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Insanity, Criminal Responsibility and Durham

The advent of a judicially-sponsored new test of insanity is an event of first importance in the legal world and justifies a historical survey of the evolution of the existing tests. The logic of the law's recognition of mental incapacity as a defense to crime is simple enough. Usually crime involves the concurrence of a wrongful act and a wrongful intent. If the defendant because of his mental condition was incapable of entertaining the intent, he cannot be held guilty of the crime. The man who kills another by unavoidable accident is not a murderer. The man who walks off with a suitcase, believing it his own, is not a thief. So, too, the legally insane man who kills or takes possession of property is not held guilty.

Psychiatrists may object to the legal rule that although intent is essential, motive is irrelevant. Once it is determined that a man intended to do the act, the inquiry is at an end; the law is not interested in why he meant to do it. To the psychologist this is a curious notion, for he cannot conceive of trying to understand human behavior without asking why the individual acted as he did.

The aim of law is not only to protect society, but also to insure justice to the person convicted of crime. A formula defining responsibility or irresponsibility in human behavior cannot do complete justice to individuals of unequal intellect or to those afflicted with mental illness or emotional instability. Of all the problems involved in the subject of mental unsoundness as a defense to a crime, the greatest difference of opinion on the part of the courts has centered around the legal tests of insanity.

An early English case, decided in 1724, is usually cited as the source of the so-called "Wild Beast Test." In *Arnold's case*¹ Judge Tracy attempted to define for the jury the line between the mental unsoundness which will relieve from responsibility and that which will not, as follows: "It is not every kind of frantic humor or something unaccountable in a man's action that points him out to be such a madman as to be exempted from punishment; it must be a man that is totally deprived of his understand-

¹ 16 How.St.Tr. 695 (1724).

ing and memory and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment."²

Earl Ferrer's case,³ decided in 1760, held that "total want of reason would acquit the prisoner but that if there were a partial degree of reason and a competent use of it sufficient to have restrained those passions, which produced the crime; if there be thought and design; and faculty to distinguish the nature of actions; to discern the difference between moral good and evil, responsibility attaches."⁴

Hadfield's case,⁵ decided in 1800, involved a veteran of many wars who had been discharged from the army on the ground of insanity and was being tried for shooting at George III. It seems the veteran was suffering from delusions that he was to sacrifice himself for the world's salvation. He was defended by Lord Erskine, a brilliant criminal lawyer, who introduced a new concept into the law: "delusion" as a test of responsibility. Many years later Judge Doe in deciding the New Hampshire case of *State v. Pike*⁶ said that "Hadfield's acquittal was not a judicial adoption of delusion as the test in the place of knowledge of right and wrong; it was probably an instance of the bewildering effect of Erskine's adroitness, rhetoric and eloquence."⁷

In 1840 one Oxford was tried for shooting at Queen Victoria.⁸ Lord Chief Justice Denman told the jury:

If some controlling disease was, in truth, the acting power within him, which he could not resist, the defendant would not be responsible. The question is whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or in other words, whether he was under the influence of a diseased mind and was really unconscious at the time he was committing the act, that it was a crime.⁹

² 16 How.St.Tr. 695, 765 (1724).

³ 19 How.St.Tr. 886 (1760).

⁴ *Id.* at 947.

⁵ 27 How.St.Tr. 1282 (1800).

⁶ 49 N.H. 399 (1869).

⁷ *Id.* at 434.

⁸ *Reg. v. Oxford*, 9 Car.& P. 525, 173 Eng.Rep. 941 (1840).

⁹ *Id.* at 546, 173 Eng.Rep. 941, 950.

The phrase here used, "the nature, character, and consequences of the act," was later adopted by the House of Lords in *M'Naghten's case*,¹⁰ and the use of the words "controlling disease . . . which he could not resist" suggests the irresistible impulse test.¹¹

In 1843 Daniel M'Naghten shot and killed Drummond, private secretary to Sir Robert Peel, believing him to be Peel. The defendant was laboring under an insane delusion that he was being hounded by his enemies and that Peel was one of them. The defense was insanity, and the medical evidence was in substance that the prisoner was affected by morbid delusions which carried him beyond the power of his own control and left him with no perception of right and wrong. The accused was not capable of exercising any control over acts which had connection with his delusion. The jury found him not guilty on the ground of insanity.

The M'Naghten Rules were formulated in 1843 as a result of the public outcry over the acquittal of M'Naghten. The House of Lords addressed certain questions to the Judges of England concerning the law of insanity. The answers have since become known as the M'Naghten Rules.¹³ The crucial portion of the reply was the following: "To establish a defense on the grounds of insanity it must be clearly proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, that he did not know the nature and quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong."¹⁴

These criteria, although based upon no actual case, became the "right and wrong" test which is today applied in England, Canada, and practically all our American states.¹⁵ New Hampshire recognizes no particular test; it is the function of the jury to determine upon all the evidence whether the accused was

¹⁰ 10 Clark & F. 200, 8 Eng.Rep. 718 (1843).

¹¹ Weihofen, *Insanity as a Defense in Criminal Law* 24 (1933).

¹² 10 Clark & F. 200, 8 Eng.Rep. 718 (1843).

¹³ Clark & Marshall, *A Treatise on the Law of Crime* 134 (1952).

¹⁴ Reg. v. M'Naghten, 10 Clark & F. 200, 205, 173 Eng.Rep. 718, 722 (1843).

¹⁵ Burdick, *The Law of Crime* 277 (1946).

capable of entertaining criminal intent and hence was responsible for his act.¹⁶

The "right and wrong" test has been the subject of much criticism.¹⁷ Cardozo, in the case of *People v. Schmidt*,¹⁸ after an exhaustive review of M'Naghten Rules cases, determined that the right-wrong test meant inability "morally" to distinguish right from wrong. Lord Goddard, Chief Justice of England, in the case of *Rex v. Holmes*¹⁹ has interpreted the word "wrong" as meaning "legal wrong." Burdick says there are probably very few cases in which distinctions between "moral" and "legal" wrong are necessary.²⁰

Attempts made in England a few years after the *M'Naghten case* to establish "irresistible impulse" as a defense to crime were unsuccessful.²¹ In *Regina v. Thomas*²² the defense was impulsive insanity. The court held there was no evidence of insanity at all and that impulsive insanity was the last refuge of a hopeless defense.²³ In the case of *Rex v. True*²⁴ the English court said: "There is no foundation for the suggestion that the rule derived from M'Naghten's case has been in any sense relaxed."²⁵ However the British Royal Commission on Capital Punishment (1949-1953) has made the following finding: "The gravamen of the charge against the M'Naghten Rules is that they are not in harmony with modern medical science, which as we have seen, is reluctant to divide the mind into separate compartments—the intellect, the emotions and the will—but looks at it as a whole and considers that insanity distorts and impairs the actions of the mind as a whole."²⁶

Many insane persons may be fully able to distinguish what is right from what is wrong, yet have no power to choose and do the right because they are driven by an uncontrollable force or irresistible impulse to do the wrong.²⁷ The "irresistible im-

¹⁶ *State v. Jones*, 50 N.H. 369 (1870).

¹⁷ Weithofen, *Insanity as a Defense in Criminal Law* 29 (1933).

¹⁸ 216 N.Y. 324, 110 N.E. 945 (1915).

¹⁹ 1 W.L.R. 686 (1953).

²⁰ Burdick, *The Law of Crime* 280 (1946).

²¹ *Reg. v. Stokes*, 3 Car. & K. 185, 175 Eng. Rep. 222 (1848).

²² 7 Crim. App. 36 (1911).

²³ *Ibid.*

²⁴ 16 Crim. App. 164 (1922).

²⁵ *Id.* at 170.

²⁶ Footnote 30, *Durham v. United States*, 214 F.2d 862, 871 (D.C. Cir. 1954).

²⁷ *Parsons v. State*, 81 Ala. 577, 2 So. 354 (1887).

pulse" test has been adopted in twenty-one American states and the District of Columbia.²⁸ Therefore in these states both the right and wrong test and the irresistible impulse test may be invoked as a defense to a crime.

The Virginia Supreme Court of Appeals has approved the giving of an instruction embodying the definition of "irresistible impulse" in the following cases: *Boswell v. Commonwealth*,²⁹ *Dejarnette v. Commonwealth*,³⁰ *Hite v. Commonwealth*,³¹ *Stover v. Commonwealth*,³² and *Thurman v. Commonwealth*.³³ In the 1952 case of *Thompson v. Commonwealth*³⁴ it held that the lower court's instruction to the jury was erroneous when its definition of insanity failed to include the doctrine of "irresistible impulse." The case, however, was reversed and remanded on another point. Chief Justice Hudgins speaking for the Court said:

There is no evidence tending to prove that his volitive powers were any more impaired than were his perceptive powers. The "irresistible impulse" doctrine is applicable only to that class of cases where the accused is able to understand the nature and consequences of his act and knows it is wrong, but his mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act.³⁵

The Virginia Court has approved the following definition of "irresistible impulse":

. . . an impulse induced by, and growing out of some mental disease affecting the volitive, as distinguished from the perceptive powers, so that the person afflicted, while able to understand the nature and consequences of the act charged against him and to perceive that it is wrong, is unable because of such mental disease, to resist the impulse to do it. It is to be distinguished from mere passion or overwhelming emotion not growing out of, and connected with, a disease

²⁸ Burdick, *The Law of Crime* 278 (1946). The states which have adopted the irresistible impulse test are: Ala., Ark., Colo., Conn., Del., Ga., Ill., Ky., La., Mass., Mich., Mont., N.M., Ohio, Penn., Utah, Vt., Va., Wash. and Wyo.

²⁹ 20 Gratt. (61 Va.) 860 (1871).

³⁰ 75 Va. 867 (1881).

³¹ 96 Va. 489, 31 S.E. 895 (1898).

³² 92 Va. 780, 22 S.E. 874 (1895).

³³ 107 Va. 912, 60 S.E. 99 (1908).

³⁴ 193 Va. 704, 70 S.E.2d 284 (1952).

³⁵ *Id.* at 717, 70 S.E.2d 284, 292.

of the mind. Frenzy arising solely from the passion of anger and jealousy regardless of how furious, is not insanity.³⁶

The Federal District Court for the District of Columbia recognized the right-wrong test in *United States v. Guiteau*,³⁷ but the Circuit Court for the District of Columbia refused to extend it in the case of *Taylor v. United States*.³⁸ The court rejected “emotional insanity” as a defense, citing with approval the following from the trial court’s instruction to the jury:

Whatever may be the cry of scientific experts, the law does not recognize but condemns the doctrine of emotional insanity—that a man may be sane up until a moment before he commits a crime, insane while he does it, and sane again soon afterwards. Such doctrine would be dangerous in the extreme. The law does not recognize it; and a jury cannot without violating their oaths.³⁹

This position was reaffirmed in *Snell v. United States*.⁴⁰

In 1929 the Circuit Court of Appeals for the District of Columbia in the case of *Smith v. United States*⁴¹ declared: “We have no hesitation in declaring it to be the law of this district that, in cases where insanity is interposed as a defense, and the facts are sufficient to call for the application of the rule of irresistible impulse, the jury should be so charged.”⁴²

In 1945 the Supreme Court of the United States⁴³ upheld the Circuit Court of Appeals for the District of Columbia in its refusal to reverse *Fisher v. United States*⁴⁴ on the appellant’s contention that an instruction should be given on “diminished responsibility” for a mental disorder short of insanity. Justices Murphy, Frankfurter, and Rutledge dissented, while Justice Jackson took no part in the consideration of the case.

The case of *United States v. Baldi*⁴⁵ in 1951 involved a prosecution for murder which came before six courts of record, be-

³⁶ 193 Va. 704, 717, 70 S.E.2d 284, 292 (1952).

³⁷ 12 D.C. (1 Mackey) 498, 10 F. 161, (1882).

³⁸ 7 App.D.C. 27 (1895).

³⁹ *Id.* at 41.

⁴⁰ 16 App.D.C. 501, 524 (1900).

⁴¹ 36 F.2d 548 (1929).

⁴² *Fisher v. United States*, 328 U.S. 463 (1945).

⁴³ 149 F.2d 28 (D.C. Cir. 1945).

⁴⁴ 192 F.2d 540 (3rd Cir. 1951).

fore a state board of pardons, before a lunacy commission.⁴⁶ Upon appeal, the conviction of the accused was upheld. But in a dissenting opinion Chief Justice Biggs of the United States Court of Appeals for the Third Circuit spoke out against the century-old legal formula of responsibility of the State of Pennsylvania: "Changes can be effected and reason can be brought to the law of criminal insanity. The rule of *M'Naghten's case* was created by decision. Perhaps it is not too much to think that it might be altered by the same means."⁴⁷

On July 1, 1954, the Circuit Court of Appeals for the District of Columbia in the case of *Durham v. United States*⁴⁸ departed from the famous M'Naghten Rules and the irresistible impulse test. The defendant, who had a background of four commitments to a mental hospital, was convicted in the District Court of housebreaking despite his defense of insanity. On appeal, the case was reversed and remanded. Not only did the court speak out against the inadequacies of the right-wrong and irresistible impulse tests, but it firmly laid down the principle that these previously well-established precedents are no longer to be regarded as exclusive. Judge Bazelon speaking for the court stated the new test as follows:

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 and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.⁴⁹

Invoking its "inherent power"⁵⁰ to define insanity, the court set forth an instruction to the jury which would be used under the rule announced:

If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was

⁴⁶ Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U.Chi.L. Rev. 320, 322 (1955).

⁴⁷ 192 F.2d 540, 568 (3rd Cir. 1951).

⁴⁸ 214 F.2d 862 (D.C. Cir. 1954).

⁴⁹ *Id.* at 874, 875.

⁵⁰ 214 F.2d 862 (D.C. Cir. 1954).

suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deductible from the testimony and the evidence in this case.⁵¹

The Circuit Court in the *Durham* case thus adopted a test which is similar to the one promulgated in 1870 by the New Hampshire case of *State v. Pike*.⁵² In this early New Hampshire case the substance of the instruction by Judge Doe⁵³ was:

... if they found that the defendant killed Brown in a manner that would be criminal and unlawful if the defendant were sane—the verdict should be “not guilty by reason of insanity” if the killing was the offspring or product of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor or transact business or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury.⁵⁴

Prior to *Durham v. United States*,⁵⁵ the New Hampshire solution to the problem of mental irresponsibility had never

⁵¹ 214 F.2d 862, 875 (D.C. Cir. 1954). The court said in footnote 46, [*Id.* at 874]: “Our approach is similar to that of the Supreme Court of California in *People v. Maugha*, 1906, 149 Cal. 253, 86 P. 187, 191, where the court prospectively invalidated a previously accepted instruction, saying, ‘We think the time has come to say that in all future cases which shall arise and where, after this warning, this instruction shall be given, this court will hold the giving of it to be so prejudicial to the rights of a defendant secured to him by our Constitution and laws, as to call for the reversal of any judgment which may be rendered against him.’”

⁵² 49 N.H. 399 (1870).

⁵³ See Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 Yale L.J. 183 (1953). See also Judge Doe’s dissenting opinion in *Boardman v. Woodman*, 47 N.H. 120, 148 (1866).

⁵⁴ 49 N.H. 399, 402 (1870).

⁵⁵ 214 F.2d 862 (D.C. Cir. 1954).

been squarely adopted anywhere outside its state of origin except in Montana.⁵⁶ The Supreme Court of Washington in 1909 rejected the New Hampshire insanity test in the case of *State v. Craig*.⁵⁷ "In so far then as we are concerned, whether insanity be a question of science or of law, there should be no objection to the keeping of the law in the law courts, leaving science in the control of its undisputed field."⁵⁸ The New Hampshire test was also rejected by the Supreme Court of Wisconsin in the case of *Eckert v. State*⁵⁹ in which the court upheld the refusal of the lower court to instruct on mental disease as a defense to a murder charge.

In May, 1954 the Supreme Court of New Mexico in the case of *State v. White*⁶⁰ adopted an extension of the M'Naghten Rules. Citing the *Report of the British Royal Commission on Capital Punishment (1949-1953)*, p. 111, the court established the following rule: "The jury must be satisfied that at the time of committing the act, the accused as a result of disease of the mind * * * [sic] (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it."⁶¹

In the case of *Stewart v. United States*,⁶² decided fifteen days after the *Durham* decision,⁶³ the accused was convicted of first degree murder committed in robbing a grocery store. On appeal, the Circuit Court of Appeals for the District of Columbia through Judge Bazelon reversed and remanded the case stating that the mental disease or mental defect test which was laid down in the *Durham* case would be applicable upon retrial. It is worthy of note that the court evidenced a tendency to reconsider the advisability of the diminished responsibility test which it had rejected in *Fisher v. United States*.⁶⁴ "We have concluded that reconsideration of our decision in *Fisher* should wait until we can appraise the results of the broadened test of

⁵⁶ Weithofen, *The Flowering of New Hampshire*, 22 U.Chi.L.Rev. 363 (1955).

⁵⁷ 52 Wash. 66, 100 P. 167 (1909).

⁵⁸ 52 Wash. 66, ----, 100 P. 167, 169.

⁵⁹ 114 Wis. 160, 89 N.W. 826 (1902).

⁶⁰ 58 N.M. 324, 270 P.2d 727 (1954).

⁶¹ 58 N.M. 324, ----, 270 P.2d 727, 731.

⁶² 214 F.2d 879 (D.C. Cir. 1954).

⁶³ 214 F.2d 862 (D.C. Cir. 1954).

⁶⁴ 149 F.2d 28 (D.C. Cir. 1954).

criminal responsibility which we recently announced in *Durham*.⁶⁵

The court in the *Durham* decision said:

We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the "irresistible impulse" test is also inadequate in that it gives no recognition of mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test.⁶⁶

In March, 1955 the Court of Appeals of Maryland in the case of *Salinger v. Superintendent of Spring Grove State Hospital*⁶⁷ and the case of *Thomas v. Maryland*⁶⁸ discussed the *Durham* decision but did not adopt its test of criminal responsibility. Judge Collins speaking for the court in the *Thomas* case stated: "There is no evidence of a mental disease or mental defect to satisfy the New Hampshire rule adopted in the *Durham* and *Stewart* cases, *supra*, which we do not here adopt."⁶⁹

In the light of these recent developments the question arises as to whether Virginia should accept the new test for criminal responsibility by giving more weight to the rationale of the *Durham* decision based upon present-day scientific knowledge than it did to the New Hampshire decision of 1870.⁷⁰ As late as 1952 the Supreme Court of Appeals of Virginia after quoting a definition of "irresistible impulse" in the case of *Thompson v. Commonwealth*⁷¹ stated: "Many unsuccessful attempts have been made to formulate a more accurate definition of legal insanity."⁷²

⁶⁵ 214 F.2d 879, 883 (D.C. Cir. 1954).

⁶⁶ 214 F.2d 862, 874 (D.C. Cir. 1954).

⁶⁷ Md., 112 A.2d 907 (1955).

⁶⁸ Md., 112 A.2d 913 (1955).

⁶⁹ *Id.* at 112 A.2d 913, 919.

⁷⁰ *State v. Pike*, 49 N.H. 399 (1870).

⁷¹ 193 Va. 704, 70 S.E.2d 284 (1952).

⁷² *Id.* at 717, 70 S.E.2d 284, 292.

Dr. Jay L. Hoffman, First Assistant Physician at St. Elizabeth's Hospital, Washington, D. C., has said:

Under the *Durham* decision the psychiatrist is not restricted in giving testimony in regard to the insanity of an accused. No longer will he be shackled by the right and wrong test and the irresistible impulse test. The psychiatrist will have greater freedom to contribute to the courtroom solution of separating the criminal from the insane. Due to the very vagueness of the court in setting forth the definition of "mental disease" and "mental defect," the psychiatrist will be able to share his knowledge with the court and jury as he learns more and more about mental diseases.⁷³

As was stated in *Holloway v. United States*,⁷⁴ the principal function of the psychiatrist is to inform the jury of the character of the mental disease. By permitting the psychiatrist to testify more fully under the new test adopted by the *Durham* case, the jury would be greatly aided in arriving at a more intelligent and equitable decision as to the criminal responsibility of the defendant. While an immediate reaction to *Durham* is a legitimate fear that there will be too many acquittals upon the ground of insanity, there is no solid reason for anticipating that use of the new test will have any such result. What constitutes mental disease and how it operates are purely medical questions, and under the new test the legal system will not attempt to impose upon medical witnesses concepts which they may or may not consider correct and adequate. They will be completely untrammelled in their approach, and the new test will be compatible with all future developments in the psychiatric field.

It is submitted that Virginia should study the *Durham* decision with a view to adopting a more modern and scientific test of insanity to replace the "right and wrong" and the "irresistible impulse" tests.

David Oscar Williams, Jr.

⁷³ Personal Interview, April 12, 1955.

⁷⁴ 148 F.2d 665 (D.C. Cir. 1945).