

CRIMINAL RESPONSIBILITY AND MENTAL DISORDER: NEW APPROACHES TO AN OLD PROBLEM

For at least 111 years society has been searching for a will o' the wisp "legal test" of criminal responsibility, *i.e.*, liability for punishment provided by law, applicable to all cases in which the defense of insanity is raised.¹ The purpose of the search is obvious: Society wants a legal standard by which to judge whether or not a man should be held responsible for his acts in order to establish certainty in the law, both for protection of the accused and for the aid of the trier of fact. The search is complicated because considerations other than legal—those of a factual and ethical nature—must be weighed in establishing such a standard.²

An "ideal" legal formula for responsibility should balance three factors: (1) The test should be based on the criminal law principle that no man can be guilty of a crime unless he is proven capable of forming the criminal intent required for the commission of the crime, that is, capable of wilfully and consciously performing the act producing the harm.³ (2) The test should provide for the most reliable medical evidence on every facet of the accused's mental condition to aid in the determination of his responsibility at the time of the crime. (3) Finally, the test should be easily understood and applied by the trier of fact, usually the jury, guiding it to a "just" decision by relating the medical evidence to the legal principle. A test balancing these three features would do much to pro-

1. The defense of insanity may be raised at the time of the preliminary hearing, at the time of the grand jury hearing, upon arraignment, or after conviction in pre-sentence hearing. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 353 (1954); WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 253 (1933). Further references in this note to Weihofen will be to his 1954 work, which largely supplants his earlier text. The main concern of this note will be with the defense of insanity in the course of the trial, in relationship to the various legal tests of insanity.

The definition of "responsibility" is that of Professor Jerome Hall, HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 537 (1947). While the concept of responsibility imputes more than mere punishability, it will be used in this sense throughout the note. See GLUECK, *MENTAL DISORDER AND CRIMINAL LAW* 178 n. 1 (1925); Keedy, *Tests of Criminal Responsibility of the Insane*, 1 J. CRIM. L. & CRIMINOLOGY 394 (1910); Streit, *Conflicting Viewpoints of Psychiatry and the Law on the Matter of Criminal Responsibility*, 8 NOTRE DAME LAW. 146, 160 (1933).

2. HALL, *op. cit. supra* note 1, at 537.

3. GLUECK, *op. cit. supra* note 1, at 107-122; HALL, *op. cit. supra* note 1, at 138-168; Note, *Rights of the Insane Offender*, 36 MINN. L. REV. 933 (1952). Except for minor crimes involving strict liability the defendant must have sufficient freedom of will to entertain the necessary intent. GLUECK, *op. cit. supra* note 1, at 92-95; HALL, *op. cit. supra* note 1, at 563-564, 297-322. "Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." Pound, *Introduction to SAYRE, CASES ON CRIMINAL LAW* xxxvi (1927). See also Morissette v. United States, 342 U.S. 246, 251 (1952).

mote justice and protect society, by fusing the legal, factual, and moral issues involved in criminal responsibility.

Within this framework two recent developments should be examined. In September, 1953, the British Royal Commission on Capital Punishment issued a report, the result of five years of study, in which it recommended that existing legal tests of insanity be abrogated and that the jury be left to decide whether, at the time of the act, the accused was suffering from such a mental disease or deficiency that "he ought not be held responsible."⁴ On July 1, 1954, the Court of Appeals of the District of Columbia, citing the Royal Commission Report eight times, discarded its existing legal tests and adopted a new rule which leaves the jury to determine whether any criminal act was the product of mental disease or defect.⁵

The importance of these two developments can be best evaluated by a comparison with the five existing approaches to the problem. Four of these attempt to establish a legal formula for responsibility, while the fifth might be called a precursor of the two recent proposals.

I. EXISTING APPROACHES: LEGAL RESPONSIBILITY

Underlying the adoption of any legal criterion of responsibility is the assumption that mental disorder⁶ and criminal irresponsibility⁷ are not coterminous and that some formula must be provided equating the relationship between them.⁸ On this assumption the House of Lords, in 1843, asked the fifteen judges of England for a legal standard.⁹ The

4. Report of the Royal Commission on Capital Punishment 1949-1953, CMD. No. 8932 at 116 (1953). This report will be referred to as CMD. No. 8932 in the remainder of this note.

5. *Durham v. United States*, 214 F.2d 862, 874-875 (D.C. Cir. 1954). Petition for Rehearing In Banc was denied September 10, 1954. See also *Stewart v. United States*, 214 F.2d 879, (D.C. Cir. 1954). For recent case notes on *Durham* see 40 VA. L. REV. 799 (1954); 54 COL. L. REV. 1153 (1954).

6. "Mental disorder" will be used as the psychiatric term throughout this discussion. It includes mental disease and mental defect (deficiency). Mental disease implies a pathological change occurring in the mind of one who has attained some degree of maturity. CMD. No. 8932 at 73. Mental deficiency means intellectual defect of understanding or control existing at birth or at a very early age. *Id.* at 117. The *Durham* court makes a similar distinction. *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954).

7. "Criminal irresponsibility" will be used synonymously with "insanity" to represent the legal term for a mental condition deemed serious enough to absolve responsibility. A long dispute has been waged as to whether the word "insanity" is a legal or medical term. The modern view seems to make the term entirely a legal one. GLUECK, *op. cit. supra* note 1, at 12-15; Karpman, *Criminality, Insanity and the Law*, 39 J. CRIM. L. & CRIMINOLOGY 584, 585 (1949).

8. CMD. No. 8932 at 112.

9. Aroused by the acquittal, as insane, of one Daniel M'Naghten who had killed Robert Peel's secretary under paranoid delusions, the Lords asked the judges five questions. Both questions and answers were preoccupied with the concept of monomania,

judges responded with an advisory opinion that "to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring 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."¹⁰ The judges qualified the famous "M'Naghten Rules" or "right or wrong test" with a warning that to apply the test without regard to the facts would be dangerous.¹¹ The M'Naghten Rules are presently the sole legal test of responsibility in England¹² and in twenty-nine American jurisdictions,¹³ and the main test in most of the remaining American states.¹⁴

The M'Naghten Rules have long been criticized by both legal¹⁵ and

obviously related to the M'Naghten trial. These questions and answers have come to be known as Daniel M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843). See Morris, *Daniel M'Naghten and the Death Penalty*, 6 RES JUDICATAE 304 (1954); Barnes, *A Century of the M'Naghten Rules*, 8 CAMB. L.J. 300 (1944); HALL, *op. cit. supra* note 1, at 479; GLUECK, *op. cit. supra* note 1, at 161.

10. M'Naghten's Case, 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (1843). Actually, the M'Naghten Rules were not a spectacular innovation but rather a composite restatement of several existing rules. GLUECK, *op. cit. supra* note 1, at 123; HALL, *op. cit. supra* note 1, at 480; WEIHOFEN, *op. cit. supra* note 1, at 52. For a historical survey of the M'Naghten Rules see CMD. No. 8932 at 397.

11. "The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; [the judges] deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your Lordships' questions." Lord Chief Justice Tindal in M'Naghten's case, 10 Cl. & F. 200, 208, 8 Eng. Rep. 718, 722 (1843). The M'Naghten test was correct, Tindal stated, when "accompanied with such observations and explanations as the circumstances of each particular case may require." *Id.* at 211, 8 Eng. Rep. at 723. Mr. Justice Maule dissented, stating that "[A]s these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the Judges may embarrass the administration of justice, when they are cited in criminal trials." *Id.* at 204, 8 Eng. Rep. at 720.

It is repeatedly pointed out that, under the M'Naghten Rules, M'Naghten himself could not have been excused by reason of insanity, as he knew the nature and quality of his act, that it was wrong, and his only delusional mistake of fact was in shooting the wrong man. See Morris, *supra* note 9, at 322; State v. Pike, 49 N.H. 399, 439 (1869).

12. CMD. No. 8932 at 79.

13. In six of the states the test is statutory. Weihofen, *The M'Naghten Rule In Its Present-Day Setting*, 17 FED. PROB. 8 n.1 (1953). For an exhaustive digest of case citations see WEIHOFEN, *op. cit. supra* note 1, at 129; GLUECK, *op. cit. supra* note 1, at 227.

14. The District of Columbia adopted the test in 1882 in a case involving the assassination of President Garfield. *United States v. Guiteau*, 12 D.C. 498, 1 Mackey 498 (1882); reaffirmed in *United States v. Lee*, 15 D.C. 489, 4 Mackey 489 (1886). Except in New Hampshire and possibly Montana, some form of the M'Naghten test is used. See WEIHOFEN, *op. cit. supra* note 1, at 68.

15. 2 STEPHEN, *HISTORY OF THE CRIMINAL LAW IN ENGLAND* 154 *et seq.* (1883); 1 WHARTON & STILLE, *MEDICAL JURISPRUDENCE* 108 *et seq.* (3rd ed. 1873); CMD. No. 8932 at 103; Meredith, *Insanity As A Criminal Defense: A Conflict of Views*, 25 CAN. B. REV. 251 (1947).

medical professions.¹⁶ This criticism is centered on the thesis that the test is medically unsound. Psychiatry views the human personality as an integrated entity, not divisible into separate compartments of reason, emotion or volition.¹⁷ The M'Naghten Rules define responsibility solely in terms of the cognitive aspect of personality.¹⁸ While cognitive symptoms may reveal mental disorder, they alone are not sufficient to present the full picture of the disorder.¹⁹ To premise a legal test solely on one type of symptom to the exclusion of all others renders the job of adequately defining the mental condition of the accused impossible.²⁰ Thus, a de-

16. RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY § 32 (4th ed. 1860); Report No. 26, Group for Advancement of Psychiatry, Committee on Psychiatry and the Law, *Criminal Responsibility and Psychiatric Expert Testimony* 2 (1954). (Hereafter referred to as G.A.P.). A poll of Canadian psychiatrists revealed that 78 of 86 questioned were not satisfied with the M'Naghten Rules. Stevenson, *Insanity as a Defense for Crime: An Analysis of Replies to a Questionnaire*, 25 CAN. B. REV. 871 (1947). A similar poll of over 300 American psychiatrists showed 80% considered the M'Naghten test unsatisfactory. GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 407 (1952).

17. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 22 (1953); GUTTMACHER & WEIHOFEN, *op. cit. supra* note 16, at 14-26, 406; Report of Committee on Insanity and Crime, CMD. No. 2005 (1924). Stephenson, *Insanity as a Criminal Defense: The Psychiatric Viewpoint*, 25 CAN. B. REV. 731 (1947).

18. This is understandable, considering the state of the medical sciences in 1843. Phrenology was then in vogue. According to this theory, each function of the mind was localized into a compartment of the brain. A trained phrenologist could thus measure man's various traits by examining respective bumps on his head. This "science" has since been relegated largely to circus side-shows. WEIHOFEN, *op. cit. supra* note 1, at 3; GLUECK, *op. cit. supra* note 1, at 170. Furthermore, the court's assumption that a person could have paranoid delusions yet be sane in all other respects is without basis in fact. GLUECK, *op. cit. supra* note 1, at 162 n.2; WEIHOFEN, *op. cit. supra* note 1, at 4; OVERHOLSER, *op. cit. supra* note 17, at 63; MERCIER, *CRIMINAL RESPONSIBILITY* 174 (1905). The M'Naghten Judges set up conflicting legal tests for such insane delusions. M'Naghten's Case, 10 Cl. & F. 200, 209, 211, 8 Eng. Rep. 718, 722, 723 (1843). Though delusions are only symptoms representing phases of more serious mental disorder, many courts continue to use such legal tests of monomania. WEIHOFEN, *op. cit. supra* note 1, 103-113. Indiana is apparently included in this group. See Note, 21 NOTRE DAME LAW. 193, 195 (1946); *McHargue v. State*, 193 Ind. 204, 139 N.E. 316 (1923); *Stevens v. State*, 31 Ind. 485 (1869) (the monomania must be related to the crime).

19. The Group for Advancement of Psychiatry emphasizes this fact: "Modern psychiatry recognizes the role of the intellect, but would give to the emotions and the unconscious a greater weight in the balance of forces in mental life, and would assert that their boundaries and degree are not readily ascertainable." G.A.P., *supra* note 16, at 2.

20. Criminal irresponsibility should not be made to rest upon any particular symptom, for, by so defining it the courts assume an impossible role, for which they have no special competence. *Durham v. United States*, 214 F.2d 862, 871 (D.C. Cir. 1954). See also CMD. No. 8932 at 114.

As one psychiatrist words it, ". . . except for totally deteriorated, drooling, hopeless psychotics of long standing, and congenital idiots—who seldom commit murder or have the opportunity to commit murder—the great majority and perhaps all murderers know what they are doing, the nature and quality of their act, and the consequences thereof, and they are therefore 'legally sane' regardless of the opinions of any psychiatrist." ZILBOORG, *MIND, MEDICINE AND MAN* 273 (1943). See also Comment, 39 KY. L.J. 463, 465 (1951); Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 YALE L.J. 183, 184 (1953).

fendant with a severe mental disorder may be held legally responsible.²¹ For this reason both *Durham*²² and the Royal Commission²³ rejected the M'Naghten Rules as a legal standard.

To complement the M'Naghten test, American courts have developed the "irresistible impulse" test, which is intended to cover the important volitional aspect.²⁴ Under this added test, even though the accused might realize the nature and quality of his act and understand that it is wrong, he is not responsible if an uncontrollable impulse, resulting from mental disorder, makes it impossible for him to refrain from doing the illegal act.²⁵ If a mental disorder destroys the defendant's power to choose between right and wrong, though he may know the difference, he is not held responsible.²⁶ Today fourteen states use this test along with some form of the M'Naghten Rules.²⁷

The irresistible impulse test is criticized as providing a view of man's volition so narrow as to be misleading.²⁸ The term has basis in scientific

21. See note 93 *infra*.

22. "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." *Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954).

23. CMD. No. 8932 at 102-116.

24. The beginnings of the concept were in Ohio, prior to the M'Naghten pronouncement. *State v. Thompson*, Wright's Ohio Rep. 617, 622 (1834); *Clark v. State*, 12 Ohio Rep. 483, 495 (1843). The term "irresistible impulse" was first used by Judge Shaw in *Commonwealth v. Rogers*, 7 Metc. 500 (Mass. 1844), although the exact test adopted was left in doubt. HALL, *op. cit. supra* note 1, at 509. *Commonwealth v. Mosler*, 4 Pa. 264 (1846), did clearly adopt the test. In general, see GLUECK, *op. cit. supra* note 1, at 232; HALL, *op. cit. supra* note 1, at 505; WEIHOFEN, *op. cit. supra* note 1, at 81.

25. *State v. Lowhone*, 292 Ill. 32, 126 N.E. 620 (1920). The District of Columbia adopted this test in *Smith v. United States*, 36 F.2d 548 (D.C. Cir. 1929). Indiana was one of the pioneer states in adopting the irresistible impulse test. *Stevens v. State*, 31 Ind. 485 (1869); *Bradley v. State*, 31 Ind. 492 (1869); *Goodwin v. State*, 96 Ind. 550 (1884); *Swain v. State*, 215 Ind. 259, 18 N.E.2d 921 (1939); *Kallas v. State*, 227 Ind. 103, 83 N.E.2d 769 (1949).

26. A famous application of the irresistible impulse test is made by Judge Somerville in *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1886). An Australian case, *Sodeman v. The King*, 55 C.L.R. 192 (1936), shows the possible interrelation of the M'Naghten Rules and the irresistible impulse concept. See Morris, *supra* note 9, at 326.

27. Weihofen, *The M'Naghten Rule in its Present-Day Setting*, 17 FED. PROB. 8 n.2 (1953). WEIHOFEN, *op. cit. supra* note 1, at 129-173. Although the rule was advocated by a 1923 Committee on Insanity and Crime (Lord Atkin's Committee), CMD. No. 2005 at 21 (1923), England has never recognized the test. For a detailed and favorable consideration of the rule see Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. OF PA. L. REV. 956-993 (1952).

28. CMD. No. 8932 at 110. The fear that irresistible impulse might become a defense for every criminal act is voiced by Waite, *Irresistible Impulse and Criminal Liability*, 23 MICH. L. REV. 443, 445 (1925). A philosophical attack is made on this test in Note, 5 NOTRE DAME LAW. 188 (1930). The various criticisms of the test are summarized and rebutted in an earlier article by Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535, 546-551 (1917), as well as in his recent article, *supra* note 27, at 986-993.

fact only in minor crimes resulting from obsession-compulsion disorders.²⁹ Seldom, if ever, does the disorder produce a major crime.³⁰ Furthermore, the test completely fails to recognize mental illness characterized by brooding and reflection. Thus the glimpse of volition allowed the trier of fact in determining the responsibility of the accused is insufficient.³¹ On these grounds this test was also rejected by *Durham*³² and the Royal Commission.³³

A third approach has been suggested by which the legal standards may be brought closer to medical facts through a broad interpretation of the M'Naghten terminology recognizing the psychiatric theory of integration.³⁴ One who cannot control his actions because of mental disorder is

29. GUTTMACHER & WEIHOFEN, *op. cit. supra* note 16, at 56-60; OVERHOLSER & RICHMOND, HANDBOOK OF PSYCHIATRY 214 (1947); Karpman, *supra* note 7, at 589; Spier, *The Psychology of Irresistible Impulse*, 33 J. CRIM. L. & CRIMINOLOGY 457 (1943). Besides kleptomania, pyromania, and exhibitionism, there may be conditions where complete inability to resist the "impulse" exists, *i.e.*, epileptics, paralytics and schizophrenics. WEIHOFEN, *op. cit. supra* note 1, at 84; GLUECK, *op. cit. supra* note 1, at 304; Aschaffenburg, *Psychiatry and Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 3, 5 (1941).

30. One psychiatrist states flatly that no homicidal or suicidal crime ever results from obsession-compulsion neuroses. "The medico-legal theory of irresistible impulse . . . lends an air of scientific literalness and accuracy to a purely legal definition without any foundation in the facts of life or science." WERTHAM, *THE SHOW OF VIOLENCE* 13 (1949). See also Gordon, *Medico-Legal Aspect of Morbid Impulses*, 12 J. CRIM. L. & CRIMINOLOGY 604, 607 (1922). But see Aschaffenburg, *supra* note 29 at 5; Keedy, *supra* note 27, at 989.

Another criticism is levelled at the difficulty of proving the "irresistibility" of the impulse, which the definition unfortunately requires. The jury is faced with deciding when the impulse was irresistible and when it was merely unresisted, a job which many psychiatrists deem impossible. ZILBOORG, *op. cit. supra* note 20, at 274. For this reason, the law has often taken a cynical view toward the irresistible impulse test. "The law says to men who say they are afflicted with irresistible impulses: 'If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help.'" Judge Riddell's charge to the jury in *The King v. Creighton*, 14 Can. Crim. Cas. 349, 350 (1908).

31. Mere addition of the irresistible impulse rule to the standard right-wrong test is not sufficient to please modern psychiatrists. Of 86 Canadian psychiatrists surveyed in 1947, 84 considered the combined test inadequate. Stevenson, *supra* note 16, at 871. Both tests are inadequate to judge criminal acts stemming from unconscious motivations. Both fail to recognize that people are usually more influenced by emotions than by reasoning. Both ignore the fact that the criminal behavior is the result of complex psychological processes of which the criminal may be largely unaware. WEIHOFEN, *op. cit. supra* note 1, at 85.

32. 214 F.2d 862, 874. (D.C. Cir. 1954).

33. CMD. No. 8932 at 109.

34. Broad interpretation was forcefully advocated by Sir James Stephen as early as 1883, as he emphasized that delusions were merely external symptoms of an all-inclusive mental disease. STEPHEN, *op. cit. supra* note 15, at 157. See CMD. No. 8932 at 79-86, 399-401; GLUECK, *op. cit. supra* note 1, at 166-186.

More recently, the interrelationship of broad interpretation to the integration theory has been set forth by HALL, *op. cit. supra* note 1, at 492-493, 499, 521-538. "Inevitably, therefore, serious mental disease impairs all aspects of the psychological organism." *Id.* at 521. For an early case discussion of the integration concept see *State v. Harrison*, 36 W. Va. 729, 15 S.E. 982 (1892).

unable, really, to "know" the nature and quality of his act; a diseased volition cannot exist apart from a diseased intelligence.³⁵ While the un-specific language of the M'Naghten Rules could be so interpreted,³⁶ the courts have been unwilling openly to admit such a broad interpretation.³⁷

Yet, in practice, the courts using the M'Naghten Rules have apparently allowed such elasticity.³⁸ If the tests have worked well, it must be attributed to a broad misapplication of the rules by either the jury or the judge or to procedural safeguards afforded the accused once the

35. While Stephen would apparently add a test similar to irresistible impulse, Hall would oppose any such supplementary test, "[f]or the psychological hypothesis which is the foundation of the 'irresistible impulse' test cannot be maintained simultaneously with the theory of 'the integration of the self.'" HALL, *op. cit. supra* note 1, at 523. The defense often made of irresistible impulse, that one may know clearly the nature and quality of his act, and that it is wrong, yet is unable to restrain himself, flies in the face of the integration theory. *Id.* at 524.

Hall's view has been attacked on the ground that "the irresistible impulse test is a more effective and less confused method of presenting the problem to the juries than an attempt to explain to them the self theory, which is claimed by Hall to embody the irresistible impulse idea." Note, 32 IOWA L. REV. 714, 719 (1947). Also, it has been suggested that a disorder may affect one of the mental processes more than another. "A disorder manifesting itself in impulses which can be said to have been 'irresistible,' may affect intelligence somewhat, but not necessarily to such extent as to obliterate knowledge of right and wrong." WEIHOFEN, *op. cit. supra* note 1, at 96. Neither of these criticisms bears much weight under a close examination of Hall's thesis. The job of informing the jury concerning the integration theory would be primarily done by the expert witness, in addition to the non-psychiatric judge, and should be as easily handled, if not more easily, than the irresistible impulse test, which has been criticized by psychiatrists (see note 30 *supra*), as well as by the court. (Yet see GLUECK, *op. cit. supra* note 1, at 220.) Furthermore, the whole point of Hall's argument is that the interpretation of "knowledge" would be broad enough to include the impulse when judging whether the defendant, as compared to a normal person, really "knew" the full consequences of his actions. A more serious objection might be raised as to the proof of validity of the integration theory itself, which may later be discarded, and to the possibility of grave misuse and confusion created by various counsel who argue the cases. In this light, it might force upon the judge an ethical determination (which is always present to some degree) as to which interpretation of the integration theory to accept in presenting to the jury the broadened right-wrong test.

36. A great dispute has been waged as to the exact meanings of numerous words and phrases used in the M'Naghten Rules, *e.g.*, whether "wrong" means legally wrong, *R. v. Windle*, 36 Cr. App. R. 85, 90 (1952); CMD. No. 8932 at 81, or morally wrong, *People v. Schimdt*, 216 N.Y. 324, 110 N.E. 945 (1915). See WEIHOFEN, *op. cit. supra* note 1, at 63-81; GLUECK, *op. cit. supra* note 1, at 219-227; MORRIS, *supra* note 9, at 312-321; BARNES, *supra* note 9, at 303-304.

37. As the Royal Commission Report stated, "[t]his somewhat strained and artificial interpretation of their [M'Naghten Rules] language has not, however, found favour with the judiciary, or with the members of the legal profession generally." CMD. No. 8932 at 80. See *Ronald True's Case*, 16 Cr. App. R. 164 (1922); GLUECK, *op. cit. supra* note 1, at 186. American courts would appear to cling to a narrow definition of the right-wrong test although a flat statement is impossible.

38. CMD. No. 8932 at 80-88; MORRIS, *supra* note 9, at 321, 333. Very few mentally irresponsible persons have been convicted under the right-wrong test, according to BURDICK, *THE LAW OF CRIME* § 203, (1946); "[I]n practice the application of these rules [M'Naghten Rules] does not appear to have led to any grave miscarriage of justice." SMITH, *FORENSIC MEDICINE* (8th ed. 1943), as quoted in a letter to the editor, 26 CAN. B. REV. 617, 619 (1948).

tests have been strictly applied.³⁹ To defend the legal tests on these grounds does little to enhance the prestige of the law in the eyes of the public or its psychiatric critics.

In 1954 the supreme court of New Mexico adopted a new test which it termed an extension of the M'Naghten Rules in an effort to allow deeper inquiry into the full personality of the offender. This extension would add to the right-wrong test the theory that no responsibility for the crime could be found if the accused, by mental disease, "was incapable of preventing himself from committing it."⁴⁰ This is identical to the amendment suggested by the British Royal Commission.⁴¹ The majority of the commission argued, however, that for this test to allow full inquiry into the mental disorder of the accused, the broadest possible interpretation would be necessary. This, in effect, would leave the jury to determine whether the mental condition of the accused was such that he ought not be held responsible, which was the Commission's major recommenda-

39. The Lord Goddard, Chief Justice of England, and other officials of the English criminal law have agreed that the M'Naghten Rules were often flexibly interpreted by the bench, and if not, the jury could be trusted to "do justice where it might be impossible to bring the case strictly within the M'Naghten Rules. . . ." CMD. No. 8932 at 82. One Justice admitted that where the prisoner was obviously insane, he would never refer the jury to the M'Naghten Rules. *Id.* at 84. Hall admits of such flexible interpretation: "It is conceded, however, even by the staunchest supporters of the M'Naghten Rules, that their defense requires much reliance on the actual practices of the courts as well as on executive review and modification of sentences." HALL, *op. cit. supra* note 1, at 505. The various procedural means available to one found guilty under this test include appeal, presentence hearing, petition for pardon or leniency to governing official of the state, and prison sanity examination.

Mr. Justice Frankfurter of the U. S. Supreme Court told the Royal Commission that the M'Naghten Rules were largely discredited by those who administer them in the United States, and that the law should be more honest about it. "I think that to have rules which cannot rationally be justified except by a process of interpretation which distorts and often practically nullifies them, and to say the corrective process comes by having the Governor of a state charged with the responsibility of deciding when the consequences of the rule should not be enforced, is not a desirable system. . . ." CMD. No. 8932 at 102. Declaring that the M'Naghten Rules "are in a large measure shams," Mr. Justice Frankfurter concluded that they ". . . are very difficult for conscientious people and not difficult enough for people who say, 'We'll just juggle them.'" *Ibid.*

40. *State v. White*, 270 P.2d 727, 731 (N. Mex. 1954). Previously the New Mexico court used only the M'Naghten Rules as its test of responsibility. *State v. Moore*, 42 N.M. 135, 76 P.2d 24 (1938), *State v. Roy*, 40 N.M. 397, 60 P.2d 650 (1936). Unfortunately, the Court of Appeals of the District of Columbia erroneously construed this adopted test of New Mexico as stating that "lack of knowledge of right and wrong is not essential for acquittal 'if, by reason of disease of the mind, defendant has been deprived of or lost the power of his will. . . .'" *Durham v. United States*, 214 F.2d 862, 872 n.32 (D.C. Cir. 1954). This suggestion, a requested instruction by the defendant and the basis of appeal, is flatly rejected by the New Mexico court. *State v. White, supra* at 730.

41. CMD. No. 8932 at 111, 116. The New Mexico court, in fact, quotes the Royal Commission suggestion as stating the rule of law applicable to the defense of insanity in their jurisdiction. *State v. White, supra* note 40, at 731. The proposal, though modified, was originally that of the British Medical Association. CMD. No. 8932 at 93, 110.

tion.⁴² This is a possible method by which to align more closely the scientific concept of mental disorder and the legal concept of insanity.⁴³

Admitting that no completely satisfactory legal test of insanity had at that time been found and that prospects of finding one were infinitesimal, New Hampshire made insanity a question of fact for the jury 84 years ago. The "New Hampshire rule" had its origin in a dissenting opinion in *Boardman v. Woodman*, an 1866 civil litigation concerning the capacity of a testator to make a will.⁴⁴ The dissent by Judge Doe stated that whether or not the testator had a mental disease was a question of fact for the jury, which should be instructed that if the will was the product of the disease the testator should be considered of unsound mind.⁴⁵ Judge Doe protested against the use of a discredited medical theory as a test of insanity, stating, "that cannot be a fact in law which cannot be a fact in science."⁴⁶

Three years later, in a homicide case, the trial judge instructed the jury in Judge Doe's terminology, that if the homicide was the product of the mental disease of the defendant, he was not guilty by reason of insanity. On appeal, Judge Doe was given further opportunity to elaborate on his rule.⁴⁷ Doe explained that the then existing legal tests forced both judge and expert witness to exceed their authority.⁴⁸ He added that the difficulty of determining whether the disease produced the act arose from the nature of the facts to be investigated, and was a practical ques-

42. CMD. No. 8932 at 115. For the amendment adequately to do the job for which it is intended, it would be necessary to interpret it as meaning that the accused not only was incapable of preventing himself from doing the criminal act had he tried to do so, "but that he was incapable of wishing or of trying to prevent himself, or incapable of realizing or attending to considerations which might have prevented him if he had been capable of realizing or attending to them." *Id.* at 111. "In view of the rigidity with which the existing Rules are now sometimes construed, it is impossible to be sure that the broader interpretation would prevail, especially since, if the change were made by statute—as it would presumably have to be—judges might feel less free to apply them otherwise than strictly." *Id.* at 112.

43. In a dissenting opinion in the White case, Justice Sadler objects to the extension as being nothing more than a disguised irresistible impulse test. *State v. White*, 270 P.2d 727, 737 (N. Mex. 1954).

44. 47 N.H. 120 (1866).

45. *Id.* at 147.

46. Judge Doe stated, "If it be necessary that the law should entertain a single medical opinion concerning a single disease, it is not necessary that that opinion should be a cast-off theory of physicians of a former generation." *Id.* at 150. The discredited theory to which he was referring was that of insane delusion.

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

48. *Id.* at 441. "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." *Ibid.*

tion for the jury to resolve.⁴⁹

This ruling was affirmed in 1871 in *State v. Jones*, a case involving the murder of a wife for alleged infidelity.⁵⁰ On the issue of insanity, Judge Ladd stated, the jury must be satisfied beyond a reasonable doubt that the killing was not produced by mental disease to find the defendant guilty.⁵¹ Then he deepened the analysis of Judge Doe. The ultimate question, he said, was whether the accused, at the time of the act, had the mental capacity to entertain a criminal intent.⁵² All symptoms were to be weighed by the jury in considering whether the act was the offspring of insanity: "if it was, a criminal intent did not produce it; if it was not, a criminal intent did produce it and it was a crime."⁵³ Under this analysis it would seem that the extent to which the mental disorder reduces the possibility of forming a criminal intent would be the extent to which the disorder may be said to have caused the act.⁵⁴

49. *Id.* at 438. In a letter to Dr. Isaac Ray, the American pioneer in forensic psychiatry, April 14, 1868, Judge Doe stated, "[J]uries may make mistakes, but they cannot do worse than courts have done in this business. . . ." See Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration of the Jurisprudence of Mental Disease*, 63 *YALE L.J.* 183, 188 (1953). Doe relied a great deal on the medical views of Dr. Ray, who recognized that "responsibility implies the integrity of all the mental powers, moral as well as intellectual." *Id.* at 188. Ray firmly supported the Doe position. After the *Pike* decision Ray wrote Doe, "This rule indicates a great advance beyond the usual practice,—too great I fear to be very generally adopted even in your generation." *Id.* at 192. Doe was well aware of the difficulties facing his "new" test, and outlined to Ray his strategy of gaining legal acceptance of the rule as founded on a venerable principle of the common law. *Id.* at 193.

50. 50 N.H. 369 (1871).

51. *Id.* at 400.

52. *Id.* at 382.

53. *Id.* at 399.

54. See Comment, 25 *TEXAS L. REV.* 295, 296 (1947). The New Hampshire Rule received early praise. "The friends of humanity may now rejoice in the well grounded faith that the day is not far distant when we shall cease to take the lives of the insane on the strength of a metaphysical subtlety." 4 *AM. L. REV.* 236, 252 (1870). (While unsigned, the article is attributed to Dr. Ray. See Reik, *supra* note 49, at 195.)

One authority predicted that, because of the juror's lack of training, the lack of stare decisis in jury verdicts, and the lack of a "superior jury" to review and correct blunders of an "inferior jury," the whole law "will become a blank, and the doctrine of responsibility will be thrown into a chaos in which it will be impossible to determine who is responsible or irresponsible, sane or insane." WHEARTON & STILLE, *op. cit. supra* note 15, §§ 108-115. See GLUECK, *op. cit. supra* note 1, at 254-264; WEIHOFEN, *op. cit. supra* note 1, at 113-119. The New Hampshire rule has been specifically rejected in three states, California, Washington and Wisconsin. See *People v. Hubert*, 119 Cal. 216, 223, 51 Pac. 329 (1897); *State v. Craig*, 52 Wash. 66, 70, 100 Pac. 167 (1909); *Eckert v. State*, 114 Wis. 160, 89 N.W. 826 (1902). The rule has been cited with favor by Indiana, *Stevens v. State*, 31 Ind. 485, 490 (1869); Georgia, *Wilson v. State*, 9 Ga. App. 274, 285, 70 S.E. 1128 (1911); and Alabama, *Parsons v. State*, 81 Ala. 577, 592. But see *Id.* at 608. Montana apparently has adopted the New Hampshire rule. Criminal responsibility is to be determined solely by the capacity of the defendant to entertain the intent to commit the particular crime. *State v. Peel*, 23 Mont. 359, 59 Pac. 169 (1899). This view is apparently affirmed in *State v. Keerl*, 29 Mont. 508, 75 Pac. 362 (1904), but one judge there dissents, stating, "I am unable to reconcile the doctrine announced

The decision of the Court of Appeals in *Durham v. United States* marks the first modern abandonment of the standard legal tests.⁵⁵ The defendant, who had previously been convicted of auto theft and passing bad checks, was convicted of housebreaking, a misdemeanor, in the lower court which sat without jury. Although only twenty-three at the time of the crime, Durham had been under observation at St. Elizabeth's mental hospital on three different occasions, and had once been typed as a psychotic with psychopathic personality. After each hospital observation he had been released as "recovered," the last release occurring just two months before the housebreaking. Durham appealed on the ground that the existing legal tests of insanity were obsolete.⁵⁶ The court of appeals reversed the lower court's decision, making insanity a question of fact for the jury to determine on the basis of the new rule, "that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."⁵⁷

By including mental defect in its ruling, the court extended the scope of mental disorder as used in New Hampshire.⁵⁸ But by failing to mention a mental disorder-criminal intent relationship, with which Judge Ladd had refined the New Hampshire rule in the *Jones* case, the *Durham* court failed to adopt the New Hampshire rule in toto.⁵⁹

in [*State v. Pike* and *State v. Jones*], which I think correct, and which seems to be approved, with what is said in the other portions of the opinion of the majority of the court." *Id.* at 523. See *State v. Crowe*, 39 Mont. 174, 102 Pac. 529 (1909); *State v. Narich*, 92 Mont. 17, 9 P.2d 477 (1932); and see Note, 1 MONT. L. REV. 69 (1940).

55. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). "The rule we now hold . . . is not unlike that followed by the New Hampshire court since 1870." *Id.* at 874.

56. There were two bases of appeal, the other being that "the trial court did not correctly apply existing rules governing the burden of proof on the defense of insanity." *Id.* at 864. Reversal was granted on both counts.

57. *Id.* at 874-875. Surprisingly enough, the District of Columbia adopted its new rule in a case involving neither homicide nor a jury, and fully disclosing the shortcomings of psychiatry.

58. New Hampshire made no distinction between mental disease and mental defect, apparently grouping both concepts under "disease." *State v. Pike*, 49 N.H. 399 (1869); *State v. Jones*, 50 N.H. 369 (1871).

59. The only reference to criminal intent made by the *Durham* court occurs in the concluding paragraph. "The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility." *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954).

One reason why the *Durham* court refused to go as far as Judge Ladd may be found in the brief of the *Amicus Curiae*, p. 30-31, *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954), filed by Abraham Chayes. It suggests that the disease-intent relationship, if literally applied, might result in more severity than the M'Naghten Rules, if "intent" is not conceived as the product of the total personality. Incapacity to form intent may be just another symptom of disease, which would confuse the expert and distort the issues

While the *Durham* rule followed the report of the British Royal Commission by almost a year, it does not go as far as the majority recommendation that the jury be left with no "test" at all. The *Durham* rule stresses the need for showing a causal relationship between mental disorder and act.⁶⁰ The majority of the Royal Commission deemed it preferable to "abrogate the [existing] Rules and leave the jury to determine whether at the time of the act the accused was suffering from a disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible."⁶¹ The *Durham* rule provides the judge with one method of control—that of instructing in terms of causation. Under the commission rule responsibility becomes almost wholly a moral consideration for the jury, once it is determined that the accused was suffering from some mental disorder at the time of the act.⁶² Thus, the British recommendation, by its terms, expresses greater faith in the ability of the jury to arrive at a "just" verdict without benefit of legal test.⁶³

Theoretically, both the *Durham* and Royal Commission rules give the jury far more power to determine criminal responsibility than the standard legal tests. The wisdom of this approach cannot be adequately assessed without a closer examination of the role of the expert witness, the judge and the jury in making the legal-factual-ethical determination of responsibility.

II. THE EXPERT WITNESS: FACTUAL RESPONSIBILITY

To be completely successful, any test of responsibility should necessitate a high degree of teamwork between the psychiatric and legal pro-

for the jury. "This second formulation of the New Hampshire test seems designed to insure that only serious or advanced mental disorders will be effective to confer immunity from punishment. If this is so, the end is better served and with less confusion by incorporating the requirement of serious disorder in the first version of the test [did the disease produce the act]. That would then require the jury to say whether the defendant was suffering from severe mental disorder of which the act charged was a consequence. So limited, the test could not be considered too lenient." *Id.* at 31.

60. *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954).

61. CMD. No. 8932 at 116, 96-116. While more members of the commission favored the amendment of the M'Naghten Rules previously discussed, (10 of 11), a majority of the commission (8 of 11) deemed complete abrogation preferable. The lone dissenter to amending the Rules, strangely enough, would prefer complete abrogation if any alteration was made, because he doubted that any satisfactory alternative could be devised. *Id.* at 284. The majority of the witnesses examined by the commission, however, were opposed to the suggestion that the M'Naghten Rules be abrogated to allow the jury to decide responsibility without any legal criterion. The three members opposing abrogation are, needless to say, quick to point this out, in a cogent dissenting memorandum. *Id.* at 285.

62. CMD. No. 8932 at 99-102, 115.

63. Yet, the Royal Commission recommendation may be identical to the *Durham* rule in this respect. See p. 212 *infra*.

fessions.⁶⁴ Existing legal tests have apparently failed in this respect, because psychiatrists are almost unanimous in their opinion that there can be no universal medical test of responsibility.⁶⁵ To the psychiatrist there is almost an infinite range of degrees of irresponsibility.⁶⁶ Likewise, numerous tests recommended by psychiatrists have not met with enthusiasm from lawyers.⁶⁷ The most recent psychiatric proposal, as stated in a 1954 committee report of the Group for Advancement of Psychiatry, suggests a two-fold test for determining criminal responsibility. The Group would first define "mental illness" as "an illness which so lessens the capacity of a person to use (maintain) his judgment, discretion and control in the conduct of his affairs and social relations as to warrant his commitment to a mental institution."⁶⁸ Then, a defendant suffering from such mental illness, who "in consequence thereof," commits a criminal act would not be held responsible.⁶⁹ Such a test, the Group points out, would enable the psychiatrist to meet the requirements of an insanity defense in his own terms.⁷⁰

While the issue of causation would remain for the jury to determine under this test, the expert would supplant the jury in deciding whether the accused should be committed to an institution. The expert's decision might also tend to make the jury's consideration of causation more or less automatic. Under this test, therefore, the psychiatrist would play a much greater role than under *Durham*.

Similar suggestions, and at least one concrete effort, have been made in the past to allow the expert, rather than the jury, decide the issue of

64. As Stephen said in 1883, ". . . in dealing with matters so obscure and difficult the two great professions of law and medicine ought rather to feel for each other's difficulties than to speak harshly of each other's shortcomings." STEPHEN, *op. cit. supra* note 15 at 128.

65. Professor John Whitehorn of Johns Hopkins recently reported to a Maryland Commission on Legal Psychiatry that "[t]he medical profession would be baffled if asked to write into the legal code universally valid criteria for the diagnosis of the many types of psychotic illness which may seriously disturb a person's responsibility, and even if this were attempted the diagnostic criteria would have to be rewritten from time to time, with the progress of psychiatric knowledge." Quoted in GUTTMACHER & WEIHOFEN, *op. cit. supra* note 16, at 419-420. See Report of the Committee on Criminal Responsibility of the British Medico-Psychological Association in CMD. No. 2005, at 29; GLUECK, *op. cit. supra* note 1, at 278; CMD. No. 8932 at 101; OVERHOLSER, *op. cit. supra* note 17, at 24-25; G.A.P., *supra* note 16, at 6.

66. CMD. No. 8932 at 100. See also *Holloway v. United States*, 148 F.2d 665, 667 (D.C. Cir. 1945).

67. The legal profession in general seems to have been suspicious of psychiatrists, as well as their proposed tests. See OVERHOLSER, *op. cit. supra* note 17, at 132.

68. G.A.P., *supra* note 16, at 8.

69. *Ibid.*

70. "The psychiatrist can answer the condition—'in consequence of such illness he committed the act,'—not in the sense that mental illness *causes* the crime, but in the sense that mental illness vitiates the normal capacity for control." *Id.* at 8 n.25.

criminal responsibility.⁷¹ The most generally suggested plan would allow the jury to decide whether the defendant did the act charged. If so, a "jury" of experts would determine whether the mental condition of the accused was such as to render him irresponsible.⁷² An attempt by the state of Washington to do this was held unconstitutional as a violation of due process and the right to trial by jury.⁷³

Assuming the constitutional barrier could be circumvented, the decision to let the experts decide responsibility would encounter strong opposition on other grounds. While psychiatry has admittedly made great strides, it still remains a young science with often conflicting theories.⁷⁴

71. GLUECK, *op. cit. supra* note 1, at 461-487; WEIHOFEN, *op. cit. supra* note 1, at 475-489; GUTTEMACHER & WEIHOFEN, *op. cit. supra* note 16, at 443. Another test is suggested by psychiatrists Bromberg and Cleckley, *The Medico-Legal Dilemma: A Suggested Solution*, 42 J. CRIM. L. & CRIMINOLOGY 729 (1952). They propose that the concept of criminal responsibility be replaced by a concept of "accountability," which "postulates an external value-judgment which society applies to the individual for his acts, *i.e.*, punishability." *Id.* at 742. They would attempt to omit the moral knowledge and free choice elements involved in "responsibility" by their definition, for "[i]t is inevitable . . . that when moral judgment or moral knowledge remains the main point on which estimation of mental disease turns in deciding criminal responsibility, psychiatry can offer little constructive help." *Id.* at 743. The psychiatric witness would be able to answer the accountability question: "Is this man to be considered less than fully accountable for his crime by virtue of mental disease, and to what degree?" *Id.* at 744.

While any attempt to eliminate the philosophical conflict of free will versus determinism, and to emphasize the integration theory of total personality is commendable, the authors omit any discussion of the role of the jury under such a test. It is to be supposed that the jury would become pretty much a rubber-stamp once the psychiatrists had answered the accountability question. The definition of "accountability" used by the authors is precisely the same as used by Hall to define "responsibility." Whether this "test" provides any surer determination of the mental condition of the accused than the Durham approach which provides the safeguard of a jury, remains to be spelled out by the proponents of this plan.

72. See Note, 4 J. CRIM. L. & CRIMINOLOGY 106, 107 (1913); WHITE, *INSANITY AND THE CRIMINAL LAW* 168 (1923); CARDOZO, *LAW AND LITERATURE* 79-82 (1931). It is interesting to note that the Durham court must have considered this possibility in adopting their new test. See Brief for Appellant on Reargument, p. 32, *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

73. The Washington statute denied the defense of insanity completely, but allowed the court to exercise discretion in placing convicted criminals in mental hospitals when it appeared necessary. The court stated that as *mens rea* was a necessary element in common law crimes, the statute would interfere with the determination of the criminal intent. *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910). See Rood, *Statutory Abolition of the Defense of Insanity in Criminal Cases*, 9 MICH. L. REV. 126 (1910). A similar Mississippi statute was held unconstitutional (violation of due process) in *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931). Glueck feels that any displacement of the jury in determining the mental element of the crime would meet a similar fate. GLUECK, *op. cit. supra* note 1, at 464. Likewise, Weihofen states ". . . under traditional conceptions of criminal law and procedure it is probably impossible to induce the courts to permit a person to be stigmatized as 'guilty' of crime except upon the verdict of a jury, if he demands such procedure." WEIHOFEN, *op. cit. supra* note 1, at 480.

74. As Justice Clark stated, "The science of psychiatry has made tremendous strides since that test was laid down in M'Naghten's Case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the

Psychiatrists differ not only as to terminology but also as to the kind and degree of mental abnormality which is required to absolve an offender from criminal responsibility.⁷⁵ While the psychiatrist can perform invaluable services by classifying symptoms and describing their effects on conduct, he cannot with certainty define the exact state of the individual mind.⁷⁶

The function of the psychiatrist, then, is not to make the ultimate decision of guilt or innocence, but to inform the jury as fully as possible, of the mental condition of the accused, thus to assist in the discovery of any mental disorder on which the legal standard of insanity must be brought to bear.⁷⁷

Under standard legal tests, the psychiatrist in his role as an expert witness often does not appear in a favorable light.⁷⁸ Much of the blame for this must be borne by the law. While the psychiatrist admittedly can neither "fit any scientifically validated entity of psychopathology into the present legal formulae of insanity" nor "testify in any manner in terms of moral judgment," he is often required to do just that.⁷⁹ Under the M'Naghten Rules, the expert is forced to testify primarily in terms of capacity to differentiate right from wrong, to the exclusion of other symptoms. He is compelled to answer a legal question of knowledge, which cannot be scientifically determined;⁸⁰ in so doing, he realizes that his testimony may be the sole basis for determining guilt or innocence.⁸¹

right and wrong test from their criminal law." *Leland v. Oregon*, 343 U.S. 790, 800 (1951). See HALL, *op. cit. supra* note 1, at 538.

75. CMD. No. 8932 at 100.

76. See G.A.P., *supra* note 16, at 6. ". . . Psychiatry has many limitations, not the least of which is the enthusiasm that has led to exaggerated claims as to current accomplishments. The best psychiatry is still more of art than of science. . . ." Sullivan, *Psychiatry*, 12 ENCYC. SO. SCI. 578, 580 (1934). The Illinois Supreme Court has gone so far as to declare, in dictum, that "[w]hile physicians are better qualified to testify to a diseased condition than are laymen, their testimony upon the subject of the mental capacity of an individual whom they have been privileged to observe is not entitled to any greater weight than that of laymen." *Tyler v. Tyler*, 401 Ill. 435, 441, 82 N.E.2d 346 (1948).

77. *Holloway v. United States*, 148 F.2d 665, 667 (D.C. Cir. 1945).

78. See Overholser, *Psychiatric Expert Testimony in Criminal Cases Since M'Naghten—A Review*, 42 J. CRIM. L. & CRIMINOLOGY 283 (1951).

79. G.A.P., *supra* note 16, at 6.

80. Dr. A. M. Barrett has emphasized this. "[T]o state whether the degree and quality of this disease abolished or impaired the capacity to reason as to the nature and consequences of an act, or whether it excluded free choice of action, or abolished the normal control of impulses to harmful actions must be impossible and would be an opinion open to controversy and debate." Quoted by Waite, *supra* note 28, at 456 n. 14.

81. G.A.P., *supra* note 16, at 4-6; CMD. No. 8932 at 103; Overholser, *The Place of Psychiatry In The Criminal Law*, 16 B.U.L. REV. 322, 329 (1936); GUTTMACHER & WEIHOFEN, *op. cit. supra* note 16, at 407. In a recent dissent Chief Judge Biggs of the Third Circuit stated, "The law, when it requires the psychiatrist to state whether in his opinion the accused is capable of knowing right from wrong, compels the psychiatrist to

The expert may be forced to violate his professional oath by attempting to relate scientific data to a non-scientific test. Frequently the expert must also violate his oath as a witness—"to tell the whole truth"—by perjuring his testimony concerning the ability of the accused to distinguish between right and wrong "for the sake of justice."⁸²

Viewing the role of the psychiatrist under the standard legal tests in this light, it is not surprising that good psychiatrists often shun this duty. The requirement that an expert must testify for or against a defendant does not elicit the best psychiatric evidence.⁸³ Furthermore, the harsh treatment the expert witness has often received at the hands of experienced prosecutors or defense counsel has not increased the enthusiasm of successful psychiatrists for testifying.⁸⁴

The *Durham* rule will eliminate many, but not all, of the burdens placed upon the psychiatrist who testifies as an expert witness. By removing the "blindness" placed upon the expert by an arbitrary, symptomatic test of responsibility, the complete picture of the mental condition of the accused may be obtained.⁸⁵ Moreover, the expert will be happily limited to those areas in which he is "expert."

Difficulty of proof, especially in borderline cases, will remain a problem. Diagnosing the mental condition of the accused at the time of the offense and determining how his mental condition affected his actions will continue to complicate the problem of proof. Just as the psychiatrist, under the standard legal tests, can state positively that the defendant knew right from wrong only in the most obvious cases, he will be equally limited under *Durham* in determining whether the necessary causation was present.⁸⁶ But even if the psychiatrist is unable to state

test guilt or innocence by a concept which has almost no recognizable reality." United States *ex rel.* Smith v. Baldi, 192 F.2d 540, 568 (3rd Cir. 1951).

82. Zilboorg, *The Reciprocal Responsibilities of Law and Psychiatry*, 12 THE SHINGLE 79, 84 (1949).

83. Overholser, *supra* note 81, at 327.

84. Consider the effect of Clarence Darrow's devastating attack on one famous "alienist" in the famous Loeb-Leopold pre-sentence hearing. DARROW, PLEA IN DEFENSE OF LOEB AND LEOPOLD (1924). See also GUTTMACHER & WEIHOFEN, *op. cit. supra* note 16, at 205-247.

85. The integration concept could be clearly explained without a resort to the artificial and, perhaps, to the jury, difficult means of tying it to the right-wrong test, as advocated by Professor HALL, *op. cit. supra* note 1, at 492 *et seq.*

86. JACOBY, THE UNSOUND MIND AND THE LAW 82 (1918); G.A.P., *supra* note 16, at 8 n.25. Glueck, commenting on a similar proposal by the British Medico-Psychological Association states: "All that any expert can say in many of these cases is that there is a reasonable probability that an offense of the type involved would not have been committed but for the mental disorder; and the jury must decide whether the case under consideration falls within this probability. Rarely . . . can the expert say categorically that the mental disorder involved was the direct and sole cause of the offense of which the defendant stands accused." GLUECK, *op. cit. supra* note 1, at 459. See also Smith,

categorically that the disorder produced the act, he will be able to report factually what, in his opinion, is the relation of the disease and act. Further, he can testify as to the degree with which the defendant's disorder vitiates the normal capacity for control.⁸⁷ There is certainly no greater difficulty in attempting to answer the causation question than the M'Naghten question of knowledge, and this inquiry is much more fundamental in the determination of criminal responsibility.

Since much of the success of the *Durham* rule depends upon obtaining the most complete psychiatric testimony from the expert witness, long-advocated procedural reforms would seem advisable if not absolutely necessary.⁸⁸ The courts or the legislature should establish more stringent requirements for the qualification of an "expert witness." While many states allow any registered physician to testify, the jury should have the benefit of experienced specialists in making their determination. Psychiatry has reached the stage where a sufficient number of qualified experts should be available for testimony. Secondly, the appointment by the court of impartial medical witnesses would offer the jury a neutral view on which to balance the testimony of opposing experts.⁸⁹ Furthermore, all expert witnesses should be present for at least one joint examination of the defendant, so as to afford the jury some ground for comparison of testimony, as well as to keep the expert testimony relevant and clear.

These procedural reforms would prove valuable whether the jurisdiction used the standard legal tests or the *Durham* approach. If, however, *Durham* forces adoption of such reforms, it would be another argument in favor of the District of Columbia ruling.

III. THE JURY: ETHICAL RESPONSIBILITY

Were responsibility only a legal question, the trier of fact could objectively determine penal liability solely by fitting the evidence into the legally provided formula, regardless of the arbitrary nature of the standard or the result. Were responsibility solely a medical question, neither

Scientific Proof and Relations of Law and Medicine, 10 U. OF CHI. L. REV. 243, 258 (1943).

87. See note 70 *supra*.

88. See, in general, on these procedural reforms: WEIHOFEN, *op. cit. supra* note 1, at 273-352; GLUECK, *op. cit. supra* note 1, at 449-452, 487-490; Overholser, *supra* note 78, at 286; Model Expert Testimony Act, approved by the National Conference of Commissioners on Uniform State Laws, in 9 U.L.A. 427-439 (1951); AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE 198-216 (1942).

89. Indiana provides for the appointment of two or three "competent disinterested physicians" to be appointed by the court when insanity is in issue. IND. ANN. STAT., § 9-1702 (Burns 1942). This was held not in violation of the witness's privilege against self-incrimination. *Noelke v. State*, 214 Ind. 427, 15 N.E.2d 950 (1938).

standard nor jury would be needed. If a jury is merely a fact-finding body, experts should decide responsibility as the facts involved are beyond the scope of laymen. But the determination of responsibility—whether or not the accused should be punished for his act—is also and primarily moral.⁹⁰ The jury, in addition to the finding of facts, has the duty of representing the prevailing ethical beliefs of the community.⁹¹ Guided either by a right-wrong rule or a *Durham* causation rule, the decision of the jury, especially in borderline cases, can be nothing more than a moral judgment that it is just or unjust to hold the defendant for what he did.⁹²

Unfortunately, a jury may often be quite arbitrary in its determination. Aroused by a particularly horrible or disgusting crime, the jury may invoke the death penalty regardless of obvious mental disorder.⁹³ Likewise, a jury sympathetic to the defendant may acquit him as insane with little or no evidence of mental incapacity.⁹⁴ Especially when exposed to uncertain, complex and conflicting psychiatric evidence framed in the emotional atmosphere of a murder trial, is the jury likely to return an unfounded verdict. Therefore, the three dissenting members of the Royal Commission argue that to provide the jury with a legal standard of responsibility would necessarily limit the occurrence of such arbitrary verdicts.⁹⁵

Yet, the only "arbitrary" cases that can be cited are those in which there was a legal standard. No arbitrary results seem to have occurred in either New Hampshire or Montana, but this might be attributed to the small number or the type of insanity cases arising in those jurisdictions. It would appear that the more information the jury could receive concerning the mental condition of the accused, the more impartial it would be in

90. CMD. No. 8932 at 99. GLUECK, *op. cit. supra* note 1, at 259.

91. The jury's traditional function is to apply "our inherited ideas of moral responsibility to individuals prosecuted for crime." *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954); See also GLUECK, *op. cit. supra* note 1, at 465. "[T]he jury, as a responsibility determining device, should not be eliminated." *Id.* at 466.

92. *Holloway v. United States*, 148 F.2d 665, 666 (D.C. Cir. 1945). The Group for Advancement of Psychiatry flatly admits that psychiatric witnesses want no part in any such moral determination. G.A.P., *supra* note 16, at 6.

93. Often cited examples include *United States v. Guiteau*, 12 D.C. 498, 1 Mackey 498 (1882); *Sodeman v. The King*, C.L.R. 192 (1936); and the *Albert Fish* case, described in WERTHAM, *op. cit. supra* note 30, at 65. In general, see WERTHAM, *loc. cit. supra*, and COHEN, MURDER, MADNESS AND THE LAW (1952).

94. See *Bradley v. State*, 31 Ind. 492, 509-510 (1866). The so-called "temporary insanity" plea is often used, or misused, in such cases. While there may be some medical basis for the defense, e.g., hypoglycemia (lowered blood sugar level), epilepsy, the defense is more often used as a last resort ("everything went blank . . ."). See Comment, 49 MICH. L. REV. 723 (1951); Note, 13 GA. B.J. 464 (1951); Note, 57 DICK. L. REV. 333 (1953); GUTTMACHER & WEIHOFEN, *op. cit. supra* note 16, at 396; COHEN, *op. cit. supra* note 93, at 153.

95. CMD. No. 8932 at 285, 287.

determining the guilt or innocence of the defendant.

If, as often contended, a jury generally answers the fundamental question of the sanity of the defendant without regard to legal tests, the jury's burden may not be greatly increased by *Durham*.⁹⁶ After deciding the extent of the mental disorder, as under all legal tests, the jury must then determine the problem of causation which *Durham* proposes. It requires the jury to acquit as insane any person suffering from a disease or defect which produced the criminal act. The British Royal Commission proposal, by its terms, made no such causal connection between the disorder and the act, yet the commission couched its support of the recommendation primarily in terms of causation. It admitted that asking the jury to decide whether or not the insanity of the accused was the "effective cause" of his unlawful act was no different from asking the jurors to determine whether or not he was so insane that he ought not be regarded responsible.⁹⁷ Should the majority recommendation be interpreted as meaning "to such a degree that" the mental disorder produced the act, the *Durham* and Royal Commission rules would be synonymous.⁹⁸

The difficult question posed by the *Durham* rule is ultimately *how much causation?* Neither the *Durham* nor the New Hampshire court answered this question, but a 1951 dissenting opinion in a federal circuit court suggested that irresponsibility be based on "proximate, or . . . contributory" cause.⁹⁹ These would seem to be two different types of physical causation. Proximate cause can imply that the disorder was the last element in space of time causing the act. Contributory cause implies that the disorder need be only one important element—a "substantial factor"—in producing the act. Two other degrees of mechanical causation might be considered. *Sine qua non* or "but for" causation would increase the degree of substantiality required to the point that, in retrospective consideration, the result would probably not have occurred had the cause in question (mental disorder) not been present.¹⁰⁰ A final causation test would require the disorder to be not only a necessary cause,

96. When asked by the Royal Commission whether he deemed it advisable to provide some legal yardstick to guide the jury, the Lord Justice General replied, "I do not think so, for this reason . . . However much you charge a jury as to the M'Naghten Rules or any other test, the question they would put to themselves when they retire is—'Is this man mad or is he not?'" *Id.* at 113.

97. *Id.* at 112.

98. *Id.* at 116. However, they might also be interpreted as to adopt a standard like that suggested by the Group for Advancement of Psychiatry. G.A.P., *supra* note 16, at 8.

99. Chief Judge Biggs, dissenting, in *United States ex rel. Smith v. Baldi*, 192 F.2d 540, 568 (3rd Cir. 1951).

100. The "but for" type of causation is a common-sense variety which would probably be used under the *Durham* definition. "But for" implies elements of causation other than the physical elements. See HALL, *op. cit. supra* note 1, at 257 n.30, 258.

but the predominant, or the sole cause, of the act.

Because various theories of causation are used successfully by juries in the determination of tort negligence cases, both the *Durham* court and the Royal Commission feel that they could be applied with equal success in determining criminal responsibility.¹⁰¹ Physical causation is not necessarily the sole determinant in such tort cases; and it is especially important that sheer mechanical causation not serve as the ultimate guide in determining penal liability for a mentally disordered offender if for no other reason than the stigma attaching to one convicted of committing a crime "against society."¹⁰²

In the never-never land of causation an exclusion of ethical considerations is not only impossible, but also undesirable. Both the *Durham* court and the Royal Commission majority are keenly aware of this fact. While the *Durham* court merely discusses the moral obligations of the jury, the commission implies them in its suggested rule.¹⁰³ Under either test it will be necessary for the jury to inquire whether the accused could have restrained himself from doing the act despite his mental disorder. If he could, he should be held responsible; if not, he should be acquitted as "insane." Thus, a lay version of causation—moral causation—will be imputed to the defendant pleading insanity under either the *Durham* or commission rules. Clearly, unless this moral consideration is imputed to the defendant, in addition to some degree of physical causation, the *Durham* rule cannot produce the just results the court is seeking.

The concept of "moral causation" serves to mitigate, if not do away with, the leading criticism of a *Durham*-Royal Commission approach to criminal responsibility, *i.e.*, that unless the law provides a legal standard to determine "insanity," the jury may be influenced by the emotional surroundings of the trial. For the jury will have a standard—an ethical, not a legal standard—which will be unchanging and fundamental in any determination of responsibility, namely, could the accused resist his mental disorder and refrain from committing the harm?¹⁰⁴ To challenge the

101. *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954); CMD. No. 8932 at 115.

102. In a chapter on Criminal Omissions Professor Hall distinguishes between the use of causation in tort and penal law. HALL, *op. cit. supra* note 1, at 256-261. Hall's view of causation is fourfold, involving ethical, policy and common-sense considerations, as well as physical or mechanical considerations. *Id.* at 258.

103. The word "ought" in the proposed British test (the accused was suffering from disease of the mind . . . to such a degree that he ought not be held responsible) implies a moral judgment on the part of the jury, requiring them to decide whether the act of the defendant was his own, rather than a result of his mental disorder.

104. The U.S. Attorney, in a petition for rehearing in banc, criticized the *Durham* rule as omitting any reference to the defendant's moral responsibility, which is implicit in the superseded test. "Moral responsibility is an unqualified standard. The trier of fact should be forcibly reminded of this especially where, as here, legal insanity is described

ability of the jury to determine this ethical question is to challenge the ability of the jury to determine any legal question. Furthermore, it might be argued that any legal test which relieves the jury of its fundamental duty of making this ethical determination is certainly not one which will increase the possibility of "the just result."¹⁰⁵

If the *Durham* rule increases the role of the jury in resolving criminal responsibility, it also places greater emphasis on the instructing role of the judge. As before 1843 he is free to bring all evidence concerning mental disorder to the jury's attention and, with causation left undefined, he is empowered to broaden or narrow the jury's channel of inquiry. Stating that no instructions could be formulated which would be appropriate or binding in all cases, Judge Bazelon suggested a simple framework around which instructions might be constructed. He indicated, in effect, that unless the jury found some causal connection between the disorder and the act, the defendant should be found guilty.¹⁰⁶ The court could further allow the jury, in appropriate cases, to consider, but not be bound by, any of the existing legal tests.¹⁰⁷

While these broad suggestions might seem to set the jury "at sea," the judge can exercise considerable legal restraint over the jury's actions. If the medical evidence is such that the jury could not reasonably reach a verdict of conviction, the judge could direct an acquittal on the ground that medical evidence clearly showed the mental disorder to be the *sine qua non* cause of the act, or sufficient to obliterate ability to formulate the required intent. If, on the other hand, there was evidence of malingering,

in terms of causality, a variable standard not clearly limited as to degree." Petition for Rehearing In Banc, p. 3, *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). Thus, if this element of moral causation were clearly emphasized to the jury, it would appear to satisfy the prosecution in the *Durham* case.

105. *CMD.* No. 8932 at 116.

106. Bazelon stated that ". . . any instruction should in some way convey to the jury the sense and substance of the following: 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." *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954). This, unfortunately, fails to mention any moral consideration on the part of the jury.

107. *Id.* at 876.

a judicial instruction as to want of causation would be appropriate.¹⁰⁸ In the borderline cases, where there is clear and unconflicting evidence of mental disorder at the time of the act, the judge should instruct in terms of *sine qua non* and "moral" causation, with respect to the defendant's ability to resist temptations arising from the disorder.¹⁰⁹

The power of the judge to define causation suggests another possibility. In crimes involving degrees of punishment, especially first and second degree murder, the judge could state the amount of causation required in such a way as to adopt a doctrine of diminished responsibility.¹¹⁰

108. Chances of successfully malingering or faking mental disorder are practically non-existent. See COHEN, *op. cit. supra* note 93, at 60-63. Thus, it is not expected that a *Durham* rule would lead to any more successful insanity defenses via imposture than do present tests. Furthermore, only where the death penalty was involved would the insanity plea offer an attractive inducement for the malingerer. *Id.* at 64.

109. An instruction in *sine qua non* causation should satisfy the most enthusiastic prosecutor. The burden, however, would be upon the judge to properly state such causation, and any misstatement might serve, as always, as a basis for an appeal by the defendant.

110. This doctrine arose to prevent the harsh effects of the law which separates all offenders into the sane or insane category, primarily when the death penalty is involved. While mental condition may not excuse guilt completely, it may affect the degree of the crime. *State v. Anselmo*, 46 Utah 137, 145, 148 Pac. 1071 (1915). Psychiatrists have long urged such a concept. See WHITE, *op. cit. supra* note 72, at 89; ZILBOURG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 45 (1954); GUTTMACHER & WEIHOFEN *op. cit. supra* note 19, at 424-433; Aschaffenburg, *supra* note 29, at 8; CMD. No. 8932 at 133-140. It has also been recognized by the courts. "Diminished responsibility is a scientific fact, scientifically established and capable of being analyzed." *Commonwealth v. Stabinsky*, 313 Pa. 231, 238, 169 Atl. 439, 442 (1933). *Fisher v. United States*, 328 U.S. 463, 475 (1946). The doctrine is reported as being adopted in ten states. *Weihofen*, 17 FED. PROB. 8, 11 n.2 (1953). WEIHOFEN, *op. cit. supra* note 1, at 174-195, 129-173. See also Brief of *Amicus Curiae*, pp. 1a-18a, *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954).

Although generally cited as one of the states allowing the use of diminished responsibility, the Indiana position is doubtful. "Partial insanity" as a mitigating element is specifically denied in *Sage v. State*, 91 Ind. 141, 145 (1883). In accord, *Warner v. State*, 114 Ind. 137, 143, 16 N.E. 189 (1887). Yet the *Sage* court would allow the jury to examine the mental condition of the accused without any plea of insanity. 91 Ind. 141, 145, (1883). This is held to be dictum and inapplicable in *Foster v. State*, 222 Ind. 133, 136, 52 N.E.2d 358, 359 (1943). But dictum in at least one other case indicates that, under the standard plea of not guilty, the mental condition of the defendant is "a proper subject of cognizance by the jury in mitigation of the offense. . . ." *Hopkins v. State*, 180 Ind. 293, 295, 102 N.E. 851, 852 (1913). While not a complete defense, it would appear that mental condition may be considered as bearing upon capacity to entertain criminal intent. *Robinson v. State*, 113 Ind. 510, 513, 16 N.E. 184, 186 (1887) (concerning weakness of mind); *McDougal v. State*, 88 Ind. 24, 27 (1882). Intoxication may serve as a mitigating defense. *Aszman v. State*, 123 Ind. 347, 24 N.E. 123 (1889); *Booher v. State*, 156 Ind. 435, 60 N.E. 156 (1901); *O'Neil v. State*, 216 Ind. 21, 22 N.E.2d 825 (1939).

It is generally argued that if intoxication and justifiable passion may mitigate the degree of crime, mental disorder, over which the defendant may have no control, should do likewise. *State v. Martin*, 102 N.J.L. 388, 403, 132 Atl. 93 (1926). See *Weihofen, Partial Insanity and Criminal Intent*, 24 ILL. L. REV. 505 (1930). A statement by Mr. Justice Gray in *Hopt v. People of Utah*, 104 U.S. 631, 634 (1882) that "the question whether the accused is in such a condition of mind by reason of drunkenness or otherwise,

If the disorder were serious enough to render the accused unable to entertain the *mens rea* required for first degree murder, yet not sufficient to leave him completely irresponsible, he might be found guilty of a lesser crime.¹¹¹ The judge would state the criminal statute under which the defendant is being charged, define the causation test to the jury, and then instruct, when appropriate, in diminished responsibility terms.¹¹² The inclusion of the concept of diminished responsibility into the *Durham* rule would mitigate the harsh first degree murder statute of the District of Columbia, which allows the jury no alternative but to order the death penalty.¹¹³ Perhaps the court had this in mind when it stated, on July 15, 1954, “. . . reconsideration of our decision in *Fisher* should wait until

as to be capable of deliberate premeditation, necessarily becomes a material object of consideration by the jury” is often taken as suggesting that diminished responsibility be adopted. (emphasis added).

The New Hampshire rule has long been advocated as a means of reaching diminished responsibility. WEIHOFEN, *op. cit. supra* note 1, at 188. *State v. Jones*, 50 N.H. 367, 375 (1871), suggests this possibility.

Another way to allow use of substandard mental degree as a partial defense is to lower the sentence of the crime in a pre-sentence hearing, as was done in the famous Loeb-Leopold case. See note 84 *supra*.

111. The Royal Commission, investigating the diminished responsibility doctrine as used successfully in Scotland, agreed that feebleminded offenders should be regarded as having diminished responsibility rather than being wholly irresponsible. CMD. No. 8932 at 121, 133. But it withheld judgment on epileptic and psychopathic offenders. *Id.* at 135, 139. While expressing faith in the ability of juries to arrive at a just result with the concept, the Commission suggested that further study be made by another group, and declined to recommend the adoption of the doctrine. *Id.* at 144. To amend the English law with such a limited rule (Scotland allows diminished responsibility solely for homicide cases) would be unjustified, the commission felt. *Ibid.* Yet it did deem it desirable to allow the jury to take this into account when determining the sentence. *Id.* at 207-208, 278.

112. A suggested jury charge might be: If you find the defendant to be suffering from a mental disorder not sufficient to render him completely irresponsible, but sufficient to deprive him of normal ability to deliberate or premeditate the killing of another, you may find him guilty of the lesser crime of second degree murder. A similar charge was affirmed in *State v. Schilling*, 95 N.J.L. 145, 148, 112 Atl. 400, 402 (1920). The charge would necessarily vary with the first degree murder statute. Thus, the District of Columbia statute, D.C. CODE ANN. § 22:2401 (1951), might also be used to allow mitigation when the disorder was such as to prevent the “sound memory and discretion” required by the statute. See Keedy, *A Problem of First Degree Murder: Fisher v. United States*, 99 U. OF PA. L. REV. 267, 287-288 (1950); Brief for Abraham Chayes as *Amicus Curiae*, pp. 52-62, *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954). The *amicus* brief, in general, presents a sound and worthwhile argument for the doctrine.

113. D.C. CODE ANN. § 22:2404 (1951). It was for this reason that the widely discussed case of *Fisher v. United States*, 328 U.S. 463 (1946), aroused so much controversy. The *Fisher* case, in which the court refused to accept the doctrine of diminished responsibility, involved the murder of a librarian by a sub-normal janitor. Three justices dissented bitterly from the Supreme Court ruling which upheld the conviction of *Fisher* for first degree murder. The case is discussed, and the ruling criticized, by the following: Weihofen and Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 YALE L.J. 959 (1947); Taylor, *Partial Insanity as affecting the Degree of Crime*, 34 CAL. L. REV. 625 (1946); Keedy, *supra* note 111; Notes, 46 COL. L. REV. 1005 (1946); 20 TEMPLE L.Q. 155 (1946); 1947 WIS. L. REV. 109; 25 TEXAS L. REV. 295 (1946).

we can appraise the results of the broadened test of criminal responsibility, which we recently announced in *Durham*.¹¹⁴

While the *Durham* rule may not, upon subsequent examination, prove to be *the* solution to the complex problem of criminal responsibility, it is *a* tangible solution in an area where the law has long been criticized for inertia.¹¹⁵ By realistically emphasizing greater freedom for psychiatric testimony, the ethical-legal role of the judge in instructing, and the moral duty of the jury to balance legal principle with medical fact, the *Durham* approach represents a forward step from the present legal tests.

PROPOSAL FOR APPORTIONMENT OF THE FEDERAL ESTATE TAX

The failure of Congress to specifically provide who shall ultimately bear the burden of the federal estate tax has resulted in much litigation, many attempts at remedial legislation, and general confusion on the matter among the states. A need clearly exists for positive action to alleviate the problems created by the void in the present estate tax structure, and an analysis of the history and purpose of the federal act and of various state attempts to interpret Congressional silence on the allocation of the tax burden should reveal what measures are required.

The federal estate tax purports to be an excise on the transfer of property resulting from death.¹ The definition of the *taxable* estate, however, includes interests which do not even pass through the executor's hands in his administration of the estate—interests which are not ordinarily considered as part of the "true estate".² This is one reason why

114. *Stewart v. United States*, 214 F.2d 879, 883 (D.C. Cir. 1954). The *Stewart* case, surprisingly enough, involved a felony (robbery)-murder situation, which might complicate the concept of diminished responsibility, at least in regard to the intent involved for the murder, none being required. However, the *amicus* thought that the doctrine would still be applicable to the intent required for the felony. See Brief for Abraham Chayes as *Amicus Curiae*, *supra* note 112, at 42-46.

115. It is significant that an important jurisdiction like the District of Columbia, where many famous insanity cases have arisen, is willing to serve as a pilot area for this approach to the problem.

1. The converse of an inheritance tax, it is a charge on the entire estate, to be paid prior to distribution. 1 PAUL, FEDERAL ESTATE & GIFT TAXATION § 1.05 (1942 ed.).

2. The definition includes all real or personal property, tangible or intangible wherever situated, except real property outside of the United States, to the extent of the interest of decedent therein at death, or more specifically: corporate stock; dower; curtesy; or statutory interests of surviving spouses; transfers, in trust or otherwise, in contemplation of death; transfers with a retained life estate; transfers taking effect at death; revocable transfers; annuities; joint interests; appointive property; life insurance proceeds; and transfers for insufficient consideration. See INT. REV. CODE §§ 2031, 2033-2044. See the definition of "legal estate" in Indiana, note 43 *infra*.