'Brien, *Psychiatry and the Defense of Insanity*, 4 *BULL. GUILD OF CATHOLIC PSYCHIATRISTS* 3 (1956).

decision because it allows them to speak in a psychiatric frame of reference without limitation by arbitrary rules of testimony set up by the *M'Naghten* rules. Personally, I have never felt this restriction and have seldom been limited in my direct testimony. This experience has been shared by others.¹³ Any future legislation should permit a reasonable amount of free discussion of the case in its pertinent clinical features. This discussion could give to the court and jury a background against which they may judge the degree of responsibility of the accused. There is, however, no value in the introduction of unconscious mental factors to the jury. It could only result in confusion.¹⁴ The court is concerned with conscious factors. The *mens rea* is formed

¹³ "In the Brannen case in Queens County, State of New York, a psychiatrist was asked the question, 'What is psychosis?' and instead of being limited to a brief answer was permitted to go up in front of the jury box and with pencil and paper explain schematically the relationship between quantity of ego functioning and psychosis. This was made possible by a team of competent defense lawyers, and even more important, an alert, curious and tolerant judge. One wonders whether Judge Farrell was even interested in adding to medico-legal history when he agreed that the psychiatrist may use diagrams in clarifying his clinical points. Later, the same lawyers and in the same case, further attacked the status quo when they were successful in a habeas corpus writ and obtained Brannen's release from Matteawan without referral to the court of original jurisdiction." Orenstein & Weisstein, *Temporary Insanity as a Defense*, 115 AM. J. PSYCHIATRY 125 (1958).

¹⁴ There are some who disagree with this opinion. See, e.g., "If the psychiatrist is to discover the basis of such unlawful behavior, to understand the offender, and serve a purpose in the trial, he must go beyond the act itself and evaluate the total personality both in its conscious and unconscious aspects." COMMITTEE ON PSYCHIATRY AND LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *op. cit. supra* note 9, at 2. "As a rule the defendant 'knows' the facts of his crime

in consciousness. The court in arriving at a verdict is not concerned with repressed material. Such material may be helpful in determining the sentence, but not in arriving at a verdict. *Responsibility for his act will be based upon the patient's subjective judgment of his act as right or wrong.* When reference is made to right and wrong the reference is to the right and wrong of the objective order. That is to say, the mentally ill man has misapprehensions of objective reality, i.e., he has an erroneous subjective judgment of what reality is. The presence of such misrepresentations of reality would not, in itself, relieve a man of responsibility. It would do so, however, if this misapprehension was due to mental illness. It would undoubtedly relieve him of any responsibility if because of mental illness he sincerely believed, on the basis of his misrepresentations, that he was doing right. It is such conscious factors which are important to the court, not all of the unconscious factors which brought about his illness.¹⁵

and knows its unlawfulness and consequences, but he does not know the unconscious basis for it. The task of the psychiatrist is to perceive the unconscious basis of the unlawful act and the nature of the inner conflict, but in action the law would confine his exploration to the familiar territory of the conscious." *Id.* at 6. "Half of that century has already gone by, and here and there some experts are permitted to testify as to the unconscious reactions of the accused — but I am afraid that the hope, if any, will lie in the twenty-first century, Dr. Godding's aspirations and our efforts to the contrary notwithstanding." ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 121-22 (1949).

¹⁵ To illustrate what I am talking about, let me refer to the *Durham* case. "According to the psychiatric testimony, Durham had the following symptoms: He was hearing false voices. He suffered from hallucinations. He believed that others [employees and others] in the store talked about him, watched him. [He believed] . . . the neighbors did the same, watching him from their windows, talking about him. According to his

The introduction of the unconscious to the jury as recommended by many psychiatrists would not assist and could only confuse them. Consider, for example, a case in which the individual had been raised by a cruel punishing father. As he grew older he repressed some of this feeling but retained a resentment of all authoritative figures. If this man in adult life commits an offense against an authoritative figure would he be relieved of responsibility merely because it is revealed that his crime was the result of a repressed hatred of his father?

Not all the differences between lawyers and psychiatrists are based on semantic problems. There is little doubt that many psychiatrists are offended by the adversary atmosphere of the courtroom.¹⁶ They cannot tolerate some of the methods of cross-examination which threaten their feelings of omnipotence.¹⁷ Strong feelings of self-confidence are necessary for success in the practice of medicine. When, however, this feeling rests on an insecure foundation, it is easily toppled. Psychiatry has not yet reached such secure foundations that psychiatric opinion can be offered with apo-

mother's testimony 'he seemed afraid of people.' But note what Durham concludes from these premises: there ought to be steel bars on his bedroom windows—which is a perfectly consistent subjective conclusion on the basis of the misjudgements he has already made." CAVANAGH, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC U. L. REV. 25, 37 (1955).

¹⁶ "Our courtrooms still lend themselves well to the expression of this hostility toward psychiatry. The psychiatrist is treated with considerable scorn." ZILBOORG, *op. cit. supra* note 14, at 111.

¹⁷ "It is this contact that makes the psychiatrist so vulnerable; it is very difficult indeed to be touching the unchartered and unexplored depths of human baseness and human greatness without giving in at times to the temptation of appearing the very master, the megalomaniac psychological manager of man and even mankind." *Id.* at 121.

dictic assurance. It cannot be proved with the accuracy of a mathematical formula. A psychiatrist who approaches the court with a proper degree of humility will experience little difficulty in testifying. "Humility" is used here in the proper meaning of the word, *i.e.*, freedom from pride and arrogance. It does not imply any feelings of inferiority or obsequiousness. He should testify as to his honest opinion based on his interpretation of the case.¹⁸

It should be pointed out that there can be an honest difference of opinion between psychiatrists. Psychiatric disorders are a matter of degree.¹⁹ They may vary from mild deviation from normality to a complete loss of contact with reality. There may well be a difference of opinion between psychiatrists as to the extent of loss of contact with reality. At the extremes of seriousness there will be little difference of opinion. However, as the median is approached opinions may differ. Examinations conducted at different times may yield different results because the patient's condition may fluctuate from day to day. There may be clear evidence of a psychosis at one time

¹⁸ "Psychiatrists themselves have become increasingly aware of the limitations of their own knowledge and the need for further research. One must realize that psychiatry as yet is unable to thoroughly understand on a scientific basis many aspects of mental disorder and its treatment. To the many problems facing psychiatry, the solution will come only through further research." Gottlieb & Tourney, *Commitment Procedures and the Advancement of Psychiatric Knowledge*, 115 AM. J. PSYCHIATRY 110 (1958). "A certain amount of modesty on the part of the psychiatrist in approaching human behavior, with his acceptance that there is a great deal that he does not know about it, and therefore his emphasis on the need for research in the field has improved, and should continue to improve, his relationship with the lawyer." *Id.* at 111.

¹⁹ CAVANAGH & MCGOLDRICK, *FUNDAMENTAL PSYCHIATRY* 26-28 (1953).

which the patient is able to conceal at other times. In spite of this fluctuation in the patient's mental condition there is not likely to be too much difference of opinion in regard to the presence or absence of a "psychosis" if the examination is complete and thorough. The difference is likely to arise over the question of whether the patient is "insane." This question is more subject to individual opinion and more dependent on the experience and training of the psychiatrist. Such honest difference of opinion should be understood by the court. These differences would probably be best reconciled by the appointment of a panel of psychiatrists by the court with the consent of both parties. Such a panel would be available for cross-examination by both prosecution and defense attorneys.

There has been much criticism of the fact that psychiatrists are likely to change their opinions concerning psychiatric concepts from time to time and even overnight. Some of this is not so much the fault of psychiatry but of psychiatrists who, because of reasons best known to themselves, must strive hard to retain their omnipotence.²⁰

²⁰ "Differences of opinion among psychiatrists when testifying in open courts are, of course, a common occurrence. The doubts thus created are accentuated by the fact that even the same group of psychiatrists may testify differently on the same topic at different times. For example, until a few weeks ago, members of the medical staff of an outstanding mental hospital were in the habit of testifying that a psychopathic or sociopathic personality did not constitute a mental disease. Recently, however, a formal announcement was made by the acting head of that institution that thereafter members of the staff would express the opinion that such a mental state is in fact a mental disease. In other words, the concept was changed overnight by the psychiatrists themselves." *In re Rosenfield, Habeas Corpus* 119-57, p. 6 (D.D.C.). A few days later, a staff physician, testifying in open court in reply to a question of the judge as to whether all the phy-

It should be realized, of course, that psychiatry is not a static but a dynamic science which is subject to change from time to time.

This brief discussion does not pretend to exhaust the problems in the area of communication. It is to be hoped that it points to some of the areas where more attempts to achieve something more than peaceful coexistence may be made. Much has been achieved, more can be, if both professions approach the conference table with true humility.²¹

The Psychosomatic Unity of Man

It may seem presumptuous to address a group of professional men on the subject of the psychosomatic unity of man. My excuse for doing so is that a great deal of scorn has been heaped on what has been referred to as the "outmoded faculty concept of mental functioning." This peremptory rejection of the product of generations of thought by the world's greatest philosophers is offensive to me. It usually indicates a failure to understand the dynamic significance of the faculty concept of mental functioning. It also indicates the regrettable

sicians on the staff of the hospital agreed with the announcement of the Assistant Superintendent, replied in substance that all the staff physicians did not agree but that no one could be sent to testify who did not concur.

The most obvious deduction to be drawn from these events is that the lack of clarity of the *Durham* rule is to be solved by administrative decision. If this is so, what happens to the great freedom of the psychiatrist to testify in terms of his own choice under *Durham*? Are psychiatric determinations to be made by administrative proclamation?

²¹ "Psychiatry too, studies many aspects of human behavior, its deviations, motivating forces, and along with law, techniques of control and modification. Therefore, it is inevitable that significant interdependences between law and psychiatry exist, and each must take cognizance of the other

development of a spirit of materialism in philosophy. The first obstacle to materialistic thinking is the soul. Considered as a threat, it is rejected. After the soul must go the faculties *as* faculties, for it has been the mark of modern philosophy, although not without its echo in earlier ages, to destroy all that is spiritual in man. This rejecting attitude has brought into the foreground the question of the mind-will relationship. Since the battle cry seems to be "deny man his freedom," the borderline between the operation of the faculties of mind and will are being gradually eliminated. Thought and will in operation have become one. To solve the "apparent" dualism of the thought-will processes, various explanations have been proposed. The pages of modern textbooks and histories of philosophy are filled with the lengthy, obscure and hopelessly inadequate results.²² It was at this point that parallelism entered psychology.

The invasion of materialism, however, is not complete as long as the problem of freedom remains. The materialist cannot logically deny the fact that man feels that he is free in some of his acts. They accept the testimony of man that he feels that he is free, but deny the validity of this belief in his freedom.

While this activity was going on on one front, a more advanced psychology approached the difficulty from another angle. Their pronouncement amounted to a denial that there was actually any problem at all. Consciousness, which gave testimony to freedom, was itself suspect, a hand-down of medieval speculation with which a "sci-

entific" psychology could have no real concern. This "science" set as its goal the study of stimuli and reactions in the human body; to co-ordinate in a psychology clinic the behavior of the organism under the stress and strain of experimentation.

One can foresee immediately what would result from this. Obviously, at this stage of the discussion, detailed investigations into the thought-will relationships became as outmoded as blood-letting. There could exist no parallel where there existed at best only one line of activity. At such a point modern philosophy can rightly be said to have abandoned the entire question. Only recently has data been brought forth by scientists themselves to build once again the crumbled structure that was once known as rational man.²³

Before we leave this historical summary, a brief review of the effects of the onslaught is in order. In the first place, it is true, tragically so in fact, that disastrous as is the rejection of the foundations of scholastic philosophy in itself, a war in the world of metaphysics would not be so terrifying if it ended there. Such, of course, is never the case. When the fundamental doctrine of freedom fell, ethics fell also. It was no longer a normative science, but, like so many modern subjects, became almost completely statistical and historical in its method. It traced conventions; it made the substitution of "mores," or like terms, for morals. As Dr. Pace has said, under this new ethical system, moral life was upheld without dependence upon the moral law.²⁴

to handle the intricate and perplexing problems of human behavior." Gottlieb & Tourney, *op cit.* *supra* note 18, at 109.

²² Cf. 2 FORBES, *PSYCHOLOGIA SPECULATIVA* 307-19 (1927).

²³ The names of De Broglie, Planck, and Milikan immediately suggest themselves as representative of this attitude of mind toward vitalism, freedom, etc.

²⁴ Pace, *The Problem of Freedom*, *NEW SCHOLASTICISM* 317 (1936).

The formal object of ethics was no longer the right ordering of the free acts of man to their proper end, but rather a species of determined activities of human agents. Indeed, ethics were now supposed to possess for the first time a truly scientific character. Scientists were delving in their spare moments into the field of morality just as championship bridge players were writing on international politics during the past war. Thus Albert Einstein, the eminent physicist, wrote during the early 1920's:

I do not believe we can have freedom at all in the philosophic sense, for we act not only under external compulsion but also by inner necessity. Schopenhauer's saying, "A man can surely do what he wills, but he cannot determine what he wills." — impressed itself upon me in my youth and has always consoled me when I have witnessed or suffered life's hardships. This conception is a perpetual breeder of tolerance, for it does not allow us to take ourselves too seriously; it makes rather for a sense of humor.²⁵

Against this background no apology is needed to review a non-materialistic concept of mind-will relationship.²⁶ Properly understood, the scholastic concept of the structure of the personality would be very helpful in arriving at an understanding of responsibility. Man functions as a unit. What affects one part affects all other parts. Physical illness and mental illness form a continuum. What is more important for our purpose is the fact that when one aspect of the personality is affected, all other aspects of the personality are affected in a proportion related to the severity of the original disturbance. When the Court in the *Durham*

decision spoke of the knowledge of "right and wrong" as being a symptom, they should have said that in view of the psychosomatic unity of man this knowledge was actually an integral part of the disorder. The value of the "right and wrong" concept is that it is a more easily measurable aspect of the mind than any other except intelligence. One cannot measure affect, or imagination, or will, but we can measure ethical values, and we can measure the accuracy of the individual's subjective evaluation of reality.²⁷

The Psychic Structure

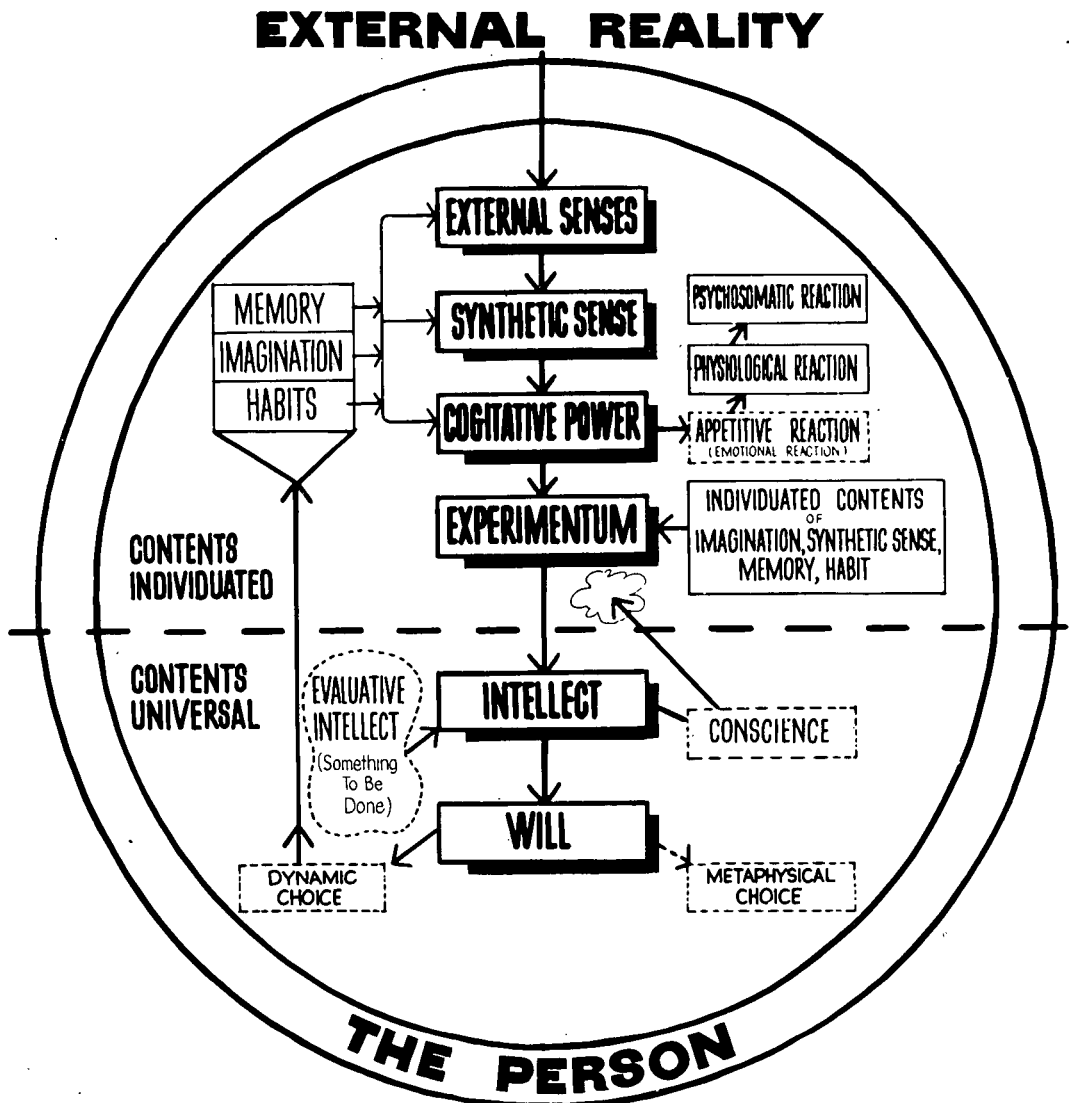
For descriptive purposes the personality must be described piecemeal, but it should not be pictured as a compartmented structure. It is actually functioning as a unit with a constant frictionless interchange between its component parts. It is as if each component was a mirror which by its reflection activates the other components. As long as each mirror reflects its proper degree of light in the right direction and with proper intensity there is a normal interchange. If something happens to one or more of the mirrors it will disturb the whole mechanism. So it is with the component parts of the mind.

Cognition starts with the perception of

²⁵ Einstein, *What I Believe*, FORUM (1930), as cited in Pace, *op. cit. supra* note 24, at 313.

²⁶ See CUTLER, THE METAPHYSICAL RELATIONSHIP BETWEEN THE INTELLECT AND WILL, UNDER ITS ASPECT OF FREEDOM (unpublished thesis, Boston College, June 1948).

²⁷ "The second point that I think we must hold on to is the relationship between intelligence and the control of conduct. If we look about us and visualize the magnificent structures of science and legal systems and ethics, we attribute these great achievements to man's capacity for thought, to human understanding. Can we then allow psychiatrists or any other specialists to persuade us that human understanding has no effective relationship to the commission of the serious harms that are the concern of criminal law?" Hall, *Mental Disease and Criminal Responsibility — McNaghton Versus Durham and the American Law Institute's Tentative Draft*, 33 IND. L. REV. 212, 214 (1958).



The Psychic Apparatus

an object in external reality (see diagram). This knowledge is conveyed through the external senses to the *Synthetic Sense*.

The *Synthetic Sense* is an internal power which perceives, unites, and classifies in the conscious beholder various impressions from the outside world. The *Synthetic Sense* (central sense) is stimulated by the external senses and co-ordinates their indi-

vidual sensations into an understood composite.

The synthesized data of the *Synthetic Sense* are acted upon by the *Cogitative Power* which picks up "insensate" qualities of the external object or situation which are not grasped by the external senses, e.g., sequential relationships, benefit or harmfulness of the external object, useful-

ness, etc. Moreover, the Cogitative Power will unite the data of the present sense experience with data which it draws on from the imagination and memory. The Cogitative Power will collate all these data to produce a unified "sense-evaluation" of the object. This "sense-evaluation" (this "sizing-up") of the object by the Cogitative Power is called the *Experimentum*.

Simultaneously with Cognition at the sense level there is an *Appetitive Reaction* at the sense level (*i.e.*, an emotional reaction). This emotional reaction will be determined partly by the contents of the Imagination, Memory, Synthetic Sense and Cogitative Power. (The intensity of effect from each of these may be further modified by Habit.) The emotional reaction will also be partly determined by the physiological condition of the individual at the particular moment.

In receiving the "insensate" qualities of *this* Immediate Object, the Memory reacts, and by the Laws of Association begins reproducing past sense experiences which are either similar or contrasted or contiguous in place or time. These past sense experiences are brought back to the Cogitative Power which uses them (not all necessarily on the conscious level) to form a synthesized sense experience called the *Experimentum*.

Imagination is an internal Cognitive Power which is stimulated by the synthetic sense and (a) preserves the images of objects perceived by the external senses, (b) recalls the images so retained, (c) creates or combines new groupings of images, (d) does not recognize the images as past or as representing past events, but relives the past as though it were present, and (e) projects the images.

The Imagination by its power of forming new groupings of images can easily have disastrous as well as beneficial effects in the life of the individual.

Moderately exercised, the Imagination is helpful. In the most normal man there is a certain play of imagery which is harmless and even beneficial when kept under control. In pathological instances, because of the harassing recollection of ill-resolved early conflicts, the individual feels the need to escape from a sense of frustration which threatens to crush him. This frustration manifests itself in fear, anxiety, worry, and feelings of inferiority. In attempting to escape from conflict, regression to the realm of creative imagination may satisfy every desire. The individual who has from earliest days met his conflicts in a non-satisfactory manner feels frustrated and experiences an urgent inner need for some type of substitute gratification, some escape from his haunting sense of failure. This he finds in images.

Unlike the Memory, the Imagination has no concept of time and thus it relives the past as though it were here and now present. There is no past for the Imagination.

In spite of what has been said, it should be remembered that the primary function of the Imagination is to retain and reproduce the images received through the external senses. It is only a secondary function, but nevertheless an important one from the psychiatric standpoint, when it is considered in the sense of fancy or Imagination. It should be remembered that the *elements of the images reproduced in the Imagination have actually been experienced*. In the secondary sense just mentioned these images are rearranged and create new impressions. The possibility of

nation and the Memory. This individuated material is then presented to the intellect.

The *Intellect* acts upon the data presented to it by the senses (primarily through the Cogitative Power) and picks up the universal aspects to be recognized in the External Object (or situation). The *Practical Intellect* evaluates the object (or situation) on the level of Universality (whereas the Cogitative Power evaluates the object as *individuated*).

The Practical Intellect judges that this object, in these circumstances, is in some respect or respects good or evil, and therefore should be chosen or rejected by the *Will*. Metaphysically, the Will must choose an object as good, or reject it as evil. The Will cannot choose evil as such or reject good as such, and the good or evil aspect of an object which moves the Will to choice or rejection must be presented to the Will by the Intellect.

The Will then considers the material presented to it by the Intellect. The *Person* possessing the Will makes his choice through the Will. The Practical Intellect may present to the Will a judgment that a given object, as it exists in a concrete situation, is good or evil with reference to qualities apprehended by, to list just a few of the cognitive faculties, Sight, Hearing, Taste, Touch, Smell, Synthetic Sense, Memory, Imagination, Cogitative Power, or Intellect itself.

The total presentation, in a given case, may be weighted in favor of the qualities apprehended as good by one or more of the powers named. If the Person has developed one of these powers by Habit, for example, to the detriment of certain other powers, this Habit may serve as an *influence* upon a more ready choice by the person toward some particular good rather than another.

Similarly, Emotion may weight the good apprehended by one power or another.

Or the person may maneuver certain of his Cogitative Powers by intermediate acts of the Will before he comes to his practical judgment. For example, in evaluating a concrete situation, the person may refuse to let Memory carry out its full role. In such a case, the contents of Memory would not be available to the Cogitative Power in collating data for the Experimentum. Then the data of the Experimentum, and the practical judgment based thereon, would be distorted to the extent that the contents of Memory were refused by the Will. A constant refusal would develop an habitual reaction which in turn contributes its influence.

Even after the practical judgment has determined that a given object in its present situation should be chosen or rejected by the Will, the Will is not necessitated to follow the counsel offered. If the counsel does not accord with the Will's inclination, the Will can direct the Intellect to revise its practical judgment and conform it to the Will's inclination. By Emotion and Habit, principally, the Will is inclined to choose some particular sorts of good and to reject others.

The Will must be considered under two aspects. In the ultimate act of choice, the Will accepts or rejects the object — in this act, one cannot speak of *degrees* of choice. In a dynamic sense — considering the entire process by which choice is made, and not its ultimate act alone — the Will may be considered as affected by many factors both conscious and unconscious (such as Memory, Imagination, Habits, etc.). In this dynamic sense there may be degrees of choice which would result in varying degrees of responsibility. It must be emphasized that man is responsible only for his free acts. If

there is no freedom there is no responsibility.

In summary, as we view the personality in this frame of reference it becomes clear:

- (1) that man functions as a unit;
- (2) that he possesses a freedom to act or not to act;
- (3) that disturbances in one part of the personality produce a disturbance in all other parts;
- (4) that much of the mental functioning is in reference to a "particular act";
- (5) that the ethical sense is more easily measured than any other aspect of the mental apparatus except intelligence.

The determination of the individual's knowledge of "right or wrong" in regard to "the particular act" at the time he performed it is not a symptom alone but an integral part of the personality which has been affected by mental illness. Each mental illness predominately affects one part of the personality. In the schizophrenic, for example, it is the Imagination, in the sociopathic personality it is the evaluative function of the Practical Intellect. Space does not permit a discussion of this material at this time.²⁸

²⁸ Almost all of the psychiatrists who have written on the subject of "right and wrong" imply that the M'Naghten rules require an abstract knowledge of "right and wrong." This is not the case. They require only that the individual know that the particular act with which he is charged was frowned upon by society. Specifically, the rules state:

[Q. II] "What are the proper questions to be submitted to the jury where a person alleged to be afflicted with insane delusions respecting one or more particular subjects or persons, is charged with the commission of a crime [murder, for example], and insanity is set up as a defense?"

[Q. III] "In what terms ought the questions to be left to the jury as to the prisoner's state of mind, at the time when the act was committed?"

Causality

A cause is that which positively influences or brings about or produces the existence of something else. Can we ever say with certainty that in this sense any criminal offense was caused by mental illness? Or could we state the contrary with equal cer-

[A. II and III] ". . . [A]s these two questions appear to us to be more conveniently answered together, we submit our opinion to be that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions had generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, *as when put with reference to the party's knowledge of right and wrong, in respect to the very act with which he is charged.* If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction: whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one that he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore, has been to leave the question to the jury, whether the accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require." M'Naghten's Case, 10 Cl. & Fin. 200, 203, 208, 8 Eng. Rep. 718, 720, 723 (H.L. 1843) (emphasis added).

tainty, *i.e.*, did the mental illness cause the crime? Or could we more easily state that because of faulty subjective judgments based on mental illness the individual committed the offense? This would seem to be true.

The United States Court of Appeals for the District of Columbia Circuit not only does not explain what it means by causality but compounds the confusion by contradicting in the second paragraph what it says in the first.

When we say the defense of insanity requires that the act be a "product of" a disease, *we do not mean that it must be a direct emission, or a proximate creation, or an immediate issue of the disease* in the sense, for example, of Hadfield's delusion that the Almighty had directed him to shoot George III. . . .

There must be a relationship between the disease and the act, and that relationship, whatever it may be in degree, *must be, as we have already said, critical in its effect in respect to the act.* By "critical" we mean *decisive, determinative, causal*; we mean to convey the idea inherent in the phrases "because of", "except for", "without which", "but for", "effect of", "result of", "causative factor"; *the disease made the effective or decisive difference between doing and not doing the act.* The short phrases "product of" and "causal connection" are not intended to be precise, as though they were chemical formulae. They mean that the facts concerning the disease and the facts concerning the act are such as to justify reasonably the conclusion that "But for this disease the act would not have been committed."²⁹

What are we to think of the relationship of cause and effect in the case of a schizophrenic patient who because he is hungry or in need of funds robs a filling station? Did the illness produce the offense in this

²⁹ *Carter v. United States*, 252 F.2d 608, 616-17 (D.C. Cir. 1957) (emphasis added).

case?

Why do so few schizophrenics commit crimes? Is there not some other factor to be considered? Is "productivity" a legal or a medical question? What is so imperfectly spelled out cannot help but confuse a jury and by the mere fact of being imperfectly defined may be altered by jury after jury so that there will be no uniformity in the administration of the law.

Psychiatrists cannot fail to have difficulty in channeling their views into this narrow passageway. Legal responsibility should not be concerned with such a nebulous relationship. Responsibility should be concerned only with whether the criminal act was intimately interwoven into the texture of the mental illness and was a predictable outgrowth of it. Causality too frequently has a doubtful meaning when applied to psychiatric concepts.

Responsibility

Responsibility results from the recognition by the average man that he is answerable to a higher authority, whether parents, city, state, or God, for approval or blame. Such answerability has no meaning unless the individual is capable of earning reward or meriting blame; in other words, unless he possesses a free will. Responsibility depends on free will as effect depends on cause. All men at all times have recognized that culpability for a free act is a reality.

The word "responsibility" has a different meaning for many of those who use it. Sir James Stephen³⁰ points out that to the lawyer it means one thing — to the physician and the average layman, who makes up the jury, it may mean something entirely different. Frym states, "Therefore, our medieval

³⁰ STEPHEN, HISTORY OF THE CRIMINAL LAW IN ENGLAND 127 (1883):

concept of responsibility no longer can be defended effectively."³¹ Frym is not the only one to express this thought. Such denials of responsibility for the acts which we commit may offer some degree of comfort for those who wish to have their cake and eat it too, but the idea of responsibility is not merely a gratuitous assumption. It is shown from the fact that the laws of all countries accept it and, in practice, all schools of philosophy, even the determinists, at least implicitly admit it. It seems clear that without responsibility there could be no law to direct and harmonize the social body. Wharton, somewhat reluctantly, agrees with this opinion.³² He says, "No matter what may be our speculative views as to the existence of conscience or of freedom of action we are obliged when determining responsibility to affirm both." Forester, in *Faith of an Agnostic* says, "If we give up free will, then we must give up moral responsibility with it. And this in practice we cannot do. We are bound to assume that men are free agents and responsible for their actions."³³ Responsibility, therefore, presupposes the liberty of the agent and implies the consciousness of his obligation to account for his actions. It is "accountability for conduct in the case of an agent possessing knowledge of the [moral] law with power to govern conduct in harmony with such law."³⁴

On the assumption that all criminals are sick and thereby deprived of their free will it has become popular on the part of some psychiatrists to say they deserve treatment rather than censure. This is probably not true, but even if it were, psychiatry has no

effective treatment for such offenders which would be any more effective than that provided by present legal means.³⁵

Summary

In conclusion, the following principles should be adhered to in any rules for determining responsibility for conduct in those who are mentally ill:

- (1) The basic tenets of the *M'Naghten* rules as properly understood. In this test the defendant's responsibility should be determined on the basis of his subjective judgment of the nature and quality of the particular act of which he is charged.³⁶

³⁵ "However, within the present framework of our psychiatric knowledge, the management of these disorders as well as the criminal depends primarily upon sound legal principles. Psychiatric examination and treatment may be a help in such management but the majority of such individuals must still be handled largely by current legal methods. These areas wait patiently for significant investigation from the psychiatric viewpoint to add to our knowledge techniques of management and therapy before there may be a change in the legal framework." Gottlieb & Tourney, *Commitment Procedures and the Advancement of Psychiatric Knowledge*, 115 AM. J. PSYCHIATRY 110 (1958). "One can think along such lines without considering every crime the product of some disease, for such a point of view would be extremely erroneous: not every criminal is ill, not every crime is a result of psychological pathology." ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 43 (1949). "Many undeterrable offenders are treated as if they are 'sane' and sent to prison to be released at the termination of sentence, free to repeat the cycle. As matters stand, as a device of criminal law administration, the Rules touch only a fraction of undeterrable mentally ill. In this there is no security for the law-abiding community." CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY, COMMITTEE ON PSYCHIATRY AND LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT NO. 26, 4 (1954).

³⁶ "Knowledge" assumes not only external sensory perception of the act but the internal understanding of the nature of the criminal act. Such

³¹ Frym, *The Criminal Intent*, 31 TEXAS L. REV. 260,278 (1953).

³² See CAMMACK, *MORAL PROBLEMS OF MENTAL DEFECT* 15 (1939).

³³ *Id.* at 13.

³⁴ *Id.* at 14.

- (2) The "unresisted urge test," sometimes erroneously known as the irresistible impulse test, should be retained. Under this test the individual is considered not responsible when, even if he knows what is right, he is unable by reason of mental illness to adhere to this judgment. Properly understood, this concept preserves the principle of the freedom of the will.³⁷ Without individual freedom there is no basis for the criminal law.
- (3) Since every act is based on a conscious (if erroneous) subjective judgment, there is no value in introducing the Unconscious to the jury. The Unconscious undoubtedly influences but does not determine the individual's behavior.
- (4) Psychiatric testimony concerning the patient's mental state should be unhampered in its presentation to the jury. However, at its conclusion properly directed questions designed to serve as guideposts for the jury in regard to the defendant's responsibility should be asked.³⁸
- (5) The psychiatrist's opinion must be his own and unhampered by administrative decision.
- (6) The principle of individual freedom to act or not to act must be preserved.
- (7) The difference between responsibility and guilt must be clearly understood.³⁹

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it annoys some psychiatrists. As I have said, it is the test of reason. To be insane, to be psychotic means to be irrational." Hall, *Mental Disease and Criminal Responsibility — McNaghton Versus Durham and the American Law Institute's Tentative Draft*, 33 IND. L. REV. 212, 214 (1958).

³⁹ "Responsibility in its derivation means ability to react to a situation, that is to respond to punishment or to be deterred by punishment. There is frequent failure to understand the difference between responsibility and guilt. I am presumptuous enough to believe that I can detect this error in the GAP Report. It seems to presume that the psychiatrist who says that an individual is responsible is finding him guilty. How else is one to understand such a statement as the following: 'Often the psychiatrist learns too late that the existence of psychosis as such at the time of the offense does not automatically exempt the offender from punishment. He knows that the psychosis about which he is testifying involves a very distinct appreciation of society's judgments of 'right and wrong' but finds too late that in affirming this he has answered so as to convict the defendant. Only in cases of disturbed consciousness or of idiocy can the psychiatrist make honest replies to the M'Naghten test questions.'" [COMMITTEE ON PSYCHIATRY AND LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *op. cit. supra* note 35, at 5.] "This concept is certainly in error. The examination of an individual to determine his responsibility for his acts is clearly a psychiatric function regardless of what method is used to come to this conclusion. Having arrived at such a conclusion the psychiatrist has concluded his part in the matter. The further determination of whether the individual is guilty is a matter for the judge and jury." Cavanagh, *supra* note 37, at 35.

understanding, if purely 'verbal and not affective,' is deficient knowledge at best. Professor Weihofen states: If the word 'know' were given this broader interpretation, so as to require knowledge 'fused with affect' and assimilated by the whole personality — so that, for example, the killer was capable of identifying with his prospective victim — much of the criticism of the knowledge test would be met." WEIHOFFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE*, as cited in O'Brien, *Psychiatry and the Defense of Insanity*, 4 BULL. GUILD OF CATHOLIC PSYCHIATRISTS 3, 12 (1956).

³⁷ Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC U.L. REV. 25, 45-48 (1955).

³⁸ "The plain McNaghten Rule states the case in language that jurors and other laymen can understand, and that justifies its phraseology, even if