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THE DISTINCTION OF BEING MAD

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I

FOR A CENTURY AT LEAST, psychiatrists have raged against that fortress of morality we denominate the criminal law. They have battered at its encrusted walls—charging that criminals are not bad but only somewhat mad. They have overrun its ramparts—crying punishment is inhuman: it does not reform, does not deter, does not even incapacitate. The psychiatric mentality has infiltrated legislatures, courtrooms, parole boards and even prisons. And now the psychiatrists have been rewarded with the sight of the fortress' hated flag—that red flag of retribution—being slowly lowered to the ground. The *M'Naghten* rule—the rule that a criminal must be so mad as not to know the difference between right and wrong before his crime may be excused—has settled in the dust at the Court of Appeals for the District of Columbia.[1]

Perhaps this is all to the good. Perhaps the public's long besieged fortress deserves surrender. It was Holmes who asked, "What have we better than a blind guess to show that the criminal law in its present form does more good than harm?"[2] It was Cardozo who said, "Everyone concedes that the present (legal) definition of insanity has little relation to the truths of mental life."[3] It was "medico-legal writers in large numbers"[4] who seemed to feel that the *M'Naghten* rule stood immutable as "the impenetrable wall behind which sits entrenched the almost unconquerable prosecutor; it is the monster of the earnest psychiatrist which prevents him from introducing into the courtroom true understanding of human psychology and of the psychology of the

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[1] Durham v. United States. For a critique of the psychiatric argument against punishment see E. de Grazia, Crime without Punishment: A Psychiatric Conundrum, 52 Col. L. Rev. 746 (1952). See also Review of Cohen, Murder, Madness and the Law, 62 Yale L.J. 679 (1953); Review of Guttmacher and Weihofen, Psychiatry and the Law, N.Y. Times Book Review (May 3, 1953); Review of Zilboorg, The Psychology of the Criminal Act and Punishment, N.Y. Times Book Review (May 16, 1954).

[2] Collected Legal Papers 188 (1920).

[3] What Medicine Can Do for Law 32 (1930).

[4] P. 820.

criminal act."[5] So it was that when Judge Bazelon led the court of appeals in its bold move to unseat *M'Naghten* for *Durham,* he had good counsel and a fine tradition behind, and a noble path in search of humanism ahead.

Judge Bazelon's opinion in the *Durham* case was judicial legislation at its best.[6] No halting, wavering, or apologetic pen, his. He deftly wrote off the *M'Naghten* test for the forensic failure it had become,[7] and recorded with swift and bold strokes the new test, a pragmatic test, that would carry with it at least as many hopes as fears.[8] Like all sound legislation, the court's new rule was made applicable only *in futuro*.[9] The decision, having been extremely well considered, will surely stand as one of the more significant contributions to the law of criminal responsibility.[10]

As almost everyone knows, the *M'Naghten* test for insanity or

[5] Zilboorg, The Psychology of the Criminal Act and Punishment 10 (1954).

[6] If the Durham test does not "work," the court's next legislative step may be the adoption of the rule of "diminished responsibility" it rejected in 1945 in Fisher v. United States, 149 F. 2d 28 (App. D.C., 1945), aff'd 328 U.S. 463 (1946). See Stewart v. United States, 214 F. 2d 879 (App. D.C., 1954). See note 9 infra.

[7] But see text to notes 13 and 14 infra.

[8] The Washington Post and Times-Herald editorially applauded the decision; the Evening Star criticized it editorially. Along with its announcement of the new test of criminal responsibility, the court of appeals also made some law with regard to mental competency to stand trial. Durham's competency to stand trial was "admitted" by his counsel. The court said it was error for the trial court to accept this waiver of a competency trial. Whenever an accused has *judicially* been found *incompetent* to stand trial, has thereupon been committed to hospital for treatment, and has been subsequently released by the hospital as (in its opinion) competent to stand trial, there *must* yet be a *judicial* determination of competency to stand trial, before the criminal trial itself properly may commence. Gunther v. United States, 215 F. 2d 493 (App. D.C., 1954); cf. Contee v. United States, 215 F. 2d 324 (App. D.C., 1954). In the case of Wear v. United States, — F. 2d — (App. D.C., 1954), it was decided that a trial judge has virtually no discretion to deny a motion for a competency trial prior to a criminal trial. "[A] motion on behalf of an accused for a mental examination, made in good faith and not frivolous, must be granted. . . ."

[9] "In the District of Columbia, the formulation of tests of criminal responsibility is entrusted to the courts and, in adopting a new test, we invoke our inherent power to make the change prospectively." P. 874. The lower court's judgment was reversed on the ground of a *misapplication* of the M'Naghten rule, and not because of the inadequacy of M'Naghten. Upon retrial, however, the new rule was to be applied by the lower court. This allowed the court to announce a new, prospective-only rule which would preclude appeals from prison—predicated on the newly-found inadequacy of M'Naghten—for reversal of past judgments founded on M'Naghten. See footnote 46 to the Durham decision, especially the quote from the California opinion: "[W]e think the time has come to say that in *all future cases which shall arise,* and where, *after this warning*. . . ." (Italics supplied.)

[10] For another, see State v. Pike, 49 N.H. 399 (1869).

criminal responsibility requires that the accused be unable to distinguish between "right" and "wrong" at the time of his crime—lest punishment be imposed. The enormous morality of the juxtaposed terms had spelled only dismay for many psychiatric witnesses summoned by lawyers to contribute to the intelligence of courtroom determinations of criminal guilt or lack of guilt by reason of insanity. Countless times, psychiatrists cried that the *M'Naghten* rule incapacitated them from assisting the judge or jury to its vital verdict. How translate "psychosis" or "psychopathy" or "dementia praecox" or "psychoneurosis" or "melancholia" or "hysteria," or even "sociopathy" or "mental disorder" or "neurotic character disorder" or "mental illness," into a psychiatric judgment of whether the accused knew "right" from "wrong"? The psychiatrist's frustration had even reached the point where one of the most articulate advocated a sort of strike by all reputable psychiatrists against testifying at all in the courts where *M'Naghten* reigned.[11] Despairing of hope and any change in the century-old *M'Naghten* rule, it was felt that such a strike was the only possible remedy for the deadly "clash of lawyers with psychiatrists in the role of baseball bats."[12]

Lest, however, only ill be spoken of the dead *M'Naghten*, it should be noted that part of the psychiatric frustration in the face of *M'Naghten* seems to have stemmed from an untoward rigidity on the part of the psychiatrists themselves. Or, if not rigidity, it was at least lack of imagination that kept usually uninhibited psychiatrists from filling the *M'Naghten* jugs of "right" and "wrong" with their own heady wines.[13] Indeed, a number of psychiatrists appear not to have been constrained by the right-wrong riddle, but gave free rein to their professional diagnostic language and symptomatic verbiage, feared not to say whether they thought the defendant insane, and did not gag even to announce their opinion of whether he could tell right from wrong.[14] But to bow his science to the feet of *M'Naghten* was for

[11] Zilboorg, op. cit. supra note 5 at 124–28.

[12] Ibid., at 112.

[13] See Hall, Psychiatry and the Law—A Dual Review, 38 Iowa L. Rev. 687, 696–97 (1953). Cardozo, in the case of People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915), after an exhaustive review of M'Naghten-rule cases, determined that the right-wrong test intended inability *morally* to distinguish right from wrong.

[14] This appeared, for example, from examination of the transcript of the record in the criminal case of United States v. Taylor, D. D.C., Criminal No. 1833-52 (not reported) (Nov. 17, 18, 1953) at 147–49. See Hall, op. cit. supra note 13. Cf. Tatum v. United States, 190 F. 2d 612 (App. D.C., 1951), where it was held that any evidence of "mental disorder" was admissible.

many an individual psychiatrist, "to force him to violate the Hippocratic Oath, even to violate the oath he takes as a witness to tell the truth and nothing but the truth, to force him to perjure himself for the sake of justice."[15]

The *Durham* decision was principally directed at the complete relief of these symptoms of sickness in forensic psychiatry. It was a sincere attempt to answer the cry of psychiatrists for relief of *M'Naghten*.[16] The court's answer was precedented by the same court's answer in 1929[17] to the psychiatric cry for the "irresistible impulse" test as a supplement to *M'Naghten*. But the passage of 25 years had taught the court that even the "irresistible impulse" test was an incomplete solution—because it gave no recognition to "mental illness characterized by brooding and reflection. . . ."[18] Neither the right-wrong test nor the irresistible-impulse test was able, it seemed, to absolve from criminal responsibility our modern-day Hamlets.

The *Durham* case is intended to, and very probably will, allow psychiatrists greater freedom to contribute to the courtroom solution of that profoundly perplexing problem of separating the criminal and the insane. "Whatever the state of psychiatry" its experts will be heard. "[T]he factfinder should be free to consider all information advanced by relevant scientific disciplines."[19] The jury "will be guided by wider horizons of knowledge concerning mental life."[20] It may be that psychiatrists will not have as much to contribute to this solution as some expect. It will surely be that psychiatrists will not have as much to contribute to this solution as most would desire. But the psychiatric witness, hitherto adrift on the seas of morality (did the defendant know right from wrong?), will be cast by *Durham* onto more familiar terrain (did he suffer from a mental disease or defect?). It is true that the existence of mental disease or defect is not the complete test set forth in *Durham;* the complete test is whether the defendant's crime was a product of a mental disease or defect. Yet, the introduction of

[15] Zilboorg, as quoted by Guttmacher and Weihofen, Psychiatry and the Law 406 (1952).

[16] The court was able easily to summon a barrage of "medico-legal" authority to support its decision to overthrow M'Naghten. Better still, the court was able to rest its new rule on the 1869 decision of the Supreme Court of New Hampshire, State v. Pike, 49 N.H. 399 (1869). See Reik, The Doc-Ray Correspondence, 63 Yale L. J. 183 (1953).

[17] Smith v. United States, 36 F. 2d 548 (App. D.C., 1929).

[18] P. 874.

[19] P. 872.

[20] P. 876.

any evidence of insanity—any testimony on behalf of the defense that the defendant suffers from mental disease—will apparently cast not only the burden of proving sanity beyond a reasonable doubt, but also the burden of proving lack of connection between disease and crime, beyond a reasonable doubt—upon the prosecution. Moreover, the average psychiatrist's attitude toward criminal behavior seems to embody, as a basic assumption, that such behavior is prima facie evidence of mental disease. It can, therefore, be expected that few psychiatrists will hesitate to find the necessary causal connection between the crime and the disease, once they have determined the disease to exist, knowing a crime has been committed.

The psychiatric character of *Durham's* controlling criterion, "mental disease or defect," will, however, pose problems for the jury and the judge. Does the term embody a jural concept or a psychiatric one? If jural, then the words are but a practical synonym for insanity, and unopposed psychiatric testimony that a defendant suffers from some alleged mental disease or defect need not necessarily compel a judgment or acquittal by reason of insanity. For, though psychiatrists may agree that "dementia praecox" or "neurotic character disorder" is a mental disease, the judge or jury may not. It may be that the disease and its depicted symptoms will not rise to the judge or jury's conception of "mental disease" and "insanity." If, however, it be taken that the court's use of the term "mental disease or defect" was psychiatric rather than jural, then it may be urged that any mental disorder or behavior pattern agreed upon by psychiatrists to constitute mental disease should conclusively generate a finding of insanity and a judgment of acquittal by reason thereof. And although these two contesting constructions will fuse and be obscured in the crucible of the courtroom, the issue will sometime emerge to require appellate solution. I would hazard the guess that "mental disease or defect" will receive the meaning first postulated, i.e., will be treated as a legal concept more or less synonymous with "insanity." Psychiatrists tend of necessity to view all aberrant behavior (whether criminal or neurotic) as manifestations of sick minds. As a result, psychiatric witnesses may be expected generally to find some "mental disease" to cover the case, whatever the defendant's symptomatic criminal behavior may be. They will describe the defendant's symptoms, will affix some one or more of their many diagnostic labels to the defendant, will answer yes (or no) to direct questions as to whether the defendant

suffered from a mental disease, will be puzzled or equivocal if asked directly whether the defendant was "insane" or not, and finally will be forced to sit with everyone else and await the jury's solemn but uncertain determination. In this connection, it may be predicted that the trial judge will in the future hesitate to inform or instruct the jury that a psychiatric diagnosis such as "psychopathy" or "psychosis"—as applied by a psychiatric witness to the defendant—is or is not equivalent to "mental disease" or "insanity."[21] For it cannot be that the *Durham* court intended to place upon the trial judge (or itself) the right to resolve the psychiatric profession's own unresolved questions, or to allow psychiatric legerdemain to dominate the courtroom, or to allow the judge to usurp the function of the jury.[22]

It has been suggested that one important effect of the *Durham* decision will be to allow greater scope for contribution by the psychiatrist to the ultimate determination of the question of insanity. Perhaps even more significant, however, will be the new instructions to the jury required of the judge. The *Durham* decision presented the court of appeals' view as to the necessary instruction to flow from judge to jury—where a plea of insanity is raised by the defense. The "model" instruction is couched only in terms of "mental disease or defect."[23] No mention is made in the instruction of "right" and "wrong" or "irresistible impulse." And though the opinion makes clear that evidence relative to these two superseded tests may indeed be relevant for jury consideration, the ultimate criterion must be that of "mental disease or defect." Wary district judges may now shy away even from injecting the possibly prejudicial "right-wrong"

[21] In Stewart v. United States, 214 F. 2d 879 (App. D.C., 1954), the court of appeals reversed a conviction because the district judge had attempted to enlighten the jury as to the distinction between "mental disease" and "mental disorder" and as to the difference between "psychopathy" and "insanity."

[22] See ibid.

[23] "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 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."

test into their charges to the jury. There is much evidence in *Durham* and in the case of *Stewart v. United States*,[24] handed down by the court of appeals during the same term, that the higher court intends to keep a tight rein upon the trial judge's discretion in commenting on the evidence and instructing the jury, with regard to criminal responsibility. Thus, *Durham's* greatest impact upon future determinations of criminal responsibility may well lie in the radical change demanded of the trial judge in his critical words to the jury.

In the end, the *Durham* court looked to the much-abused but indestructible jury to sift all the evidence on "mental disease" through "our inherited ideas of moral responsibility." It was the jury who would continue to make its "moral judgment"—reached, it was hoped, by way of the "fundamental precept that 'Our collective conscience does not allow punishment where it cannot impose blame.' "[25]

This reaffirmance by the *Durham* court of the importance of the jury in determinations of insanity in criminal cases holds further significance. By common law, the question of insanity originally was held to be a question of *fact* for the jury to decide.[26] The *M'Naghten* rule erred by injecting into the jury's arena of deliberation a legal test which colored the evidence and disturbed the requisite judgment of fact.[27] The error was for the court to instruct the jury on an issue of fact as if it were an issue of law.[28] The jury was led to believe (for the court so instructed) that in order to acquit it had to decide that

[24] 214 F. 2d 87 (App. D.C., 1954).

[25] P. 876.

[26] "I think the common law is as follows: it does not recognize 'only a certain kind or degree of insanity as having any legal consequences'; it recognizes insanity as a disease, and, so far as contracts and crimes are governed by the common law, they cannot be produced by disease of the mind. Whether, in any particular case, there is mental disease, and, if there is, whether a certain transaction is a product of that disease,—are questions of fact for the jury and not of law for the court. The court can only instruct the jury that a product or an offspring of mental disease is not a contract or a crime. I think the entire common law is stated above. . . ." Judge Doe as quoted in Reik, The Doe-Roe Correspondence, 63 Yale L. J. 183, 189 (1953).

[27] "In early times (and to this day in England and some of our states), the courts charged juries upon many matters of fact,—disregarding the distinction between law and fact, a practice which readily accounts for much, if not all, of the confusion that now prevails in the law of insanity." Ibid.

[28] "If the tests of insanity are matters of law, the practice of allowing experts to testify what they are, should be discontinued: if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself qualified to testify as an expert." State v. Pike, 49 N.H. 399, 441 (1869). It may not be amiss to note that an average judge's "inherited ideas of moral responsibility" (Durham v. United States) may be quite different from those of the average jury.

the defendant did not know the difference between right and wrong (a legal conundrum) rather than that the defendant was insane (as a matter of fact). At best, the jury could not help but be confused as to which was the test—insanity or ignorance of right and wrong![29] Thus the real vice of the *M'Naghten* rule was that it allowed the court to impede the jury in its determination of insanity—allowed the court to intrude upon, if not actually usurp, the jury's rightful province.[30] The *M'Naghten* rule functioned as a "brake" upon a jury's disposition to acquit defendants by reason of insanity.[31] And though such judicial paternalism is certainly not unfamiliar,[32] the ascendancy of the *demos* today would seem sufficient reason for the courts to restore to the jury its rightfully predominant role in the community judgment of who should, and who should not, be relieved of criminal responsibility.[33]

This restoration may indeed be effected by the *Durham* decision—

[29] Consult Reik, op. cit. supra note 26. "It is claimed in behalf of the defendant, however, that he was insane at the time that these offenses are said to have been committed. If you believe this to be the case of course your verdict should be not guilty on the ground of insanity. . . . The law, indeed, does not hold *certain types of insane persons* responsible for their acts, because in order to be responsible for his acts a person must have the mental capacity to commit the act with which he is charged; but it is *not every kind of insanity*, it is not every kind of mental derangement, or every kind of mental deficiency that is sufficient to lead to the conclusion that a person is not responsible for his acts. *There are many abnormal or subnormal persons whom the law holds responsible* for any crime that they commit. Obviously, *in the interest of protecting society* there are good reasons for this rule. Now, the law defines insanity, *and insanity must be within the legal definition* in order to justify the conclusion that a person is not responsible for his act. *Now insanity as the law defines it must be the result of a derangement of the mind, and in addition it must meet one of the following tests:*" (There follows the court's expositions of the "right-wrong" and "irresistible impulse" tests.) Charge to the jury of Holtzoff, J., in United States v. Taylor, D. D.C., Criminal No. 1833–52 (not reported), Transcript of Record (Nov. 17, 18, 1953) at 147–49.

[30] Cf., "The custom of courts charging juries as to matters of fact . . . arose from many circumstances peculiar to England in early times. First, in many cases in which the Crown took an interest, such as those affecting the rights of the Crown as opposed to the rights of the people, the judges, being then mere tools of the Crown, were used by the Crown to obtain verdicts favorable to the Crown. In that process, the judges necessarily undertook to dictate to juries concerning the decision of questions of fact." Judge Doe as quoted in Reik, op. cit. supra note 26 at 190.

[31] It has apparently never been suggested that the right-wrong test operated to encourage judgments of insanity by the jury. See the court's charge quoted note 29 supra.

[32] See note 30 supra.

[33] See note 30 supra. Cf., "Second, there was a vastly greater difference between the intelligence of the court and the jury, than there is now, and the tendency was for the learned and great judges to bestow their learning very liberally upon the ignorant and degraded jury, by way of instructions. Third, the use of experts as witnesses to give opinions upon scientific subjects was comparatively unknown." Judge Doe as quoted in Reik, op. cit. supra note 26 at 190.

although this appears not to have been the primary purpose of *Durham*. Such a return to the jury of its rightful fact-finding function was, however, the primary purpose of the New Hampshire high court when it adopted eighty-five years ago[34] the insanity test which the *Durham* test mirrors.[35]

In the final analysis, the *Durham* decision may be read as an attempt by the court more properly to reallocate the duty of determining insanity—among the judge, the jury and the expert psychiatric witness. As has already been indicated, *Durham* withdraws from the judge. As between the jury and the psychiatric witness, the *Durham* court appeared doubtful, inclined toward the psychiatrist, then wavered toward the jury. In the end, as has been noted, the decision left unresolved the question whether the controlling criterion, "mental disease or defect," was intended to be *psychiatric* (in the sense that psychiatric conceptions of "mental disease" would legally be equated to "insanity") or *jural* (in the sense that the jury's view of "mental disease" would control). Upon this "pending" decision hangs the critical issue of whether psychiatrist or jury will have the final say of criminal responsibility.

Whether the jury or the psychiatrist should have the final word, and why, are questions which must be resolved, but which cannot be resolved here. It may only be suggested that the psychiatric mind has not yet shown its willingness or ability to deal with moral matters[36]—and the matter of criminal responsibility (whether it be predi-

[34] State v. Pike, 49 N.H. 399 (1869). See Reik, op. cit. supra note 26.

[35] "Giving this matter to the jury leaves the way open for the reception of all progress in your science (psychiatry). . . . Juries may make mistakes, but they cannot do worse than courts have done in this business." Judge Doe as quoted in Reik, op. cit. supra note 26 at 188.

[36] The most vociferous complaint of the psychiatrists about M'Naghten was that the rule forced them into the impossible position of making a moral judgment. To answer yes or no to the question whether the defendant was able to distinguish right from wrong was, for the psychiatrist, to state whether the defendant was or was not, in his opinion, morally responsible for his crime. Even the most casual observer of the psychiatric scene becomes aware that the psychiatrist consistently shuns "moral" judgments and vigorously denies that his therapy consists, in any way, of moral guidance. (For the argument that psychotherapy consists of moral guidance, see S. de Grazia, Errors of Psychotherapy 188-96 (1952). Indeed, the psychiatric repugnance for morality seems sometimes to resemble the reputed horror of the devil at the sight of the holy cross. In this connection, it may be noted that Karl Menninger has remarked the fear with which the psychiatrist beholds the concept of punishment. See Menninger, Psychiatry and the Law—A Dual Review, 38 Iowa L. Rev. 687, 702. Punishment, of course, smacks loudly of morality. The dilemma of psychiatry appears to be that on the one hand, it cannot avoid moral questions, and on the other hand, it cannot deal with them without seeming to invalidate its claim of being a "science," not a theology.

cated initially upon "mental disease" or ignorance of "right" and "wrong") *is* a moral matter. For it matters much to all whether a madman be punished or treated for his madness and whether a criminal be treated or punished for his crime. Until this matters no longer, the issue of criminal responsibility will be a moral one. Until such time, then, as the psychiatrist becomes willing and able to deal with moral questions, and until such time as the democratic community is ready to acknowledge the word of the psychiatrist as the authority of its high priest, the judgment of whom to punish and whom to treat belongs with the jury—for better or for worse.

In the meanwhile, as will be seen, the psychiatrist (however unwittingly) is already spinning a web which is entangling the ancient fabric of criminal justice.

II

It may be recited that under *Durham*, as under *M'Naghten*, the ultimate question for judge or jury is "insanity." Is the accused guilty or not guilty by reason of insanity? The issue is a moral one. If the perpetrator of a crime was insane, his punishment would be unjust. And if the *M'Naghten* rule in fact led to the punishment of the insane, it was indeed an unjust law. In such a case, the accusation so often leveled by the psychiatrist at the lawyer for being host to an indefensible rule would be warranted. And the *Durham* court would be entitled to its reward on earth as well as in heaven.

The real issue at stake with *M'Naghten* or *Durham* or any other rule of criminal responsibility is whether it conduces to the punishment of the sane and the treatment of the insane.[87] Most psychiatrists and most lawyers assume with good reason that any sensible rule of criminal responsibility will mete out punishment to the sane and treatment to the insane automatically, almost upon a judgment of guilty for the sane and not guilty for the insane.[88] Thus, the struggle for

[87] See, in general, E. de Grazia, Crime without Punishment—A Psychiatric Conundrum, 52 Col. L. Rev. 746 (1952).

[88] But does the jury assume this? There can be no doubt but that the jury knows a verdict of "guilty" will result in imprisonment. But there is grave doubt whether they know that a verdict of "not guilty by reason of insanity" will transport the defendant to a mental hospital until cured. The jury well may fear that the latter verdict will mean only freedom for the defendant. Even the Durham court found it desirable to note that an acquittal by reason of insanity generates a presumption of insanity and committal to a hospital for the insane. In the absence, however, of such knowledge on the part of the jury, the defendant's right to acquittal may easily be prejudiced. It would therefore seem desirable that the trial judge be required to inform the jury of the defendant's disposition upon acquittal.

a more just disposition of the sane and insane proceeds at the level of the rule. Yet the importance of the difference will be found to lie not so much in the question of conviction or acquittal as in the question of the disposition of the defendant following conviction or acquittal. "Guilty" or "not guilty by reason of insanity" are, after all, but legal labels attached to the criminal upon judgment. And if the psychiatrist, who fought so hard for a better rule to disinguish the mad from the bad, is nevertheless to be found treating the mad as badly as the bad, the surrender of *M'Naghten* may herald a Pyrrhic victory.

It is generally assumed that a convicted criminal will be "punished" through confinement to a prison. Yet the day is surely gone when the prison whip and chain, or the rack and wheel, promised unquestionable pain for the prisoner. The day is behind, too (gone, it seems, with the coming of the writ of habeas corpus), when the prison held that awful terror of being "left to rot," of being forgotten by the world. And, it would seem, the day has also passed when the prisoner could not hope for a clean bed to sleep on, room to stretch his legs, or sufficient food and medical care to keep himself alive.[39] The prisoner today is treated no more than the madman like a "wild beast." He is deprived of many liberties and much freedom, deprived of the opposite sex, and forced to wear a crown of thorns constructed of community fear and distrust.

But what of the insane? The insane criminal, by definition, is to be treated and not punished. This means he will go to a mental institution instead of to prison.[40] This does not mean he will retain his

[39] J. Parnell Thomas could summon no worse complaints of prison life than Communism, being deloused, pro-Rooseveltism, anti-Semitism, shortage of food, clothes and medicine, guards harassing inmates, inmates heckling guards, petty bribery, petty thievery, and the injustice of parole procedure. 37 Life No. 14, at 138 (Oct. 4, 1954).

[40] The Durham opinion's last footnote reads: "An accused person who is acquitted by reason of insanity is presumed to be insane [citing cases] and may be committed for an indefinite period to a 'hospital for the insane' [citing the D. C. Code]." It should be well noted that this presumption of insanity upon judgment after trial will often follow hard on the heels of a determination that the accused was "mentally competent to stand trial and . . . able to consult with counsel to properly assist in his own defense." In order, apparently, to cast off any doubt as to its intention that defendants found mentally competent to stand trial and not guilty by reason of insanity could be presumed to be insane and confined to a hospital for the insane, the court of appeals made the following amendment to Durham's last footnote (approximately three months after the release of the Durham decision): "We think that even where there has been a specific finding that the accused was competent to stand trial and to assist in his own defense, the court would be well advised to invoke this Code provision so that the accused may be confined as long as 'the Public Safety and . . . [his] welfare' require. Barry v. White, 62 App. D.C. at 71, 64 F. 2d at 709." (For the court of appeals' new

liberties or his freedom. Rather may he be deprived of them, not for a fixed term of years, but possibly for life—for he may be obliged to "rot" in a mental hospital until "cured."[41] It may matter not that his only offense, his "forgiven" crime, was not grievous—but possibly only a forged check or shop-lifting or some homosexual act. It may not matter that he is incapable of cure. He may yet be incarcerated for the rest of his natural life.[42]

The insane criminal will, of course, not be permitted to enjoy the company of the opposite sex.[43] He will be forced to wear his own crown of thorns—constructed of community fear and disgust. But more than this, his hospital may be so overcrowded that he will find himself in the company of "many wild and violent insane persons" who are wont to beat him with their shackles and eat excreta at dinner.[44] And he may one day (and thereafter) find himself strapped to a table and methodically subjected to the convulsions of electric shock, subshock or insulin shock "therapy."[45]

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law with regard to the issue of mental competency to stand trial, see note 8 supra.) The true significance of the "presumption of insanity" may be understood by comparison with the English parallel—the judgment of "guilty but insane." Both function to preserve the court's jurisdiction over the defendant and to assure the community that the defendant will not be given a judicial passport to the streets. But see Guttmacher and Weihofen, Psychiatry and the Law 422–23 (1952), where the English verdict is called "word-magic" while the "presumption" is deemed sound.

[41] Ibid., and note 58 infra. "[A]fter an offender has been treated in whatever groping and uncertain ways the psychiatrist may have attempted, what prophet wants to take the responsibility of saying that the patient is well and may be released and will do society no more harm?" Menninger, Psychiatry and the Law—A Dual Review, 38 Iowa L. Rev. 687, 702 (1953). Dr. Winfred Overholser, Superintendent of St. Elizabeth's Hospital (the "hospital for the insane" in the District of Columbia), has intimated to the author that this uneasy responsibility might be shifted back onto the shoulders of the courts by making patients try habeas corpus in order to obtain their release. It appears to be an open secret among psychiatrists that they often cannot tell whether a patient is "cured." In fact, psychiatrists often do not even know of any treatment which can promise cure. See Menninger, op. cit. supra, at 701.

[42] Consult Menninger, op. cit. supra note 41, at 701. See notes 58 and 63 infra.

[43] Nor the same sex in the case of the homosexual. See Overholser, Some Problems of the Criminal Insane at St. Elizabeth's Hospital, 22 Med. Annals of D. C., No. 7 (July, 1953).

[44] See Miller v. Overholser, 206 F. 2d 415 (App. D.C., 1953). Significant for the purpose of this paper is the fact that the court held that such a hospital milieu could not be considered "treatment," but that it resembled "punishment," and entitled the patient to release upon his writ of habeas corpus. Sometimes patients have to wait in jail for a month or two for a bed in the hospital. See Overholser, op. cit. supra note 43.

[45] Monte Durham had been subjected to subshock insulin therapy during at least one of his four spells at St. Elizabeth's, prior to his trial. For criticism of shock therapy and other psychotherapies, see S. de Grazia, Errors of Psychotherapy (1952).

Shock therapy is widely used today for treating the mentally ill, including insane criminals. It is used in the federal hospitals for insane criminals[46] and apparently at all state mental institutions.[47] It has optimistically been described as "the most effective single remedy in the whole range of psychiatry in relation to the number of patients deriving benefits from the treatment."[48] Little is known about how shock treatment works.[49] But even less is said about how the patient feels.[50] About all that is known is that it sometimes works, and that it is always painful.[51] Some believe it works because it is so painful.[52] Shock treatment induces convulsions. These have been described as "terrifying in the extreme." The initial stage is likened to the experience of "being electrocuted" or "roasted alive in a white-hot furnace," after which the shock apparently rises "to an acme of indescribable fear and terror."[53]

Perhaps shock therapy is the humanistic, scientific, psychiatric answer to inhuman, barbaric, legal punishment by imprisonment. Perhaps shock treatment may be pardoned because it *may* "cure,"[54] and the whip and chain *may* not?[55] But perhaps, also, shock treat-

[46] Communication to the author from Dr. H. M. Janney, Medical Director, Bureau of Prisons, U.S. Department of Justice; communication to the author from Dr. Winfred Overholser, Superintendent, St. Elizabeth's Hospital, Washington, D.C.

[47] See The Mental Health Programs of the Forty-Eight States (1948).

[48] Palmer, Recent Techniques of Physical Treatment and Its Results, in Harris, Modern Trends, 254–55 (1948).

[49] See ibid.

[50] Apparently, the mental hospitals customarily seek the consent of a relative before applying shock therapy. Communications to the author noted supra note 46. As to the paucity of publicity of the terrifying effects of shock treatment, see S. de Grazia, Errors of Psychotherapy 195 (1952).

[51] In general, see ibid., at 188–96, and authorities therein cited.

[52] See note 56 infra.

[53] Good, Some Observations on the Psychological Aspects of Cardiazol Therapy, 86 Jour. of Mental Science (1940).

[54] It did not cure Monte Durham. He was given "subshock insulin therapy" during at least one of his three commitments to St. Elizabeth's Hospital, prior to his criminal trial. It should be well noted also that Durham had been released from the hospital as "cured" three different times; none of these cures, however, seemed to cure him of his disposition toward crime. There is conflicting evidence of cure with regard even to shock therapy. In Karpman, The Sexual Offender and His Offenses 247–48 (1954), it is reported that shock therapy had no benefit on "sex psychopaths." By comparison, however, a number of psychiatrists reported that *prison* was a valuable therapeutic implement in treating sexual psychopaths. See note 56 infra.

[55] One seventeenth-century therapist held that, "By this method, the mind, held back by restraint, is induced to give up its arrogance and wild ideas and it soon becomes meek and orderly. This is why maniacs often recover much sooner if they are treated with

ment cures because the patient's convulsions are felt as physical punishment.[56]

If a defendant in a criminal case were well advised by counsel, he might hesitate to plead not guilty by reason of insanity. He might not wish to forego the certain austerity of prison for the uncertain luxury of a hospital for the insane. And if the criminal were in any position to elect between the psychiatrist and the jurist as the future guardian of his liberties, he might be well advised also to re-elect the jurist. For in many vital respects the expansive psychiatric movement in the criminal law gives promise of a dim future for the criminal. Significantly, this is true in spite of, or even perhaps because of, the individualistic, scientific credo of the psychiatrist.[57] It is the psychiatrist who would incarcerate even the minor criminal offender for life unless "cured."[58] It is the psychiatrist who would do this even though he can promise little in the way of successful treatment, can

torture and torments in a hovel instead of with medicaments." As quoted in S. de Grazia, op. cit. supra note 50 at 195. D. W. Abse, Psychology of Convulsion Therapy, 76 Jour. of Mental Science (1940), was "inevitably reminded" by shock treatments of the older "hot and cold douches to which patients were exposed and even (historically) to the thrashings to which they were once so brutally subjected." Another writer suggests that the application of shock therapy makes one "suspect deeper and darker motives." Atkins, J., as quoted in S. de Grazia, op. cit. supra note 50 at 269.

[56] Psychoanalysts consider the punitive element of shock therapy may be responsible for its beneficial effects. See Stainbrook, Shock Therapy, 43 Psychological Bulletin (1946); S. de Grazia, op. cit. supra note 50 at 270. An official at St. Elizabeth's Hospital recently was reported as saying, "It may be that some of the sex deviates (incarcerated under the District of Columbia's "sex psychopath" law) we now consider untreatable would become treatable after serving some time in a prison." See The Washington Post, p. 15 (Dec. 8, 1952). Dr. Karl Menninger has said, "As I use the word ('treatment'), putting a man in jail may be the best possible treatment (or at least one step in the treatment), but again it might not be—indeed, usually isn't." See Menninger, op. cit. supra note 41 at p. 702. Karpman notes several psychiatrists who now believe prison is curative. See Karpman, op. cit. supra note 54 at 248.

[57] "Only slowly are men of more scientific bent of mind extricating the criminal law from the grip of this quasi-religious conception, and replacing it with a more positive approach." Guttmacher and Weihofen, Psychiatry and the Law 444 (1952). For the "positive" approach, see note 65 infra. See also notes 61 and 63 infra.

[58] "If analysis of the convict's personality indicates that he cannot safely be released, he may have to spend the rest of his life under legal supervision of some kind, even though the only crime he has actually committed was a minor one." Guttmacher, op. cit. supra note 57 at 445. See notes 63, 65 infra. Recently, it was reported that "[o]f the sex psychopaths now at the (St. Elizabeth's) Hospital, five or six are exhibitionists whose offense was exposing themselves to men. From present prospects, it was noted (by hospital officials), they probably won't respond to treatment, which means that under the act they will be kept there for the rest of their lives." The Washington Post, p. 15 (Dec. 18, 1952). The only question apparently raised in the hospital official's mind by these facts was that, "[a]t today's cost of hospitalization, that makes a big bill for citizens to pay for protection against this offense."

never promise "cure," but can promise that many criminals can never be cured.[59] It is the psychiatrist, too, who apparently finds no reason to restrain his hand from inducing the pain of convulsions by shock treatment, in the *hope* of "cure."[60] And it was the psychiatric hand which nourished that blight on civil liberty and criminal justice known as the "sexual psychopath" law—a pseudo-criminal law designed to catch sex criminals where the criminal law cannot because no crime has been committed and no charge of crime even brought.[61] Finally, it is the psychiatrist who can so easily proclaim today that:

> Fundamentally, why should it make any difference whether a person who has committed a criminal act was sane at the time and therefore guilty, or not guilty by reason of insanity? In either case he has shown himself a menace to society who must be taken into custody and control. Why worry over whether that control is based on criminality or insanity?[62]

[59] "Who is to say that a patient needs this kind of handling instead of the standard procedure? And as to who shall decide what kind of treatment is to be given and administer it, it is certainly an open professional secret that we psychiatrists do not know how to treat such patients in a curative way, or—to put it more accurately—we do not know of any specific treatment which can be regarded as promising what society wants. And, incidentally, where are we to find the psychiatrists to even attempt it, or to do research in the area?" Menninger, op. cit. supra note 41. See also notes 54, 58 supra. Dr. Karl Menninger is one of the few articulate psychiatrists today with an acute appreciation of the profound problems presented by the relations between psychiatry and the criminal law. See his book review, op. cit. supra note 41.

[60] See S. de Grazia, op. cit. supra note 50. Karpman notes the following succinct case history of a "sexual psychopath": "White. Male. Age 26. Charge: Sexual psychopath. *At fifteen* he had been *accused* of attempted rape. He was then considered a borderline mental defective; *committed to an institution* and *sterilized*. Upon release, he was charged with forging checks. He had had homosexual relations in adolescence. He was quiet, cooperative, wanted to be helped. He was given *seventeen (shock) treatments*, followed by courtyard parole. Each time he became involved in fellatio and pederasty with other boys" (italics supplied). Karpman, op. cit. supra note 54 at 248.

[61] The sentence prescribed is life unless "cured." By 1950, at least twelve states and the District of Columbia had "sexual psychopath" laws on their statute books. See Psychiatrically Deviated Sex Offenders, published by the Committee for Forensic Psychiatry of the Group for the Advancement of Psychiatry (1950). Appendix A of this publication sets forth a comparative analysis of the essential provisions of the fourteen laws. The requisite elements for incarceration under the Wisconsin law are described as "Irresponsible for sexual conduct and thereby dangerous to himself or others because of: (1) emotional instability; or (2) impulsiveness of behavior; or (3) lack of customary standards of good judgment; or (4) failure to appreciate the consequence of acts; or (5) combination of above." Apparently the only evidence needed of these elements is testimony by psychiatrists to this effect. No criminal conviction or charge of crime is necessary to bring the "sexual psychopath" within the law. *Some* of the statutes require a *charge* of crime for jurisdiction. *None* require conviction. A New York bill was vetoed in 1947. It should be stated that the general psychiatric view has become critical (post-Kinsey?) of the entire law with regard to sexual crimes and offenses. The committee opines that if the sexual laws were strictly enforced, "we should be indeed witness to a colossal travesty touching all levels of American society. *Absolute law enforcement would perforce touch about 95% of the total male population.*" (Italics supplied.)

[62] Guttmacher and Weihofen, op. cit. supra note 57 at 443.

Why worry indeed! Given such a psychiatric philosophy of the criminal law, *M'Naghten* is rendered moot. *Durham* becomes meaningless, as would any other legal test which struggles to distinguish between the criminal and the insane.

For, instead of struggling or worrying, every man, woman and child[63] who has committed some criminal act, or shown some pattern of "irresponsible behavior,"[64] need only be transported into the arms of the psychiatrist—there to lie until cured.[65] We can forget that imprisonment by such arms might be contrary to one's desires. Forget that it may last for life. Forget that it may become at times rather painful. Forget that habeas corpus offers no freedom at all to one unable to prove himself "cured." And forget that it all may be unjust.[66]

Some time ago I suggested that the psychology of the individual and

[63] The child could be transported into the arms of the psychiatrist for life unless "cured"—via the "Model Youth Correction Authority Act." "The act provides, first, that when a youth is found guilty of an offense, there shall be a careful investigation of the cause of his offending; second, that anything within the bounds of what is humane [sic; query shock therapy?] shall be done to correct that cause and prevent his further criminality; third, that when he is released, he shall be actively helped to live an honest life; and fourth, that if he cannot be made safe to return to society, he shall be kept in custody *for life*" (emphasis in the original). Guttmacher and Weihofen, op. cit. supra note 57, at 451. Although the authors claim that this "model" act (presented in 1940 by the A.L.I.) has been adopted "with varying modifications by several states and the federal government," the fact appears to be that neither state nor federal government accepted the "model" act's provision for life custody unless cured. The federal act provides for a maximum of six years incarceration, except where a longer period of imprisonment could be prescribed by law for the crime committed. A minimum of one year is required. 64 Stat. 1085 (1950), 18 U.S.C.A. §§ 5005-5024 (1951). For analyses of the state statutes, see Comment, Youth Correction—The Model Act in Operation, 17 U. of Chi. L. Rev. 683 (1950). The author suggests that the unwillingness to enact the "model" act's proposal for "perpetual control" may be rooted in the fear that such control would be repugnant to the constitutional prohibition against "cruel and unusual punishment."

[64] See note 61 supra and note 69 infra. The "sexual psychopath" laws by their nature offer much opportunity for administrative abuse. If 95% of the total male population of the United States violate the sex laws (see note 61 supra), the selection of those to be prosecuted under the "psychopath" laws can only be dangerously arbitrary. Prosecution could be brought for "political" reasons. Inability to prove the commission of a crime could lead to prosecution under the "psychopath" law where there is no requirement of proof of crime. In the case of Miller v. Overholser, 206 F. 2d 415 (App. D.C., 1953), the court-appointed attorney filed an affidavit with the court of appeals stating his opinion that defendant was not a "sex psychopath" and that "there is a strong probability that [defendant] was 'framed.'"

[65] "But after the defendant has been found guilty . . . the decision as to *what* kind of treatment is needed calls for . . . the psychiatrist. . . . Fixing the sentence should therefore either be taken from the judge entirely and vested in a tribunal composed of experts . . . or . . . the sentence should be a wholly indeterminate one, under which the person could be held as long as necessary, whether that be for a few days or for the rest of his life." Guttmacher and Weihofen, op. cit. supra note 57 at 445.

[66] As to the injustice of "overpunishment" of the criminal, see E. de Grazia, op. cit. supra note 1, esp. footnotes 59 and 61.

of the public required that criminals be punished for their crimes.[67] I suggested further that treatment of the criminal could not be considered a substitute for his punishment.[68] I would like leave to record a change of mind. I would now concede that a system of treatment may as effectually deter criminality as a system of penalties. I concede that the prospect of possible life imprisonment in a mental institution, whether among maniacs or not, may as effectually deter as the prospect of ten years in prison. I concede also that the fear of shock therapy may be at least as effective a deterrent as the fear of prison guards. I concede that the community's fear and disgust for the insane may be as great and as powerful a deterrent as the community's fear and distrust of a criminal. I concede that the psychiatric hand may prove as fearful as the jurist's ever was. I concede finally that the psychiatric movement may lead to the punishment and deterrence not only of crime, but of any behavior found offensive to a community too guilty or hypocritical otherwise to make that behavior criminal.[69]

Aristotle observed long ago that "punishment is a sort of medicine." We have considerable cause today to observe that medicine can be a sort of punishment, *sans* due process of law.

[67] E. de Grazia, op. cit. supra note 1.

[68] Ibid., at 764.

[69] See notes 61 and 64 supra. The "sexual psychopath" laws have given birth to a bastard class—neither criminal nor insane—whose members are designated "offenders" because of their offensive behavior. These unhappy nonconformists may be punished or treated just as badly as the criminal and the insane, but obtain far less in the way of due process of law. See note 61 supra for an example of the elements of their "crime" or condition of "insanity." These statutes have been upheld as noncriminal, and the requirements of criminal due process have insensibly been thought inapplicable. "Virtually all the 59 sex offenders admitted to the hospital under the Miller Act (District of Columbia's psychopath law) were men with uncontrolled desires to expose themselves, become peeping toms, molest small children, or otherwise indulge in unconventional sex activities. None was formally charged with the very serious sex offenses, rape or carnal knowledge." The Washington Post, p. 15 (Dec. 18, 1952). The same article quotes a St. Elizabeth psychiatrist to the effect that there is no scientific evidence "that persons who commit minor sex offenses progress to more heinous ones, that the Peeping Tom of today is tomorrow's rapist, that the man who fondles a child now may some day brutally attack another. . . . In fact, any evidence there is points the other way." Guttmacher and Weihofen, op. cit. supra note 57, at 111–12, indicate agreement. "[I]t is believed that sex offenders regularly progress from minor offenses such as exhibitionism to major offenses like forced rape. Such a graduation is almost unknown. . . . A fourth major source of error is the belief that all sex offenders tend to be recidivists." The authors note that "rape" and "other sex offenses" are at the bottom of the list of criminal recidivism. For a full treatment of the "sexual offender," see Karpman, The Sexual Offender and His Offenses (1954). For a sensible lay article on the subject, see Stein, The Facts on Sex Offenses against Children, Parents' Magazine (October, 1954).