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A JUDGE VIEWS THE M'NAGHTEN RULE

PETER T. FARRELL*

OUR DISCUSSIONS concerning the efficacy of the *M'Naghten* formula are indeed timely. It may be reasonably expected that the Report of the Governor's Conference on the Defense of Insanity¹ will induce prompt consideration of this important problem at the next session of our State Legislature. Accordingly, it is fortunate that there is presently available a wealth of information on all facets of the controversy, the constructive results of the labors of many lawyers, criminologists and psychiatrists.² The necessity of a full and frank discussion of this matter, so vital to the proper administration of justice, has been apparent to many informed students of the problem for many years.

The so-called "right-and-wrong" rule, now statutory in at least twenty-nine states of our union, has had its rigorous advocates as well as its belligerent opponents. Shortly before the original *M'Naghten* case arose in England in 1843, Dr. Isaac Ray, a prominent student of criminal insanity of that era, indicated conclusions directly at variance with the formula subsequently adopted³ as a result of that famous trial. It was his collaboration with Judge Doe that was responsible for the pronouncement of the New Hampshire rule,⁴ now regarded as the sire of the *Durham* "product" rule. Dr. Ray's theories are still being defended by many articulate disciples of the present day.

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¹ GOVERNOR'S CONFERENCE REPORT ON THE DEFENSE OF INSANITY, (April 1958).

² See Hofstadter & Levittan, *The M'Naghten Rules — A Reappraisal and Proposal*, N.Y.L.J. Sept. 15-19, 1958, p. 4, col. 1.

³ RAY, MEDICAL JURISPRUDENCE OF INSANITY 263 (1838).

⁴ *State v. Pike*, 49 N.H. 399 (1869).

The promulgation of the *M'Naghten* formula, the New Hampshire rule and the irresistible impulse norm⁵ preceded the writings of Sigmund Freud (1856-1939), commonly accepted as the progenitor of modern psychiatry. As Freud's theories were elucidated, psychiatry and psychology each acquired a commonly accepted professional autonomy. The practitioners in each field increased in number and the motivation and causation of human behavior inherent in the commission of crime properly received their attention. Whether it is caused by the natural tensions implicit in our highly developed civilization or is the result of the natural groping by the average citizen for an answer to the complex predicaments of everyday existence, it is apparent that a large section of public opinion is presently psychiatrically oriented. It is the fashion of the age to seek a psychological and psychiatric answer to the problems of human experience. Some segments of the population appear to regard the psychiatrist as a sort of spiritual leader, who has stepped into the role formerly occupied by the priest or minister on the one hand and by the political innovator on the other. This is the social climate within which the use of psychiatric expert testimony in courts of law operates.⁶

That psychiatry can make constructive contributions to the efficiency of the administration of justice in many respects is commonly understood by lawyers and judges. The efficiency of the criminal court sentence procedure is determined in large measure by the accuracy of the antecedent

⁵ See Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956 (1952).

⁶ Szasz, *Psychiatric Expert Testimony*, 20 J. OF INTERPERSONAL PROCESSES: PSYCHIATRY (Aug. 1957).

investigation, where an inquiry as to the motivation for the crime, the results of psychological tests and, in many instances, psychiatric examinations of the defendant are necessary ingredients. Hence the common complaint by judges that budgetary authorities have failed to provide adequate psychiatric diagnostic and therapeutical clinical facilities in their salutary effort to prevent recidivism by law violators. The hostile or uninformed lawyer-critic of psychiatry, so distasteful to members of his profession, is a rare exception in modern jurisprudence.⁷

If there is presently an abyss between the law and psychiatry,⁸ resulting from trials involving the issue of criminal insanity, an enlightened age requires that every effort be made to bridge the gulf of difficulty. One basic requirement in that endeavor is a realization of the proper domain of each discipline. An autocracy of law is as repugnant to fair discussion as what an eminent psychiatrist has called "psycho-authoritarianism."⁹

The law must take cognizance of the accepted modern advances of psychiatry. Our understanding of the conditions under which men act has been clarified by the evaluations of psychiatry and many other

⁷ "We all know how intense is the hostility which at times is displayed in our courts between the jurist and the psychiatric expert. A highly respected and very just federal judge once addressed me as I was sworn in as an expert witness: 'I don't like doctors; they talk a language which we don't understand. Please, Doctor, bear this in mind and talk plainly so that we can understand you.'" ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 106-07 (1954).

⁸ See Morris, *Criminal Insanity: The Abyss Between Law and Psychiatry*, 12 RECORD OF N.Y.C.B.A. 171 (Nov. 1957).

⁹ See Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336 (1955).

disciplines since the *M'Naghten* formula was established. If the present rule prevents a qualified witness from explaining to a jury the complete mental picture of the defendant that his diagnosis has developed, then the psychiatrist has a reasonable complaint. If the word "know," used in our formula, should be interpreted in the light of commonly accepted principle as meaning more than surface knowledge and requiring perception in depth, then the psychiatrist should be permitted to so testify. Certainly, the proper ends of justice should permit him to explain a diagnosis of impairment of volition which, with cognition, is a component of ordinary human judgment. The law is intended to be dynamic and the present controversy should not degenerate into crude semantics.

The professional psychiatrist is a witness whose proper testimony is necessary for the information of the jury when insanity is an issue. But his function is to give opinion evidence. The issue before the criminal court is not mental disorder but legal responsibility, a fact which the legal profession has been pointing out to its medical critics for years.¹⁰

The common concern of doctors for those whom they diagnose and treat for mental ills is a commendable professional attribute. But it has no more proper place in a trial than the solicitude of the devoted criminal court lawyer whose conviction as to the righteousness of his defendant's contention often induces a belligerency seldom excused by either the judge or the jury. The psychiatrist's activity in criminology has too often been characterized by an ethical premise which places the doctor in the role

of the protector of the accused. Thus, the offender is elevated from the role of "criminal" to that of "patient."¹¹ In many instances psychiatric diagnosis proceeds from the premise that all law offenders are sick people — ". . . that criminology is an expression of an inner drive rather than something willfully premeditated; that it represents impulsive behavior; and that the criminal is more often weak than vicious. Punishment is not a deterrent of crime."¹²

If psychiatrists complain that in the courtroom they are cast in the role of partisan hirelings whose professional competence and integrity are impugned¹³ part of the fault is undoubtedly theirs. They resent the cross-examination which often damages their direct testimony, ignoring its value to the fact-finding jury. Since their discipline deals with intangibles, their claim to status as a science is commonly disputed even by some of their eminent number. It has been said that to a large extent psychiatry is still an art and that although there are wide areas of agreement on basic facts, there is a considerable disagreement once one gets beyond these.¹⁴

When insanity is an issue in a trial, the attitude of the average juror is often one of ambivalence. In his private professional relations, the average juror has more respect for his doctor than his lawyer. Consequently, when he hears a psychiatrist, testifying for the prosecution, state that a

¹⁰ See Weihofen, *The Flowering of New Hampshire*, 22 U. CHI. L. REV. 356, 359 (1955).

¹¹ See Szasz, *Psychiatry, Ethics and the Criminal Law*, 58 COLUM. L. REV. 183 (1958).

¹² Karpman, *On Reducing Tensions and Bridging Gaps Between Psychiatry and the Law*, 48 J. CRIM. L., C. & P.S. 164 (1957).

¹³ Guttmacher, *Why Psychiatrists Do Not Like to Testify in Court*, PRACTICAL LAWYER, 50, 52 (May 1955).

¹⁴ Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATHOLIC U. L. REV. 25 (1955).

defendant had neither mental defect or disease and another equally qualified psychiatrist testify that a defendant suffers from hebephrenic schizophrenia,¹⁵ he may, despite his respect for the profession, wonder how accurate is a claimed science which produces such a dichotomy of opinion.¹⁶

An ethical code that would insure standards of professional competence among psychiatrists would dissipate much of the distrust of their testimony in our court trials.¹⁷ If their profession complains that "what happens to psychiatrists in the courtroom is actually not a clash of opinion but a clash of lawyers, with psychiatrists in the role of baseball bats,"¹⁸ one answer could be that they become "baseball bats" because of an inability to agree on fundamentals in diagnosis and for failure to enforce their own compulsory moral code for practitioners. A criminal trial is not the usual scientific inquiry that scientists conduct. In their field, preponderance of the evidence may suffice and majority opinion prevails; in a criminal trial, because of the human values at stake, proof beyond a reasonable doubt by a unanimous verdict is required.

Far transcending the confidence of psychiatry in its own norms and its natural compassion for a "sick" defendant is the concern of society as a group for the victim of the crime and the victims of others whose actions he may inspire. Society insists upon

a standard of moral responsibility to protect its safety. It will not countenance any rule on criminal responsibility which links human actions more often to material forces and mass controls than to spiritual personality and individual responsibility. It insists that responsibility should be the usual norm and excuse the challenged exception. As it enters the domain of the law, psychiatry must take cognizance of the ethics inherent in our jurisprudence, despite the common suspicion that some systems of psychiatry have severed all relationships with morality.¹⁹

Since our criminal law is based on the assumption of free will,²⁰ it cannot properly digest the deterministic theories of some schools of psychiatric thought.²¹ Even though "[psychiatrists] don't believe in the propriety of punishment,"²² society will hardly accept the elimination of the elements of punishment or retribution as an effective deterrent. Our proper perspective of the role of psychiatry in the criminal law should not be blurred by an argument over punishment nor deflected by the separate question of the efficacy of the mandatory death sentence for the commission of certain crimes of murder in the first degree. As has been said, the assault on the "right-and-wrong" rule is sometimes regarded as principally a flank attack on capital punishment.²³

¹⁵ "Hebephrenia. A clinical form of dementia praecox . . . coming on soon after the onset of puberty and marked by rapid deterioration, hallucinations, absurd delusion, senseless laughter, and silly mannerisms." AMERICAN ILLUSTRATED MEDICAL DICTIONARY (1943).

¹⁶ See Trial Record, *People v. Yaeger* (Queens County June 1958).

¹⁷ See ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 124 (1954).

¹⁸ *Id.* at 112.

¹⁹ VANDERVELT & ODENWALD, PSYCHIATRY AND CATHOLICISM 15 (1957).

²⁰ GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 408 (1952).

²¹ See HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 526 (1947).

²² Hall & Menninger, "Psychiatry and the Law" — *A Dual Review*, 38 IOWA L. REV. 687, 702 (1953).

²³ See Snyder, *What is Wrong About the M'Naghten Rule and Who Cares?* 23 BROOKLYN L. REV. 1, 19 (1956).

The irresistible impulse norm was, for a time, presented as an example of the "uniform" opinion of psychiatrists of criminal responsibility and yet today it is rejected by most of them as unsound.²⁴ The promulgation of the *Durham* "product" rule in 1954, although not subsequently followed in two jurisdictions of equal level,²⁵ was hailed by many psychiatrists with enthusiasm.²⁶ Its soundness, however, has since been widely disputed²⁷ by many students of the problem of criminal insanity and it is rejected as a proper test in the report of Governor Harri- man's Commission.²⁸ Since it must have the standard of stability, our law cannot embody any psychiatric norm that is either fadistic or too variable. The abolition of a legal test of criminal liability and the substitution of the diagnosis of mental illness for the moral responsibility inherent in the *M'Naghten* formula represents strenuous objection to most proposed changes. It is

²⁴ See Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L. J. 761, 772-74 (1956).

²⁵ See *Howard v. United States*, 232 F.2d 274 (5th Cir. 1956); *Andersen v. United States*, 237 F.2d 118 (9th Cir. 1956).

²⁶ See Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325 (1955); Zilboorg, *A Step Toward Enlightened Justice*, *id.* at 331.

²⁷ Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B.A.J. 917 (1956); Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367-76 (1955).

²⁸ "It should be added that in framing our recommendation we gave consideration to the principle formulated in the *Durham* case, which would refer responsibility solely to whether the criminal act was the product of mental disease or defect. While we appreciate the value of this concept as opposed to strict *McNaghten*, and its usefulness in freeing psychiatric testimony from the arbitrary limits now imposed, no member of the Study Committee would prefer its adoption to the formulation we propose." GOVERNOR'S CONFERENCE REPORT ON THE DEFENSE OF INSANITY 7 (April 1958).

suggested that the proposal of the Governor's Commission has this grave handicap and will not even satisfy many medical critics of the present rule.²⁹ The dangers inherent in the elastic connotation of the words "mental disease or defect," "substantial capacity" and "result" used in this suggestion are apparent.

The *M'Naghten* formula embodies the moral orientation that society requires to accomplish substantial justice. Serious criticisms of the unfair application of its tenets, exemplified in the case of *People v. Horton*³⁰ can be met by increasing the scope of proper psychiatric testimony and broadening the context of the court's instruction to the jury. The psychiatrist is entitled to a proper respect for his professional standing in the courtroom and it is often unfair to put him "on the rack" by compelling a compulsory "yes" or "no" answer. Judicial intrusion in the interrogation at trial, compelling this procedure, often connotes to a jury an unfair distrust for the validity of elementary psychiatric principles. Not every mental condition can be characterized as "black" or "white." There are shades of "gray" — the mixtures of neuroses and psychoses which dictates of justice require should be explained to the jury by the psychiatric expert.

Whether the accomplishment of these changes should be left to the slow evolution of decisional law is questionable. An immediate amendment to the Code of Criminal Procedure of our state could define the mechanics and limit judicial discretion in the matter. Such a change would make the

²⁹ Hofstadter & Levittan, *The M'Naghten Rules — A Reappraisal and Proposal*, N.Y.L.J. Sept. 15-19, 1958, p. 4, col. 1, particularly the issue of September 17, 1958.

³⁰ 308 N.Y. 1, 123 N.E. 2d 609 (1954).

M'Naghten formula more consonant with presently accepted psychiatric principles.

At the same time, legislative consideration could be given to two salutary proposals — one in the report of the Governor's Commission and the other contained in Justice Hofstadter's New York Law Journal article.³¹ The present statutory provision that defendants acquitted by a verdict of "not guilty by reason of insanity" are confined by judicial discretion, under Section 454 of the Code, "until sane" is truly inadequate for the protection of the public. The adoption of a post-trial procedure after such verdicts, contained in Section 4.08 of the proposed Model Penal Code, the salutary work of the American Law Institute, would be an improvement. Embodied in this plan is an answer to a common jury concern as to how society can cope with possible recidivism by mentally sick defendants, often too early released from custody.³²

One of Justice Hofstadter's suggestions provides for a Board of Disposition to convene and hold a hearing after a verdict of

guilty resulting from a trial where sanity has been in issue. More comprehensive medical and other testimony could be heard than that adduced at the trial with specific emphasis on consideration of the defendant as an individual allegedly mentally disturbed.

Under our system of law, juries determine responsibility, and their duty can more properly be discharged if our procedure more adequately defined the scope of their fact-finding function. No matter how explicit and direct is the court's charge that they must not consider what will happen after the rendition of their verdict, natural human speculation compels the jurymen's concern with the overtones involved in the commission of crimes by mentally disturbed defendants and society's stake in the aftermath.

The law has, through centuries of experience with the fallibilities of human nature, acquired substantial knowledge of human behavior. The basic retention of the *M'Naghten* formula with the changes proposed will, it is submitted, afford protection to society and include proper solicitude for the individual in the light of our present knowledge, scientific and otherwise.

³¹ See note 29 *supra*.

³² GOVERNOR'S CONFERENCE REPORT ON THE DEFENSE OF INSANITY, *supra* note 28.