PSYCHIATRY AND CRIMINAL RESPONSIBILITY

JEROME HALL†

PSYCHIATRY has much to contribute to law; but it also has many limitations which even lawyers and judges sometimes do not appreciate. Moreover, because Anglo-American criminal law embodies and safeguards important values, it ought to be obvious that not all the discoveries of psychiatry are grounds for modification of the criminal law. For example, a valid statistical generalization expressing the high probability that a specified class of persons will commit certain offenses should not be made the basis of wholesale legal restraints, for such restraints would conflict with the value of each person included in the class and destroy the protection traditionally accorded such values by the criminal law. Similarly, legal controls cannot be abandoned in response to the alleged findings of current science until it is ascertained whether the scientific knowledge necessary for effective operation of the new laws is actually available. An example of disregard of this is provided by the indefinite incarceration laws of some states, which were enacted in the confident but erroneous belief that psychiatrists could supply appropriate, dependable information regarding the future conduct of "sexual psychopaths." The only thing that saves these laws from imposing the tyranny of bygone ages is that they are not being enforced.¹

Able lawyers like Judge Bazelon² and Solicitor General Sobeloff³ have advocated abandonment of the M'Naghten Rules of criminal responsibility, partly because they have read vehement criticism of those rules by psychiatrists, based upon allegedly scientific knowledge and reflecting an apparently uniform expert opinion. The critics are specialists in mental disease, while the lawyer is a layman. Who is he to challenge the experts? The outcome of so limited an inquiry is a foregone conclusion.

†Professor of Law, Indiana University. The substance of this paper was presented Dec. 2, 1955 in Lawrence, Kansas, at a conference on criminal responsibility sponsored by the Menninger Foundation and the University of Kansas.

1. See Ludwig, *Control of the Sex Criminal*, 25 ST. JOHN'S L. REV. 203, 212-13 (1951); Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L., C. & P.S. 543 (1950).

It should be added that although the number of persons incarcerated under these statutes is relatively small, very serious abuse of fundamental rights is prevalent. See Mihm, *A Re-Examination of the Validity of Our Sex Psychopath Statutes in the Light of Recent Appeal Cases and Experience*, 44 J. CRIM. L., C. & P.S. 716 (1954).

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

3. Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793 (1955).

An adequate inquiry must go much further. Lawyers should read not only the extremist psychiatrists who are dogmatic and aggressive in their attacks on the law of criminal responsibility, but also the work of such distinguished psychiatrists as Wertham, Cleckley, H. A. Davidson and Norwood East,⁴ who find much merit in that law.⁵ They should ask what portion of all reputable psychiatrists in the United States are represented by the extremist critics. For example, there are approximately 8500 practicing psychiatrists and a very large number of other qualified experts in the United States; yet the reports of questionnaires concerning criminal responsibility indicate that no more than a handful of them have ever been consulted by members of the legal profession.⁶ The inquiring lawyer should extend his reading beyond psychiatry into the wider field of psychology and criminology, where he would find not only very different theories of human nature and criminal conduct⁷ but also very severe criticism of psychiatry, and especially of psychoanalysis.⁸

The lawyer pondering the attacks of the psychiatrist critics might also consider the meaningful case of "irresistible impulse." He would discover that only a short time ago that concept was emphatically presented as an example of the "uniform" opinion of psychiatrists on criminal responsibility; and yet today "irresistible impulse" is rejected by most psychiatrists as unsound!⁹ At this point, the inquiring lawyer might well conclude that psychiatric knowledge is far from being indisputable,¹⁰ and that to reach a sound conclusion of his own he must do something more than choose among the experts. He might,

4. See CLECKLEY, *MASK OF SANITY* 495-501 (2d ed. 1950); EAST, *AN INTRODUCTION TO FORENSIC PSYCHIATRY IN THE CRIMINAL COURTS* (1927); Davidson, *Criminal Responsibility: The Quest for a Formula*, in *PSYCHIATRY AND THE LAW* 61 (Hoch & Zubin ed. 1955); Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336 (1955). Other citations are given in HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* c. 14 (1947); Hall, *Psychiatry and the Law—A Dual Review*, 38 IOWA L. REV. 687 (1953).

5. None of the works of these psychiatrists is cited by Judge Bazelon, who wrote in *Durham v. United States*, 214 F.2d 862, 872, 870 (D.C. Cir. 1954), both that, "the courts have assumed an impossible role, not merely one for which they have no special competence," and that "medico-legal writers in large number . . . present convincing evidence that the right-and-wrong test is 'based on an entirely obsolete and misleading conception of the nature of insanity.'"

6. Dr. Philip Q. Roche received 102 answers to his questionnaire, as reported by Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956, 989 (1952). On wider questions of criminal responsibility, a circular letter was sent to the 150 members of the Group for the Advancement of Psychiatry, of which number 86 made returns. COMMITTEE ON PSYCHIATRY AND LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY* 6 n.20 (1954). Dr. M. Guttmacher reports on a poll of the same group. Guttmacher, *The Quest for a Test of Criminal Responsibility*, 111 AM. J. PSYCHIATRY 428, 430 (1954).

7. See, e.g., Cressey, *The Differential Association Theory and Compulsive Crimes*, 45 J. CRIM. L., C. & P.S. 29 (1954).

8. See notes 39, 53 *infra*.

9. See text at note 54 *infra*.

10. "The case material collected so far in the clinical psychoanalyses of criminals is so insignificant in amount, so inconclusive in results, that it simply excludes any possibility

in sum, be persuaded of the desirability of forming an independent estimate; rather than accept any psychological theory on authority, he would become "his own competent critic. . . ."¹¹ In casting off the tow-line of authority, he would find encouragement in learning that the 1953 *Report of the Royal Commission on Capital Punishment*, upon which the *Durham* decision¹² relies, has been almost completely ignored by Parliament, and that in the only detailed discussion of the *Report* by an English judge published so far, one of the ablest of them, Justice Devlin, rejects both of the Commission's principal recommendations.¹³

When he has reflected on these matters with reference to the weight he should attach to the views of the current extremist critics of criminal responsibility, the inquiring lawyer may be ready to put greater confidence in the living psychology of Anglo-American criminal law, and its emphasis on moral responsibility. He may even come to accept the observation of an eminent psychologist that, "dealing as it does mainly with human behavior, the law very likely has more to teach psychology than to learn from it."¹⁴

Yet psychiatry has much to offer in the improvement of the law and its administration. The problem is to establish a sound theoretical basis on which psychiatry and legal science can work harmoniously together. That this is a difficult problem is witnessed by the current polemics. But that it is not insuperable should be apparent if we view it as essentially a problem of interdisciplinary knowledge. Considerable progress has been made in some interdisciplinary areas, biochemistry for example, and very promising results have been attained in others, such as anthropology, institutional economics, and certain socio-legal studies.¹⁵ There is no extraordinary obstacle to similar progress in interrelating psychiatry and law.

The principal barrier at present seems, to this observer, to be a lack of understanding of the grounds on which psychiatry and legal science can meet. It is the purpose of this paper to explore these grounds and the reasons for the present misunderstanding, and then to take another look at the central interdisciplinary question, the law of criminal responsibility. The first step will be to examine the basic issues underlying the current polemics. This should

of basic conclusions, even if one overlooks the contradictions in the conclusions made by different authors and achieved through differing approaches.

"Some authors compensate for prevailing ignorance by overoptimism, some by overpessimism, concerning the future possibilities of the therapy of crinimos. The *simple fact is that we just don't know*." Bergler, *Crime and Punishment*, 21 PSYCHIATRIC Q. SUPP. 37-38 (1947).

11. ROBINSON, *LAW AND THE LAWYERS* 111 (1935).

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

13. Devlin, *Criminal Responsibility and Punishment: Functions of Judge and Jury*, 1 CRIM. L. REV. 661, 682 (1954).

14. THORNDIKE, *MAN AND HIS WORKS* 133 (1943).

15. E.g., BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); LLEWELLYN & HOEBEL, *THE CHEYENNE WAY* (1941); MOORE & CALLAHAN, *LAW AND LEARNING THEORY* (1943); HALL, *THEFT, LAW AND SOCIETY* (2d ed. 1952).

reveal the conflict of perspectives and, more important, clarify the essential meaning of the law regarding crime and punishment. It is into this framework that the rules of criminal responsibility must fit; and within it that psychiatry can make a fruitful contribution to the law. Against this framework the paper will then consider the M'Naghten Rules, the psychiatrists' criticism of those rules, and the major alternative formulations. Finally, a proposed substitute for the M'Naghten Rules will be presented, together with some suggestions concerning the future development of forensic psychiatry.

THE UNDERLYING ISSUES

The Conflict of Perspectives

A major underlying fact of the current polemics is the clash of elementary philosophical perspectives. Every science rests upon certain axioms or postulates such as matter, force and inertia—postulates that are accepted by scientists as “given,” while philosophers remain curious about them. Without examining these ultimates, we can easily perceive the perspective that psychiatry, and especially psychoanalysis, draws from them. Since it purports to be rigorously scientific, it takes a determinist position. Its view of human nature is expressed in terms of drives and dispositions which, like mechanical forces, operate in accordance with universal laws of causation.¹⁶

On the other hand, criminal law, while it is also a science, is not a science whose sole concern is to understand and describe what goes on. It is, instead, a practical, rational, normative science which, although it draws upon theoretical science, also is concerned to pass judgment on human conduct. Its view of human nature asserts the reality of free choice and rejects the thesis that the conduct of normal adults is a mere expression of imperious psychological necessity. Given the scientific purpose to understand conduct, determinism is a necessary postulate. Given the additional purpose to evaluate conduct, some degree of autonomy is a necessary postulate.

Accordingly, there is no more validity in a scientific psychiatrist's criticism of the ethical perspective of the criminal law than there would be in the normative legal scientist's criticism of the determinist perspective of theoretical science. I do not imply that psychiatrists have no business criticizing law; on the contrary, they have important contributions to offer. But whatever contribution they can and should make to criminal law will not result from the substitution of the perspective of empirical science for that of a normative one.

Nor is the crucial issue simply a matter of scientists versus lawyers, as is implied in some criticisms. Lawyers did not invent the perspectives that lie at the foundation of our legal system. The criminal law is an institution into whose construction have gone hundreds of years of social experience, participated in by all classes and professions. To speak of the resulting philosophy

16. It will be suggested below that the determinist perspective in psychiatry is supplemented by the problem-solving viewpoint, especially in therapy. See text at note 75 *infra*.

and psychology as "common sense" might suggest that specialists and scientists have not contributed to the legal order—when of course they have. But because of the nature and functions of this social institution, the principal doctrines of our law emphasize not expert opinion but common experience influenced by such opinion. And a salient fact in this experience is that freedom and self-control, limited though they be, are not mere metaphysical abstractions.

The choice of distinctive postulates regarding the nature of human conduct—free choice or cause-and-effect—determines the corollary attitude toward punishment. From the viewpoint of an empirical science, punishment may be seen as emotional reaction, the vengeance of an angry group. It is also a condition which must be included among the causal factors of behavior; and, finally, as Alexander and other Freudians have recognized,¹⁷ it is a vicarious experience which keeps a "sense of justice" in precarious equilibrium.

But for the purposes of law, punishment must be interpreted consistently with a view of human nature that is both practical and ethical. The key to this interpretation is the concept of responsibility. To be responsible means to be accountable, as a normal person, for voluntary conduct. A person is morally culpable when he voluntarily harms someone,¹⁸ and he is legally liable to punishment if that conduct and harm have been legally proscribed. In this view, punishment serves the public good: first, by giving concrete effect and publicity to the community's concepts of right and wrong; second, by incapacitating the convicted harm-doer from further harm-doing; third, by deterring other potential harm-doers; and finally, if wisely tempered and individualized, by furthering the rehabilitation of offenders.¹⁹

Punishment is, in sum, a corollary of responsibility, based upon the concept of man as capable, within limits, of making free moral choices: a normal adult who is the author of harm to others should be punished for the reasons stated. It might be granted that a normal adult need not have killed a certain person or taken his property, and held at the same time that nothing should be done about it—but this position could be consistent only with pure science, religious idealism, or anarchy. It is wholly incompatible with—it is, indeed, the negation of—responsibility in its social and legal significance. To take no punitive measure against normal persons who voluntarily harm others would be the grossest sort of social irresponsibility, an avoidance of obligation and a conjuring up of Hobbes' war of each man against every other man. Furthermore, if human beings are in any degree free moral agents, then treatment cannot be wholly substituted for punishment; treating all criminals as ipso facto sick persons cannot be justified even on humanitarian grounds. A dogma that equates

17. ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* 207-25 (1931).

18. "Actually then only deliberate action, conduct into which reflective choice enters, is distinctively moral, for only then does there enter the question of better and worse." DEWEY, *HUMAN NATURE AND CONDUCT* 279 (1930).

19. The author has elsewhere examined some of the current fallacies that omit one or more of these components from the objectives of punishment. See Hall, *Science and Reform in Criminal Law*, 100 U. PA. L. REV. 787, 794-99 (1952).

normal adults with helpless victims of disease is incompatible with respect for personality and distinctive human traits.

The Rule of Law

The issues resulting from the conflict of philosophical perspectives, theories of human nature, and corollary attitudes toward punishment, must be resolved for practical as well as theoretical purposes. And the practical resolution gives rise to another issue which also has far-ranging consequences: the issue of the rule of law versus individualization of treatment.

This issue is usually stated as a conflict between the law's interest in society and the doctor's concern for his patient—which can run to insistence upon an individualization of therapy so complete that no effort whatever is made to induce any degree of conformity or "acceptance of reality."²⁰ The tenet of individualization is also reflected in criminologists' demands for wholly indeterminate sentences. The logic is that since each person and situation is unique, uniformity of treatment is both unscientific and unjust.

The issue of law versus individualization is an ancient one. In the *Statesman* Plato debated the respective merits of the rule of law and the unfettered authority of the philosopher-king.²¹ Law, he said, suffers from two inescapable defects: it is general, and thus cannot fit the requirements of each case in the way unrestricted wisdom could; and people and facts change, while law remains fixed. Nevertheless, although he preferred the ideal of the philosopher-king, Plato concluded that since the rulers of any actual state would be far from perfect—might in fact be the worst of ignorant tyrants—the best practical solution is the rule of law. The Western tradition of the sovereignty of law extends from Plato to the present time. It protects the innocent, including psychiatrists, from abuse by officials armed with the might of the state. It even protects the worst type of convicted criminal from being subjected to any form of punishment that is not prescribed by law.

Now, one cannot have his cake and eat it too. We cannot have the advantages of protection by law and also have all the advantages that in particular instances might flow from completely unfettered discretion in the treatment of criminals. From a medical viewpoint, it may be absurd to release an offender at a fixed time that in fact has no relation to rehabilitation. But if no law fixes an upper limit, there is no adequate protection for any convicted person against life imprisonment.

It needs to be recognized that the issue of the rule of law is involved in certain psychiatrists' criticism of the legal classification of persons as either "sane" or "insane." This "black or white" business, say these psychiatrists, flies directly in the face of the known facts—the intermediate grays, the hardly perceptible differences forming an unbroken continuum between the ideal ex-

20. Cf. Zilboorg, *The Struggle for and Against the Individual in Psychotherapy*, 104 AM. J. PSYCHIATRY 524 (1948).

21. See Hall, *Plato's Legal Philosophy*, 31 IND. L.J. 171, 184-86 (1956).

tremes. But if we are to have a legal order instead of unfettered power, that means precisely that we must submit to generalizations describing *classes* of persons, harms, and the like. And given such a class, it follows inevitably that any relevant item either falls within the class or falls outside it. This is not the folly of lawyers. The same holds equally for the classes that comprise the structure of any science or discipline, and the difficulties encountered by psychiatrists in reaching agreement on a sound classification of the psychoses²² aptly illustrate the limitations that are inherent in the generalization of rules. The criticism of the legal classification could not be met by adding a class of the "partially insane," for there would still be intermediates that fell between the three classes. And so it would continue, no matter how many classes were provided.

Our substantive law is set up to determine the basic questions, who shall be subjected to the control of the state, and who shall remain free of that. The social interpretation of punishment qualifies the meaning of this substantive classification—determines, that is, what *kind* of control shall be exercised by the state. It assumes, therefore, that there are important differences between hospitals and prisons—even though the law does not prevent a penal institution from utilizing the services of psychiatrists or from transferring the serious cases to hospitals.

If some of the critics have ignored or misunderstood the relation of substantive legal classification to the rule of law, still their criticisms are not devoid of substance. It is a fact that among those who are held legally responsible there may yet be various degrees of mental impairment, and it is unjust to ignore these and impose uniform sentences. Within the rule of law there can and should be a substantial measure of individualization. The result of a Procrustean approach is particularly deplorable when the sentence is the death penalty: in the *Fisher* case,²³ for instance, a defendant who was clearly mentally defective was found guilty of first degree murder, which carried a mandatory death penalty, because premeditation and deliberation were found on the basis of a "reasonable man's" performance of the defendant's overt acts, without inquiry into the defendant's actual state of mind. The writer has long advocated exclusion of the objective test from the entire field of criminal law;²⁴ if this were accepted, the trial itself could provide an important measure of

22. "There is growing recognition of the inadequacies of our present psychiatric classification based on rigid 'all or nothing' diagnostic labels. These inadequacies have caused some to go so far as to stress individual case studies and not even make a diagnostic evaluation. This appears to be giving up scientific methodology in the fields of psychiatry and abnormal psychology before it has been given a fair trial. It not only gives up classification but in effect says that these fields can never be developed into a science. For if there is no agreement on classification there can be no discovery of truths or laws." Wittman & Sheldon, *A Proposed Classification of Psychotic Behavior Reactions*, 105 AM. J. PSYCHIATRY 124 (1948).

23. *Fisher v. United States*, 328 U.S. 463 (1946). Compare *Wilson v. Inyang*, [1951] 2 K.B. 799.

24. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* c. 6 (1947).

individualization, compatible with the rule of law, by determining the actual *mens rea* of the defendant and suiting criminal liability to that.

Much more can be done to individualize the treatment of criminals without at the same time weakening the safeguards of the rule of law. The disorganized mass of penal sanctions requires thorough, systematic study; a more flexible but still legally controlled plan might be adopted, establishing sharply reduced prison terms, with added provisions for taking aggravating and mitigating circumstances into account in proper cases.²⁵ Indeed, perhaps the entire initial sentencing function should be returned to the judge. The pre-sentence hearing, making use of evidence of impaired personality, motivation, and so on, could then be widely adopted.

To such individualization of treatment within the rule of law, the psychiatrists can make important contributions. As the late Professor Dession pointed out, however, the most serious problems concerning the use of psychiatry arise from the limitations of penal institutions and the lack of resources to provide adequate psychiatric services.²⁶ These are problems on which psychiatrists and lawyers can join in common effort, without further dispute about the rules of criminal responsibility.

But criticism of the rules continues. And much of the criticism seems simply to ignore the importance of the rule of law—very likely because the principal effort of the critics has been to widen the definition of incapacity, to enlarge the area of exculpation. Even granting the validity of the purpose, the question remains how to achieve it without sacrificing the values of law. If no definition of “insanity” is provided, may not a jury, instead of taking a wider view of psychosis, take a very narrow view? May not a vengeful prosecuting witness employ a psychiatrist who would testify, in effect, that only the most extreme psychotic is “insane”?²⁷ More likely, no doubt, the principal result of failure to provide a definition of serious mental disease would be to hospitalize many offenders who should be imprisoned. And this would tend to undermine the value of the rule of law, with its dual function of protecting society while it also protects individuals from abuse by the state. If people were convinced that the criminal law did not even try to cope with ordinary criminal conduct, they would act in ways that damaged both society and the legal safeguards of innocent people, defying the law or else taking it into their own hands.

There are two further characteristics of the legal order that must be taken into account. First, the application of the principles of criminal law in a concrete situation is presently placed to a large extent in the hands of lay juries.

25. See the recommendations in the ALI's current draft of a MODEL PENAL CODE 10-57 (Tent. Draft No. 2, 1954).

26. Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L.J. 319 (1938).

27. See note 33 *infra*. The possibility of narrowing the range of exculpation by a rule framed as broadly as the New Hampshire one is pointed out in Note, 30 IND. L.J. 194, 204 n.59 (1955).

Whether they should be replaced by experts as the triers of criminal responsibility is a separate question which will be examined shortly; but so long as we have juries performing the function, it is necessary that we help the jurors to understand what they are to do so that they may reach sound results.²⁸ Accordingly, we provide definite rules specifying criteria of responsibility—rules that are phrased for the layman's understanding, not the expert's. Again, although the law must adapt to a changing world and a changing understanding of that world, there is a need as well for stability, certainty and predictability in the law. To attain these objectives, it is necessary that the law should not change with every change in expert opinion.²⁹ The goal should remain a legal order assuring the protection of both society and individuals. It is within this order that we must seek to utilize the advances in scientific knowledge, and within this order that psychiatry can be of use in the law.

Psychiatry's Contributions to the Law

Some of the areas in which psychiatry has something to offer the law have already been mentioned in passing—for instance, assisting in the rehabilitation of criminals. There are two other ways in which the psychiatrists have made contributions: first, in the familiar role of experts in criminal cases, they have aided in the administration of the rules of criminal responsibility; and second, in another function, likewise familiar but so far much less useful, they have offered their criticism of those rules. It may be worthwhile to examine briefly the nature of the contribution that psychiatry can make in these two roles—in determining fact and in suggesting methods of determining fact.

It is obvious that psychiatrists know far more about mental disease than do judges and jurors. Is it not therefore absurd to permit the latter to decide that question? Should we not, instead, allocate that function to the experts? Indeed,

28. See REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT [hereinafter cited as ROYAL COMM'N REPORT] 287 (1953) (minority recommendation). Cf. Devlin, *supra* note 13, at 683:

"If a general question is to be left to them, why restrict it to sanity or insanity? Why not ask them in a general way whether the accused was responsible at all? Under our system the prosecution must allege and prove a definite crime. No one would suggest that the jury should be left with a general question whether the law has been broken or whether the prisoner should be punished or not. I believe that a general question on insanity would be just as objectionable. I think there is great force in the observation of the minority of the Commission on this point at p. 286 where they say: 'It is the traditional duty of our criminal law to lay down by definition, as clearly as possible, the essential elements of liability to conviction and punishment.' "

29. "Nor can we go to the other extreme and completely abandon all idea of legal formulation for this would result in a chaos of unpredictability and complete lack of stability. Each succeeding issue of the psychiatric journals that brought forth a new theory or a varied concept would then become the law. And the law would vary from journal to journal and from article to article." Polsky, *Application and Limits of Diminished Responsibility as a Legal and Medical Concept*, in PSYCHIATRY AND THE LAW 196, 198 (Hoch & Zubin ed. 1955).

would anyone deny that if he were simply seeking knowledge about mental disorder, he should consult psychiatrists rather than jurors—even though he might also believe that thoughtful laymen could make important contributions to that knowledge?

But in the first place a criminal trial, while it ought to use the best available knowledge, is not a scientific inquiry of the sort that psychiatrists have been trained to conduct. In some scientific inquiries a preponderance of the evidence may suffice, and majority opinion prevails; in a criminal trial, because of the human values at stake, the jury must be convinced beyond any reasonable doubt, and usually they must be unanimous in their verdict. On the other hand, many scientists insist on the verification of empirical generalizations by observable data, but law admits common sense intuitions and the opinions of experts and others. Psychiatrists can defer their acceptance of any proffered theory or interpretation indefinitely; a criminal trial must reach definite decisions within a short time.

More profoundly, the question of mental disease, as a legal issue, cannot be separated from other relevant issues, such as that of criminal intent; hence, even though improvements could be made in the use of expert opinion, it would still be necessary to have a jury or judge to interpret what the experts meant by their finding and how that affected *mens rea*. And a brief mention will suffice to reiterate the major fact that a criminal trial may seek to ascertain whether the accused in fact was competent to make a moral decision; many psychiatrists insist that they are wholly unable to aid the solution of this issue. There are also sound reasons of policy, implemented by constitutional guarantees, for trial by judge or jury. For example, we cannot ignore the fact that in a democratic society there are excellent political reasons for avoiding government by experts in crucial areas of lawmaking and adjudication.³⁰

Finally, despite the fact that experts know much more than do laymen, there are reasons for preferring the decisions of jurors as sounder fact-finding (and in appraising these reasons one must exclude current limitations that are not inherent in the system—one must presuppose, for example, a jury of intelligent

30. With reference to this question, there is a thoughtful essay by Harold J. Laski on the limitations of the expert which merits careful reading. Recognizing that in modern complex society the use of expert knowledge is essential, Laski insists that although the expert is "an invaluable servant," he is also "an impossible master." LASKI, *THE LIMITATIONS OF THE EXPERT* 10 (Fabian Tract No. 235, 1931). Laski also writes:

"The expert tends . . . to make his subject the measure of life, instead of making life the measure of his subject. . . . For your great chemist, or doctor, or engineer, or mathematician is not an expert about life. . . . He does not co-ordinate his knowledge of a part with an attempt at wisdom about the whole. . . . Such [expert] analytic comprehension is purchased at the cost of the kind of wisdom essential to the conduct of affairs. The doctor tends to think of men as patients; the teacher sees them as pupils; the statistician as units in a table. . . . Because a man is a brilliant prison doctor, that does not make him the person who ought to determine the principles of a penal code. . . ."

Id. at 9. See also Frank, *The Place of the Expert in a Democratic Society*, 16 *PHILOSOPHY OF SCI.* 3 (1949).

laymen).³¹ It is not merely that selected experts may not be representative or that those selected would decide not on the evidence but "almost always on their own private opinion of the subject-matter."³² There is also the inevitable disagreement among experts, which arises from many factors.³³ Disagreement is frequent even among experts in well-established sciences. In a sensational English trial for poisoning by strychnine, the principal question was whether very small quantities of that poison leave traces in the body. The most eminent authorities in England flatly disagreed concerning the possibility of detecting such quantities six days after death.³⁴ In a leading American case, famous experts on handwriting and inks were in direct conflict on the question crucial to the genuineness of a will—whether a certain ink was available on the market at the relevant time.³⁵ And, as Dr. Davidson points out, disagreement among psychiatrists is to be expected; indeed, a lack of disagreement would in many cases raise doubts regarding the integrity or competence of the witnesses.³⁶

It is for these reasons that the law uses objective methods of clarifying and testing the testimony of the experts. One of these methods is cross-examination; and despite the repugnance of some psychiatrists, unaccustomed to having anyone check their diagnoses, much less criticize them, there is no doubt that cross-examination is necessary and helpful.³⁷ The principal method of evaluating the expert's testimony is to submit the factual questions to a representative group of intelligent laymen who are guided and, within limits, controlled by the trial judge and appellate courts. The initial seeming absurdity of doing this gives way, in the light of the various considerations discussed above, to the defensible conclusion that the prevailing methods of fact-finding concerning the issues of criminal responsibility should not be abandoned.³⁸

There is another consideration regarding the psychiatrist as a determiner of fact that applies equally to the psychiatrist as a critic of the criminal law.

31. See STEPHEN, *GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 218 (1863).

32. *Id.* at 216.

33. "In litigation involving personal injuries, death by accident, alleged mental irresponsibility and the like, the medical expert has become a stench in the nostrils of upright judges. . . . Even the generally respected physician and surgeon whose skill is unquestioned frequently shades his testimony to the advantage of the party paying his fee. Alienists are notoriously available for prosecution and defense in sensational criminal trials." Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285, 292-93 (1943).

34. Palmer's Trial, discussed in WIGMORE, *THE PRINCIPLES OF JUDICIAL PROOF* § 231 (2d ed. 1931).

35. *Throckmorton v. Holt*, discussed in WIGMORE, *op. cit. supra* note 34, § 231.

36. Davidson, *Psychiatrists in Administration of Criminal Justice*, 45 J. CRIM. L., C. & P.S. 12, 13-14 (1954).

37. See Smith, *Cross-Examination of Neuropsychiatric Testimony in Personal Injury Cases*, 4 VAND. L. REV. 1, 15 (1950).

38. "I think it would be a calamity if the disposition of criminal cases would be taken out of the hands of judges and given into the hands of psychiatric and other experts." Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 BUFFALO L. REV. 41, 48 (1953).

This is the question of the objective validity of psychiatric knowledge. In other words, when the law turns to the fields of empirical knowledge for information, how does it find psychiatry ranked in the scale of the "sciences"? It may be confidently asserted that legal practice reflects the accepted hierarchy—it places greater reliance upon the physical sciences than upon the social disciplines. If a trial concerns the composition of a compound, the identification of a fingerprint or a gun from which a certain bullet was fired, great reliance upon expert testimony may be expected, and the cases show it is given. But somewhat less confidence may be merited by the psychiatrists' "convincing evidence" of the inadequacy of the law on criminal responsibility. For psychology, including psychiatry, deals with vastly complex and impalpable data—personality, internal states and social norms, for instance. Indeed, many psychiatrists have entered the limitless realms of philosophy and religion: one need only scan the titles of Freud's and Jung's works to appreciate the commanding inclusiveness of the modern psychiatrist's perspective and pronouncements. One may be justly inclined in these circumstances to regard certain phases of psychoanalysis as rather over-extended.³⁹ Eminent psychiatrists themselves have testified as to the status of psychiatry: e.g., H. S. Sullivan, that "the best psychiatry is still more of art than of science";⁴⁰ and Jung, that "there are, in fact, many methods, standpoints, views and convictions which are all at war with one another."⁴¹

39. "[A]t the present time, coming closest to the phrenology and animal magnetism of another age, both from the standpoint of cult value and in success in erecting an imposing scientific facade, is that discipline which has come to be known as psychoanalysis." Johnson, *Psychoanalysis—A Critique*, 22 *PSYCHIATRIC Q.* 321 (1948).

"So many and so flagrant have been the unscientific theorizing and practices of psychoanalysts during the past 50 years that many critics of analysis have become quite disillusioned and have begun to see science and analysis as antithetical." Ellis, *An Introduction to the Principles of Scientific Psychoanalysis*, 41 *GENETIC PSYCHOL. MONOGRAPHS* 149, 195 (Murchison ed. 1950). Dr. Ellis also concludes that:

"[O]rthodox analytic theory is itself so formulated that a premium is often set on preconception and prejudice, while objectivity and open-mindedness on the part of analytic interpreters is made most difficult to achieve and retain."

Id. at 155.

"Analytic theory has frequently managed to get so far away from factual referents that analysts easily fall into the habit of evolving such clever, complex, and almost fiendishly astute hypotheses that they neglect entirely to look for objective data with which to support them."

Id. at 157.

Commenting on Ellis' monograph, Dr. Hilgard states:

"Anyone who tries to give an honest appraisal of psychoanalysis as a science must be ready to admit that as it is stated it is mostly very bad science, that the bulk of the articles in its journals cannot be defended as research publications at all."

Hilgard, *Psychological Science and Psychoanalysis*, in *PSYCHOANALYSIS AS SCIENCE* 44 (Pumpian-Mindlin ed. 1952).

40. Sullivan, *Psychiatry*, 12 *ENCYC. SOC. SCI.* 578, 580 (1934).

41. JUNG, *MODERN MAN IN SEARCH OF A SOUL* 33 (1939). See also HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 484-85 (1947).

It can at least be said, therefore, that psychiatric knowledge is far from having reached the point of unimpeachable scientific certainty. Neither in using expert psychiatric witnesses nor in developing the legal formulas that govern the determination of punishable conduct need the law bow to any unassailable authority in the bailiwick of the psychiatrists. That psychiatrists have knowledge to offer to the law cannot be doubted; but that knowledge must be carefully selected and fitted into the framework in which it can be made useful. The elements of this framework have been indicated in the discussion so far: first, a view of human nature that posits free choice and responsibility; second, a corresponding order of law that makes punishment a corollary of responsibility; third, within this order of law, stable and workable classifications permitting consistency of treatment appropriately tempered to the needs of individual cases; fourth, effective application of these classifications through rules that can be understood and employed by the agencies of justice, the judge and the jury; and finally, maximum use of available knowledge, including psychiatric testimony.

With this framework in mind we can now turn to a consideration of the M'Naghten Rules, the criticisms that have been leveled against them, and the substitutes and additions that have been proposed for them.

THE M'NAGHTEN RULES UNDER ATTACK

Psychiatrist-critics of the M'Naghten Rules⁴² assume that they were the creation of the legal mind of 1843, preceded only by such absurdities as the "wild beast" test of insanity. Fantasy dies hard in the minds of historians out to prove a thesis; but it bears repeating that there was considerable understanding of mental disease centuries before Freud, and that the M'Naghten Rules, except for their emphasis on the particular criminal act in question, were a restatement of long-existing law.⁴³

A brief summary of the meaning of the Rules will indicate the pertinent issues. The first wing of the M'Naghten Rules—the accused's knowledge of the "nature and quality of the act he was doing"—is an ordinary way of specifying what, in part at least, is meant by the psychiatrist's "reality principle."⁴⁴ It is a plain way of defining an elementary criterion of rationality, simply stating the truism that a rational person is a sane person. Against this,

42. The principal part of the M'Naghten Rules, it will be recalled, provides that, "to establish a defence on the grounds of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." M'Naghten's Case, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843).

43. Long before "irresistible impulse" became an issue, Hawkins wrote, "The Guilt of offending against any Law whatsoever, necessarily supposing a wilful Disobedience can never justly be imputed to those, who are either incapable of understanding it, or of conforming themselves to it. . . ." HAWKINS, *PLEAS OF THE CROWN* 1 (2d ed. 1724). See also HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 490-97 (1947).

44. See *id.* at 502-03.

psychiatrists who demand adoption of the "irresistible impulse" test urge, in effect, that a rational person may be insane (psychotic).

About the second clause of the M'Naghten Rules—the so-called "right and wrong" test—sophisticates have said that it requires an ordinary person to do what philosophers through the ages have with dubious success been trying to do, namely, to distinguish right from wrong. But the assertion that the Rules require any such competence in abstract thinking is a mere straw-man construction—which, incidentally, would hold most persons insane, whereas the complaint is that the M'Naghten Rules allow many psychotics to be found sane. What the clause stipulates is incapacity, due to serious mental disease, to make commonplace social valuations—to realize, for instance, that it is wrong to kill a human being or take his property. When certain psychiatrists attack this criterion as outmoded "metaphysics" they are saying nothing more than that valuation is irrelevant in the perspective of scientific psychiatry.⁴⁵ But by the same token, as has been seen, that perspective is irrelevant to valuation: obviously, if conscience is no more than a sublimation of instinct, there is no room for moral blame or responsibility.

Although the M'Naghten Rules are phrased in terms of cognition, they are generally interpreted broadly by the courts, with the result that all psychiatric evidence relevant to the defendant's mental condition is admitted. And not a few of the most experienced forensic psychiatrists believe the M'Naghten Rules function very well in practice, without miscarriages of justice attributable to the use of the Rules, and that no better substitute has been proposed.⁴⁶

Yet the M'Naghten Rules can no doubt be improved, to give more scope to current interdisciplinary knowledge and to employ language that will facilitate the use of psychiatric testimony. Any improvement must, however, be based

45. "A second assumption of the Rules is that the existence or absence of such 'knowledge' is readily determinable by the methods of psychiatry. This assumption is unwarranted. There is no developed scientific method of determining the existence of such 'knowledge' of the nature and quality or the right and wrong as related to an act, or the lack of it. Nevertheless, the law in effect compels answers to invalid questions of 'knowledge,' which cannot be met." COMMITTEE ON PSYCHIATRY AND LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY 6 (1954).

When the members of this same Group for the Advancement of Psychiatry were asked in a questionnaire, "Are there cases where a person, suffering from mental derangement, knows that it is wrong to inflict bodily harm (killing, maiming, ravishing) upon another person, but owing to the mental derangement is incapable of controlling (resisting) the impulse to commit such bodily harm?" 93 of 102 who answered replied "yes." Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 957, 989 (1952).

Replying to a similar inquiry, 84 of 86 Canadian psychiatrists expressed their disapproval of the M'Naghten Rule with "irresistible impulse" as an added feature. Stevenson, *Insanity as a Defence for Crime: An Analysis of Replies to a Questionnaire*, 25 CAN. B. REV. 871 (1947).

46. EAST, AN INTRODUCTION TO FORENSIC PSYCHIATRY IN THE CRIMINAL COURTS 73-74 (1927); East, *Delinquency and Crime*, 90 J. MENTAL SCI. 382, 391 (1944); cf. ROYAL COMM'N REPORT 86.

on a view of human behavior that is both psychologically sound and compatible with legal principles. The essential legal premise is that man is, in significant measure, a rational being; and a psychological theory that is not only consistent with this but independently valid as well, is that man functions as a unitary being. That is, reason, will, feeling, and so on coalesce; in normal persons they are integrated. In discussions of the M'Naghten Rules, what emerges most prominently is the wide agreement concerning this theory of the personality. The personality is seen as a fusion of functions and not a mere interrelation of separate faculties, whether these be designated cognition, will and emotion, or ego, superego and id; hence, there can be no serious impairment of one of these functions without serious impairment of the others. As the Royal Commission expresses it, "[I]nsanity distorts and impairs the action of the mind as a whole."⁴⁷ This position, adopted by Stephen,⁴⁸ has been urged by the writer for a decade in terms of more modern psychology.

It will be seen that, given the premise of an integrated personality, the concept of "irresistible impulse"—of will totally separated from reason and emotion—is untenable. Yet only a very short time ago "irresistible impulse" was the Scientific Truth around which the extremist critics of criminal responsibility rallied their forces.⁴⁹ This problem was considered in 1952 by Guttmacher and Weihofen. They say,

"But while it is true that the affective, cognitive, and conative processes of the mind are interrelated, certain forms of mental disease may affect one more than the others. A disorder manifesting itself in impulsive acts may affect intelligence *somewhat*, but it is quite possible that impulsiveness may have reached the point where it can be said that it is 'irresistible,' and yet intelligence has not deteriorated so much as to obliterate knowledge of right and wrong."⁵⁰

It will be noted that the learned writers use the word "interrelated," and that, if they mean this word to be synonymous with "integrated," they do not explain how some primary functions may be severely disordered while at the same time the others, with which it fuses, may be so little impaired as to remain quite within the realm of normality.

In a later statement, Dr. Guttmacher, referring to the integration of the various functions, added the following:

"Certainly, this is scientifically sound but it is of doubtful practical value since the various functions of mentation are disparately affected in various

47. *Id.* at 113. See also *id.* at 286.

48. 2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 170-72 (1883).

49. See note 45 *supra*. The "irresistible impulse" test seems to hark back to the psychology of the M'Naghten era. For example, the *Mosler* case, decided in 1846, recognized "moral insanity" and the notion that "there may be an unseen ligament pressing on the mind. . . ." *Commonwealth v. Mosler*, 4 Pa. 264, 267 (1846). Another case, decided in 1869, was based on "the division of powers announced by Kant," and so on. *Bradley v. State*, 31 Ind. 492, 507 (1869).

50. GUTTMACHER & WEIHOFFEN, PSYCHIATRY AND THE LAW 410 (1952).

diseases and in different individuals. The same may be said of disorders of other organ systems. Respiratory difficulties are present in cardiac disease but their intensity varies greatly in different pathological conditions and in sick individuals. In many serious psychiatric cases, disorders of the will may be prominent while defects of the intellect are minimal. . . ."⁵¹

Is this a persuasive solution? Does the mere pointing to a single alleged instance,⁵² without any report whatever of the mental condition of the person involved, suffice to support it? Can the theory of the integration of the functions of personality be "scientifically sound" and also be "of doubtful practical value"? And is it valid to equate integration of the personality with the "organ system" of the body and to conclude that just as severe cardiac disease induces or is accompanied by minor respiratory difficulties, so a major volitional disorder can be accompanied by only minor impairment of cognition? I submit, with deference, that none of this is either persuasive or consistent with integration of the functions. Instead, it implies a rejection of the view that man functions as a unitary being.⁵³ There is, of course, no reason why that theory may not be challenged or why an acknowledgment of the limitations on existing knowledge should not be made. But if radical changes are to be made in the law of criminal responsibility, and justified on the grounds of advances in psychiatric knowledge, the new grounds should be firmer than this.

The Royal Commission recognized that "irresistible impulse" was unsound: "[T]he concept of the 'irresistible impulse' test has been largely discredited . . . it is inherently inadequate and unsatisfactory."⁵⁴ And yet the Commission itself made a recommendation that is hardly an improvement on "irresistible impulse." The Commission's second preference⁵⁵ (and the minority's primary recommendation) was retention of the M'Naghten Rules, with an additional alternative clause exculpating the accused if he "was incapable of preventing

51. MODEL PENAL CODE 175 (Tent. Draft No. 4, 1955).

52. *Ibid.* The case is that of a soldier who had an "overpowering desire to kill some officer" and did so, but was found "not psychotic."

53. "One of the greatest dangers now confronting analysts, and standing stalwartly in the way of their founding a truly scientific theory and practice of psychoanalysis is their utilization of what seems to be an outdated, unscientific, compartmentalized notion of personality: namely, Freud's concept of the ego, super-ego, and id.

"Obviously, to anyone who has imbibed deeply at the well of modern psychological and psychiatric knowledge a person's ego, id or super-ego cannot do, under its own power, anything whatever. It is, in the case of any normal adult human being, the whole person, or individual, or organism who thinks, emotes, and acts." Ellis, *supra* note 39, at 169-70.

54. ROYAL COMM'N REPORT 109. "Sir Norwood East said that in fifty years he had never met a murder due to irresistible impulse unconnected with mental disease." *Id.* at 96. "The Medical Superintendent of Broadmoor . . . emphasized that he had never known an irresistible impulse leading to a crime of violence except in association with other signs of insanity." *Id.* at 95. Compare Hoedemaker, "Irresistible Impulse" as a Defense in Criminal Law, 23 WASH. L. REV. 1, 7 (1948): "Every tenet of modern psychiatry points toward the acceptance of the 'irresistible impulse' plea as a proper defense in criminal law."

55. The first preference is discussed in the text at note 66 *infra*.

himself from committing [the act]."⁵⁶ A similar proposal is found in a tentative draft of the American Law Institute, which would exculpate the defendant if he was unable "to conform his conduct to the requirements of law."⁵⁷ With due deference, I submit that these proposals either amount to a merely verbal reformulation of the "irresistible impulse" test, or else are so general and nebulous as to amount to the abolition of all rules.

An examination of the Commission's logic is revealing. First of all, the Commission seems to adopt the sound integrative view that mental disease affects *both* cognition and volition: "insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions."⁵⁸ That is sound psychology, everywhere accepted. But the inference does not follow that, "An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, but yet commit it as a result of the mental disease."⁵⁹ This is a clear *non sequitur*. The premise—both *A* and *B* are necessary in serious mental disease—does not imply that *A* alone is necessary. If *both A* and *B* are necessary and sufficient, how can *A* or *B alone* be necessary and sufficient? It appears that the integration theory of personality is simultaneously avowed and denied. Much more is involved than a logical inconsistency. For what emerges is like "irresistible impulse"—which the Commission wishes to reject as unsound—in the very important respect of hypothesizing a mental disorder which, it is said, is so severe as to be a psychosis even though the cognitive functions remain normal.⁶⁰

The Commission distinguishes its proposal from "irresistible impulse" on the basis that it does not require *impulsive* action; the facts, adds the Commission, do not support the notion of sudden impulsive action, but instead reveal the lapse of considerable time during which a disordered uncontrollable person may be considering the harm he subsequently commits.⁶¹ But are these facts truly inconsistent with the "irresistible impulse" test? The test is law in some states. And the illustrative cases in those states do not exhibit its use in the

56. ROYAL COMM'N REPORT 113, 287.

57. MODEL PENAL CODE 27 (Tent. Draft No. 4, 1955).

58. ROYAL COMM'N REPORT 113. See also text at note 47 *supra*.

59. *Id.* at 80.

60. In this analysis, it has been inferred that the proposed alternative, "or was incapable of preventing himself from committing it," was intended to provide for volitional and emotional disorder, since the entire approach of the Commission, as is evident from the context, was to take account of those phases of personality. See, *e.g.*, *id.* at 107-08. If the context were different, another interpretation, much closer to the valid implication of the premise of integration, might obtain, namely that the "or" clause refers to and includes *all* the essential criteria concerning cognition, will and emotion. The difficulty with this interpretation (even if the context permitted it) is that it makes the M'Naghten Rules superfluous; stated otherwise, on this interpretation the "or" clause merely repeats the two preceding clauses.

61. ROYAL COMM'N REPORT 110. It was urged a century ago that "The use of 'impulse' . . . has been particularly unfortunate." BUCKNILL, UNSOUNDNESS OF MIND IN RELATION TO CRIMINAL ACTS 84 (1856).

way found objectionable by the Commission, *i.e.*, its restriction to action on sudden impulse. The facts reveal "the lapse of considerable time"; the test in practice amounts to determining "inability to conform" or "to prevent himself," and so on.⁶² In sum, the proposed alternatives seem to be no more than merely verbal improvements, without making any change in the substance of the test.⁶³

The "irresistible impulse" test is not law in England, of course, and it is possible to argue that the Commission's second preference actually goes beyond what has been recognized in American states as "irresistible impulse." Certainly the Commission places a very broad interpretation on the proposed alternative. But this raises the second major question: is the proposed alternative so general and vague that it provides no rule of criminal responsibility? In support of its recommendation to add the alternative clause, "or was incapable of preventing himself from committing it," the Commission discusses the *Ley* case as illustrative of the meaning of the proposed clause. But its comment and interpretation of that case seem to refer to criteria that fall directly within the orbit of the M'Naghten Rules; and whatever there may be in addition is so vague as to provide no guidance to any jury—if, indeed, it has any definite meaning for anyone.⁶⁴

62. There is, of course, much uncertainty regarding the law on the irresistible impulse test: for instance, it is sometimes said that the test is law in fourteen states, but at other times the number of such states is alleged to be twenty-one. It is uncertain whether in some of those states the courts have merely recognized that serious impairment of the cognitive functions is also expressed in a lack of normal self-control which, of course, is not acceptance of the irresistible impulse test. See HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 508-09, 510 n.14 (1947). Nor have enough of the facts in the cited cases been presented to permit critical appraisal of decisions holding that an instruction in irresistible impulse terms must be given. Professor Weihofen's valuable book, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 81-103 (1954), provides very little description of the facts in the cases involving "irresistible impulse."

This is also true of the quotation of foreign codes in which similar phrases occur. Cf. Keedy, *supra* note 45, at 969-76. It cannot be assumed, in the absence of supporting case law and doctrinal writing, that such provisions represent the irresistible impulse test rather than the view that lack of normal control is the result of serious impairment of the cognitive functions.

63. "The real criticism that is now directed against the rule is that although a man may know that what he is doing is wrong, he may be unable to help himself doing it. This is what used to be called irresistible impulse." Devlin, *Criminal Responsibility and Punishment: Functions of Judge and Jury*, 1 *CRIM. L. REV.* 661, 682 (1954).

"It impresses me that in the so-called extension of the rule of the M'Naghten case . . . adopted by the majority, they have for all practical purposes embraced the doctrine of 'irresistible [sic] impulse' as a defense in criminal cases." *State v. White*, 58 N.M. 324, 339, 270 P.2d 727, 737 (1954) (dissenting opinion).

64. "Ley, because of his insanity, lived in a twilight world of distorted values which resulted not so much in his being 'incapable of preventing himself' from committing his crime, in the strict sense of those words, as in his being incapable of appreciating, as a sane man would, why he should try to prevent himself from committing it. It seems to us reasonable to argue that the words 'incapable of preventing himself' should be construed so as to cover such states of mind; that they should be interpreted as meaning not merely

This is substantially the conclusion reached by Justice Devlin. After quoting the Commission's interpretation of its alternative proposal, he writes: "This seems a lot to read into the formula, and as the report says, if it is to be interpreted so widely, is it not tantamount to inquiring from the jury whether the accused was so insane that he ought not to be regarded as responsible and thus leaving them in the end with the general question?"⁶⁵

Leaving the general question of responsibility to the jury was the substance of the Commission's primary recommendation, which was "to abrogate the Rules 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."⁶⁶ Such total abolition of any rule of criminal responsibility would, no doubt, satisfy the demands of the psychiatrists who claim to be unable to testify under the M'Naghten Rules. It would allow them to testify in any way they pleased, and in support of any conceivable theory, about the defendant's "disease of the mind (or mental deficiency)." But what use would the testimony be to the jury, groping their way through a blizzard of scientific terminology and conflicting theories, without any guide to their objective? And how could there be any certainty at all of their reaching the objectives of the rule of law?

The *Durham* rule,⁶⁷ inspired in part by the Royal Commission's Report, purports to offer the jury at least some guidance. The formula is that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."⁶⁸

There are several serious difficulties with this rule. First, it vies in vagueness with the Royal Commission's general question, offering only the faintest hint of direction to the jury in its search for the facts relevant to responsibility. The jury must make determinations about degrees of impairment or disease that puzzle the experts themselves. But the emphasis of the *Durham* test is on the question of causation; and here too the jury can do no more than

that the accused was incapable of preventing himself if he had tried to do so, but that he was incapable of wishing or of trying to prevent himself, or incapable of realising or attending to considerations which might have prevented him if he had been capable of realising or attending to them. If each of Ley's acts is considered separately, it would be difficult to maintain that he could not have prevented himself from committing them. Yet if his course of conduct is looked at as a whole, it might well be argued that, as a result of his insanity, he was incapable of preventing himself from conceiving the murderous scheme, incapable of judging it by other than an insane scale of ethical values, and, in that sense, incapable of preventing himself from carrying it out. If the addition to the M'Naghten Rules were construed in this way, it would serve its purpose well, and the Rules thus amended should cover most of the cases where a defence of insanity ought to be admitted." ROYAL COMM'N REPORT 111.

65. Devlin, *supra* note 63, at 683.

66. ROYAL COMM'N REPORT 116.

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

68. *Id.* at 874-75. The *Durham* rule was rejected in *United States v. Smith*, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954); *Bryant v. State*, 207 Md. 565, 115 A.2d 502 (1955); *Thomas v. State*, 206 Md. 575, 112 A.2d 913 (1955).

speculate.⁶⁹ And finally, the *Durham* test ignores cognition; it ignores the rational element of purposive conduct, or at best insinuates it in under a spacious mantle of verbal imprecision; it ignores the question that is crucial, from the perspective of the law—whether the accused was competent to make the relevant moral decision.

The criminal law is concerned with voluntary conduct, and the problem of "causation" is therefore quite different there from what it is in the realm of mechanics. To make sense of "causation" in the sphere of purposive conduct means to take account of the actor as a rational being. A harm is imputed to (is caused by) a human actor *because* he voluntarily brought it about. And to say that he voluntarily brought it about is to say also that cognition was involved in the conduct. This is how the problem of causation must be dealt with in analysis of purposive conduct; this, indeed, is the logic of the M'Naghten Rules and of integrative psychology.

This view of volitional conduct has been discussed by various writers. "Will exists," states Professor Hocking, "when, and in so far as, any instinctive impulse has first to obtain the consent of a ruling policy before pursuing its course."⁷⁰ "The power to act intelligently is volition," writes Professor H. G. Wyatt, "and the degree of volition expressed in any act is in direct ratio to the degree in which intelligence outweighs impulse. . . . [I]n no sense is volition random or arbitrary; for it is only so far as intelligence, the power of principle or order, participates, that volition participates, also."⁷¹ In sum, "volition is the active aspect of intelligence."⁷²

To omit cognition, as does the *Durham* decision, and to try nonetheless to make sense of volition, and then to pose the issue of causation as a relation between an undefined "mental disease or mental defect" and the defendant's conduct raise a very difficult set of problems, whose complexity is aggravated by the simplicity of the verbal formula. In contrast, in the integrative view, not only is causation (*i.e.*, imputation) no such separate problem, but no question arises requiring any niceties of determination as regards degrees of impairment or disease.

A very important consequence of the integrative view would be to give the word "know" in the M'Naghten Rules a wide meaning;⁷³ and it is now generally admitted that this would meet the principal current criticism of the

69. See Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 307 (1955).

70. HOCKING, *HUMAN NATURE AND ITS REMAKING* 93 (rev. ed. 1923).

71. WYATT, *THE PSYCHOLOGY OF INTELLIGENCE AND WILL* 153 (1930).

72. *Id.* at 156.

73. "When no longer dismembered and falsified in one-dimensional aspect, but considered in all that we sometimes imply by 'appreciation,' 'realization,' 'normal evaluation,' 'adequate feeling,' 'significant and appropriate experiencing,' etc., the term 'knowing' does not restrict us solely to a discussion of the patient's reasoning abilities in the abstract." Cleckley & Bromberg, *The Medico-Legal Dilemma*, 42 J. CRIM. L., C. & P.S. 729, 737 (1952). See also CLECKLEY, *MASK OF SANITY* 495-501 (2d ed. 1950); Hall, *Psychiatry and the Law—A Dual Review*, 38 IOWA L. REV. 686, 696 (1953).

Rules.⁷⁴ In any case, the present narrow, intellectualistic interpretation of the word "know" by psychiatrists intent on adoption of the "irresistible impulse" test merely perpetuates the rationalist psychology of the M'Naghten era.

A SUBSTITUTE FOR THE M'NAGHTEN RULES

The above discussion has indicated the criteria of a sound rule of criminal responsibility. Such a rule must (1) be consistent with the view of man as a rational being—that is, it must retain irrationality as a criterion of insanity; (2) be consistent with the concept of integration of the functions; (3) facilitate psychiatric testimony regarding volitional and emotional phases of personality; and (4) be stated in terms that are understandable to laymen.

It is possible to conform to these criteria by stating the rule in terms that emphasize both conduct and mental state. Accordingly, I suggest the following substitute for the M'Naghten Rules:

A crime is not committed by anyone who, because of a mental disease, is unable to understand what he is doing and to control his conduct at the time he commits a harm forbidden by criminal law. In deciding this question with reference to the criminal conduct with which a defendant is charged, the trier of the facts should decide (1) whether, because of mental disease, the defendant lacked the capacity to understand the physical nature and consequences of his conduct; and (2) whether, because of such disease, the defendant lacked the capacity to realize that it was morally wrong to commit the harm in question.

Although this proposal retains the essential structure of the M'Naghten Rules, it seems to me to be a substantial improvement, going as far as possible toward meeting the current criticism. Thus, the proposed rule omits the term "insanity" and substitutes a more suitable word which is also one of common speech ("mental disease"), but does not use the technical term "psychosis." The rule focuses attention upon the defendant's control of his conduct. Emotional reactions are not specified in the proposed rule because they are only significant in their effect on the rational functions; but the words "control his conduct" should make it easier for the expert witness to discuss emotional disorganization. Further, the proposed rule, in conformity with the theory of integration, joins rational functions with control of conduct. Finally, the present allegedly restrictive connotation of "know" gives way to the wider term "understand" and "realize." These terms—the latter in association with the words "morally wrong"—should facilitate interpretations that take account of the emotional phases, the affective tones, in the voluntary infliction of serious harms by normal persons.

74. "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." WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 77 (1954).

Since valuation is retained in the proposed rule, it is necessary to consider the assertion that psychiatry cannot contribute to the understanding of such matters. I think the rigor of that view would be greatly reduced by the adoption of the proposed words, for, as stated, they would encourage a broad interpretation. Moreover, despite extremist assertions regarding the scientific method of psychiatry, it is evident that clinical analysis consists largely of case history, a reconstruction of the patient's experiences. The essence of this method is the use of empathy, the sensitive re-living of the patient's experience. It is widely recognized that such analysis would be grossly inadequate if the analyst did not attain considerable insight into the patient's scheme of values.⁷⁵ This requires a reliving of his moral conflicts and evaluations, including their appraisal on moral grounds.⁷⁶

Again, the psychiatrist's job is to marshal the patient's potentialities to help him overcome his difficulties.⁷⁷ Therapy looks to the future, and it assumes that at least some patients can assist their recovery—which, to a large extent, requires them to cope with moral problems.⁷⁸ Thus, it seems arbitrary to insist that psychiatrists can tell a jury nothing whatever about the capacity of the defendant to appreciate the moral significance of his conduct.

But there is another point here. Insofar as it is true that psychiatrists cannot testify about moral problems, it may be suggested that psychiatrists have neglected the societal and legal matrices in which mental disease occurs. Dr. Frederic Wertham has made this point in a penetrating critique; he concludes that "an asocial psychiatry becomes inevitably an anti-social psychiatry."⁷⁹ If

75. Whitehorn, *Psychiatry and Human Values*, in *PSYCHIATRY AND THE LAW* 152-56 (Hoch & Zubin ed. 1955).

76. See HALL, *THEFT, LAW AND SOCIETY* xvi (2d ed. 1952).

77. Whitehorn, *The Concepts of "Meaning" and "Cause" in Psycho-dynamics*, 104 *AM. J. PSYCHIATRY* 289 (1947).

78. Dr. Harry Stack Sullivan writes:

"[T]he therapist functions by rectifying impractical evaluational systems. Personal evaluations—those things that we call good and bad, right and wrong . . . are momentary manifestations in a given personal situation—momentary presenting features, if you please—of highly integrated, interpenetrative systems of evaluation. And, therefore, the therapist in attempting to alter the value that a patient puts upon a certain act, or a certain belief, is not dealing with a little atom but is actually undertaking to change a very large integrated system in the person. These systems of evaluations, these very large integrations, all of which combine in various ways to form the personality itself are very intimately connected with what we may call the feeling of personal worth which the particular individual has. This feeling of personal worth is most intimately tied up with the evaluational systems which apply to one's acts and the acts of other people, and thereby forms the channels by which are expressed most of the positive movements of the personality and most of the negative, hostile, or destructive movements of the personality."

Sullivan, *The Theory of Anxiety and the Nature of Psychotherapy*, 12 *PSYCHIATRY* 4-5 (1949). See also Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 *BUFFALO L. REV.* 41, 49-50 (1953).

79. Wertham, Book Review, 22 *U. CHI. L. REV.* 569, 572 (1955). Wertham's review is an extremely important contribution to the development of a sound forensic psychiatry. With

more clinical psychiatrists could be persuaded to study the social, moral and legal environment in which mental diseases occur, they would be able to co-operate fully in the interpretation of the proposed rule, and they would also accelerate the development of forensic psychiatry.

THE PROGRESS OF FORENSIC PSYCHIATRY

The presently rudimentary character of forensic psychiatry is evident from the fact that it concentrates on the psychiatrist as an expert witness, largely to the exclusion of the much more important interdisciplinary problems. Indeed, it has not even been noticed that the relation of psychiatry to applied law⁸⁰ presents quite different problems than does the relation of psychiatry to legal science.⁸¹ Much more difficult language problems are encountered when specialists of different fields attempt to construct an interdisciplinary science. On that level of discourse, the terminology employed should be precise.⁸² This problem is aggravated by the fact that psychiatry, especially the psychoanalytic branch, employs very vague, complex words;⁸³ and the day of a uniform terminology, such as is found in biology, is remote. All in all, interdisciplinary studies proceed on a very unsteady basis; for instance, it is not even recognized as essential that opposing psychiatric viewpoints be represented in joint studies and discussions.

The difficulties of constructing a forensic psychiatry are by no means due only to the limitations of psychiatry. They arise equally from the limitations of the legal discipline—where, for instance, it is still necessary to clarify such fundamental problems as the difference between motive and *mens rea* and the exclusion of motive from the legal definition of criminal conduct.

But the principal barrier to the progress of forensic psychiatry seems to be the thesis that criminal responsibility is a strictly legal question. In 1883 Stephen wrote, "The question, 'What are the mental elements of responsibility?'

reference to the present point, he also writes, "The whole overemphasis on psychology as the basic consideration is misleading, and serves to divert attention from the social environment in which all psychological forces operate." *Id.* at 569.

80. "The purpose of expert testimony is to communicate to this body of ordinary persons [the jury] the wisdom and understanding necessary for the triers to exercise sound judgment in determining the issue in controversy." Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 428 (1952).

81. See Lasswell, *Legislative Policy, Conformity and Psychiatry*, in PSYCHIATRY AND THE LAW 13 (Hoch & Zubin ed. 1955).

82. "One of the greatest difficulties connected with cooperation between representatives of different sciences is the lack of a common terminology." Linton, *Foreword to KARDINER, THE INDIVIDUAL AND HIS SOCIETY* v (1939).

83. "Psychoanalytic language has been . . . ultra-complex and involved, derived from Greek and other esoteric terminology, usually idiosyncratic, and frequently vague and meaningless. There has been a notable lack, in analytic writings, of sticking to concepts and terms which have clear-cut factual referents and avoiding the coining of terms and abstractions which have a dubious existence." Ellis, *An Introduction to the Principles of Scientific Psychoanalysis*, 41 GENETIC PSYCHOL. MONOGRAPHS 149, 193 (Murchison ed. 1950).

is, and must be, a legal question."⁸⁴ And in 1923 Lord Atkin's Committee said, "Much of the criticism directed from the Medical side at the M'Naghten rules is based upon a misconception. It appears to assume that the rules contain a definition of insanity. . . ."⁸⁵ Moreover, where legal positivism dominates, formal law is sharply separated from the moral and cultural components of law, so that the inference reasonably drawn by psychiatrists is that the lawyers are merely raising a "no trespassing" sign. The difficulty is that the judges and scholars who insist that criminal responsibility is a legal question do not more fully explain their meaning; for there is no doubt that psychiatry and other nonlegal knowledge are closely involved in the legal tests of responsibility.

Stephen himself gave the clue to that when, after making the above quoted statement, he said, "the mental elements of responsibility . . . are knowledge that an act is wrong and power to abstain from doing it"⁸⁶—in which statement not a single word is a legally technical one. Nonetheless, it is often asserted that the tests laid down in the M'Naghten Rules were not intended to, nor do they, specify any criteria of serious mental disease. Instead, it is said that mental disease is a psychiatric question, and that the legal question is which mentally diseased harm-doers shall be held "insane," *i.e.*, not legally responsible. But the facts of adjudication show that "psychosis" for the psychiatrists and "insanity" for the lawyers are not separate matters.

Definitions of "psychosis" that psychiatrists formulate in their scientific classifications and for purposes of clinical work directly reflect the scientific objectives. When the inquiry concerns legal responsibility, certain questions are asked regarding "insanity," but these questions do not express peculiarly legal criteria or anything super-added upon serious mental disease. They specify characteristics of psychosis that are relevant to certain legally significant conduct. If those questions or tests had no foundations in fact, the testimony of psychiatrists would not be relevant to the issue of responsibility. But, of course, it is relevant;⁸⁷ and the reason why it is relevant is revealed in the application of the tests of responsibility. The facts of adjudication are that given the case of a psychotic defendant—as determined by legally recognized methods—exculpation follows because a defensible meaning of psychosis is incapacity to understand the wrongfulness of one's harmful conduct and to

84. 2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 183 (1883).

85. COMMITTEE ON INSANITY AND CRIME, REPORT 6 (1923). So, too, Lord Hewart: "The law does not purport or presume to define insanity. That is a medical question." *ESSAYS AND OBSERVATIONS* 216 (1930). And see Wechsler, *supra* note 69, at 373.

86. 2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 183 (1883).

87. "The criteria that an offender, to be held not responsible, must be in such a state of disorder 'as not to know the nature and quality of the acts for which he is indicted and not to know the acts are wrong,' are valuable ones." CLECKLEY, *MASK OF SANITY* 289 (1941).

"The word 'psychosis' is a synonym for insanity and the adjective 'psychotic' is a synonym for insane." Davidson, *The Psychiatrist's Role in the Administration of Criminal Justice*, 4 *RUTGERS L. REV.* 578, 580 (1950).

control oneself in that regard. Indeed, despite extremist avowals, it is widely recognized that defendants excluded from responsibility by the M'Naghten Rules are psychotic. Does not this imply that the tests specify valid criteria of psychoses?⁸⁸

We need not be misled by the form of expert testimony—by the fact that a psychiatrist may use the terms of his discipline. The triers of the facts do not first listen to the testimony, decide that the defendant was seriously diseased (psychotic) and then later ask themselves, as an independent question, whether he knew what he was doing, and so on. On the contrary, not only are the experts asked to testify in terms of the tests, but every statement the psychiatrists make is interpreted as telling the triers of the facts something about the accused's competence to understand and control his conduct. The inquiry proceeds upon the assumption that to have a psychosis means to be incompetent in the ways the tests designate. In sum, there is no requirement of science or language that there be only one definition of "psychosis." A definition reflects a point of view and certain objectives. The limitation on all descriptive definitions, besides an inevitable degree of vagueness,⁸⁹ is that the criteria selected, whatever the point of view may be, must find verification in the facts.

Still, disagreement concerning legal and psychiatric definitions of insanity remains, and until the issue is resolved, it is difficult to see how forensic psychiatry can make important progress. That it cannot proceed upon the supposition that the medical question and the legal question exist in separate compartments is clear. Many clinical psychiatrists have not studied psychotic behavior in life situations that are legally important, and have not formulated apt definitions to express the pertinent knowledge; but this does not imply that that knowledge is outside the realm of their competence or that it is peculiarly legal. To the extent that they study abnormal conduct in social contexts they will contribute to the kind of knowledge that is directly significant in both psychiatry and law. They have emphasized the volitional and emotional phases of mental disease; they should give more study to concomitant impairment of the cognitive functions. The progress of forensic psychiatry depends upon a sound synthesis of existing knowledge and an appreciation of legal values and methods.

88. "The criterion [M'Naghten Rules] is therefore sound as far as it goes." ROYAL COMMISSION REPORT 108. See also Wertham, *A Psychiatrist Looks at Psychiatry and the Law*, 3 BUFFALO L. REV. 41, 49-50 (1953).

That some psychotics are held to be punishable within the Rules does not invalidate the above, but indicates first that the Rules, especially the word "know," are not being interpreted correctly, and second that the Rules should be extended in ways that are sound from both the psychiatric and the legal viewpoints. That is the purpose of the writer's proposed substitute, discussed above.

89. "The concept of mental disease is well-defined and beyond controversial interpretation only in a central core of the concept. . . ." Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 384 (1952). "[I]f psychiatry seems not a little vague about what mental health and disease are, scientific medicine does not actually fare much better." Zilboorg, *The Struggle For and Against the Individual in Psychotherapy*, 104 AM. J. PSYCHIATRY 524 (1948).