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## Criminal Law - Reexamination of Tests for Criminal Responsibility

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## COMMENTS

CRIMINAL LAW—REEXAMINATION OF TESTS FOR CRIMINAL RESPONSIBILITY—Criminal law in the Anglo-American system of jurisprudence is based upon the concept that persons should be held responsible for their acts. A strong corollary to this idea is that certain

types of persons, namely the "insane," should not be held responsible for criminal conduct. Although this proposition seems beautifully simple, courts in England and the United States for over a hundred years have wrestled with the problem of what constitutes insanity, or, to phrase it more accurately, what type of mental condition should preclude responsibility for a criminal act.

### I. *Past Approaches to the Problem*

Without attempting to trace the entire history of formulated tests of insanity, the law in England and the United States may be briefly summarized. There are four major tests used, although the wording may vary somewhat from jurisdiction to jurisdiction. The first, and by far the most significant, is popularly known as the right and wrong test. Formulated in the famous *M'Naghten* case, the question was stated to be whether:

" . . . 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>1</sup>

This is the law in England today and until recently the primary test of mental responsibility in all but one jurisdiction in the United States.<sup>2</sup> In fourteen or more states<sup>3</sup> the so-called irresistible impulse test is used to supplement, but not replace, the *M'Naghten* rules. In substance, even though the defendant knew the act to be wrong, this rule excuses him if by reason of his mental condition he did not have enough will power to resist the impulse to commit it. A third rule worthy of brief mention is concerned primarily with persons suffering from insane delusions. This test excuses a defendant if he would have had a valid defense, e.g., self defense, had the delusion he acted upon been true. This test also had its origin in the *M'Naghten* case and was at one time quite popular. Today, however, it is used in only seven or eight states;<sup>4</sup> the courts have been reluctant to impose a rational standard intended for sane and responsible persons upon persons suffering at least from delusions. The fourth test, although used only in New Hampshire, is significant because of the attention paid to it by legal writers and because it forms the basis for a new rule adopted in Washington, D.C.,

<sup>1</sup> *M'Naghten's Case*, 10 Cl. & F. 200 at 210, 8 Eng. Rep. 718 (1843).

<sup>2</sup> New Hampshire uses a different rule which will be discussed later.

<sup>3</sup> See WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 51 (1954).

<sup>4</sup> *Id.* at 104.

in the recent case of *Durham v. United States*.<sup>5</sup> First formulated in 1866,<sup>6</sup> the New Hampshire rule was decisively adopted in 1870<sup>7</sup> and applied again in 1871.<sup>8</sup> In the last of these cases the court rejected all conventional tests of insanity, saying that the entire question was one for the jury:

“. . . the real ultimate question to be determined seems to be, whether, at the time of the act, he had the mental capacity to entertain a criminal intent—whether, in point of fact, he did entertain such intent.”<sup>9</sup>

Under this approach, the jury must decide first whether the defendant had a mental disease and second, if he had, whether the disease was of such character or was so far developed as to take away capacity to form or entertain the criminal intent.<sup>10</sup>

## II. *Durham v. United States*

With a very sketchy picture of the legal tests for determining criminal responsibility as background, attention can be directed to the most recent attempt to formulate a satisfactory rule, the case of *Durham v. United States*. In this case the defendant, Monte Durham, was charged with housebreaking; his only defense was insanity. The evidence showed that defendant had a long history of imprisonment and hospitalization: he had been committed several times to St. Elizabeths Hospital, where at one time the diagnosis was “psychosis with psychopathic personality” and at another time it was “without mental disorder, psychopathic personality.” Upon release, he was quick to break the law again. Under the housebreaking indictment, he was again found to be of unsound mind and spent another sixteen months in St. Elizabeths before he was released to stand trial. The trial judge correctly stated that the burden of proof as to the issue of sanity was on the government once the issue was raised, but stated that there was no evidence as to the defendant’s mental state on the particular date of the crime, and therefore that the usual inference of sanity must stand. He further stated that the defendant had not shown himself to be of unsound mind in that he did not meet the right and wrong test or the irresistible impulse test. On appeal, the case was reversed for

<sup>5</sup> (D.C. Cir. 1954) 214 F. (2d) 862, hereafter referred to as the principal case.

<sup>6</sup> *Boardman v. Woodman*, 47 N.H. 120 (1866) (dissenting opinion).

<sup>7</sup> *State v. Pike*, 49 N.H. 399 (1870).

<sup>8</sup> *State v. Jones*, 50 N.H. 369 (1871).

<sup>9</sup> *Id.* at 382.

<sup>10</sup> WEIHOFFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 154 (1954).

error in the burden of proof question, a unanimous court holding through Judge Bazelon that there was sufficient evidence to shift the burden of proof to the prosecution and prospectively applying a new standard for determining criminal responsibility.

The opinion purports to adopt a rule "not unlike that followed by the New Hampshire court." Because of its significance it may be well to set out the new rule in full:

"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>11</sup>

After thus stating the new test, the court expressly rejected the right and wrong test and the irresistible impulse test,<sup>12</sup> which until then had both been in force in that jurisdiction.<sup>13</sup>

Reflected in Judge Bazelon's opinion are the traditional objections which have been leveled at the existing insanity rules for a number of years. Among the most frequently voiced criticisms are, first, that the words used are themselves ambiguous and have never been defined adequately; that "right" and "wrong" are changing ethical concepts which have no place in the criminal law. More particularly, it is commonly charged that the whole basis of the M'Naghten rules is invalid under prevalent psychiatric opinion. The rules were formulated at a time when the human mind was thought to be composed of distinct parts, such as the reason or the intellect as opposed to the emotions and instincts. Today virtually all psychiatrists believe that the personality is integrated and cannot be isolated in this manner. The right and wrong test, moreover, covers only disorders of the cognitive or intellectual phase of the mind. Although it would seem that this deficiency could be mended by a liberal application of the irresistible impulse test, this test was also rejected by the *Durham* court.<sup>14</sup>

<sup>11</sup> Principal case at 874-875.

<sup>12</sup> *Id.* at 874. The court did state (at 876), however, that juries might want to take the old criteria into account, but that henceforth they need not be bound by them exclusively.

<sup>13</sup> *United States v. Guiteau*, 12 D.C. Sup. Ct. (1 Mackey) 498 (1882), adopted the right and wrong test; *Smith v. United States*, (D.C. Cir. 1929) 36 F. (2d) 548, added the irresistible impulse test.

<sup>14</sup> Principal case at 874, where the court stated that "it gives no recognition to mental illness characterized by brooding and reflection. . . ."

At this stage it might be well to point out that the new test might also be subject to criticism. First, the wording may prove difficult to construe. "The product of" definitely signifies a causal connection, but in what degree the court does not say. Courts have always had to struggle with the problem of causation, however, and perhaps it is wiser not to become entangled in such qualifying words as "substantial," "principal" and so forth.<sup>15</sup> In addition to this difficulty, critics of the new rule will doubtless take issue with the breadth of the definition of mental disease.<sup>16</sup> As stated, it is wide enough to include many forms of mental disease from certain types of the so-called "psychopathic personality" to the psychoses. Courts and lawyers may fear that this will lead to a breakdown of the whole legal attitude toward crime if any number of minor mental deviations are allowed to come within the test. Although there may be some validity to this objection, it is also dangerous to restrict the definition to one type of disease, for instance, to the psychoses. A "psychopath" might well be more dangerous to society, and undeterrable by a prison sentence or threat thereof, than would certain types of psychotics. Therefore, tentatively accepting the value of this breadth and simplicity in the rule, the fundamental premises of the test itself must now be examined.

Before going into an analysis of the court's reasoning, it might be advisable to set out some of the suggestions made by other leading authorities in the criminal law field. Some of the more cautious recommend merely that the M'Naghten rules and the irresistible impulse test be expanded and given a more liberal interpretation.<sup>17</sup> The noted professor of criminal law, Herbert Wechsler, suggests that the question should be whether the capacity of the defendant to control his conduct is so greatly impaired that "he cannot justly be held criminally responsible."<sup>18</sup> Apparently the authorities in the field of psychiatry would recommend a test which would include two questions: whether the individual was suffering from a medically recognized mental disorder and, if so, whether it had significantly distorted his social judgment or

<sup>15</sup> See Wechsler, "The Criteria of Criminal Responsibility," 22 *UNIV. CHI. L. REV.* 367 at 371 (1955), where he reasons: "It will no doubt be answered that the problem for the jury is to give importance to causal relationships that satisfy its sense of justice in relation to a criminal conviction."

<sup>16</sup> This criticism has already been made. See 68 *HARV. L. REV.* 364 (1954); also Wechsler, "The Criteria of Criminal Responsibility," 22 *UNIV. CHI. L. REV.* 367 (1955).

<sup>17</sup> See Hall & Menninger, "Psychiatry and the Law"—A Dual Review," 38 *IOWA L. REV.* 687 (1953), where Hall so recommends at 695. See also GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 472 et seq. (1925).

<sup>18</sup> Wechsler, "The Criteria of Criminal Responsibility," 22 *UNIV. CHI. L. REV.* 367 at 372 (1955).

seriously impaired his social control.<sup>19</sup> Perhaps the most significant recent work on the problem of insanity rules is the 1953 Report of the Royal Commission on Capital Punishment in England. This Commission concluded that the M'Naghten rules, standing alone, were not adequate, and that a liberal form of the irresistible impulse test should be added, the new impulse test merely to ask whether the defendant "was incapable of preventing himself from committing it."<sup>20</sup> This suggestion, however, was not the whole of the Commission's recommendation. It was believed preferable to abrogate the rules entirely and "to leave 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>21</sup> Finally, one of the more extreme views taken would base the test on "the presence or absence of a clinically recognizable mental disorder (psychosis) or mental deficiency (imbecility or idiocy) at the time the crime was committed."<sup>22</sup>

Although the purpose of the run-down of suggested tests may not have seemed clear, upon examination it will be seen that these and the existing tests (including that of New Hampshire) all have several elements in common. First, they all require proof of a mental disease or deficiency. It would also be reasonable to say that underlying all of these tests is the assumption that there is a causal connection between the disease or deficiency and the crime charged. This is evidenced by the fact that in each case the insanity must be with respect to the crime charged rather than in the abstract. The third, and perhaps the most vital, common characteristic deals with the question of moral responsibility, the crux of the entire insanity problem. The concept of moral responsibility is often referred to, but seldom defined. Culpability and blameworthiness seem to be its closest synonyms. It takes the form of a collective moral judgment which is deemed a prerequisite to a penal conviction. The inadequacy of any explanation is apparent, but the principle remains: before any man can be sent to jail, there must be a moral judgment imposed upon him. In other fields of the criminal law, this might be called the *mens rea*; writers in the field of

<sup>19</sup> According to GUTTMACHER AND WEIHOFEN, *PSYCHIATRY AND THE LAW* 420-421 (1952).

<sup>20</sup> ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1953 Report, p. 111.

<sup>21</sup> *Id.* at p. 116.

<sup>22</sup> Ploscowe, "Suggested Changes in the New York Laws and Procedures Relating to the Criminally Insane and Mentally Defective Offenders," 43 *J. CRIM. L., CRIMINOLOGY AND POLICE SCIENCE* 312 at 314 (1952). Note that although this seems broader than the Durham rule, the parenthetical definitions of disorder and deficiency restrict its application substantially and even arbitrarily.

insanity seem to prefer to call it moral responsibility. The M'Naghten rules try to reach this concept by asking, did the defendant know what he was doing or that it was wrong? the irresistible impulse test by saying, could he help himself? the New Hampshire test by demanding that he have the requisite criminal intent. The Royal Commission and Professor Wechsler state the problem the most succinctly: ought he be held responsible? Assuming that these three requirements are necessary, then it would follow that the existence of a mental disease will not invariably excuse a person from criminal responsibility even if the causal factor is established. He must further establish that his mental disease took such a form that it impaired his social judgment or control, that it rendered him morally irresponsible. One theory behind this requirement seems to be that if he has in fact retained judgment and control, he is deterrable by punishment or threat of punishment. Whether or not this is one hundred percent accurate medically, it seems at least eminently reasonable. Broadly construed, the M'Naghten rules together with the irresistible impulse test try to accomplish these ends. It is generally conceded, however, that if strictly applied they often work injustice. Their fallacy lies in their attempt to define the symptoms of moral irresponsibility. The presence or absence of these symptoms is usually indicative of responsibility, but not invariably so.

Under the Durham test, whether the act was the product of mental disease or mental deficiency, it can readily be seen that only two of the three traditional elements of criminal responsibility are present. The element of blameworthiness is omitted from the wording of the test itself. This is not to say that it was forgotten by the able court or its importance overlooked. On the last page of the opinion the court declared that "in leaving the determination of the ultimate question of fact to the jury, we permit it to perform its traditional function which . . . is to apply 'our inherited ideas of moral responsibility to individuals prosecuted for crime' . . . ." <sup>23</sup> It is evident from this statement that the court intended that the new test be used only in connection with this concept of moral responsibility. The test itself and the charge to the jury suggested by the court are silent in this respect, however. This would appear to be a real danger to the ultimate success of the rule. For if a jury hears only the test without the later qualification of moral responsibility, it will inevitably conclude that mental disease plus causation should automatically mean acquittal. Academically, it may be

<sup>23</sup> Principal case at 876, quoting *Holloway v. United States*, (D.C. Cir. 1945) 148 F. (2d) 665 at 667.



proper to exonerate anyone who can establish the existence of a mental disease in relation to an otherwise criminal act, but pragmatically, those who administer American justice are not quite ready to adopt that view. Perhaps in the future psychiatry and the law will have become sufficiently allied so that the law will accept the premise that every mental disease warrants such recognition, but for the present at least the law should not deprive the jury of its function of making this moral judgment.

### III. *Significance of Mental Disease in Other Phases of Criminal Law*

At first blush it seems brutal that a person with a mental disease or defect which caused his acts will be held to account if he does not meet the requirement of moral responsibility. This does not mean that his mental disorder cannot play an important part in deciding his fate, however. There are at least four ways in which an accused may avail himself of his mental disorder.<sup>24</sup> First, it may be grounds for reducing his punishment.<sup>25</sup> At least ten states accept the fact that mental disorder may serve to negate the specific intent required for the crime charged.<sup>26</sup> For instance, if it was of sufficient gravity to take away the capacity to premeditate and deliberate, a person charged with murder in the first degree would be able to reduce the charge to second degree. The states which follow this principle represent a growing minority, the only major objection being that the line between the various degrees of crime is at best difficult to draw. The principle, however, is one which has been accepted since the earliest days of the common law, namely, that an act must be accompanied by the necessary criminal intent before it is a crime. A second manner in which mental disorder is recognized is by specific legislation dealing with certain types of offenders who are most likely to be mentally abnormal. An example of this type of legislation may be found in the sexual psychopath laws which have been enacted in at least twenty states.<sup>27</sup> These generally provide for commitment proceedings or psychiatric examination for sex offenders either upon indictment or conviction or before trial. Another example of this type of statute may be seen in the

<sup>24</sup> Weihofen, "The M'Naghten Rule in Its Present-Day Setting," 17 *FED. PROBATION* 8 (1953).

<sup>25</sup> Weihofen and Overholser, "Mental Disorder Affecting the Degree of a Crime," 56 *YALE L.J.* 959 (1947).

<sup>26</sup> WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 184 (1954).

<sup>27</sup> *Id.* at 196.

Massachusetts Briggs Law<sup>28</sup> which provides for routine psychiatric examination before trial of every person charged with certain major felonies or for certain types of habitual offenders. Third, due process requires that every person be mentally competent to stand trial. A person who might fear a harsh application of the right and wrong test or whose condition has deteriorated since the time of the act may raise this point and thus be sent to a mental hospital for treatment. The usual test in this area is whether the accused is mentally competent to understand the nature of the proceedings and to aid in his own defense.<sup>29</sup> Finally, the mental disorder of the defendant in many jurisdictions is considered in fixing his sentence. Many eminent authorities recommend that this sentencing function be greatly enlarged, virtually allowing an independent board of experts to settle the fate of an offender; some of them even suggest that the jury decide only the question of whether he committed the crime, leaving the rest to a commission of psychiatrists and social workers in conjunction with the judge.<sup>30</sup> Each of these four roles of mental disorder represent significant developments in criminal law and can be only briefly stated in this study. They are pertinent to the problem of insanity tests primarily in that they may aid persons who do not find relief under the existing rules, including the *Durham* test.

#### IV. Conclusion

This has not been an elaborate preparation for an endorsement of the status quo. Merely because mentally diseased or mentally deficient persons can find solace in other fields of the law when a harsh application of the old rules precludes the insanity defense does not mean that nothing should be done to improve the existing tests where possible. For a number of years dissatisfaction with the right and wrong test and the irresistible impulse test has been expressed by medical and legal opinion alike. This has not resulted in constructive action primarily because many believed that a better rule had not been

<sup>28</sup> Mass. Laws Ann. (1950) c. 123, §100A. It is also worthy of note that this law has largely eliminated the "battle of the experts" in Massachusetts because the impartial experts who report on the mental health of the offender may, and do, testify at the trial.

<sup>29</sup> See WEIHOFFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 335-340, 347-348 (1933).

<sup>30</sup> See WEIHOFFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 206-211 (1954); GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 485-486 (1925); Stevenson, "Insanity as a Criminal Defense: the Psychiatric Viewpoint," 25 *CAN. B. REV.* 731 (1947); Waelder, "Psychiatry and the Problem of Criminal Responsibility," 101 *UNIV. PA. L. REV.* 378 (1952). See also CARDOZO, *WHAT MEDICINE CAN DO FOR THE LAW* 8 et seq. (1930), where it was foreseen that some day this might be the practice in all cases.

suggested. The *Durham* opinion represents a possible solution to many of the difficulties inherent in the existing tests. The principle of the new test is valid as far as it goes. If the moral responsibility factor were included in the body of the rule, it would present a test which other jurisdictions might do well to follow. A more complete formulation of the test might encompass this factor to read substantially as follows: the question is whether his unlawful act was the product of mental disease or mental defect to such a degree that he ought not to be held responsible.<sup>31</sup>

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<sup>31</sup> Cf. ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1953 Report, p. 116.