

The Virtues of M'Naghten

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Imposing punishment on those who transgress criminal prescriptions has been thought to serve the interests of society in a number of ways. The painfulness of the punishment is designed to deter others from engaging in conduct inimical to these interests. Similarly, to the extent that an offender is likely to offend again, his imprisonment will protect society from further depredations by him. Finally, punishment and other therapeutic means utilized during imprisonment may rehabilitate the offender into a useful and law-abiding citizen.¹

That individual conduct has adversely affected interests protected by the criminal law, however, has rarely been enough to invoke the sanctions of that law. Before punishing one who has invaded a protected interest, the criminal law has generally required some showing of culpability in the offender.² The basic *mens rea* concept, the notion that one has not violated the law unless he knows or in some cases should know the facts making his conduct criminal, is the most notable device to excuse those who are thought not blameworthy.³ Provision of trial by jury and police and prosecutorial discretion in the invocation of the criminal process are other means used to sift out "innocent" offenders from those to be subjected to punishment.

There is a condition, then, to the general use of the criminal process to effect social ends. Before punishment may be exacted, at least with respect to most major crimes, blameworthiness must

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1. We do not mean to imply here, or in the discussion below, that we would agree that the justifications of the criminal process bear all the weight that they are sometimes made to bear. We do, however, suggest that if one wishes to use the existing criminal law in the traditional way, including the guilt-innocence dichotomy, consideration must be given to fulfilling the functions thought to justify the criminal law.

2. See BRETT, *AN INQUIRY INTO CRIMINAL GUILT* 37 *passim* (1963); H. M. Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROB.* 401 (1958). No matter how high the predictability that a particular individual will commit an offense, most people intuitively abhor the thought that he ought to be imprisoned or treated before he has done so. See generally MEEHL, *CLINICAL VERSUS STATISTICAL PREDICTION* (1954).

3. See Packer, *Mens Rea and the Supreme Court*, 1962 *SUP. CT. REV.* 107; Sayre, *Mens Rea*, 45 *HARV. L. REV.* 974 (1932).

be present in the offender. That some deterrent, restraint, or rehabilitative purpose may be served is not in itself enough.

This emphasis on blameworthiness has led some commentators to assert that the criminal law is nothing more than a sophisticated vehicle for exacting retribution.⁴ No doubt that purpose also is served. But there is nothing inconsistent in upholding an institution on solid utilitarian grounds that also serves a function many find to be distasteful. And much may be said, if only to still disquietude, for demanding blameworthiness as a pre-condition in those who are used as good soldiers in the fight for a better social order.⁵

Moreover, the exaction of retribution is more than the hang-over from our barbaric past that most observers choose to characterize it.⁶ The utility of the criminal law inheres not only in those simplistic notions of deterrence, restraint, and rehabilitation already described. It is based, too, on the creation of an individual abhorrence of certain conduct that is far more effective in discouraging that conduct than the largely fictional intellectual balancing of relative pain of imprisonment against pleasure of engaging in a forbidden act. That instinctive aversion is created by viewing criminal conviction as a societal judgment of moral condemnation. By allowing the rest of society to view the criminal as wicked and deserving of punishment, emulation of the criminal's conduct is discouraged.⁷ Another related function of

4. *E.g.*, Lukas, *A Criminologist Looks at Criminal Guilt*, in 2 CONFERENCE ON SOCIAL MEANING OF LEGAL CONCEPTS—CRIMINAL GUILT 113, 151-52 (Cahn ed. 1950).

5. H. L. A. HART, *THE MORALITY OF THE CRIMINAL LAW* 20 (1964); H. L. A. HART, *PUNISHMENT AND THE ELIMINATION OF RESPONSIBILITY* 27-30 (1962).

If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.

1 HOLMES-LASKI LETTERS 806 (Howe ed. 1953).

6. See Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1011 (1940).

7. ROCHE, *THE CRIMINAL MIND* 79 (1958); CARDOZO, *What Medicine Can Do For Law*, in LAW AND LITERATURE 70, 88-89 (1931); Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L., C. & P.S. 176, 180 (1952); Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1017 (1940); Michael, *Psychiatry and the Criminal Law*, 21 A.B.A.J. 271, 275 (1935); Wechsler, *The Issues of the Nuremberg Trial*, 62 POL. SCI. Q. 11, 16 (1947); See ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 131 (rev. ed. 1956); FLUGEL, *MAN, MORALS AND SOCIETY* 133-34 (1945); WEST, *CONSCIENCE AND SOCIETY* 165-76 (2d ed. 1950).

the criminal law is the promotion of a sense of individual responsibility for the effects of one's conduct on others. By holding to account those who violate the law, all are led to recognize that they too will be held to account for their conduct. This recognition in turn may lead individuals to a higher level of conduct than the minimum demanded by the criminal law.⁸

Obviously, the promotion of responsibility and the creation of abhorrence through moral condemnation are part of a larger goal of minimizing socially harmful acts. The criminal law effects this purpose in three distinguishable ways. First, it deters by creating an inducement—imprisonment—to avoid certain conduct. Second, it implants or reinforces an instinctive abhorrence of certain conduct by labelling that conduct evil and by excising from society those who engage in such conduct. Finally, it creates or bolsters a more thoughtful approach to one's place in society by fostering the recognition that individual responsibility must be taken for the effect of one's conduct on others.

The criminal law, in short, reduces the number of socially dangerous acts in more ways than by inviting a Benthamite intellectual assessment of relative pain and pleasure. To be sure, the reason most of us do not engage in rape is not because imprisonment for life is more painful than forced intercourse is pleasurable. But the criminal sanction against rape has helped create our abhorrence of the act and recognition of our responsibility to society for the damage it would cause our victims.

The imposition of punishment as a means of expressing the moral condemnation of society, barbaric retribution though it may be in the view of some, is justified to the extent that such an expression is related to and promotive of the senses of responsibility and abhorrence that are necessary to the attainment of the goal of minimizing socially harmful conduct. Disapproval of and desire to punish criminals may be necessary concomitants of those senses of abhorrence and responsibility that are themselves highly desirable. To fail to satisfy the desire to punish is to undercut the abhorrence and responsibility that prevent damage to others.⁹

These propositions, of course, are too easily overblown. Much as deterrence through threatened punishment is a matter

8. ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 130 (rev. ed. 1956); H. M. Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROB.* 401, 410 (1958); cf. MOBERLY, *RESPONSIBILITY* 22-23 (1956).

9. 2 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 79-80 (1883).

of faith with respect to many crimes, so is the idea that the senses of abhorrence and responsibility partially bred by punishment will diminish if punishment is ended. It is impossible to know, and difficult even to speculate as to what, over time, the views of society would be toward socially dangerous but unpunished conduct. If, however, the societal need for moral condemnation through retribution, for the feeling that another is not getting away with something not permitted to most, is continually frustrated,¹⁰ it is not unfair to conclude that the utility of the criminal law would be impaired.

Perhaps it suffices to say that attainment of the present goals of the criminal law depends in large part on social acceptance of the methods used and the results achieved in individual cases. Just as the institution of the criminal law may be brought into disrepute by the too easy attribution of criminality in situations where the label criminal is generally thought inappropriate,¹¹ so also may the institution be undercut if it releases as noncriminal those society believes should be punished. This does not mean that the criminal law may not be a means of educating the public as to the conditions under which moral condemnation and punishment is inappropriate.¹² It does mean that the results may not depart too markedly from society's notions of justice without risking impairment of the acceptability and utility of the institution.¹³

Our purpose is to explore the place of the insanity defense within the framework and purposes of the criminal law. Initially, it is clear that to the extent offenders generally may be thought to need restraint for the protection of society and rehabilitation to function well as members of society, the same

10. See ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 211-23 (rev. ed. 1956); FLUGEL, *MAN, MORALS AND SOCIETY* 169-74 (1945); Ehrenzweig, *A Psychoanalysis of the Insanity Plea—Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell*, 73 *YALE L.J.* 425 (1964).

11. H. M. Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROB.* 401, 423 (1958).

12. See H. L. A. HART, *PUNISHMENT AND THE ELIMINATION OF RESPONSIBILITY* 16-18 (1962).

13. "In the determination of guilt age old conceptions of individual moral responsibility cannot be abandoned without creating a laxity of enforcement that undermines the whole administration of criminal law." *Fisher v. United States*, 149 F.2d 28, 29 (D.C. Cir. 1945) (Arnold, J.), *aff'd*, 328 U.S. 463 (1946). See also *In re Rosenfield*, 157 F. Supp. 18 (D.D.C. 1957); ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 213-14 (rev. ed. 1956); WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 336 (1959); Learned Hand, *A Letter*, 22 *U. CHI. L. REV.* 319 (1955).

may be said of mentally diseased offenders. Indeed, these needs would seem even greater for the diseased person who has committed a criminal act. Similarly, the deterrence of certain behavior in others by the imposition of punishment on some will not be diminished, and may be marginally increased, by imprisoning as criminals those offenders who now elude such punishment by use of the insanity defense.¹⁴ Why, then, should we excuse from criminal responsibility those or some of those suffering from mental illness?

In traditional terms, the insanity defense can be justified only on the supposition that mental illness may negate that normal prerequisite to use of the criminal process, the culpability of the offender.¹⁵ To test the utility of the defense, one must be able to identify the elements distinguishing blameworthy conduct from other conduct. Preliminarily, we reject the notion, frequently advanced, that deterrability is the touchstone of responsibility.¹⁶ It is obvious that all offenders are nondeterrable in the sense that they were not deterred by the existing system of criminal sanctions. It is similarly obvious that all offenders could be deterred by some set of circumstances. And it is far from obvious, although it may be true, that insane offenders can be deterred only by means far more immediate in applica-

14. H. L. A. Hart, *Legal Responsibility and Excuses*, in DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 81, 94-96 (Hook ed. 1958); Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1008 (1940); Silving, *Mental Incapacity in Criminal Law*, 2 CURRENT L. & SOCIAL PROBLEMS 3, 25 (1961).

15. BRETT, AN INQUIRY INTO CRIMINAL GUILT 172 (1963); H. M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 414 n.31 (1958); Silving, *Mental Incapacity in Criminal Law*, 2 CURRENT L. & SOCIAL PROBLEMS 3 (1961).

16. GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 412, 420 (1952); MODEL PENAL CODE § 4.01, comment (Tent. Draft No. 4, 1955); Davis, *Some Aspects of the Currens Decision*, 35 TEMP. L.Q. 45, 46 (1961); Kuh, *The Insanity Defense—An Effort to Combine Law and Reason*, 110 U. PA. L. REV. 771, 782 (1962); See generally SCHLICK, PROBLEMS OF ETHICS 143-58 (1939); Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 374 (1955). Discussions of deterrability in this context may not be directed to the culpability of the offender. Thus, the assumption is often made that punishment of the insane will add no particular force to the deterrent efficacy of the law toward other insane potential offenders. This proposition, of course, ignores the fact that punishment of insane offenders may have a deterrent effect on potential noninsane offenders. Hill, *The Psychological Realism of Thurman Arnold*, 22 U. CHI. L. REV. 377, 392 (1955); see text accompanying note 14 *supra*. Those who stress deterrability may also be proceeding, sub silentio, on an economy of punishment theory. See text accompanying notes 31-35 *infra*.

tion than necessary to deter noninsane offenders.¹⁷ We should and do attach moral condemnation to the person engaging in conduct that has not been and probably by any reasonable means could not be prevented.¹⁸ If deterrence, abhorrence, and responsibility are to be promoted, condemnation must follow moral failure.

A more promising place to begin is with the inquiry whether insanity is inconsistent with moral failure. A person may be morally blameless if under the circumstances it would be unreasonable to expect avoidance of the forbidden conduct.¹⁹ The criminal law has long taken account of this notion in many of its defenses. Thus, a man is permitted to kill if he reasonably believes it to be necessary to defend himself from being killed. Similarly, through the *mens rea* concept, a man is excused from criminality if he reasonably did not know the facts making his conduct criminal. And the defense of duress has excused in select cases where the threatened harm to the actor was far more severe than the harm caused to the victim by the criminal conduct.

At least two difficulties arise in equating the reasonableness of expecting compliance with moral blameworthiness. First and most obvious is the absence of any standard by which to judge the reasonableness of expecting compliance. In addition, even in those cases where opinion is nearly unanimous that compliance cannot reasonably be expected, the criminal law has often imposed moral condemnation. Thus, in a nondefensive situation, one may not take another's life to save one's own even though it is known that the actor will almost certainly do so.²⁰ That one acting reasonably is ignorant of the existence of a particular penal statute is no defense though one cannot reasonably be expected to comply with an unknown rule. One is not excused if an unreasonable mistake of fact causes the actor to believe his conduct is lawful. In all these cases, looking at the actor at the moment he acts, it is unreasonable to expect compliance. Nonetheless, the law condemns because the actor is expected to have the power of compliance.

The presence of moral blameworthiness then is less a quality

17. See Wechsler & Michael, *A Rationale of the Law of Homicide*: I, 37 COLUM. L. REV. 701, 753 n.179 (1937).

18. See text accompanying note 20 *infra*.

19. H. L. A. HART, PUNISHMENT AND THE ELIMINATION OF RESPONSIBILITY 20 (1962); Raab, *A Moralistic Look at the Durham and M'Naghten Rules*, 46 MINN. L. REV. 327, 329 (1961).

20. *E.g.*, Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884).

of the offender, resting on his actual ability or inability to conform, than of the normative judgment of others that he ought to have been able to conform.²¹ We have come full circle by saying a man is culpable when we intuitively believe him culpable. Yet this is not simply a begging of the question. It is only a recognition that the aims of the criminal law frequently conflict. Rejection of certain demonstrations that an offender could not reasonably have been expected to do otherwise can be justified on utilitarian grounds. In those cases, the value of demanding blameworthiness before punishment is thought to be overridden by other values. Thus, strict liability is generally justified on the ground that the punishment of those who are blameless tends to increase the level of compliance with the law by others and that to try *mens rea* issues in the wholesale prosecutions of public welfare offenses would unduly burden the court.²² For our purposes, whether these justifications are persuasive is unimportant. What is important is the recognition that culpability, in the sense that society can reasonably expect the actor to do other than he did, is not an ultimate value but only one of the many values that must at times give way. Our own preferences are for the widest possible recognition of nonblameworthiness as an excuse. But given the utilitarian functions of the criminal law and the difficulty in assessing culpability, we do expect to compromise.

Beginning then with an admission of philosophical inability, we propose to examine the insanity defense, in all its forms, in terms of its effectiveness in isolating those elements which by

21. MERCIER, CRIMINAL RESPONSIBILITY 40-41 (1935); ROCHE, THE CRIMINAL MIND 86, 249 (1958); DAVIDSON, *Criminal Responsibility: The Quest for a Formula*, in PSYCHIATRY AND THE LAW 61, 67 (Hoch & Zubin eds. 1955); SILVING, *Mental Incapacity and Criminal Law*, 2 CURRENT L. & SOCIAL PROBLEMS 3, 13 (1961). Many commentators on the insanity defense assume there is some underlying notion of culpability that will easily resolve cases appropriately. Thus, it is said that the insanity defense negates *mens rea*. *E.g.*, United States v. Currens, 290 F.2d 751, 761 (3d Cir. 1961); BIGGS, THE GUILTY MIND 82-84 (1955); DAVIS, *Some Aspects of the Currens Decision*, 35 TEMP. L.Q. 45, 46 (1961); GOLDSTEIN & KATZ, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963). But absence of *mens rea* is just a shorthand designation for "a series of situations in which a man will be held by the criminal law to be without guilt, unified by a very broad and vague statement of principle." BRETT, AN INQUIRY INTO CRIMINAL GUILT 40 (1963). See also H. L. A. HART, THE MORALITY OF THE CRIMINAL LAW 6 (1964). To say that insanity negates *mens rea* is to imply falsely that an insane offender is never responsible. Such an assertion says nothing about the actual or appropriate content of the defense.

22. See Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 737-39 (1960).

common consent negate culpability. Our framework will be the notions of culpability inherent in the existing criminal law. We recognize that notions of culpability vary and that no formulation can satisfy all moral sensibilities. Nonetheless, we believe an effort so directed is valuable if only to emphasize the consideration we believe to be fundamental, a consideration always subsumed but rarely alluded to in discussions of this topic.

At the outset we should make it clear that we take the criminal law seriously. We believe that a criminal conviction is a societal condemnation that should not be imposed lightly.²³ Consequently, we believe that it is meaningful to examine the efficacy of the insanity defense as a device to exclude a group not properly subject to this condemnation. We recognize that there are those who view this as a merely semantic quarrel wasteful of societal resources at best and heedless of the crucial issue. To these commentators, insanity is relevant only to disposition and unnecessary to a finding of guilt.²⁴ We admit that it is appealing to contemplate the demise of the insanity defense with the consequent ending of the agonizing effort that has gone into its administration. And it is also appealing to contemplate a more careful approach in the disposition of offenders. If the purpose of the insanity defense, as suggested by the framers of the Model Penal Code, were solely to distinguish between those cases "where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind that the law should allow,"²⁵ then surely it would be more useful to approach the matter administratively at the disposition stage where a more refined determination could be made.

But it is clear that resolution of this treatment question is not the function of any of the present or proposed insanity defenses, and, in our view, it is equally clear that it ought not to be

23. On the morality of punishing where one cannot blame, see H. L. A. HART, *THE MORALITY OF THE CRIMINAL LAW* 28 (1964); 2 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 172 (1883); De Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 348 (1955); Michael, *Psychiatry and the Criminal Law*, 21 A.B.A.J. 271, 275 (1935); Wechsler, *Panel Discussion: Insanity as a Defense*, 37 F.R.D. 365, 381-82 (1964).

24. WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 245-54 (1959); Diamond, *From M'Naghten to Currens, and Beyond*, 50 CALIF. L. REV. 189, 204-05 (1962); Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 327 (1955); Weintraub, *Criminal Responsibility: Psychiatry Alone Cannot Determine It*, 49 A.B.A.J. 1075 (1963); see *Newsome v. Commonwealth*, 366 S.W.2d 174, 180 (Ky. 1962) (dissenting opinion), *cert. denied*, 375 U.S. 887 (1963).

25. MODEL PENAL CODE § 4.01, comment (Tent. Draft No. 4, 1955).

the function. First, the disposition of the offender is irrelevant to the issue of whether one has committed an offense. Yet, the insanity defense is used to negate criminal guilt.²⁶ Second, no proponent of a test of criminal responsibility seriously contends that his test resolves appropriate disposition. And it would be burdensome to the administration of criminal justice to inject that issue in a meaningful way into a criminal trial.

The major objection to destruction of the insanity defense in favor of confining insanity to resolution of the disposition question is that it would either permit the assessment of moral blame where it is inappropriate²⁷ or cut loose the criminal law from its moorings of condemnation for moral failure. Once one has started down this road, there is no defensible stopping point short of strict liability with the question of culpability being raised at the stage of disposition.²⁸ While it is possible to construct a new system, and perhaps a more rational one, on these lines, we assume that such radical reconstruction is neither imminent nor appropriate so long as present social attitudes toward criminals and toward the utilitarian functions of the criminal law continue.²⁹

Some preliminary mention must also be made of the problem of determinism. To the extent that the notion of culpability rests on the judgment that the actor ought to have done otherwise, and to the extent that determinism holds that an actor can never have done otherwise, there is an irreconcilable conflict.³⁰

26. See Acheson, *McDonald v. United States: The Durham Rule Redefined*, 51 GEO. L.J. 580, 581 (1963).

27. See note 23 *supra*. It can be argued that as much social opprobrium attaches to being labelled insane as to being labelled criminal. See De Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 350, 355 (1955). While this may be so practically, the purpose of the insanity label in a criminal trial is to extract the opprobrious connotations from having committed a criminal act. Wechsler, *supra* note 23, at 398. So long as we maintain the present structure of the law, we must take this distinction seriously. Compare *Pigg v. Patterson*, 370 F.2d 101 (10th Cir. 1966), with *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967).

28. WOOTTON, *CRIME AND THE CRIMINAL LAW* 32-57 (1963).

29. H. L. A. HART, *THE MORALITY OF THE CRIMINAL LAW* 27-29 (1964).

30. That there are causes for a person's act is not inconsistent with his having the power to do other than he did. Edwards, *Hard and Soft Determinism*, in *DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE* 104, 106 (Hook ed. 1958); Sellars, *Fatalism and Determinism*, in *FREEDOM AND DETERMINISM* 141 (Lehrer ed. 1966); University of California Associates, *The Freedom of the Will*, in *READINGS IN PHILOSOPHICAL ANALYSIS* 594 (Feigl & Sellars eds. 1949); Hobart, *Free Will as Involving Determinism and Inconceivable Without It*, 43 MIND 1

Without plumbing these philosophical depths, it is enough for our purpose to say that the utilitarian functions of the criminal law are consistent with, indeed dependent on, the notion of determinism. It is expected that the structure of the criminal law will be a determinant on others. And assessing moral blame, regardless of the impropriety of this in the view of the determinists, will make the criminal law a more effective determinant.³¹ The theory that it is unreasonable to expect anyone to do other than he did is speculative at best. This, and the additional fact that to embrace the theory is to destroy the existing postulates of the criminal law, require its rejection as a working principle of nonresponsibility.

Finally, we must briefly examine the notion of economy of punishment. In Bentham's terms this has meant that punishment ought not to be imposed where unnecessary to fulfill the purposes of the criminal law.³² Thus, it has been argued that insane offenders need not be punished because insane potential offenders cannot be deterred, and the exclusion from punishment of such offenders would not impair the general deterrent function of the criminal law on noninsane potential offenders.³³ In our

(1934); Raab, *Free Will and the Ambiguity of "Could,"* 64 *PHILOSOPHICAL REV.* 60 (1955). Some determinists go further than this and assert that causes exist which preclude choice. It has been argued that determinism precludes moral blameworthiness to the extent that the determining psychological forces operative are unconscious. Hospers, *Free-will and Psychoanalysis*, in *READINGS IN ETHICAL THEORY* 571 (Sellars & Hospers eds. 1952). See generally McCONNELL, *CRIMINAL RESPONSIBILITY AND SOCIAL CONSTRAINT* (1912); WHITLOCK, *CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS* 54-71 (1963); Louisell & Diamond, *Law and Psychiatry: Détente, Entente, or Concomitance*, 50 *CORN. L.Q.* 217 (1965). But see Fingarette, *Psychoanalytic Perspectives on Moral Guilt and Responsibility: A Re-evaluation*, 16 *PHILOSOPHY & PHENOMENOLOGICAL RESEARCH* 18 (1955). For a prosecutor's forceful presentation of the collision between legal concepts of blameworthiness, responsibility, free choice, and the typical psychiatric emphasis upon viewing antisocial conduct nonmorally, as a kind of sickness which is strictly determined by the offender's past and in a sense beyond his voluntary control, see GOULETT, *THE INSANITY DEFENSE IN CRIMINAL TRIALS* 21-25 (1965).

31. Brandt, *Determinism and the Justifiability of Moral Blame*, in *DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE* 137, 138-39 (Hook ed. 1958).

32. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 164, 184 (Dolphin ed. 1961).

33. The underlying assumptions of this argument are that insane offenders as a class are nondeterrable, that normal people will not identify with such offenders, and that, consequently, exculpation of these offenders "bespeaks no weakness in the law." MODEL PENAL CODE § 4.01, comment (Tent. Draft No. 4, 1955). See Board, *Operational Criteria for Determining Criminal Responsibility*, 61 *COLUM. L. REV.* 221

judgment, this argument has two major defects. First, it again separates blameworthiness from the criminal law. We view it as morally reprehensible to treat equally blameworthy persons differently on the fortuitous basis of the effect of such treatment on others.³⁴ Secondly, the economy argument focuses only on the criminal law purpose of deterrence by intellectual balancing of pleasure and pain. The creation of the senses of abhorrence and responsibility might well be impaired by such an approach. And the community's respect for the justness of the criminal law, on which its utility must rest, would almost certainly be reduced. Finally, it is not at all clear that the existence of an insanity loophole would not diminish to some degree the general deterrent effect of the criminal law.³⁵

There are two basic and unavoidable problems in framing an insanity defense. First, mental condition cannot be split neatly into disease and health as the criminal law demands because of the need to find a defendant either innocent or guilty. Recognizing that mental health usually involves, among other things, "adjustment to a particular culture or to a particular set of institutions,"³⁶ mental disease or disorder involves slight incremental gradations of nonadjustment. Wherever on this continuum a line is drawn for any purpose, it is necessarily somewhat arbitrary as between those cases on either side and close to that line.³⁷ The second problem is that, assuming the existence of a mental illness, the question of whether the defendant would have acted differently had he been free of mental illness is necessarily one of probability. An expert testifying to this issue can state only his belief and the basis for that belief. Certainty is impossible.

The oldest and most widely used test of criminal responsibility is that enunciated by the House of Lords in *M'Naghten's*

(1961); Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 379 (1952). But see Silving, *Mental Incapacity in Criminal Law*, 2 CURRENT L. & SOCIAL PROBLEMS 3, 25-26 (1961). All these assumptions are open to serious question.

34. An argument could be made for the Benthamite view if insane offenders were necessarily blameless and others were being punished, though blameless, solely for utilitarian reasons. But one need not accept the notion that since punishment is evil, everyone, regardless of blame, should escape it when such escape has no anti-utilitarian consequences.

35. See text accompanying note 14 *supra*.

36. WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 218 (1959).

37. This arbitrariness remains even if the concept of mental disease is further subdivided. For an attempt to distinguish mental disease, mental illness, and mental disorder, see *Naples v. United States*, 307 F.2d 618, 629 n.34 (D.C. Cir. 1962).

Case:³⁸ The accused is not responsible if, at the time of committing the act, he "was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

Although the admonition has been uttered many times, it is always necessary to start any discussion of *M'Naghten* by stressing that the case does not state a test of psychosis or mental illness. Rather, it lists conditions under which those who are mentally diseased will be relieved from criminal responsibility. Thus, criticism of *M'Naghten* based on the proposition that the case is premised on an outdated view of mental disease is inappropriate. The case can only be criticized justly if it is based on an outdated view of the mental conditions that ought to preclude application of criminal sanctions.³⁹

Before it is possible to assess whether *M'Naghten* is a satisfactory test of criminal responsibility, it is necessary to examine the meaning of the *M'Naghten* language. Although it is usually assumed that the meaning is obvious, as with most legal formulae, this is simply not the case. What follows is an attempt to put psychological meat on these legal bones.

From the psychologists' viewpoint, the noun "reason" refers to certain psychological functions, held together by virtue of a conceptual unity.⁴⁰ This unity lies in the fact that, in carrying out any of these functions adequately, inference takes place. That is, some sort of mental transition occurs between one mental content and another where there is a rational or logical relation between the contents justifying the inferential step. The existence of this rational relation is a condition to a justifiable making of this transition. The adequacy of these inferential transitions usually tends to be somewhat correlated in spite of differences in the particular subject matter or logical form of the

38. 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (1843). See Diamond, *On the Spelling of Daniel M'Naghten's Name*, 25 OHIO ST. L.J. 84 (1964). On the history of the insanity defense, prior to *M'Naghten*, see BIGGS, *THE GUILTY MIND* (1955); Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227 (1966); Platt & Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. OF THE HISTORY OF THE BEHAVIORAL SCIENCES 355 (1965).

39. E.g., Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 373 (1955).

40. For a discussion of whether "reason" is a unitary concept from a psychologist's viewpoint, see text accompanying notes 69-70 *infra*.

relation. That is, one would expect that a person who reasons more ably than most people in solving riddles will more likely than not reason more ably in other domains. If a person's momentary state (*e.g.*, sickness, fatigue, intoxication, rage) greatly impairs his ability to do arithmetic problems, it will also impair his working of crossword puzzles.

Identity of logical form and similarity of content will not, however, guarantee perfect correlation between reasoning abilities as displayed in two reasoning tasks. If the tasks differ appreciably in context or content (as they must if they are really two tasks), they will involve specific (task-tied) abilities over and above the cognitive abilities they share. Further, especially in mentally abnormal persons, they may arouse markedly different motivational or emotional states. Such noncognitive influences may aid, or may impede, the reasoning process. Fear, anger, shame, boredom, competing interests, bias, and all such we shall designate generically, insofar as they exert an adverse influence, as "interfering factors." In ordinary language, we do not usually attribute to defective reason those inferential errors caused by interfering factors. For example, if a man thinks rationally about everything except politics (he is a zealous member of the Prohibition Party), we tend to describe him as "prejudiced" or "buggy about booze," rather than invoking a defect of reason. Ordinarily, we would not postulate a defect of reason unless we had evidence of considerable generality over diverse content domains, and, preferably, also lacked good evidence for exaggerated influence of interfering factors. In this respect the psychologist proceeds rather closely in accord with the usages of ordinary speech. A possible difference, however, is that given a sufficiently extreme irrationality in a single domain (*e.g.*, delusion of persecution), the psychologist is likely to invoke the notion of a defective ego, a concept that does imply at least the potential for defective reasoning over many or all domains. Whether ordinary usage resembles "psychologese" here is hard to say, partly because ordinary usage does not attempt these refinements for the extreme case. We rather suspect, however, that the layman would tend to question the financial judgment of a man who thought he was Napoleon. It is probable that common usage actually inflates the generality of reason.

In psychologese, then, a defect in reason would be a defect in the class of mental functions involved in performing psychological transitions between mental contents on the basis of a logical relation between them. In our view this is a sensible construc-

tion of these words and one which is wholly consistent with current psychological knowledge and practice. The argument often advanced by *M'Naghten* detractors that this phrase involves an outmoded conception of mental life⁴¹ is simply not so.

In addition to the process of reasoning, the phrase "defect of reason" may also include the ability to perceive. The process of perception and categorization, the subsuming of the perceived item into its logical category, involves to some extent the ability to properly infer. Furthermore, when perceptions are demonstrably false, as when one hallucinates the voice of God speaking to him, the ability to reason is, usually, generally impaired. Accordingly, while a defect in perception does not always involve a defect in inferring, for purposes of *M'Naghten* such defects should be included in the concept defect in reason. This, in turn, changes the psychologese of defect in reason to defect in the cognitive ego functions—perceiving, remembering, inferring, classifying, judging, etc.—the meaning traditionally assigned to *M'Naghten*.

Defect of reason, of course, shares with the concept of mental abnormality the problem of degree. Inferential errors in the process of reasoning vary considerably in magnitude and depend on a variety of factors. It is impossible to say precisely how great a defect in reason is necessary to satisfy the *M'Naghten* rule. Words such as "substantial" or "gross" only mask the user's view. The substantial defects we have in mind, however, correspond roughly to the present distinction between psychosis and other mental abnormalities. In the words of Page:

[In the neurotic] there is no deterioration of personality, intellect, or social habits, and no significant organic pathology. Rapport with the world of reality and the social group is maintained. Speech and thought processes are logical and coherent. Behavior is in conformity with cultural demands and responsive to social pressures. . . . The psychotic, on the other hand, is sharply differentiated from the normal individual by the bizarreness of his actions, the incoherency of his speech, the absurdity of his hallucinations and delusions, the inappropriateness of his emotional responses, and his general mental confusion Especially marked is the psychotic's loss of contact with the social group. The psychotic has withdrawn from reality Consequently his behavior and thoughts are unaffected by rules of logic, cultural mores, or outside happenings.⁴²

41. *E.g.*, BIGGS, *THE GUILTY MIND* 132-33 (1955); WEIHOFEN, *THE URGE TO PUNISH* 11 (1957); ZILBOORG, *A Step Toward Enlightened Justice*, 22 U. CHI. L. REV. 331 (1955); see *Pierce v. Turner*, 87 Sup. Ct. 978 (1967) (Douglas, J., separate opinion).

42. PAGE, *ABNORMAL PSYCHOLOGY* 100 (1947). See also AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL* 12 (1965); HEN-

The second phrase in the *M'Naghten* formulation is "disease of the mind," a term that appears in all the existing or proposed tests of insanity. As several writers have observed, this phrase more than any other poses problems for the administration of the criminal law.⁴³ Disease of the mind could mean an organic abnormality in brain structure or performance. It could also mean any diagnostic category in general usage in the psychiatric profession. Finally, it could be indicated by any strikingly abnormal conduct. As used, it has meant all these things and more. From the standpoint of the purposes for which the term is used, any of the usages may be entirely proper. From the standpoint of the criminal law, however, more refined usage is essential.

Restricting the meaning of mental disease to organic abnormality of brain structure or performance is too narrow for the purposes of the criminal law. Traditional psychiatric disorders such as schizophrenia may have no organic manifestations. Despite this, those afflicted with such disorders may not be culpable as that term is generally used.

But once the meaning of mental disease is broadened beyond organic disorders, reasoned analysis becomes even more difficult. In the first place the phrase, according to one commentator, means only a "theory by means of which we 'explain' how the events in question might have occurred."⁴⁴ If a crime is the event in question which calls forth an explanation of mental disease, and if those mentally diseased are excused, then there is a reasonable likelihood that most of those engaging in criminal

DERSON & GILLESPIE, *TEXTBOOK OF PSYCHIATRY* 133 (9th ed. 1962); HINSIE & CAMPBELL, *PSYCHIATRIC DICTIONARY* 488, 602 (3d ed. 1960); MASLOW & MITTELMAN, *PRINCIPLES OF ABNORMAL PSYCHOLOGY* 305 (rev. ed. 1951); MASSERMAN, *PRINCIPLES OF DYNAMIC PSYCHIATRY* 61, 305 (2d ed. 1961); NOYES & KOLB, *MODERN CLINICAL PSYCHIATRY* 421 (6th ed. 1963); ROSEN & GREGORY, *ABNORMAL PSYCHOLOGY* 7 (1965); STRECKER, EBAUGH & EWALT, *PRACTICAL CLINICAL PSYCHIATRY* 371-72 (7th ed. 1951); WHITE, *THE ABNORMAL PERSONALITY* 51 (3d ed. 1964); FREUD, *Neurosis and Psychosis*, in 2 *COLLECTED PAPERS* 250-51 (1924).

43. *E.g.*, ROCHE, *THE CRIMINAL MIND* 15, 253 (1958); WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 205-25 (1959); Diamond, *From M'Naghten to Currens, and Beyond*, 50 *CALIF. L. REV.* 189, 192-93 (1962); Hakeem, *A Critique of the Psychiatric Approach to Crime and Correction*, 23 *LAW & CONTEMP. PROB.* 650 (1958); Swartz, "Mental Disease": *The Groundwork for Legal Analysis and Legislative Action*, 111 *U. PA. L. REV.* 389, 390 (1963); see GOULETT, *THE INSANITY DEFENSE IN CRIMINAL TRIALS* 7 (1965).

44. Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 *COLUM. L. REV.* 183, 190 (1958); see also SZASZ, *THE MYTH OF MENTAL ILLNESS* at ix (1961).

conduct would be excused. This is particularly so because much crime is by definition the sort of abnormal conduct likely to call forth an explanation of mental disease.⁴⁵ Moreover, while labeling such a theory of human conduct as mental disease may be a proper shorthand designation of the probable utility of psychiatric treatment, it has little to do with whether blameworthiness is negated.⁴⁶

We shall explore later in this article how results vary from differing usages of the phrase "mental disease." For the present, we simply note that the criminal law has usually used the term in what one writer has called its core concept,

i.e., with regard to such conditions in which the sense of reality is crudely impaired, and inaccessible to the corrective influence of experience—for example, when people are confused or disoriented or suffer from hallucinations or delusions.⁴⁷

Under *M'Naghten* this usage is achieved by requiring the mental disease to result in a defect of reason.

With rare exceptions, the verb "know" in *M'Naghten* is used as a dispositional concept. Even though it is a verb grammatically, it usually refers to a state of potentiality rather than to an action or event. Dispositional concepts in psychology designate more or less enduring potentialities of the individual to react in a certain way given certain circumstances. If the circumstances rarely or never arise, the disposition remains unactivated, but it still has reality as a disposition. In this respect, dispositional concepts in psychology are not basically different from those attributed to inanimate objects. Thus, soluble is a dispositional concept, and we consider it literally correct to say that a particular sugarlump is soluble even though it happens never to be put into solution. It is obvious that most of the terms used to describe people, whether in psychologese or ordinary speech, are dispositional in nature. Skills, habits, abilities, and character

45. "The occurrence of any crime creates a powerful impetus to construct a theory to explain it." SZASZ, *LAW, LIBERTY AND PSYCHIATRY* 134 (1963). See also Davidson, *Criminal Responsibility: The Quest for a Formula*, in *PSYCHIATRY AND THE LAW* 61, 63 (Hoch & Zubin eds. 1955); De Grazia, *The Distinction of Being Mad*, 22 *U. CHI. L. REV.* 339, 343 (1955).

46. "Discussion of addiction as a mental illness in a broad social context or for treatment purposes is quite a different matter from labeling addiction 'mental disease' in the context of determining criminal responsibility." *Heard v. United States*, 348 F.2d 43, 46 (D.C. Cir. 1964); see *Campbell v. United States*, 307 F.2d 597, 608-10 (D.C. Cir. 1962) (dissenting opinion); *Blocker v. United States*, 288 F.2d 853, 859-62 (D.C. Cir. 1961) (concurring opinion).

47. Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 *U. PA. L. REV.* 378, 384 (1952).

traits are all dispositional; if it were otherwise we could never attribute any such trait to a person unless he was momentarily manifesting it. When we say, "Jones knows the date of the Norman Conquest," we do not require that he be saying or thinking it. His knowing is his disposition (power, potentiality, ability) to say, or think, or write "1066" under suitable eliciting circumstances. When we say that Jones knows the date of the Norman Conquest, we cannot predict for sure he will be able to come up with the correct response on each and every occasion. He may have a momentary blockage for any of a number of reasons. The only way to cover all such contingencies so as to formulate an accurate dispositional statement is to exclude the entire class of interfering factors among the pre-conditions. But since this list is, strictly speaking, unknown to us, the only way of referring to it is by saying "and other interfering factors being absent," which renders the dispositional statement tautologous and empirically applicable only after the fact.

What does it mean to "know . . . that his act was wrong"? If a psychologist were to employ this language, he would be intending either (or both) of two components. One of these components is of an ethical-cognition nature; the other is of a guilt-signal nature. For short, let us designate these components by notations " e_c " and " g_s " respectively.

The primarily cognitive component e_c consists of a whole family of dispositions to perceive, classify, expect, think, recognize, infer, and *talk* (especially internally) about actions with respect to their allowed or forbidden character. These dispositions are, of course, the product of life experiences of many kinds, including explicit instruction in moral rules, observation of and identification with significant figures, and the whole reward-punishment regime which the institutions of the family, peer-group and society have provided. We italicized "talk" because the ability to produce verbal responses in oneself, which in turn act as behavior controllers, is one of the most important dimensions in ethical choice. As we all know, a person can permit himself all sorts of inconsistent ethical behavior as long as he can avoid "talking to himself" about the real ethical nature of his actions. However, because the word talk has a social and out-loud implication, we shall employ the more neutral word "token," used by logicians and psycholinguists, as a generic term for the whole class of psychological events that have a symbolic nature sufficient to justify treating them as essentially propositional.⁴⁸

48. A propositional mental event is one capable of being either true or false.

Thus when we say "Jones tokened red," we mean that there occurred within Jones a psychological event of a symbolic, referential, representational character—that in some sense, however attenuated, he said to himself or thought or intended the English sign red. He may have spoken it aloud, or his vocal chords may have formed the word silently, but these are not necessary conditions for a tokening event.

The cognitive component e_c involves a family of dispositions including dispositions to token such statements as "this is forbidden," "I shall deserve punishment," "if I do that I am wicked," "I'll hate myself later," and the like. While philosophers dispute about what is the essential element of ethical tokenings, psychologically we cannot—at least presently—assign clearly privileged status to some of these over others. The main point is that a person's moral training (all kinds, from all sources, and largely inexplicit) results in his having a family of dispositions to token statements containing ethical concepts such as wrong, illicit, forbidden, duty, ought, bad, sinful, unfair, and the like. If we could make an exhaustive survey of these tokening dispositions, and could then sort out the common features of those actions he is disposed to categorize one way or the other, we would have arrived inductively at the content of his particular ethical system.

The noncognitive component g_s is a motivational-affective state or event which is normally elicited by the activation of the dispositions e_c and which in turn functions as a behavior inhibitor. It is called a signal because it warns of future consequences (punishment, disapproval, guilt feeling, loss of self-esteem). As Freud points out, we learn by experience how to turn off this internal anxiety signal aroused by our impulse to forbidden actions. Most of the time our forbidden impulses are suppressed so quickly and automatically that the anxiety signal consists only of the faintest, briefest "blip" of internal warning, and is often not reportable (consciously introspectable) by the individual.

When psychologists say, then, that a person knows something is wrong, they may mean two different things.⁴⁹ First, an ethical-cognition signal may be meant. Thus, as we have indi-

49. It is frequently said that whether a person knew his act was wrong is an unanswerable question. CASSIFY, *THE QUALITY OF MURDER* 6 (1958); GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 408 (1952); Diamond, *Criminal Responsibility of the Mentally Ill*, 14 *STAN. L. REV.* 59, 60-61 (1961); Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 *U. CHI. L. REV.* 320, 321 (1955). For the reasons discussed, we believe this assertion is false.

cated is only the tokening of the phrase "this act is forbidden." A guilt signal, on the other hand, involves some emotional response such as anticipatory anxiety. In ordinary language, the distinction may be illustrated by the speeding driver who knows (*i.e.*, tokens an ethical-cognition signal) that his act is illegal but does not feel that he is acting wrongly (*i.e.*, does not adequately appreciate, in the sense of emotional-motivational overtones, that he may be imperilling the lives of himself and others). For *M'Naghten* purposes, it is obvious that the former meaning of "know" must be meant. That an offender has no conscious appreciation that he is presently acting dangerously, experiences no internalized inhibitory signal, and feels no guilt or remorse is irrelevant.

Returning to the e_c component of knowing that an act is wrong, we have interpreted this expression to mean that the individual, at the time he performed the act, had the disposition to token "this is wrong" or other roughly equivalent ethical statements. What *M'Naghten* says is that if he lacks this disposition, and if the cause of his lacking it is a defect in cognitive ego functions, then he is not criminally responsible. The writers of *M'Naghten* were aiming at a critical psychological distinction. Presumably anyone raised in our society (given at least some exposure, whether in home, church, school, or from peers) will have acquired ethical tokening dispositions. But whether an e_c disposition is activated at a given time depends upon a whole complex of factors, including the interference factors, operative at that moment. It obviously will not do to exculpate the agent solely because something impeded the activation of the e_c disposition,⁵⁰ because that impeding something may be any of the motives and emotions which impel a man to commit wrong acts and concurrently impair his momentary ability to token a member of e_c . If nondisposition to token an e_c signal were enough in itself, then the plea "my client didn't think his act was wrong at the time, because he hated the victim and intensely wished him dead" would, if factually established, justify acquittal. To avoid such absurd results, the rule specifies that the cause of the

50. A person of sound mind and discretion will not be exempted from punishment because he might have been a person of weak intellect or one whose moral perceptions were blunted or ill developed or because his mind may have been depressed or distracted from brooding over misfortunes or disappointments, or because he may have been wrought up to the greatest and most intense mental excitement from sentiments of disappointment, rage, revenge or anger.

State v. Andrews, 187 Kan. 458, 465, 357 P.2d 739, 744 (1960), cert. denied, 368 U.S. 868 (1961).

failure to token a member of e_c must be not an emotional or motivational factor, but a defect of reason.

The *M'Naghten* rule can be restated in these terms: The defendant will be excused if at the time of the criminal act he had a mental disease or defect which included among its symptoms or consequences an impairment in one or more of the psychological functions requisite for reasoning (*i.e.*, cognitive ego functions) which, in turn, reduced the strength of his disposition to token "this is wrong" to a negligibly low value and, as a result, he did not in fact token "this is wrong" though, if the impairment of reasoning had not been present, the probability of his so tokening would have been materially greater. We recognize that this formulation can hardly be said to improve on the surface clarity of *M'Naghten*. But, as we have observed, this surface clarity is delusive and, in dealing with the human mind, simple formulae cannot be expected.

The meaning we have given the *M'Naghten* language, while consistent with existing definitions, is not to our knowledge generally recognized.⁵¹ Almost all commentators have agreed that knowledge of wrong means more than the ability to say that murder is wrong.⁵² To hold to the contrary would be to destroy the defense, for no one in our society is unaware of the illegality and immorality of murder.⁵³ Beyond this, there is no agreement. As one court put it, "The usual practice is to just say 'know' to the jury, and let it go at that."⁵⁴

This is not to say that commentators have not attempted, just as we have above, to give a rationalizing construction to those words.⁵⁵ Perhaps the most sophisticated attempt was by

51. *But see* Davidson, *Criminal Responsibility: The Quest For a Formula*, in *PSYCHIATRY AND THE LAW* 61, 68 (Hoch & Zubin eds. 1955).

52. *E.g.*, HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 481 (2d ed. 1960); WILLIAMS, *CRIMINAL LAW* 495-97 (2d ed. 1961).

53. *E.g.*, WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 76 (1954); Diamond, *Criminal Responsibility of the Mentally Ill*, 14 *STAN. L. REV.* 59, 61 (1961); Guttmacher, *The Psychiatrist as an Expert Witness*, 22 *U. CHI. L. REV.* 325, 328 (1955).

54. *Sauer v. United States*, 241 F.2d 640, 649 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957).

55. *E.g.*, MAUDSLEY, *RESPONSIBILITY IN MENTAL DISEASE* 103 (1897); RUBIN, *PSYCHIATRY AND CRIMINAL LAW* 20 (1965). See also *United States v. Westerhausen*, 283 F.2d 844 (7th Cir. 1960); *Chase v. State*, 369 P.2d 997 (Alaska 1962); *People v. Wolff*, 61 Cal. 2d 795, 799-803, 40 Cal. Rptr. 271, 273-79, 394 P.2d 959, 961-67 (1964); *State v. Iverson*, 77 Idaho 103, 111, 289 P.2d 603, 607 (1955). It has been suggested that it would be improper to give "know" a meaning unfamiliar to the jury. Kuh, *The Insanity Defense—An Effort To Combine Law and Reason*, 110 *U. PA. L. REV.* 771, 783 (1962). While more elaborate, the meaning we have given that word is the common meaning.

Sir James Fitzjames Stephen in 1883. In his view, a man could not know his act was wrong if he "was deprived by disease affecting the mind of the power of passing a rational judgment on the moral character of the act which he meant to do."⁵⁶ In explanation, he stated: "Knowledge has its degrees like everything else and implies something more real and more closely connected with conduct than" the faint "perception of reality" possessed by the insane.⁵⁷ By defining self-control as "a power to attend to distant motives and general principles of conduct, and to connect them rationally with the particular act under consideration,"⁵⁸ he was then able to conclude "that a man who by reason of mental disease is prevented from controlling his own conduct is not responsible for what he does."⁵⁹ Stephen's analysis is remarkably similar to our own. Indeed, if we were to reduce it to psychologese, we would reach the same result.⁶⁰

Other writers have reached similar conclusions by focusing on the words "nature and quality of his act." "Nature" is usually explained by asking whether the actor knew that he was knifing someone. Thus, to use one of Professor Wechsler's examples, "a madman who believes that he is squeezing lemons when he chokes his wife"⁶¹ does not know the nature of his act. "Know" is used in a different sense here than we have used it before. Rather than a disposition to respond, "know" in this usage refers to present awareness of surrounding physical facts.⁶² The "nature" portion of *M'Naghten* is unimportant for two reasons. First, it almost never arises in actual practice. Second, most cases excusable under it would also be reached by knowledge of wrongfulness. It does have some theoretical interest in a case where the madman believes he is illegally choking his neighbor's dog when he is actually choking his neighbor. But one with such distorted awareness would almost certainly be suffering from a defect of reason creating a minimal disposition to token the appropriate ethical rule.

56. 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 163 (1883).

57. *Id.* at 166.

58. *Id.* at 170.

59. *Id.* at 167.

60. *But see* MERCIER, CRIMINAL RESPONSIBILITY 218 (1935).

61. MODEL PENAL CODE § 4.01, comment at 156 (Tent. Draft No. 4 1955); Wechsler, *Panel Discussion: Insanity as a Defense*, 37 F.R.D. 365, 382 (1964).

62. BIGGS, THE GUILTY MIND 110 (1955); WEIHOFEN, THE URGE TO PUNISH 35 (1957); WHITLOCK, CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS 32 (1963).

The word "quality," on the other hand, has more elastic possibilities. The most mentioned meaning is that it refers to the actor's recognition of the consequences of his act.⁶³ An example of Stephen's makes the point: "An idiot once cut off the head of a man whom he found asleep, remarking that it would be great fun to see him look for it when he woke."⁶⁴ Stephen assumed that the idiot knew his act was wrong in the sense that he knew his elders would reproach him for his mischievousness in forcing the man to look for his head. But it is clear that the idiot did not appreciate the enormity of what he had done. The difficulty with this approach is that very few criminals at the time of the crime have a real recognition of the extent of their wrong. If they did, crime might diminish. If quality is to take on the meaning of appreciation of enormity, its usage must be limited to gross cases such as that posed by Stephen. A test premised on complete understanding of what the consequences to the victim will be would exculpate almost every criminal.⁶⁵

The *M'Naghten* rule has been the subject of much criticism.⁶⁶ Consider first the claim that since modern science has

63. DAVIDSON, *FORENSIC PSYCHIATRY* 5 (2d ed. 1965). Courts have generally equated quality with physical nature. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 73 (1954); WILLIAMS, *CRIMINAL LAW* 495 (2d ed. 1961).

64. 2 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 166 (1883).

65. There is a serious danger, we believe, in emphasizing affect, the emotional appreciation of the consequences of an act, as part of true knowledge as some courts and writers would do. See *People v. Wolff*, 61 Cal. 2d 795, 40 Cal. Rptr. 271, 394 P.2d 959 (1964); WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 76-77 (1954); Hall, *Psychiatry and Criminal Responsibility*, 65 *YALE L.J.* 761, 781 (1956). "Nothing suggests a doubt of his sanity, unless it is the enormity of his crime; and it would be unsafe to indulge a presumption of a want of sanity from that alone . . ." *Burr v. State*, 237 Miss. 338, 342-43, 114 So. 2d 764, 766 (1959), quoting *Singleton v. State*, 71 Miss. 782, 789, 16 So. 295, 296 (1894).

66. The objection is sometimes made that the *M'Naghten* rule inappropriately requires the psychiatrist to give an either-or judgment and that this ignores the fact that mental disorder is a matter of degree. *E.g.*, Diamond, *Criminal Responsibility of the Mentally Ill*, 14 *STAN. L. REV.* 59, 62 (1961). Of course, this is so. As put by Stephen, "[I]f criminal law does not determine who are to be punished under given circumstances, it determines nothing." 2 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 183 (1883). But this does not mean that the psychiatric state of a responsible individual is irrelevant for other legal purposes. Thus, the degree of the crime has been reduced when the accused's mental state is such that he could not "*maturely and meaningfully* reflect upon the gravity of his contemplated act." *People v. Wolff*, 61 Cal. 2d 795, 821, 40 Cal. Rptr. 271, 287, 394 P.2d 959, 975 (1964). See also *People v. Goedecke*, 56 Cal. Rptr. 625, 423 P.2d 777 (1967); *People v. Conley*, 64 Cal. 2d 310, 49 Cal. Rptr. 815, 411 P.2d 911 (1966); *Early v.*

shown that the mind is an integrated whole, a rule such as *M'Naghten* which is formulated in terms of the rational or cognitive functions is counterscientific.⁶⁷ The first thing to be clear about is what we mean by saying that the mind is an integrated whole. If this rather imprecise expression is taken to mean that modern medical and behavioral science does not recognize the existence and operation of part-functions in mental life and behavior, in the sense that the mind or the person-in-action is conceived of by psychologists and psychiatrists as a kind of undifferentiated blob, the generalization is simply false as a summary statement of the teachings of these sciences. We are unaware of any theoretical formulation, however many or few professional adherents it commands, which treats of mind or behavior as an undifferentiated unity of the sort which this phrase might seem to suggest to an uncritical reader. If we examine the conceptualizations of human behavior and experience arising from such different approaches as clinical psychiatry, the statistical analysis of performance on psychological tests (differential psychology), or the experimental study of human and animal learning, we find, in spite of the vast differences in methodology and in the resulting substantive content of such theories, that they all utilize a model of the mind which postulates the existence of distinguishable processes, state-variables, part-functions, factors, intrapsychic "structures," and the like.⁶⁸

People, 142 Colo. 462, 352 P.2d 112, *cert. denied*, 364 U.S. 847 (1960); State v. Gramenz, 256 Iowa 134, 126 N.W.2d 285 (1964); State v. Sikora, 44 N.J. 453, 210 A.2d 193 (1965); State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959); State v. White, 60 Wash. 2d. 551, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883 (1963). *But see* State v. Rideau, 193 So. 2d 264 (La. 1966); Fox v. State, 73 Nev. 241, 316 P.2d 924 (1957). On other uses of mental condition in criminal law, see Louisell & Diamond, *Law and Psychiatry: Détente, Entente, or Concomitance*, 50 CORN. L.Q. 217 (1965). It is sometimes argued that *M'Naghten* is faulty because it prevents the expert from introducing true understanding of the psychology of the criminal act. See, e.g., ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 10 (1954). But when this is so it is a function only of the evidential rule of relevance. Unless such true understanding would lead to a change in assessment of blameworthiness, there is no reason to hear it on the issue of guilt.

We psychiatrists have not made it sufficiently clear that attempting to understand an individual whom we treat is not necessarily to condone all the behavior of such an individual, or even to expect inevitable penalties for such behavior to be waived merely because he is in treatment.

Menninger, Book Review, 38 IOWA L. REV. 697, 703 (1953).

67. See, e.g., BIGGS, *THE GUILTY MIND* 133 (1955); BROMBERG, *CRIME AND THE MIND* 51 (1965); WEIHOFEN, *THE URGE TO PUNISH* 31 (1957).

68. With the single exception of "information theory," which does

not purport to be a theory of the mind at all, and which does not have any known relevance to the insanity defense, there is no such holistic presentation. Consider, for example, the broadly psychoanalytic tradition as exemplified in Freudian theory and its derivatives. This theoretical formulation utilizes such part-functions or structures as superego, ego, libido, anxiety signal, the whole family of a dozen or more defense mechanisms, the several instincts and their components, and the like. Again, the psychometric tradition as represented by factor analysis enables us to identify and measure a very large number of components (e.g., at least 120 intellectual factors; see generally GUILFORD, *THE NATURE OF HUMAN INTELLIGENCE* [in press]) by means of standard situations or tests, ranging from perceptual capacities or mechanical abilities to personality traits such as social introversion, anxiety-tolerance or emotional reactivity. The general intelligence and reasoning factors emerging from such statistical analysis of differential psychometric data are, presumably, of some relevance to the proper psychological constructibility of common language terms like "reason" which figure importantly in legal discourse. The third tradition is exemplified by learning theoretical formulations which utilize such concepts as drive, reinforcement, conditioned reinforcement, response chain, discrimination, habit strength, fractional anticipatory goal response, stimulus sample, expectancy, cognitive map, cathexis, conditioned inhibition, or the like. See generally BUSH & ESTES, *STUDIES IN MATHEMATICAL LEARNING THEORY* (1959); ESTES, KOCH, MACCORQUODALE, MEEHL, MUELLER, SCHOENFELD & VERPLANCK, *MODERN LEARNING THEORY* (1954); HILGARD & BOWER, *THEORIES OF LEARNING* (3d ed. 1966); HULL, *PRINCIPLES OF BEHAVIOR* (1943); TOLMAN, *PURPOSIVE BEHAVIOR IN ANIMALS AND MEN* (1932); KIMBLE, HILGARD & MARQUIS, *CONDITIONING AND LEARNING* (2d ed. 1961); 2 *PSYCHOLOGY: A STUDY OF A SCIENCE* (Koch ed. 1959); SKINNER, *THE BEHAVIOR OF ORGANISMS* (1938). A good test case for our overall thesis regarding the ubiquity of part-functions in psychological theories is provided by the "orthodox Skinnerian line," inasmuch as this form of psychological theory, perhaps the most powerful technologically of any in existence, officially eschews the invocation of multiple hypothetical constructs, and aims to operate as closely as possible to a purely dispositional analysis of behavior itself. Nevertheless a reading of its major sources, e.g., HOLLAND & SKINNER, *THE ANALYSIS OF BEHAVIOR* (1961); OPERANT BEHAVIOR: AREAS OF RESEARCH AND APPLICATION (Honig ed. 1966); SKINNER, *SCIENCE AND HUMAN BEHAVIOR* (1953); SKINNER, *VERBAL BEHAVIOR* (1957); ULRICH, STACHNIK & MABRY, *THE CONTROL OF HUMAN BEHAVIOR* (1966), makes it obvious that even this chaste, superpositivistic, behavior engineering approach takes it for granted that one must distinguish among several classes of variables of which behavior is a function. Thus, it makes a crucial difference whether an organism's nonresponding on a particular occasion is due to his satiated hunger drive, or an emotional state elicited by an aversive stimulus, or a recent reinforcement following a certain type of reinforcement schedule, or several hours of experimental extinction. While it is true that this relatively atheoretical kind of formulation avoids the postulation of such hypothetical entities as ego, fractional goal response, or perceptual speed factor, the behavior analysis nevertheless proceeds on the underlying assumption that there are experimentally distinguishable classes of operation, e.g., feeding-fasting as contrasted with reward-punishment, which differ importantly in their effects as mediated by different intra-organismic state variables. Thus, for example, food deprivation (a "drive" manipulation) produces changes in the whole family of instrumental acts which have been rein-

Everyday experience demonstrates the ease with which psychological part-functions can be isolated. Consider, for example, a Siamese cat which, we are informed, has learned to shake hands. Interested in testing the truth of this somewhat unlikely allegation, a psychologically untrained layman offers his hand to the cat and says "shake." The cat fails to lift his paw. What are the possibilities that explain this failure of response? Since the cat, unlike the dog, is relatively weak in its susceptibility to control by purely social reward (such as a pat on the head and verbal approval, "Good cat!"), if he has been taught to shake hands to human command, the teaching very likely proceeded by the use of a more basic biological reward, such as a bit of food. This suggests the possibility that the cat fails to lift his paw because he has recently been fed to satiety and is in a state of minimal hunger drive. The layman knows that in order to test this particular hypothesis, the rational procedure is to prevent the animal from having access to food for a sufficient number of hours to ensure that the hunger drive will again be at high strength. Alternatively, it could be that the cat-trainer was a Frenchman so that the cat does not understand a verbal command uttered in English. Or, it may be that the cat is unusually shy of strangers and his normal response tendencies are being

forced with food, apart from their resemblance in response topography; by contrast, the giving or withholding of reinforcement affects the strength of a class of responses defined by their having similar topography, and emitted on the occasion of physically similar discriminative stimuli. To the extent that the mind-is-a-whole dogma does come from psychological or medical sources, it relies upon quotes from professionals who for some reason are speaking inaccurately about how their own profession really thinks and acts. Somewhat analogous to a minimally theoretical formulation such as Skinner's, consider the so-called "Mental Status Examination" of (descriptive) clinical psychiatry. In assessing the patient's current clinical status, the psychiatrist or psychologist finds it necessary to distinguish such functional rubrics as sensorium and intellect, emotional tone, or mental content. If "the mind is an integrated whole" meant that no distinction between part-functions were possible, the whole Mental Status Examination would have to be junked, since it requires of the clinical examiner that he attempt—difficult though it may be at times—to distinguish between different kinds, and psychological sources, of impairment. Suppose, for example, that a patient seems, superficially, to be disoriented. Is he exhibiting a true disorientation of the organic type, or is he kidding the examiner (manic jocularity), or is he malingering to escape criminal responsibility, or do we have to deal with the pseudodisorientation that may arise in schizophrenia on a delusional or hallucinatory basis? No competent psychiatrist or psychologist will ignore such everyday distinctions as these. Similarly, the intelligence test was originally invented to help make the distinction between genuine intellectual incapacity and other sources of poor school performance (e.g., laziness, perceptual defect, emotional upset).

emotionally impaired by the interfering affective state of fear. Even in this simple animal case, we recognize that in order for certain behavior to appear, the organism must *know* something, must *want* something, and must not be too *emotionally disturbed*. That is, we take for granted that a given bit of behavior, or the absence thereof, is susceptible of alternative explanations, in terms of distinguishable psychological variables, processes, or states. The difference between this homespun kind of example and the application of a complex, highly abstract psychological theory, great as it is and differing in important details, is fundamentally a matter of degree.

A second frequently voiced objection to *M'Naghten* is that "reason" is not a psychological concept. With regard to the existence of a general reasoning factor, the statistical evidence is unclear.⁶⁹ This may be attributable to the reliance most such studies place upon psychological tests (rather than clinical manifestations) as applied to samples of subjects drawn from the mentally healthy population. When abnormal individuals compose a large part of the sample, and the data subjected to factorization are ratings by skilled clinicians based on extensive diagnostic contact, a strong factor of cognitive slippage (ego weakness, thought disorder) emerges, being reflected in high factor loadings on such phenomena as disturbances of conceptualization, perceptual distortions, illogical or unrealistic thinking, altered states of consciousness, associative dyscontrol—in short, the group of abnormalities traditionally considered evidential of a psychotic process.⁷⁰ Such a statistical finding, of course, should

69. See ADKINS & LYERLY, *FACTOR ANALYSIS OF REASONING TESTS* (1952); Ahmavaara, *On the Unified Factor Theory of Mind*, 106 *ANNALES ACADEMIAE SCIENTIARUM FENNICAE* Ser. B 1 (1957); Botzum, *A Factorial Study of the Reasoning and Closure Factors*, 16 *PSYCHOMETRIKA* 361 (1951); Carter, *Factor Analysis of Some Reasoning Tests*, 66 *PSYCHOLOGICAL MONOGRAPHS* No. 8, at 66 (1952); Guilford, *Basic Conceptual Problems in the Psychology of Thinking*, 91 *ANNALS OF N.Y. ACADEMY OF SCIENCES* 6 (1960); Guilford, Kettner & Christensen, *The Nature of the General Reasoning Factor*, 63 *PSYCHOLOGICAL REV.* 169 (1956); Guilford, *The Structure of Intellect*, 53 *PSYCHOLOGICAL BULL.* 267 (1956); Guilford, *The Structure of Intellect Model: Its Uses and Implications*, U. CAL. PSYCHOLOGICAL LABORATORY, REPORT No. 24 (1960); Matin & Adkins, *A Second-Order Factor Analysis of Reasoning Abilities*, 19 *PSYCHOMETRIKA* 71 (1954). See also Guttman, *A Faceted Definition of Intelligence*, 14 *SCRIPTA HIEROSOLYMITANA* 166 (1965); Guttman, *The Structure of Interrelations Among Intelligence Tests*, *PROCEEDINGS OF THE 1964 INVITATIONAL CONFERENCE ON TESTING PROBLEMS OF THE EDUCATIONAL TESTING SERVICE*.

70. See Glueck, Meehl, Schofield & Clyde, *The Quantitative Assessment of Personality*, 5 *COMPREHENSIVE PSYCHIATRY* 15 (1964); Schofield, Meehl, Glueck & Clyde, *A Comprehensive Phenotypic Personality*

not be surprising to those versed in the psychodynamic system which measures ego strength in these terms.

Even assuming that there is no such thing as a general reasoning factor in psychology, it still would not follow that the *M'Naghten* reliance on that concept would be either unreasonable or counterscientific. It is important only that the concepts used in the law be compatible with existing scientific knowledge, not that the law utilizes scientific concepts. Whether an individual starting with certain premises consisting of the information from his sensory input together with certain general principles of conduct which he may be supposed to have learned, is capable of drawing the correct inference as to the moral and legal characteristics of a contemplated action may very well depend upon the presence and operation of several distinguishable psychological factors or functions. The question, admittedly of great interest to the psychometric theorist in psychology, as to whether these distinguishable part-functions are statistically correlated or completely independent does not prevent the moral philosopher or the legislator from asking the question, for legal purposes, whether the individual's net ability to think reasonably is materially impaired. That is to say, the notion of rationality is properly viewed as what the philosophers call an attainment concept, a concept referring to the efficacy or validity of a certain behavioral outcome quite apart from the detailed causal analysis of the various parts of the mental machinery that must play their proper role in attaining this outcome. Thus if I am an employer hiring a retail clerk, it is important for me to assess the job applicant's ability to make change correctly. For my purposes, this outcome disposition is what is pragmatically im-

Description—Sources and Content, (unpublished paper read at the convention of the American Psychological Association) (New York City, September 4, 1966). As is to be expected in research of this sort, variations in patient population studied, quality and duration of clinical contact, construction of the item pool, and choice of alternative mathematical solutions to the factor problem will all influence the results. And similar or identical factors may be differently named by the investigators, since name choice is somewhat arbitrary. (Thus cognitive slippage, ego weakness, thought disorder, and conceptual disorganization may all refer to the same kind of psychological defect as it emerges under slightly different guises in several research studies.) It may be that ego weakness in the form of perceptual distortion is sufficiently different from conceptual disorganization to warrant speaking of two factors, although in the work of Glueck, et al., one powerful cognitive slippage factor appeared saturating both symptomatic forms. For an excellent summary of the methodological problems and the present state of the evidence, including cross-matching of factors from different studies, see LORR, KLETT & McNAIR, SYNDROMES OF PSYCHOSIS (1963).

portant. This trait or disposition of the person can be assessed without carrying on a psychological inquiry into the system of part-functions which must be intact in order for it to exist, and into the question of whether these part-functions are in any way correlated.

To take another example, suppose a law firm is interested in hiring an attorney to handle automobile accident cases and in writing letters of inquiry the firm speaks of "auto accident case winning ability." A vocational psychologist undertakes a job analysis of what a lawyer does in working up such cases, devises a set of tests which he shows empirically to be severally predictive of these various job components, and then performs a factor analysis upon the matrix of intercorrelations among these tests. As a result of this factor analysis, he is able to show that the ability to win automobile accident cases is a complex composite of several distinct psychological dimensions which are completely independent of one another. He might, for instance, discover that lawyers who have a strong medical interest, a special detective talent in collecting bits and pieces of evidence, a knack for spotting potential jurors who will be free with the insurance company's money, and who know how to get under the skin of medical witnesses on cross-examination are the ones who tend to win this type of case. Since these factors are logically distinguishable, and show up in the statistical analysis to be unrelated to one another, the psychologist tells the law firm that they ought to stop talking about "automobile accident case winning ability" because his research has demonstrated that there is no such unitary trait or function in the mind. We doubt that the senior partners of the firm would find this argument persuasive, given their purposes.

Another frequent criticism of *M'Naghten* is that it improperly attempts to define insanity in terms of the single symptom of defective reasoning.⁷¹ But this again confuses the issue of mental disease with that of criminal responsibility. If a symptom is the only relevant one for purposes of blameworthiness, the law has no choice but to define responsibility in terms of it. Moreover, this criticism implies that cognitive functions have been relegated to a minor status in diagnostic psychiatry. The opposite is true. For example, in diagnosing psychosis, the ex-

71. *E.g.*, *Durham v. United States*, 214 F.2d 862, 872 (D.C. Cir. 1954); GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 417 (1952); Sobeloff, *From McNaghten to Durham and Beyond*, in *CRIME AND INSANITY* 136, 138 (Nice ed. 1958).

tent to which the patient's cognitive ego functions are intact is the single most important basis for distinguishing the psychotic from the nonpsychotic. The model of the mind which would seem presupposed by *M'Naghten* is a human being subject to various conflicting impulses and forces from within and without, that his behavior is the resultant of these forces, and that the mode of resolution of opposing forces (as, for instance, avarice impelling to larceny countervailed by fear of imprisonment and social shame if detected) is mediated by the operation of certain broadly cognitive processes. This model is, of course, precisely the model of the mind accepted in the psychodynamic picture of the role of the rational ego.⁷² Under such a model, there is nothing strange about requiring, as a condition for criminal responsibility, that this rational ego must be capable of carrying out its weighing, judging, and decision making functions.⁷³

While technical philosophical considerations in legal thinking should be kept to a minimum, we are persuaded that part of the confusion and controversy surrounding the rationale and especially the case application of the *M'Naghten* rule arises from a lack of philosophical clarity about such core concepts as "knowing" and "reason." If a tendency (readiness, power, capacity) to respond in a certain way is conceived as a disposition of the first order, then the tendency or capacity or power to acquire or lose a disposition of the first order may properly be looked upon

72. "The ego represents what we call reason and sanity, in contrast to the id which contains the passions." FREUD, *THE EGO AND THE ID* 30 (1927).

73. "The conscious ego utilizes the information imparted by the senses, subjects such data to the discerning and integrative processes of the intellect and so evaluates the milieu in terms of available sources and means of gratification as opposed to possible dangers of frustration or injury." MASSERMAN, *PRINCIPLES OF DYNAMIC PSYCHIATRY* 29 (2d ed. 1961).

Thus the most important part of the ego is its intellectual process.

This intellectual activity, "after considering the present state of things and weighing up earlier experiences, endeavors . . . to calculate the consequences of the proposed line of conduct." Thus by means of its faculties of judgment and intelligence, by the application of logic and reality-testing, the ego blocks the tendency of the instincts toward immediate discharge.

HINSIE & CAMPBELL, *PSYCHIATRIC DICTIONARY* 578 (3d ed. 1960). See also Freud, *Formulations Regarding the Two Principles in Mental Functioning*, in 4 *COLLECTED PAPERS* 13 (1911); FREUD, *INHIBITIONS, SYMPTOMS, AND ANXIETY* (1926); FREUD, *NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS* ch. 3 (1933); FREUD, *THE EGO AND THE ID* (1927); HARTMANN, *EGO PSYCHOLOGY AND THE PROBLEM OF ADAPTATION* 60, 65 (1958); *ORGANIZATION AND PATHOLOGY OF THOUGHT* (Rapaport ed. 1951).

as a disposition of the second order. Thus in the realm of inanimate objects, the term "magnetic" designates a physical disposition of the first order. A magnetic bar is disposed to be attracted to the iron hull of a ship and is disposed to attract iron filings toward itself. These movements of bodies are individual events, located in space-time. By contrast, a disposition is not thought of as a short-term event or episode but as a state or power or potentiality having a more extended duration. (These distinctions are not offered as philosophically precise but as adequate for present purposes.) The property of being magnetic is, therefore, a disposition of the first order. Now a bar of iron may or may not be magnetic depending upon its history, this history having resulted in a certain microstate. By placing an iron bar in a sufficiently powerful electromagnetic field we can confer upon it the first-order disposition magnetic. By heating a magnetized bar, on the other hand, we can disarrange its molecular domains and render it nonmagnetic. A bar of iron has the potentiality of acquiring the first-order disposition designated by the term magnetic and also of losing this first-order disposition. The same is not true of a chunk of glass since glass is not a magnetizable substance. The property of being magnetizable, as distinguished from the property of being magnetic, is therefore a second-order disposition. Theoretically one can conceive of a hierarchy of dispositions of various orders, although in practice we rarely pass beyond the second, and almost never beyond the third.

In the realm of behavior the ability to calculate sums and products is a first-order disposition. That is, while no one is perpetually in a state of doing mental arithmetic, under suitable circumstances such behavior can be elicited. However, one is not born with this first-order disposition; it must be acquired. The capacity to acquire arithmetical dispositions of the first order is therefore a disposition of the second order, one which is lacking, for instance, in a congenital idiot. One might view a genetic defect producing an inborn error of metabolism that would lead an untreated individual to become an idiot as a disposition of the third order, because by suitable chemical procedures (*i.e.*, dietary regime in an infant with phenylketonuria) we can induce in him the second-order disposition called the capacity to learn arithmetic. Another type of feeble-minded individual (say, one who has an anatomical absence of a large number of cells in the brain) cannot be brought into a condition of normal arithmetic acquiring capacity and, therefore, his third-order dispositions

are different from those of the first case.

Applying these concepts to the analysis of the notion "defect of reason," an individual piece of invalid inference is an episode or event characterized by certain properties, these properties being partly specified by the science of psychology and partly by the science of logic. The tendency to reason validly or invalidly at a given moment in time is a disposition of the first order. Whether such reasoning is valid depends upon a variety of factors, chief among which are motivational state (wishes, desires, goals, aversions), emotional state (fear, rage, excitement, arousal), and the whole family of cognitive instrumental habits usually subsumed under the broad rubric "cognitive functions of the ego." No psychologist alive can write the mathematical equations which give the probability of a valid inference. One cannot say with precision whether an individual tokened an ethical sentence judging a contemplated action as wrong. Again we remind the reader that for purposes of the criminal law it is not necessary to do this, and even if it could be done it would not be readily possible to translate it into jury instructions. It suffices for our purposes to recognize the three broad classes of determiners which enter into the insanity defense in a quantitatively significant way. A person may have a negligible probability of tokening the relevant ethical sentence because the combination of three classes of factors is sufficient to impair his first-order disposition to think rationally, to token a sentence which is a highly relevant logical inference from the perception or knowledge he currently possesses. The first of these classes of factors is his motivational state. Thus a very strong motive of avarice may impair an intelligent and informed taxpayer's momentary disposition to token the sentence "fudging on my income tax is wrong." Secondly, emotional state variables such as fear and rage and perhaps general excitement (extremely heightened arousal) may impair one's disposition to token the appropriate ethical sentence. Thirdly, the set of cognitive instrumental habits broadly subsumed under cognitive ego functions (speaking psychoanalytically) or reasoning functions (speaking psychometrically) may be defective. Schizophrenic thought disorder, feeble-mindedness, organic brain damage, or a very extreme psychometric deviation at the low end of one of the several capacity or ability factors involved in a certain type of cognitive performance would all be examples of this third kind of inadequacy. Now it is obvious that a relatively weak ego will be, in general, more susceptible to the influence of the impairing fac-

tors of heightened (or grossly reduced) motivation, or of states of emotional excitement, than a relatively strong ego. From this point of view one may look upon ego strength and specifically the rational functions as second-order dispositions in the sense that they affect the potential influence of the two other classes of factors upon the first-order disposition to think rationally or irrationally, as the case may be, at a given moment in time.

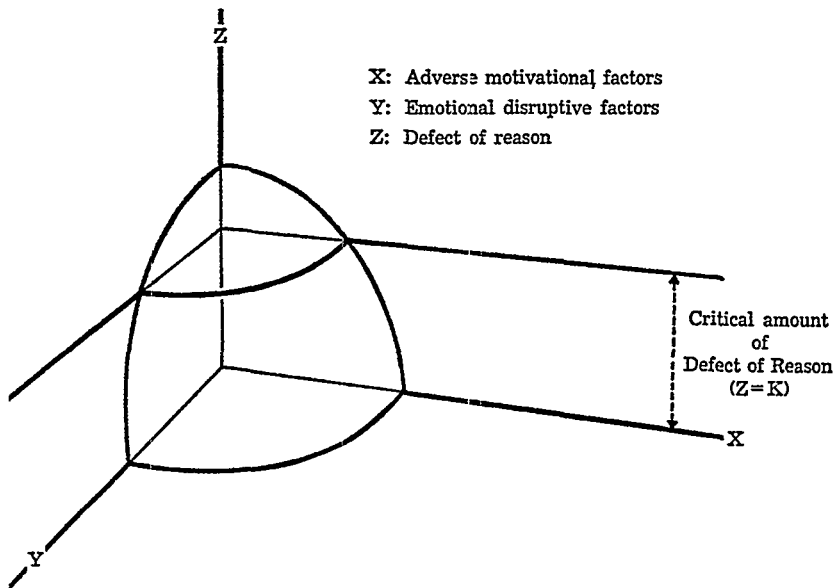


Figure 1

Not with the intention of a misleading claim to mathematical precision but for expository purposes, it is convenient to represent the *M'Naghten* rule criterion geometrically. The x-axis (running from left to right in the plane of the page) corresponds to the influence of the broad class of factors called "motivational," the direction of increased impairment of the disposition to token rationally increasing as we move towards the right. The point of origin at zero is for present purposes taken as the optimal motivational state for thinking rationally. The y-axis (pointing out toward the reader, perpendicular to the plane of the page) may be taken to represent the composite impairing influence of the broad class of emotional disruptive factors such as fear, rage, and general heightened physiological arousal or excitement. The vertical z-axis (perpendicular to the

other two and lying in the plane of the page) represents cognitive ego weakness: Strong ego is at the origin and the readiness of rational function to be impaired increases as we move away from the origin. On any particular occasion, an individual's psychological state for purposes of the *M'Naghten* rule is then representable as a point in this space, the x, y, and z coordinates of this point representing the adverse strength of influence of motivational, emotional, and ego weakness factors respectively. As we move further away from the origin in this geometrical representation of the psychological functions, the disposition to token appropriately, the ability to think rationally, decreases. If we translate such common sense terms of the law as "unable" or "substantial incapacity to . . ." as meaning a negligible probability or near-zero disposition, say a momentary disposition state such that the probability of tokening the appropriate legal or ethical sentence is less than .01, then we can represent this negligible probability (substantial incapacity) to token appropriately as a surface, such as the sphere shown in the diagram. Momentary states of an individual in which the combination of the strength of factors is such that the values of the relevant variables x, y, and z lie outside this surface are occasions in which we would say, for legal purposes, that the individual cannot think correctly about a situation or a contemplated action. Inside the sphere are coordinates of the points representing momentary values of the motivational, affective, and cognitive variables such that the probability of a correct and relevant ethical or legal tokening exceeds this low value. It may still have a probability considerably less than one-half, so that one would still be entitled to predict that the individual would not token appropriately, but the law does not exculpate anybody merely on the grounds that he had less than a fifty-fifty probability or chance of passing the correct moral judgment on what he is about to do. (Obviously if we proceeded on that basis, it would follow as a mathematical consequence that half of all criminal offenders should be excused, since, on the average, half of them will be below that probability level.)

The *M'Naghten* rule for exculpation requires more than that, at the time of the action, the accused's momentary state correspond to a point lying somewhere outside the sphere representing the tokening probability of .01. It adds the further condition that, given a negligible probability of the offender's tokening the correct ethical sentence, the defect in the third component (*i.e.*, the rational second-order disposition) must be above a certain critical value.

The explanation we have given may also be represented arithmetically. If x equals the effect of adverse motivational factors, y the effect of adverse emotional factors, and z the effect of the second-order disposition ego weakness, then there is an unknown function, f , which gives the e_c tokening probability, p , for any combination of these factors. If not knowing an act to be wrong means both a failure to token e_c and a probability of less than .01, then *M'Naghten* first requires that the joint values of x , y , and z were such at a given time that: $p=f(x, y, z) < .01$. Under *M'Naghten*, if $p < .01$, but e_c occurs, then conviction is required. If $p > .01$, whether or not e_c occurs, conviction is required. Only if $p < .01$ and e_c fails is acquittal possible.

It is not sufficient, however, that $p < .01$ and e_c fail. *M'Naghten* also requires that the adverse z component (ego weakness, cognitive slippage, thought disorder) must exceed a certain value in the pathological direction, k . As we have said before, this value cannot be precisely stated. Words such as "marked," "extreme," "pathological" can be used. Alternatively, one could say two standard deviations meaning psychometrically a condition experienced by less than three per cent of the population. Either of these explanations, of course, is arbitrary. They are merely illustrative.

The full *M'Naghten* requirement, then, is that defendant fail to token e_c , that $p=f(x, y, z) < .01$, and that $z > k$. If $z < k$, while tokening may still not occur because of the strength of x and y , conviction must follow because the defendant had the second-order disposition, the capability of thinking rationally at the time of the act.

The immediately preceding material deals with the explication of the *M'Naghten* rule with emphasis upon a philosophically and psychologically adequate analysis of the verb "to know." It goes without saying that a similar diagram or equation can then be drawn in which the output variable or event is the overt response which is the subject matter of the offense. Given whether and how clearly a defendant tokens one or more sentences containing a moral or legal judgment upon the act he is about to commit, then whether he will in fact proceed to perform it will again be a function of the three classes of variables. But in this second diagram, the probability surface of interest is the probability of performing the overt act rather than, as in the diagram shown, the probability of a correct ethical-legal tokening event.

But whereas the psychologist is interested in the manner in which this second probability is related to the three major classes of factors, the *M'Naghten* rule is not. It nowhere denies that cognitive, conative, and affective components are inextricably involved jointly in determining the defendant's conduct; it merely disclaims any interest given the prior occurrence of a relevant ethical-legal tokening *e.*. It is important to recognize this two-stage situation, because without such recognition one would be led to the erroneous conclusion that a rule which focuses attention upon the impairment of cognitive function is committed to the view that cognitive function is not susceptible of being impaired by motivational and emotional factors.⁷⁴ This *M'Naghten* does not deny. What it does deny is that it is legally and morally relevant whether, given an adequate disposition to token an appropriate ethical-legal judgment upon one's contemplated act (*i.e.*, given the person's knowledge of the act's wrongness), the act was performed anyway because of strong feelings or urges. The important point is that from the standpoint of the community's sense of justice, while we are understandably reluctant to exculpate a criminal action on the ground that, although the person performed it knowing it was criminal, he was impelled so to do by strong criminal motives or emotions, we are much more willing to exculpate if his emotions and motives impaired his ability to be capable of thinking rationally.

Our defense of *M'Naghten* is not to be understood as defending all, or even perhaps most, of its application in current administration of the criminal law. It is our view that the inadequate analysis of knowing as a disposition, with the resultant inability or reluctance of expert witnesses to render their expertise into what they take to be the *M'Naghten* concepts, has in part resulted in the unedifying "battle of the experts," all too often present when insanity is at issue, and has contributed to the widespread disaffection among psychiatrists and social scientists with the *M'Naghten* rule itself. It is our position that when a proper analysis of moral and legal knowing is made, it is generally possible for an expert witness to translate the *M'Naghten* language into his own familiar clinical or scientific mode of thought, and that he can be responsive to counsel's

74. See WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 4, 66-67 (1954); WEIHOFEN, THE URGE TO PUNISH 12, 34 (1957); GLUECK, LAW AND PSYCHIATRY 48 (1962); WHITLOCK, CRIMINAL RESPONSIBILITY 35 (1963); Davis, *Some Aspects of the Currens Decision*, 35 TEMP. L.Q. 45, 46 (1961).

questions without doing violence to his professional concepts. But of course this presupposes that the expert witness is not himself tendentious with respect to the criminal law, or hostile to its underlying policy of implementing the community's sense of justice.

Because of the widespread criticism of *M'Naghten* based on that test's alleged defects many attempts have been made to formulate better rules of responsibility. These attempts have embraced one or more of four separable approaches to the problem of criminal responsibility.

The most interesting new formulation is that advocated by a majority of the Royal Commission on Capital Punishment. They would "leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible."⁷⁵ In short, the jury is asked as the community in microcosm to apply its sense of justice to determine whether, given his mental condition, the accused ought to have been able to obey the law. If it is important that the criminal law reflect the societal sense of justice, this test meets that challenge on its own terms.⁷⁶

75. ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-53 *Report*, CMD. No. 8932, at 116 (1953).

76. This approach is often associated with the opinion of Judge Thurman Arnold in *Holloway v. United States*, 148 F.2d 665 (D.C. Cir. 1945), *cert. denied*, 334 U.S. 852 (1948). He there wrote:

But the issue of the criminal responsibility of a defendant suffering from mental disease is not an issue of fact in the same sense as the commission of the offense. The ordinary test of criminal responsibility is whether defendant could tell right from wrong. A slightly broader test is whether his reason had ceased to have dominion of his mind to such an extent that his will was controlled, not by rational thought, but by mental disease. The application of these tests, however they are phrased, to a borderline case can be nothing more than a moral judgment that it is just or unjust to blame the defendant for what he did. Legal tests of criminal insanity are not and cannot be the result of scientific analysis or objective judgment. There is no objective standard by which such a judgment of an admittedly abnormal offender can be measured. They must be based on the instinctive sense of justice of ordinary men. This sense of justice assumes that there is a faculty called reason which is separate and apart from instinct, emotion, and impulse, that enables an individual to distinguish between right and wrong and endows him with moral responsibility for his acts. This ordinary sense of justice still operates in terms of punishment. To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame.

* * *

This proposal has been most strongly criticized for its failure to provide any standard by which jury decision is to be guided.⁷⁷ For its application to be consistent with the rest of criminal law, the jury would have to be lectured on the purposes of the criminal law and the notions which generally control responsibility there. If this is to be done, it can better be done in the formulation of the test of insanity. On the other hand, if the test is to be applied intuitively, other problems arise. First, since intuitions will vary, similar cases will be treated differently. While that threat is always present, it has been the purpose of all legal systems to minimize rather than accentuate it.⁷⁸ More serious in our view is the underlying assumption that mental disease or deficiency is itself a reason to allow open jury nullification when it is forbidden elsewhere.⁷⁹ The jury is never asked directly whether this accused should be punished, although we cannot prevent that consideration from affecting their judgment on the issues left to them. Why should the fortuity of mental disease change the nature of the submission?⁸⁰ The only justifiable answer to this question is that mental disease inevitably so affects conduct that the accused ought not to be held responsible. But if this is so, then the question left to the jury ought to be whether the accused is suffering from a mental disease. If it is not so, then the question of justice of punishment ought to be left to the jury only in those cases in which the mental disease is of a type having a serious and substantial effect on conduct. Once this

Psychiatry offers us no standard for measuring the validity of the jury's moral judgment as to culpability. To justify a reversal circumstances must be such that the verdict shocks the conscience of the courts.

Id. at 666-67. See generally Hill, *The Psychological Realism of Thurman Arnold*, 22 U. CHI. L. REV. 377 (1955). Hints that legal rules are a "fantastic semantic charade," *People v. Johnson*, 13 Misc. 2d 376, 169 N.Y.S.2d 217, 218 (Sup. Ct. 1957), masking a nonrational submission to the jury of the question whether the accused ought to be punished recur in the cases. *E.g.*, *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954); *People v. Nash*, 52 Cal. 2d 36, 49-50, 338 P.2d 416, 423-24 (1959); *Sellers v. State*, 73 Nev. 248, 252-53, 316 P.2d 917, 919 (1957); *Brook v. State*, 21 Wis. 2d 32, 47, 123 N.W.2d 535, 542-43 (1963).

77. MODEL PENAL CODE § 4.01, comment 5 (Tent. Draft No. 4, 1955); ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953 *Report*, CMD. No. 8932, at 286-87 (1953).

78. Davidson, *Criminal Responsibility: The Quest for a Formula*, in *PSYCHIATRY AND THE LAW* 61, 65 (Hoch & Zubin eds. 1955); Silving, *Mental Incapacity in Criminal Law*, 2 CURRENT L. & SOCIAL PROBLEMS 3, 29 (1961).

79. Silving, *Mental Incapacity in Criminal Law*, 2 CURRENT L. & SOCIAL PROBLEMS 3, 21 (1961).

80. Hill, *The Psychological Realism of Thurman Arnold*, 22 U. CHI. L. REV. 377, 382-83 (1955).

point is reached, the formulation that the Royal Commission avoided making must be made.

The besetting sin of the Royal Commission's test, as in all the proposed insanity rules, is the ambiguity of the phrase "mental disease or defect." As we have observed before,⁸¹ the concept is simply not susceptible of any but a normative definition.⁸² It means what the user wants it to mean. Even to limit it to the diagnostic categories of the American Psychiatric Association is illusive. It would be an unusual criminal who could not be placed by a friendly expert witness in one of the following categories: inadequate personality,⁸³ emotionally unstable personality,⁸⁴ sociopathic personality disturbance,⁸⁵ and transient situ-

81. See text accompanying notes 43-47 *supra*.

82. WEIHOFFEN, *THE URGE TO PUNISH* 75-76 (1957); WHITLOCK, *CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS* 74 (1963); Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 327 (1955). The Group for the Advancement of Psychiatry defined mental illness for this purpose 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." GAP REPORT No. 26, *CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY* 8 (1954). This creates the need for a definition of when capacity is sufficiently lessened to warrant commitment. Additionally, of course, it ignores the different purposes of the law of commitment and the law of criminal responsibility.

83. 000-x41 Inadequate personality

Such individuals are characterized by inadequate response to intellectual, emotional, social, and physical demands. They are neither physically nor mentally grossly deficient on examination, but they do show inadaptability, ineptness, poor judgment, lack of physical and emotional stamina, and social incompatibility.

AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL* 35 (1952).

One expert labelled inadequate personality a mental disease in *United States v. Naples*, 192 F. Supp. 23, 43 (D.D.C. 1961), *rev'd*, 307 F.2d 618 (D.C. Cir. 1962).

84. 000-x51 Emotionally unstable personality

In such cases the individual reacts with excitability and ineffectiveness when confronted by minor stress. His judgment may be undependable under stress, and his relationship to other people is continuously fraught with fluctuating emotional attitudes, because of strong and poorly controlled hostility, guilt, and anxiety.

This term is synonymous with the former term "psychopathic personality with emotional instability."

AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL* 36 (1952).

Emotionally unstable personality was characterized as a mental disease by the experts in *Campbell v. United States*, 307 F.2d 597, 608 (D.C. Cir. 1962), as was passive-aggressive personality disorder in *King v. United States*, 372 F.2d 383, 387 (D.C. Cir. 1967).

85. 000-x60 Sociopathic Personality Disturbance

Individuals to be placed in this category are ill primarily in

ational personality disturbance.⁸⁶ It is no answer to say that these are not mental diseases unless we can also say what are

terms of society and of conformity with the prevailing cultural milieu, and not only in terms of personal discomfort and relations with other individuals. However, sociopathic reactions are very often symptomatic of severe underlying personality disorder, neurosis, or psychosis, or occur as the result of organic brain injury or disease. Before a definitive diagnosis in this group is employed, strict attention must be paid to the possibility of the presence of a more primary personality disturbance; such underlying disturbance will be diagnosed when recognized. Reactions will be differentiated as defined below.

000-x61 Antisocial reaction

This term refers to chronically antisocial individuals who are always in trouble, profiting neither from experience nor punishment, and maintaining no real loyalties to any person, group, or code. They are frequently callous and hedonistic, showing marked emotional immaturity, with lack of sense of responsibility, lack of judgment, and an ability to rationalize their behavior so that it appears warranted, reasonable, and justified.

The term includes cases previously classified as "constitutional psychopathic state" and "psychopathic personality." As defined here the term is more limited, as well as more specific in its application.

000-x62 Dyssocial reaction

This term applies to individuals who manifest disregard for the usual social codes, and often come in conflict with them, as the result of having lived all their lives in an abnormal moral environment. They may be capable of strong loyalties. These individuals typically do not show significant personality deviations other than those implied by adherence to the values or code of their own predatory, criminal, or other social group. The term includes such diagnoses as "pseudosocial personality" and "psychopathic personality with asocial and amoral trends."

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL 38 (1952).

Sociopathic personality disturbances have been recognized as mental disease under both the *Durham* and Model Penal Code formulations. See, e.g., *United States v. Freeman*, 357 F.2d 606, 612 (2d Cir. 1966); *United States v. Currens*, 290 F.2d 751, 755 (3d Cir. 1961); *Blocker v. United States*, 288 F.2d 853, 874 (D.C. Cir. 1961) (Miller, J., dissenting), 274 F.2d 572 (1959).

86. Transient Situational Personality Disorders

This general classification should be restricted to reactions which are more or less transient in character and which appear to be an acute symptom response to a situation without apparent underlying personality disturbance.

The symptoms are the immediate means used by the individual in his struggle to adjust to an overwhelming situation. In the presence of good adaptive capacity, recession of symptoms generally occurs when the situational stress diminishes. Persistent failure to resolve will indicate a more severe underlying disturbance and will be classified elsewhere.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL 40 (1952).

A situational depression was part of the expert diagnosis in *State v. Trantino*, 44 N.J. 358, 365, 209 A.2d 117, 120 (1965), *cert. denied*, 382 U.S. 993 (1966), but the court held that, standing alone, it did not establish a *M'Naghten* mental disease.

mental diseases. And, to allow the jury to disregard expert testimony on this issue on the basis that the accused ought to be punished is simply to mask the fact that the announced test is not the test at all.

This is well-illustrated by the experience of the District of Columbia under the *Durham* rule. Under that test, "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."⁸⁷ In *Blocker v. United States*,⁸⁸ the court felt compelled to grant a new trial because the doctors at St. Elizabeth's hospital had relabelled sociopathy a mental disease after having characterized it as merely a personality disturbance at the initial trial. Such a change in nomenclature may be useful, even necessary, for some purposes. But it is extremely unlikely that the psychiatrists considered the purposes of the criminal law in making their decision. Moreover, it is doubly unlikely that a delegation to psychiatrists of power to establish rules of criminal responsibility was the intent of the *Durham* decision.

It has been suggested that this result could be avoided by making mental disease an issue for decision by the jury.⁸⁹ But this is to return to the unprincipled decision that has been the basis of criticism of the Royal Commission test. If we have standards of what mental diseases are appropriate bases for excuse, why not state them in the rule? If we do not, how is the jury to decide the issue except on an intuitive judgement of whether the accused ought to be punished?

In *McDonald v. United States*,⁹⁰ the court modified the *Durham* rule by limiting the meaning of mental disease or defect to "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs be-

87. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954). Disease and defect were defined in that case as follows:

We use "disease" in the sense of a condition which is considered capable of either improving or deteriorating. We use "defect" in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.

Id. at 875.

88. 274 F.2d 572, 572-73 (D.C. Cir. 1959). See generally *Blocker v. United States*, 288 F.2d 853, 857 (D.C. Cir. 1961) (Burger, J., concurring).

89. *King v. United States*, 372 F. 2d 383, 387-88 (D.C. Cir. 1967); *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962); *Stewart v. United States*, 214 F.2d 879, 882 (D.C. Cir. 1954). See Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 932-33 (1961).

90. 312 F.2d 847, 851 (D.C. Cir. 1962).

havior control." Unfortunately, ambiguity remains. It is unlikely that anything will ever be labeled a mental disease which does not have manifestations of abnormal mental or emotional processes. The chameleon "substantial" does not provide an effective limitation; necessarily it must bear the meaning the user wishes. The effect on processes is substantial enough to consider the individual diseased. How can one answer how much more substantial, if at all, the effect must be before it is substantial enough to qualify as a mental disease for *McDonald* purposes? How can the jury decide that issue? If the jury is permitted to say to the experts that what is substantial enough for you is not for us, are we not again simply covertly asking the jury to intuitively apply its own sense of justice?⁹¹ If we want to do this we should do it openly. The second requisite for a *McDonald* mental disease, a substantial impairment of behavior control, can, in our view, only be taken as a restatement of the product rule discussed below. If the crime would not have occurred but for the mental disease, how can it be said that the mental disease has not substantially affected behavior control.⁹²

Of course, it is unreasonable to ask that the concept mental disease dichotomize in the same way as guilt and innocence. Given the fact, however, that mental disease will often be used to characterize deviations from normality that have no criminological significance, it is important to recognize that the concept serves a very slight limiting function. If it is important to provide some standard for the jury, then a characteristic of those mental diseases that ought to affect responsibility should be isolated. This in our view is what the defect in reason requirement of *M'Naghten* does.

The most criticized portion of the *Durham* rule is the phrase "product of." As used by the court, it has meant that if the conduct would not have occurred but for the presence of mental disease, then the conduct is a product of that disease.⁹³ To the extent that mental disease is a hypothesis as to why the accused acted as he did, the product question is already answered. This is a problem of the concept of disease, of course. But given its

91. Such an approach is suggested in *King v. United States*, 372 F.2d 383, 388 (D.C. Cir. 1967): "The [mental disease] question for the jury requires the application to medical knowledge, and the lay evidence as well, of the understanding and judgment of the community as reflected in the jury."

92. Acheson, *McDonald v. United States: The Durham Rule Redefined*, 51 GEO. L.J. 580, 587 (1963).

93. E.g., *Carter v. United States*, 252 F.2d 608, 617 (D.C. Cir. 1957); *Wright v. United States*, 250 F.2d 4, 12-13 (D.C. Cir. 1957).

existence, normal causative principles may serve no limiting function. Observers have also criticized the inherently speculative nature of the question asked. As Judge Brosman put it, "There may be some controversy concerning the scientific validity of the premise that a criminal act may be committed which is *not*, in some sense, a product of whatever mental abnormality may coexist."⁹⁴ While the "but for" rule may limit the scope of this dilemma, it does not end it. Indeed, a harder problem is raised, for it is practically impossible to say that a different individual would not have acted differently.⁹⁵ This last criticism is partially unsound. The question of the extent to which the mental disease affected the conduct is, though crucial, necessarily speculative. The expert can legitimately provide a conclusion only as to probabilities. This problem exists under any insanity test, but is accentuated in the *Durham* jurisdiction because once mental disease is established, the burden is on the government to prove that the conduct was not a product of that disease.⁹⁶ Since the product question is very difficult, perhaps impossible to answer, this burden could very well lead to acquittal of all who are mentally diseased, a result unrelated to common notions of blameworthiness.

Two other approaches have been advanced by those who believe that *M'Naghten* is faulty and that neither *Durham* nor the Royal Commission offer adequate alternatives. Both are present in the Model Penal Code approved by the American Law Institute:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he

94. *United States v. Smith*, 5 U.S.C.M.A. 314, 322, 17 C.M.R. 314, 322 (1954). "If the disease produces a mental derangement of such character as necessarily to influence the accused's every action, there is no further problem." *Carter v. United States*, 252 F.2d 608, 616 (D.C. Cir. 1957). See also ROCHE, *THE CRIMINAL MIND* 267 (1958) ("the product question is answerable by psychiatry only in the affirmative"); Davidson, *The Psychiatrist's Role in the Administration of Criminal Justice*, in *CRIMINAL PSYCHOLOGY* 13, 20 (Nice ed. 1962).

95. "[O]nly Omniscience can say whether the act would have been committed had the taint not existed." *People v. Hubert*, 119 Cal. 216, 223, 51 Pac. 329, 331 (1897). See also *King v. United States*, 372 F.2d 383, 386-87 (D.C. Cir. 1967); Acheson, *McDonald v. United States: The Durham Rule Redefined*, 51 GEO. L.J. 580, 583 (1963). Some commentators have suggested that the product question is just another way of leaving the issue to the jury's instinctive sense of justice without standards to control the exercise of that judgment. ROCHE, *THE CRIMINAL MIND* 268 (1958); Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 372 (1955).

96. *E.g.*, *Frigillana v. United States*, 307 F.2d 665 (D.C. Cir. 1962); *Satterwhite v. United States*, 267 F.2d 675 (D.C. Cir. 1959).

lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.⁹⁷

The first part of this formulation is a careful attempt to obviate what some observers believe to be *M'Naghten's* defects. The phrase "substantial capacity" avoids the problem of whether non-disposition to token must be absolute.⁹⁸ And the use of the word "appreciate" has been thought to remove any lingering doubt that more than mere knowledge that murder is wrong is required.⁹⁹ Also, the Code makes clear that a mental defect is to be treated in the same way as a mental disease, a point not expressly resolved under *M'Naghten*.¹⁰⁰ The issue of moral or legal wrongfulness is left unanswered.

The major defect, in our view, in this reworking of *M'Naghten* is that it excises those portions of the old rule that provide

97. MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962). In varying forms, it has been adopted by statute in 4 states and by judicial decision in 2 circuits and states. See 38 ILL. REV. STAT. ch. 38, § 6-2 (1965); N.Y. PENAL LAW § 1120 (1965) (omitting substantial capacity to conform); VERNON'S ANN. MO. STAT. §§ 552.010, .030 (Supp. 1966); 13 VT. STAT. ANN. § 4801 (1959); *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964); *Commonwealth v. McHoul*, 226 N.E.2d 556 (Mass. 1967); *State v. Shoffner*, 31 Wis. 2d 412, 143 N.W.2d 458 (1966) (burden of proof on accused). It is also the basis for the test in another circuit. *United States v. Currens*, 290 F.2d 751, 774 (3d Cir. 1961). The court stated:

The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.

Ibid. Presumably an approach similar to the Model Penal Code is intended by those jurisdictions which frame insanity defenses in terms of impairment of cognition or volition. See *Davis v. United States*, 165 U.S. 373 (1897); *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967); *United States v. Williams*, 372 F.2d 76 (7th Cir. 1967); *Dusky v. United States*, 295 F.2d 743 (8th Cir. 1961), *cert. denied*, 368 U.S. 998 (1962); *Hall v. United States*, 295 F.2d 26 (4th Cir. 1961); *Howard v. United States*, 232 F.2d 274 (5th Cir. 1956); *Terry v. Commonwealth*, 371 S.W. 2d 862 (Ky. 1963); *State v. White*, 58 N.M. 324, 270 P.2d 727 (1954). Of course, these jurisdictions vary as to how great the impairment of either faculty must be.

98. *E.g.*, ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 116 (1964); WEIHOFEN, THE URGE TO PUNISH 63 (1957).

99. *E.g.*, GLUECK, LAW AND PSYCHIATRY 69 (1962).

100. Compare WILLIAMS, CRIMINAL LAW § 147 (2d ed. 1961), with WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY 230 (1959). See also *State v. Fuller*, 229 S.C. 439, 93 S.E.2d 463 (1956); *State v. Deyo*, 358 S.W.2d 816 (Mo. 1962).

workable standards for judicial administration of the defense. Instead of the limiting device of defect of reason, a standard containing understandable fact issues,¹⁰¹ the framers have rested on the illusion of mental disease. We can only say again that this leaves responsibility in the hands of labellers. That the framers were neither unaware of nor unbothered by this problem is obvious from their exception in the second clause of sociopathy from the category of mental disease.¹⁰² Unfortunately, more than the exception of one troublesome case is necessary to avoid the ambiguity of mental disease. The excision of the old "nature and quality" clause, while not terribly significant, does remove that hedge against inappropriate attribution of responsibility in those few cases mentioned above in which there is a disposition to token that the act is forbidden but for other reasons there is no real understanding of the conduct engaged in.

The addition to *M'Naghten* contained in the Model Penal Code is the excusing condition of substantial incapacity to conform conduct to the requirements of the law. This raises the most relevant philosophical question. If a man is rendered incapable of obeying the law by mental disease, how can we find him morally blameworthy? The rub is that the question is unanswerable. In terms made familiar by the long debate over irresistible impulse, how do you distinguish an irresistible impulse from an impulse that was not resisted? In the terms of the Model Penal Code, how do you distinguish incapacity from indisposition?¹⁰³ There are several ways out of this impasse. One can move intuitively and ask whether the offender ought to have been capable, but this, of course, destroys the test. Alternatively, one can invoke the principle of causality and inquire as the test seems to suggest, whether the disease was a cause of the conduct. But we know of no way to answer this question except by a *Durham*-like inquiry—whether, but for the disease, that act would have occurred. Finally, it is possible to construe the test as requiring an examination of the strength of

101. Most important of all the merits of the *M'Naghten* formula, however, is the fact that a defence of intellectual insufficiency can be tested by criteria external to the actions which it is invoked to excuse. The proof that a man is deluded or lacks understanding lies, not in the fact that he commits a crime, so much as in his behaviour before and afterwards, or even in his capacity to understand things that have nothing to do with his offence.

WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 231 (1959).

102. MODEL PENAL CODE § 4.01, comment (Tent. Draft No. 4, 1955).

103. WEIHOFFEN, *THE URGE TO PUNISH* 70 (1957).

the desire. As a theoretical matter, if impaired cognition should excuse, why should not magnified desires that make existing cognition useless for purposes of control? To administer such a rule would be impossible.¹⁰⁴ There is simply no way to measure the strength of desires. One further problem exists if ability to conform is read in this way. Even if related to mental illness, can level of desire be related to culpability? If normal or near normal inhibitory potential exists, can outrageous desires be blameless?¹⁰⁵

As a means of testing the utility of *M'Naghten* and the newer rules, we have constructed a series of cases in which mental disease or defect is arguably present in one engaging in criminal conduct.¹⁰⁶ We will attempt to demonstrate how results will vary under the different formulations and how expert witnesses could reasonably testify in response to those formulations.

CASE 1

Defendant, an adult living at home with his parents, is a mentally deficient individual with an IQ in the imbecile range. He has been watching some neighbor boys play cops and robbers with capguns, and upon finding a loaded revolver in the glove compartment of his father's car, he shoots and kills one of the

104. So it may be that the act of the sexual pervert or the kleptomaniac is due, not to the weakening of moral restraint, but to the overpowering strength of the prompting desire. It may be that this is so, but we do not know that it is so; and, if it were determined affirmatively, I am not sure that it would influence our view of the responsibility of the actor, though perhaps it ought to do so.

MERCIER, CRIMINAL RESPONSIBILITY 172 (1935).

105. DAVIDSON, FORENSIC PSYCHIATRY 20 (2d ed. 1965).

The medical evidence most favorable to him was that he possessed a personality which made it a little more difficult to adhere to the right. A mental capacity to adhere to the right may vary in individuals but so long as a person is able to do so he is not legally insane. To overcome that deficiency, which may arise out of moral and not mental deterioration, a person might be required to exercise more self-discipline, but that alone does not legally excuse the commission of a crime.

United States v. Edwards, 4 U.S.C.M.A. 299, 303-04, 15 C.M.R. 299, 303-04 (1954).

106. In our discussion of these cases we have assumed away all evidential problems. We of course recognize that there will often be conflicting expert opinion, that much expert opinion may be inherently improbable, and that in many jurisdictions even uncontradicted expert testimony may be disregarded. We have, however, deliberately chosen to ignore these problems of the administration of the defense in order to better focus on its substantive content. For an excellent detailed treatment of practical problems in qualifying and examining expert psychiatric and psychological witnesses, see GOULETT, THE INSANITY DEFENSE IN CRIMINAL TRIALS (1965).

neighbor boys. The patient's intellect is such that he does not discriminate between a capgun and a revolver, does not understand the meaning of death, does not know the difference between a television actor who falls down upon being shot and one of the neighbor boys who falls down pretending to be killed, and so forth. While in jail he asks whether the slain person will come to visit him. He shows no comprehension of what he has done or why he is involved with the police and is thoroughly baffled by the whole proceeding.

Diagnosis: 000-x903 Mental deficiency (severe).

While it is apparent that defendant is suffering from a defect of reason, his acquittal under *M'Naghten* will depend on whether "disease of the mind" includes mental deficiency. If it does, then defendant should fall under either branch of *M'Naghten* for failure to know the nature and quality of his act and to know that the act was wrong. Such a result is clearly dictated by the modified *M'Naghten* rule of the Model Penal Code.¹⁰⁷

Results under the other tests are not so clear. The Royal Commission's rule precludes predictability and the result in this case would depend on the particular jury's view of the appropriateness of punishment. Under the capability approach of the Model Penal Code, we cannot predict. If capability means that but for the defect the conduct would not have occurred, the *Durham* inquiry, we would assume that an acquittal would follow. Beyond this, we are unable to give meaning to the test.

CASE 2

A patient previously diagnosed as epileptic on the basis of typical *grand mal* seizures but hitherto without general disturbances in behavior suffers instead of his usual *grand mal* attack a so-called epileptic equivalent, a clouded state with deep confusion, hallucinations, fears, and violent outbreaks, in the course of which he commits a homicide. Persons in an epileptic equivalent are almost completely unfluencable by social stimuli and behave as in an automatic state. They usually have complete amnesia for the episode. Nevertheless, the patient's condition is definitely unlike that of the more usual motor seizure because the motor pattern itself instead of being the purposeless contraction of opposed muscles as in a *grand mal* fit, or a brief loss of consciousness as in the *petit mal* attack, has the usual characteristics of organized motor output with sequential move-

107. See note 100 *supra*.

ment patterns quite appropriate to what might be called at least the short-term or subsidiary goals. Thus, for example, a patient sent to the hospital by the court for psychiatric evaluation following an apparent unmotivated assault suffered an epileptic clouded state during his hospitalization in which he systematically dismantled the bed in his room, apparently to use the parts as weapons. The epileptic equivalent, however, is a member of the same disease family if not the same exact disorder as *grand mal* epilepsy.

Diagnosis: 000-550 Acute Brain Syndrome associated with convulsive disorder (epileptic equivalent).

This case is easily handled under each of the insanity formulations.¹⁰⁸ In the "but for" sense, the conduct is the product of the defect. Presumably, the jury under the Royal Commission test would be inclined to acquit. Under *M'Naghten* the disposition to token the e, signal would be, we assume, wholly absent. The one problem would be whether this nondisposition resulted from a defect in reason. To some extent, the person's ability to carry out purposive conduct demonstrates an ability to reason, but this is true of anyone no matter how impaired he might be. Various tests, such as an EEG, demonstrate a marked organic change during an epileptic equivalent. This plus the amnesia after the event and the inability to influence conduct during the attack by external stimuli lead us to conclude that a defect of reason is present. Under almost any meaning given those tests requiring an inability to conform, the accused would also be acquitted.

CASE 3

Patient is an extreme case of paranoid schizophrenia with delusions and hallucinations, who believes that the Masons are plotting to take over the government and that, because of their having learned that he is aware of their intentions, they have decided to do away with him as a potential informer. A salesman with a Masonic button in his lapel comes to the front door. As a result of his delusional misinterpretation of certain things he has heard in listening to a news broadcast, the patient has concluded that today is the day for his execution and is in an acute state of panic. He has armed himself and upon seeing the Masonic button he is sure that the salesman is the triggerman

108. See generally BARROW & FABING, *EPILEPSY AND THE LAW* 124-33 (2d ed. 1966); GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 338-42 (1927).

who has been sent to kill him. When the salesman puts a hand in his coat pocket to take out a personal card identifying himself, the patient is convinced that he is reaching for a revolver. The patient draws his own weapon and shoots first in self-defense.

Diagnosis: 000-x24 Schizophrenic reaction, paranoid type.

Under *M'Naghten*, an acquittal would occur. A thought disorder, or defect in reason, is the hallmark of schizophrenia.¹⁰⁹ This in turn, on the facts posited, has created a minimal disposition to token the appropriate signal. An argument could also be made that the disease-induced mistake prevents him from knowing the nature or quality of his act since he believed himself to be acting in justifiable self-defense. This would create a seeming inconsistency with normal rules of mistake of fact. While an unreasonable belief in the need for self-defensive action would inculcate, an outrageous belief would exculpate. But this is not a real problem so long as only those outrageous beliefs caused by defects of reason excuse.¹¹⁰ Acquittal should also follow under *Durham* and the Model Penal Code.

CASE 4

Patient is a professionally trained woman (Ph.D. degree in

109. See generally ARIETI, *INTERPRETATION OF SCHIZOPHRENIA* (1955); BELLAK, *SCHIZOPHRENIA: A REVIEW OF THE SYNDROME* 18 (1958); BLEULER, *DEMENTIA PRAECOX; OR, THE GROUP OF SCHIZOPHRENIAS* (1950); FENICHEL, *THE PSYCHOANALYTIC THEORY OF NEUROSIS* 416, 421 (1945); JUNG, *PSYCHOLOGY OF DEMENTIA PRAECOX* (1909); KRAEPELIN, *TEXTBOOK OF PSYCHIATRY* (8th ed. 1913); LANGUAGE AND THOUGHT IN SCHIZOPHRENIA (Kasanin ed. 1944); MASLOW & MITTELMAN, *PRINCIPLES OF ABNORMAL PSYCHOLOGY* 523-24 (rev. ed. 1951); Payne, *Cognitive Abnormalities*, in *HANDBOOK OF ABNORMAL PSYCHOLOGY* 248-50 (Eysenck ed. 1961); Payne & Hewlett, *Thought Disorder in Psychotic Patients*, in 2 *EXPERIMENTS IN PERSONALITY* 3 (Eysenck ed. 1960); Piotrowski & Lewis, *Clinical Diagnosis of Manic-Depressive Psychosis*, 42 *PROCEEDINGS OF AMERICAN PSYCHOPATHOLOGICAL ASSOCIATION* 25 (1952); Rabin & King, *Psychological Studies*, in *SCHIZOPHRENIA: A REVIEW OF THE SYNDROME* 216 (Bellak ed. 1958); STRECKER, EBAUGH & EWALT, *PRACTICAL CLINICAL PSYCHIATRY* 275-79 (7th ed. 1951); Winder, *Some Psychological Studies of Schizophrenia*, in *THE ETIOLOGY OF SCHIZOPHRENIA* 191 (Jackson ed. 1960). Eisenstein, *Differential Psychotherapy of Borderline States*, 25 *PSYCHIATRIC Q.* 379 (1951); Hoch & Polatin, *Pseudoneurotic Forms of Schizophrenia*, 23 *PSYCHIATRIC Q.* 248 (1949); Lewis, *Criteria for Early Differential Diagnosis of Psychoneurosis and Schizophrenia*, 3 *AMERICAN J. OF PSYCHOTHERAPY* 4 (1949); Meehl, *Schizotaxia, Schizotypy, Schizophrenia*, 17 *AMERICAN PSYCHOLOGIST* 827 (1962); Zilboorg, *The Problem of Ambulatory Schizophrenias*, 113 *AMERICAN J. OF PSYCHIATRY* 519 (1956).

110. For an interesting analysis of the insanity defense with reference to its similarities to the defense of mistake, see Silving, *Mental Incapacity in Criminal Law*, 2 *CURRENT L. & SOCIAL PROBLEMS* 3, 35 (1961).

Political Science and some interest in the law) who is in psychotherapy with presenting complaints of diffuse anxiety, inability to relate socially and get along with colleagues, some irrational and nongratifying sexual acting out, and a history of a possibly genuine suicide attempt. While the presenting complaints and the superficial clinical picture are those of a neurotic who is chronically unhappy but by no means incapacitated for work and for at least a socially acceptable modicum of interpersonal relations, intensive therapeutic exploration and psychological testing make evident a basically schizoid personality structure with the attendant tendencies to cognitive slippage, extreme ambivalence, defective capacity for pleasure experiences, and a pervasive and recalcitrant interpersonal aversiveness ("distrust," "social fear," "closeness-panic"). The patient does at times think that others are looking at her or paying some special kind of attention to her when they actually are not. Her concern about the reactions of others when this social anxiety is sufficiently intensified and her hypersensitiveness and over-concern, which we normally consider to be neurotic, verges rather markedly into distortions of reality of sufficient deviation, and entertained sufficiently seriously by the patient, to be considered delusional. If these episodes, instead of lasting for hours or at most days, persisted and were unattended by some degree of self-awareness on the patient's part of her tendencies to distort, she would properly be diagnosed as schizophrenic reaction paranoid type instead of pseudoneurotic schizophrenia.

During one of these micropsychotic episodes in which she thought that some of her coworkers were speculating as to whether she was an alcoholic and as to whether she was illegitimately pregnant, she expressed the idea to the therapist that her administrative superior had as part of his supervisory responsibilities the duty to put a stop to this malicious gossip, and that since he did not seem to be doing so, he obviously was hostile to the patient. She was baffled by her supervisor's hostile attitude but was very indignant that he did not carry out his proper moral responsibility in defending her against this vicious character assassination. During this episode of delusional mentation she manifested what was for her a very rare expression of overt anger, clenching her teeth and with glaring eyes saying that she had put up with about as much of this kind of thing as she was going to stand for and that she intended if necessary to take some action to put a stop to it. Asked by the therapist what she had in mind, she said that she had not made up her

mind what to do, whether to confront this superior, to go to somebody above his head and complain, to go to the police, or to take legal action. She was reluctant to go to the police since she thought perhaps the police were in some way involved and perhaps had been alerted to put her under surveillance. She then said, with an expression of mixed hatred and fear upon her face, that "after all, even the law recognizes a person's right to kill in self-defense." In describing the attitude and behavior of her fellow workers and the delinquent supervisor she had employed terms like character assassination, annihilation, or—a favorite term of paranoid patients—the verb "destroy." Thus she said, "I don't have to just sit and let these people destroy me."

Now as events turned out, while the therapist went through a period of some professional anxiety, this micropsychotic episode quickly subsided. The patient, while insisting that the people at work had some negative feelings toward her, indicated that she had perhaps slightly overdone things. Let us suppose, however, that instead of this harmless outcome, the patient had taken some form of direct violent action against the allegedly delinquent supervisor.

Diagnosis: 000-x26 Schizophrenic reaction, chronic undifferentiated type.

This case well illustrates the cognitive slippage associated with schizophrenia. By leaping from apparent dislike to desire to destroy, the patient is able to subsume her action under the heading self-defense and to believe that her action is morally and legally right. The ability to engage in reasoning of a sort is demonstrated by the patient's use of the following syllogism:

Major Premise: A homicide in self-defense is justifiable.

Minor Premise: My (contemplated) homicide is in self-defense.

Conclusion: My (contemplated) homicide is justifiable.

While its formal structure is irreproachable, this legal-moral syllogism is based upon a material fallacy of equivocation in the use of the term "self-defense." In the major premise the expression "self-defense" has the meaning given it in the law, that defensive force may be used when one has reasonable grounds to believe that he is in immediate danger of death or serious bodily harm by a physical attacker. In the minor premise, however, given the facts which the patient herself has presented (neglecting that these "facts" are themselves paranoid distortions), she is not in immediate danger of death or serious bodily harm but only of damage to her reputation. The material fallacy of equivocation which she commits upon the middle term "homicide in

self-defense" is in turn predicated upon an equivocation in a pre-supposed underlying syllogism which she does not token overtly in the interview (but which she may well have tokened implicitly prior to the interview) and which involves further equivocations upon words like "attack," "annihilate," and "destroy." Now every clinician is familiar with the tendency of paranoid schizophrenics to utilize the word "destroy," and we know that this word has a meaning for these patients that includes the notion of annihilation and the death of the self. And by "meaning" here we do not refer only to the noncognitive elements of meaning such as the motivational and affective features, although they are certainly crucial in the psychopathology of schizophrenia; we are saying that the cognitive meaning, the role in the entire associative network of verbal linkages which are the psychological basis of all logical transitions in symbolic thought, is aberrated in the schizoprene.¹¹¹ We emphasize the fact that it is the system of this patient's emotional and motivational forces—of her psychodynamics—that leads her to commit this egregious fallacy, one which a person with many years less education and many points lower IQ than she would hardly be capable of committing. There is no implication here that the rest of the personality, that is, her motives and her emotions, are utterly unrelated to the cognitive functions of this woman. On the contrary, it is precisely those other forces that lead her to commit the fallacy in question. But the point is that normal individuals or neurotics or sociopaths free of schizoid cognitive defect, would not be able to commit such a gross logical mistake. It is her schizoid ego weakness, her second-order disposition to cognitive slippage, that makes it psychologically possible for her to make a mistake of this sort. If she were to undertake the planning of a homicide under these circumstances, her ego is sufficiently intact (at this stage of the disease) so that she would be quite capable of rationally planning it, the reason being that the motivational and emotional system will not, in a patient with this degree of preservation of ego-function, suffice to impair her rationality as regards instrumental (means-to-end) connections.

It might be objected that this woman surely knows that defense against physical attack is *not* conceptually identical with defense against verbal damage to reputation, and therefore the *M'Naghten* rule would require that she be found guilty. But

111. FENICHEL, *PSYCHOANALYTIC THEORY OF NEUROSIS* 49, 421 (1945); HINSIE & CAMPBELL, *PSYCHIATRIC DICTIONARY* 247, 658 (3d ed. 1960). See also authorities cited note 109 *supra*.

this objection overlooks the dispositional character of the word "know." It is true that if she were asked whether there were a difference between these two kinds of attack, she would probably be capable of tokening the appropriate differentiating sentences. But it is part of her semipsychotic ego defect that her disposition to token this self-critical sentence also has a negligible probability, and that is one of the crucial ways in which she differs from a normal or neurotic person. Putting it in another way, having studied a course in undergraduate logic, somewhere in her brain is stored the necessary cognitive material to permit her to form a sentence to the effect that she has just committed a material fallacy of equivocation. But she has a negligible disposition to token any such self-critical sentence, and that is one of the most important respects in which she differs from the rest of mankind.

A useful analogy in thinking about this type of cognitive slippage is to imagine a person intending to play according to the rules of solitaire but who is playing with very badly printed cards, a smudged deck, so that denominations and suits get mixed up. He might be playing by the formal rules of solitaire, but he would be making mistakes. A schizoid person is playing with a partly smudged deck of conceptual cards. Not all suits or denominations are equally smudged. And on some occasions of misplaying a card, he has done so because he very much wants to win the game. When it is psychologically convenient he does not look as carefully at a card that "fits" the rules as he would at another. Admittedly the degrees of cognitive slippage in the major mental disorders may sometimes be very subtle, hard to detect, and difficult to evaluate quantitatively. But in this respect, psychiatric testimony is not essentially different from any other kind of expert testimony where questions of amount and degree may at times be very difficult to answer.

In our opinion a *M'Naghten* defect in reason is present. As a result, the patient has a minimal disposition to token an e_c signal and she must be acquitted.¹¹² Similar results would occur under the Model Penal Code and *Durham*.

CASE 5

The patient has the same degree of psychopathology as in

112. That the ability to subsume a concrete act under its proper legal category is part of the *M'Naghten* test is argued in OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS 141 (1909), and approved by GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 219 (1927) and WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 80 (1954).

Case 3, with a clinically manifest thought disorder resulting in a breakdown of the reality testing functions of the ego in the form of delusions and hallucinations. The difference between this case and that one lies in the relation between the content of the delusional ideation and the illegal act performed. This patient has the delusion that he is a special agent of God and experiences auditory hallucinations in the form of divine commands (a not uncommon symptom of paranoid schizophrenia). God tells him that the Episcopal bishop is corrupting the diocese into heresy (the patient is a devout Episcopalian) and God's hallucinated voice instructs him that the bishop should be "done away with." In his thought disorder the patient conceives himself as a religious martyr who will perhaps be badly handled by the organized institution of the church as was true of Jesus and of the great reformers. He also recognizes that shooting bishops for heresy is against the criminal law. He nevertheless commits a homicide involving careful planning and lying in wait outside the Episcopal residence for the bishop to appear so he can shoot him. Testimony is presented, and he also admits the fact that he drove away from the vicinity of the bishop's residence upon seeing a squad car come into the block. When interrogated by the police he states that he assumed that the institutions of society would, as usual, line up with the ecclesiastical hierarchy and that he expected to be persecuted for his God inspired action. The presence of the schizophrenic psychosis is not in question, and no psychiatric testimony is offered to rebut the claim that the patient has paranoid schizophrenia and that his particular reaction was the direct psychological consequence of his psychotic delusion and hallucination.

Diagnosis: 000-x24 Schizophrenic reaction, paranoid type.

This case presents the question of the definition of wrong—does it mean legally or morally wrong? Courts have split on this issue.¹¹³ While no untoward results would occur from allowing a broader definition in the case of commands from God,¹¹⁴

113. Compare *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966), *State v. Kirkham*, 7 Utah 2d 108, 319 P.2d 859 (1958), and *State v. Allen*, 231 S.C. 391, 98 S.E.2d 826 (1957), with *Terry v. Commonwealth*, 371 S.W.2d 862 (Ky. 1963). See generally GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 405 (1952); HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 479-80 (2d ed. 1960); WILLIAMS, *CRIMINAL LAW* § 159 (2d ed. 1961); Annot., 45 A.L.R.2d 1447, 1454-55 (1956).

114. At least two reported cases, however, involve an attempt to fake an insanity defense on the basis of hallucinatory commands from God. *United States v. Mathis*, 15 U.S.C.M.A. 130, 35 C.M.R. 102 (1964); *People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (1915). We cannot resist

it is obvious that at some point the accused must not be allowed to impose his own morality on the social system. Consequently, while we prefer the broader definition, we recognize that general acceptability of that morality may be an issue.¹¹⁵ On the present facts we believe that the hallucination prevented the tokening of an e_c signal and that the defendant ought to be acquitted.

CASE 6

The following language is taken from *People v. Wolff*:¹¹⁶

[I]n the year preceding the commission of the crime [the fifteen year old] defendant "spent a lot of time thinking about sex." He made a list of the names and addresses of seven girls in his community . . . whom he planned to anesthetize by ether and then either rape or photograph nude. One night about three weeks before the murder he took a container of ether and attempted to enter the home of one of these girls through the chimney, but he became wedged in and had to be rescued. In the ensuing weeks defendant apparently deliberated on ways and means of accomplishing his objective and decided that he would have to bring the girls to his house to achieve his sexual purposes, and that it would therefore be necessary to get his mother (and possibly his brother) out of the way first.

The attack on defendant's mother took place on Monday, May 15, 1961. On the preceding Friday or Saturday defendant obtained an axe handle from the family garage and hid it under the mattress of his bed. At about 10 p.m. on Sunday he took the axe handle from its hiding place and approached his mother from behind, raising the weapon to strike her. She sensed his presence and asked him what he was doing; he answered that it was "nothing," and returned to his room and hid the handle under his mattress again. The following morning defendant

quoting Stephen on this problem:

My own opinion, however, is that, if a special Divine order were given to a man to commit murder, I should certainly hang him for it unless I got a special Divine order not to hang him. What the effect of getting such an order would be is a question difficult for anyone to answer till he gets it.

2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 160 n.1 (1883).

115. See *People v. Wood*, 12 N.Y.2d 69, 187 N.E.2d 116 (1962); Devlin, *Mental Abnormality and the Criminal Law*, in CHANGING LEGAL OBJECTIVES 71, 84 (Macdonald ed. 1963). It may be that so long as the sense of moral propriety is honestly held by the defendant and sufficiently connected with the defect in reason, acquittal should follow. Although the cases have talked about the requirement of consistence with general moral views, this has usually been in connection with a scarcely believable defendant. Thus, in the *Wood* case, the court's opinion seemed to rest on a general disbelief that the defendant believed it morally right to kill degenerates. Similarly there may be a causal question. One may view euthanasia as morally right without that view being connected with the concurring defect in reason. Cf. *Regina v. Windle*, [1952] 2 All. E.R. 1.

116. 61 Cal. 2d 795, 40 Cal. Rptr. 271, 394 P.2d 959 (1964).

arose and put the customary signal (a magazine) in the front window to inform his father that he had not overslept. Defendant ate the breakfast that his mother prepared, then went to his room and obtained the axe handle from under the mattress. He returned to the kitchen, approached his mother from behind and struck her on the back of the head. She turned around screaming and he struck her several more blows. They fell to the floor, fighting. She called out her neighbor's name and defendant began choking her. She bit him on the hand and crawled away. He got up to turn off the water running in the sink, and she fled through the dining room. He gave chase, caught her in the front room, and choked her to death with his hands. Defendant then took off his shirt and hung it by the fire, washed the blood off his face and hands, read a few lines from a Bible or prayer book lying upon the dining room table, and walked down to the police station to turn himself in. Defendant told the desk officer, "I have something I wish to report. . . . I just killed my mother with an axe handle." The officer testified that defendant spoke in a quiet voice and that "His conversation was quite coherent in what he was saying and he answered everything I asked him right to a T."¹¹⁷

In conversation with police officers, the defendant stated that he knew his act to be wrong.

Diagnosis: The four expert witnesses at trial testified that defendant suffered from schizophrenia, although they disagreed on type, but that he knew his act was wrong.

If the experts were using "knowing the act to be wrong" in the sense that we believe to be proper, then of course the defendant must be convicted under *M'Naghten*. Whatever meaning they attributed to those words, their testimony effectively insured conviction. Nor could this result be avoided by their further testimony that the defendant's sense of wrong, his careful planning, and his calm were all consistent with the medical diagnosis. As the California court observed, schizophrenia itself is not a defense to crime: If that schizophrenia did not substantially impair the defendant's knowledge of wrongness, his conduct was no less culpable than any other criminal's conduct.

It may well be that the schizophrenia contributed to or was evidenced by the defendant's rather bizarre desires and the failure to satisfy them once having started in that direction. But it is not yet the law that unusual desires are an excuse for crime. *Durham* would lead to an acquittal, for under that test it prob-

117. 61 Cal. 2d at 806-07, 40 Cal. Rptr. at 277-78, 394 P.2d at 965-66.

Defendant lived with his mother and older brother since his parents were divorced some 13 years previously. However, his father remained on good terms with the family; he drove by their house each morning to ascertain that they had not overslept, and he often ate with them in the evening.

61 Cal. 2d at 806 n.6, 40 Cal. Rptr. at 277 n.6, 394 P.2d at 965 n.6.

ably could not be said that, absent the schizophrenia, the conduct would still have occurred. The ability-to-conform test might similarly lead to acquittal. In our view, such results demonstrate the fallibility of those formulations. We are unable to distinguish, in terms of culpability, abnormal desires in mentally diseased persons from abnormal desires in undiseased persons. Sexual fantasies are not exactly rare in teenagers, and, given a relatively equal inhibitory potential, we cannot see why as between two individuals who criminally act to realize those fantasies, only the one who concurrently suffers from mental disease should be acquitted.

All this may be an unnecessary quarrel with the expert evidence in the *Wolff* case. It is possible that the experts could have testified that the defendant was minimally disposed to token the appropriate e_c signal. On the other hand, and perhaps more likely, at least from the facts given by the court, the experts may have been too quick to explain the unusual desires by the label "schizophrenia." While such desires may evidence schizophrenia, considerably more is required before that diagnosis can be made. Assuming, however, the existence of schizophrenia coupled with the unusual desires of defendant and his failure to rationally effectuate his purpose, it may be more probable than not that at the time of the homicidal act his defect in reason prevented the necessary tokening.¹¹⁸ The strength of this probability rests on the nature and severity of the schizophrenia and on the view taken of the bizarreness of defendant's actions.¹¹⁹

CASE 7

A 35-year-old woman without previous history of mental illness develops a depressive episode of psychotic proportion

118. See *Frigillana v. United States*, 307 F.2d 665 (D.C. Cir. 1962); *Satterwhite v. United States*, 267 F.2d 675 (D.C. Cir. 1959); *Weihofer, The Flowering of New Hampshire*, 22 U. CHI. L. REV. 356, 361 (1955).

119. A jury question would be presented on the "craziness" of the accused's actions. The expert witness has no particular expertise on the rationality of the defendant's conduct; this is almost exclusively a matter of social judgment. Consequently, the jury should be instructed that if irrational behavior is found, the expert's opinion should be considered on the issue of insanity, otherwise not. For such conditional use of expert testimony, see *United States v. Hopkins*, 169 F. Supp. 187 (D.C. Md. 1958); *State v. Bertone*, 39 N.J. 356, 188 A.2d 599, *cert. denied*, 375 U.S. 853 (1963). On motiveless behavior, see WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* 233-35 (1959). For a case where a rational motive did not overcome other proof of insanity, see *Wright v. United States*, 250 F.2d 4 (D.C. Cir. 1957).

with the usual symptoms of extreme sadness of mood, weight loss, sleep disturbances, loss of interest in her usual activities, preoccupation with negative thoughts of guilt and hopelessness of the future, and psychomotor retardation. During the deepest phase of the depression, the psychomotor retardation is such that she is massively inhibited from doing almost anything, including anything dangerous to herself or others. As the depression begins to lift, however, the psychomotor retardation is somewhat reduced, permitting her to make a few decisions and take a few actions, and since her affective state is still one of very black mood and her thinking is still along lines of hopelessness, she kills both of her children and makes an unsuccessful suicide attempt. On that day, she kept the children home from school, called up the cleaning woman and told her not to come as scheduled, and in various other ways showed clear evidence of systematic planning and premeditation of the killings. Emerging from the depression, she is at the time of trial essentially "normal" in all respects, and has a recollection although a somewhat dim one both of the events that transpired and of her mental state at the time. Insofar as she can recall how she felt and what she thought, her recollection is in accordance with the statements she made to police officers at the time, namely that while God did not command her to do anything and no voices were heard, it seemed perfectly clear to her that the situation was hopeless and that the killing was the only right thing to do because of the terrible state of the world and the terrible kind of mother she had been and would no doubt continue to be. The question as to whether she was doing something forbidden by law did not enter her consciousness in any form, although obviously she recognized the necessity of performing the act in some sense surreptitiously, when her husband and the cleaning lady and so on were not around. The evidence indicated, and the psychiatric testimony was to the effect that the suicide attempt was genuine and miscarried quite inadvertently.

Diagnosis: 000-x12 Manic depressive reaction, depressed type. An alternative possible diagnosis would be 000-x14 psychotic depressive reaction, depending upon the relative emphasis placed by the diagnosing clinician on the absence or presence of previous marked mood swings versus the presence of environmental precipitating factors.

Within the ambit of the depressive attack, the patient suffers from a defect of reason. There is a significant impairment

of intellectual function and conceptualizing powers.¹²⁰ The patient's views of the world, though not necessarily delusional in the sense of objectively false, are not subject to change by rational argument. Thus, no demonstration that this patient was in fact as good or better mother than most would have any chance of affecting her belief that she was not. In turn, this defect of reason reduced her disposition to token the appropriate e. signal. This is true despite her efforts to keep others away because of her recognition that they would disapprove of her acts. The absence of the appropriate disposition is evidenced by her feeling that the act was right and it is not negated by her feeling that others would disapprove.

Whether this defendant is acquitted under *M'Naghten* depends on the view taken of the meaning of the word "wrong." If it means illegal, she must be convicted because she was disposed to token that phrase. If it means morally wrong, so long as the morality is consistent with social views generally, conviction might still follow. Only if wrong means morally wrong in the sense that the defendant honestly did not believe in the moral propriety of her action will acquittal occur. We believe this last construction is the proper one and for that reason favor acquittal.¹²¹

CASE 8

Defendant is a psychopath possessing all those characteristics that so exasperate observers. Although showing no psychotic or neurotic traits, he engages in inadequately motivated antisocial behavior without feelings of guilt. He has no real insight into his condition and he is unable to learn by experience.¹²² Well-known in the town for his past trials with the law on petty charges, he once again passes bad checks in circumstances where it is obvious that he will be apprehended.¹²³ Indeed, he makes

120. See KRAINES, *MENTAL DEPRESSIONS AND THEIR TREATMENT* 257-81 (1957); Beck, *Thinking and Depression: Idiosyncratic Content and Cognitive Distortions*, 9 *ARCHIVES OF GENERAL PSYCHIATRY* 324 (1963); Beck, *Thinking and Depression: Theory and Therapy*, 10 *ARCHIVES OF GENERAL PSYCHIATRY* 561 (1964).

121. For a somewhat similar case, see *Commonwealth v. Woodhouse*, 401 Pa. 242, 164 A.2d 98 (1960).

122. See generally CLECKLEY, *THE MASK OF SANITY* (4th ed. 1964); McCORD & McCORD, *PSYCHOPATHY AND DELINQUENCY* (1956); *PSYCHOPATHIC DISORDERS AND THEIR ASSESSMENT* (Craft ed. 1966); Guttacher, *The Psychiatric Approach to Crime and Correction*, 23 *LAW & CONTEMP. PROB.* 633, 638 (1958).

123. For a similar case under the *Durham* rule, see *United States v. Amburgey*, 189 F. Supp. 687 (D.D.C. 1960).

no effort to cover his tracks.

Diagnosis: 000-x61 Sociopathic personality disturbance, antisocial reaction.

M'Naghten would require conviction because psychopathy does not involve a defect of reason. The results under the Model Penal Code are less easy to judge. We believe that the psychopath is minimally disposed to token the relevant e_c signal. Thus, he may be said not to appreciate the criminality of his conduct and not to be able to conform his conduct to the requirements of the law. Undoubtedly, there will be testimony that psychopathy is a mental disease.¹²⁴ But the second paragraph of the Model Penal Code expressly excludes from the term mental disease any "abnormality manifested only by repeated criminal or otherwise antisocial conduct."¹²⁵ On its face this serves to exclude only those psychopaths whose only manifestation of abnormality is antisocial conduct. While the unusual antisocial conduct is normally what brings the psychopath to the psychiatrist's attention, other manifestations of abnormality are almost always present.¹²⁶ Thus, although it is clear that the framers of the Model Penal Code meant to exclude the psychopath, it is not at all clear that they did so.¹²⁷ The resolution of that question controls whether this defendant will be acquitted or convicted.

The question yet unanswered is whether the psychopath should be acquitted. There is some evidence that his disorder is neurophysiological, and there is overwhelming evidence that he differs markedly from the normal criminal. The impulsive, rationally purposeless nature of his conduct demonstrates that the law is not and cannot be a significant restraining influence on his actions. Yet on the surface he appears mentally healthy. To acquit him is to create an appearance of arbitrary action.¹²⁸ To the public it will seem that the more unrestrained and irresponsible one is, the less likely that one will be held to account.¹²⁹

124. *E.g.*, Diamond, *From M'Naghten to Currens, and Beyond*, 50 CALIF. L. REV. 189, 192 (1962).

125. MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962).

126. *E.g.*, RUBIN, PSYCHIATRY AND CRIMINAL LAW 68 (1965); Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A.J. 527, 530 (1962).

127. Compare ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 122 (1964), and Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 608, 626 (1963), with *People v. DeSimone*, 67 Ill. App. 2d 249, 260, 214 N.E.2d 305, 311 (1966).

128. In one psychiatrist's view, to convict him is to create the reality of arbitrary action. Diamond, *From M'Naghten to Currens, and Beyond*, 50 CALIF. L. REV. 189, 194 (1962).

129. The courts have reflected this lay concern. *E.g.*, *Williams v.*

This can only undermine the public's view of the justness of the criminal law. Further, to the extent that punishment of those transgressors who appear to be similar to the class that is to be deterred is essential to general deterrence, acquittal in these circumstances would subvert that function of the law as well. Consequently, while it may be unreasonable to expect the psychopath to comply with the law, there are also considerations requiring the law to insist on compliance.

CASE 9

Defendant is an adult male homosexual invert of long standing. While he sometimes has affairs with adult males, his preference is for adolescent boys. The present offense involves a fourteen-year-old boy whom the defendant homosexually seduced. The defendant is free of any signs whatsoever of psychosis or even psychoneurosis, and is essentially "normal" in all respects except for the fact of his homosexuality.

Diagnosis: 000-x63 Sociopathic personality disturbance, sexual deviation, homosexual.

Again, since a defect of reason is not present, conviction under *M'Naghten* is required. The Model Penal Code presents more difficulties. While this homosexual is classified as a sociopath he is entirely different from the sociopath in Case 8. The only similarity in fact is in name. Many experts would, therefore, refuse to testify that homosexuality is a mental disease even though they would say that other sociopaths are mentally diseased. Even if experts did conclude that homosexuality was a disease, the second paragraph of the Model Penal Code formulation might prevent a finding to that effect. Again, however, homosexuals manifest other abnormalities than antisocial behavior. While we would conclude that this homosexual was disposed to token the e_c signal, we are not certain that he was capable of conforming his conduct to the requirements of the law. If that test is a restatement of *Durham*, acquittal should follow. But for his homosexuality, he would not have committed this act. Similarly, if the test refers to the strength of the desire as against normal inhibitory potential, acquittal might be necessary. While such measurements are impossible, we could

United States, 312 F.2d 862, 864 (D.C. Cir. 1962) ("A long criminal record does not excuse crime."), *cert. denied*, 374 U.S. 841 (1963); *Snider v. Smyth*, 187 F. Supp. 299, 302 (E.D. Va. 1960) ("That he has a strong anti-social personality and is blunted morally and ethically affords no legal defense for his atrocious crime."), *aff'd*, 292 F.2d 683 (4th Cir. 1961).

not negate, and someone would surely testify to, the proposition that homosexual desires are unusually strong.

Since we share the common view that both homosexuals and heterosexuals must keep their criminal desires merely desires, we prefer conviction on these facts.¹³⁰ If the law is to promote responsibility, it must impose responsibility. There is nothing to satisfactorily demonstrate that this defendant should be free to pursue his desires while the generality of mankind must exercise restraint. Nothing would more quickly bring the criminal law into disrepute than to admit as a defense what is in effect the plea "I wanted very badly to do the act."

CASE 10

Defendant, a hair fetishist, is charged with assault for snipping off a girl's pigtail while standing on a crowded bus. His description, well-supported by corroborating psychiatric testimony and by an acquaintance with whom he discussed his problem several days before the event, is one of mounting tension with a feeling tone close to anxiety and with a masked flavor of erotic excitement. Although he made various efforts to distract himself or to systematically place himself in situations where he would be safe from performing such an act, he finally gave in to the impulse and got onto the bus with a pair of scissors in his pocket. Outside the area of the pathological impulse itself he does not show any gross psychiatric abnormality but on more careful study there is considerable evidence of a neurotic character structure with predominantly obsessive-compulsive features and also a possibility of a schizoid makeup. No gross thought disorder is present and a diagnosis of schizophrenia would not be warranted on the evidence.

Diagnosis: 000-x63 Sociopathic personality disturbance, sexual deviation, fetishism.

Resolution of the insanity defense in this case is almost exactly the same as in Case 9. *M'Naghten* leads to conviction both because there is no defect in reason and because there is a disposition to token the appropriate signal. Assuming that fetishism is a mental disease, *Durham* leads to acquittal.¹³¹ If ability

130. See Menninger, Book Review, 38 IOWA L. REV. 697, 703 (1953). "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." King v. Creighton, 14 Can. Crim. Cas. 349, 350 (1908). Of course, we pass by the question whether certain consensual homosexual activity ought to be proscribed.

131. See *Briscoe v. United States*, 248 F.2d 640 (D.C. Cir. 1957), *change of plea allowed*, 251 F.2d 386 (D.C. Cir. 1958) (setting fires to

to conform involves an assessment of the strength of the desire, acquittal might follow under that portion of the Model Penal Code test. This is true even though the defendant's prior actions demonstrate some ability to control if substantial inability is construed as meaning markedly more difficult to avoid the prohibited conduct.

CASE 11

Defendant is a nonpsychotic individual who, exhibiting the paranoid personality makeup, has for many years been characterized by a pattern of traits including over sensitiveness, especially to affronts to pride or apparent slights, a tendency to "take note of" speech or gestures by other people more than most do, a kind of rigid self-righteousness, a heavy emphasis upon rules and principles, a tendency to irritability, an intense resistance to being told what to do, and, smoldering, often very close to the surface, a great deal of chronic anger which at times is rather frightening because it may take the form of a burst of volcanic rage. In addition, he is suspicious, envious, and stubborn.

Defendant puts up a no-trespassing sign to keep out picnickers. When he finds that does not keep them away, he sets out a lot of bear traps and puts up a sign saying that trespassers enter at their own risk. A picnicker comes onto the property, steps into one of the bear traps, and as a result is so badly injured that he has to have his leg amputated. Defendant is charged with aggravated assault.

Diagnosis: 000-x44 Paranoid personality.

Under *M'Naghten*, a conviction would be obtained. A paranoid personality does not involve a sufficient defect of reason. Secondly, even though a negligible disposition to token the appropriate phrase exists, this is not caused by defendant's abnormal personality. It results instead from simple ignorance of the law. It is possible to argue that the disorder prevents defendant from appreciating the consequences to others of his conduct and thus prevents him from subsuming his action under the heading assault. But even if this construction is given, the failure to token would not result from the cognitive disorders included in defect of reason.

Under *Durham* and the Model Penal Code, the result would

gratify sexual urges). See also Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 927-28 (1961).

hinge on whether paranoid personality is a mental disease. If it is, then the conduct was a product of it if the argument above is accepted. And, in Model Penal Code terms, the mental disease caused a substantial inability to appreciate the wrongness of his action. If that much is assumed, then defendant also was substantially unable to conform. In order to conform, defendant would have had to be capable of self-criticism about his own self-righteousness concerning his legal rights in his land and capable of at least some empathy and sympathy for the possibly maimed trespasser.

Paranoid personality may be just a technical way of referring to a mean, envious, spiteful, over-sensitive, suspicious, and self-righteous person. If nonresponsibility ever goes this far, it is difficult to imagine who will be responsible. Our efforts to understand why people act as they do should not lead us to a deterministic conclusion that because he did as he did, he could not have done otherwise. At least we should not reach that conclusion unless we are willing to junk the criminal law as it presently exists.¹³²

CASE 12

The chief manifestation of the defendant's emotional instability is a pronounced tendency to "temper tantrums" or "rage attacks" when his pride is hurt or he feels unfairly treated. Defendant is an unattractive, ugly, undersized little squirt whose chief basis of security is that he is a very adept poker player. He has recently, however, had a run of bad luck and is rather deeply in debt. He is being pursued by several creditors including an underworld character who has lent him money at usurious rates and is known for beating up people who do not pay their debts promptly. He becomes involved in an all night poker game in which one of the participants is a very famous gambler. Defendant knows his reputation but has not previously played poker with him. The famous gambler has been egged on by some of the others in the group, because of their dislike of the defendant, to needle the defendant. The gambler keeps up a running fire of sarcastic remarks during the course of the game. The defendant loses consistently and in desperation uses the rest

132. Consider also the person suffering from an "aggressive reaction" indicating "that the accused would be more likely than a completely normal individual to 'respond explosively in the face of what would be a mild provocation.'" *United States v. Dunnahe*, 6 U.S.C.M.A. 745, 750, 21 C.M.R. 67, 72 (1956) ("Savagery alone does not show a lack of mental responsibility.").

of his money in an effort to bluff. The gambler successfully calls and says sneeringly, "I'll teach you to try to bluff me, you little pip-squeak!" The defendant is overcome with rage and strikes the famous gambler. The gambler falls over backward, strikes his head, and subsequently dies from a subdural hematoma. Defendant is charged with manslaughter.

Diagnosis: 000-x51 Emotionally unstable personality.

Once again, because defendant's negligible disposition to token the e_c signal does not proceed from a defect of reason, he would be convicted under *M'Naghten*. Under the looser right-wrong test of the Model Penal Code, he might be acquitted. If an emotionally unstable personality is a mental disease,¹³³ then his nondisposition to token results from that disease. The circularity of the Code is thus highlighted. The diagnostic category is an explanation of the conduct which in turn excuses it. Similarly if capability of conforming is read in terms of *Durham* causality, acquittal must follow. And if that language is meant to refer to relative strength of impulse as against strength of control system, this case might well present a substantial inability to conform.

CASE 13

Defendant is an enlisted man who mysteriously disappeared from a military post and turned up three weeks later in a distant city where he walked up to a military policeman standing in a bus depot and turned himself in. Investigation revealed that the defendant had bought a ticket to this city at a small town near the military post, had acted somewhat confused at the time, had upon arrival in the city rented a hotel room and signed a false name, and had laid aside his uniform and purchased a civilian suit. The military policeman testified that the defendant seemed somewhat puzzled and confused when he turned himself in and did not seem to be clear about what city he was in or what the date was. Detailed interviewing led the psychiatrists and the clinical psychologists to testify that in their opinion the defendant had a complete amnesia for the intervening period. The psychiatrists described him from the mental status examination as a classical hysterical personality with dissociative trends, and the psychometric data are strongly supportive of this assessment of the personality structure.¹³⁴

133. It has been so characterized. *Campbell v. United States*, 307 F.2d 597 (D.C. Cir. 1962).

134. This case was suggested by *United States v. Carey*, 11 U.S.C. M.A. 443, 29 C.M.R. 259 (1960).

Diagnosis: 000-x02 Dissociative reaction (fugue).

Since defendant literally did not know who he was or what he was doing, it is quite obvious that he did not know the nature or quality of his act (AWOL) or that it was wrong. On the assumption that defect of reason includes impairment of cognition such as this, an acquittal under *M'Naghten* is necessary. Similar results would follow under the other tests.¹³⁵

CASE 14

Defendant is an epileptic, his susceptibility to *grand mal* seizures being fairly well controlled by anticonvulsive medication. He also exhibits a not uncommon characteristic of epilepsy, a coexisting tendency to irritability and temper explosions. Defendant commits a serious assault in overreacting to a minor slight by an acquaintance. There is psychiatric testimony that defendant's rage differs from "normal rage" in that it is far more intensive, it is grossly disproportionate to the instigation, and it is attributable to an "epileptic brain."¹³⁶

Diagnosis: Convulsive disorder (epilepsy), a condition not numbered as a psychiatric disorder except when manifested as an epileptic equivalent.¹³⁷

Since defendant did not suffer from a defect of reason at the time of the act, he is not excused by *M'Naghten*. If an epileptic makeup is a disease or defect, as it surely is given a common sense definition of those terms, then under the Model Penal Code and *Durham*, defendant must be acquitted. Defendant was minimally disposed to token the e. signal and this indisposition resulted from his makeup. Consequently, he was also substantially unable to conform.

This case again raises a difficult question of culpability—whether we can reasonably expect defendant to do other than he did. Surely he is not to blame for his genetic makeup. But then neither is the homosexual or, for that matter, the hoodlum

135. We included this case of typical dissociative reaction in part to distinguish it from what typically passes as a dissociative reaction in the cases. Courts should be wary of the claim that everything went black. Dissociative reactions are rare and are almost never attended by violent actions. It is extremely unlikely that armed robbers or murderers are correctly diagnosed as having a dissociative reaction. Cf. *Isaac v. United States*, 284 F.2d 168 (D.C. Cir. 1960); *Pollard v. United States*, 282 F.2d 450 (6th Cir. 1960).

136. See GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 341 (1927).

137. See Case 2 *supra*. "930-x01 Grand Mal" is the standard medical designation for *grand mal* epilepsy.

who has acquired the criminal values of the environment in which he was blamelessly forced to grow up. It is a pity that we expect as much of these people as of those who by heredity and environment find obedience to the law much less taxing. Nonetheless, we do and it is difficult to see how we can do otherwise consistent with present social values. To isolate the cause of conduct is not yet to excuse it. Consequently, we are inclined to the view that this defendant should be convicted.¹³⁸

CASE 15

Defendant is charged with bank robbery. The psychiatric examination shows no evidence of thought disorder, true sociopathic personality, or organic brain damage. Defendant is of average intelligence and not particularly neurotic. His mother was a low-level nightclub entertainer and part-time prostitute, and his father was a bootlegger and thug. Defendant has two older brothers, both of whom became delinquent at an early age and have entered a life of professional crime. He grew up surrounded by persons who were either criminals or very marginal members of society, and from his early teens took it for granted that one did not work for a living but entered some kind of a racket. The problem of vocational choice for him was essentially which racket he should go into. The psychological and psychiatric examination shows an intact ego-function but a severely aberrant superego function, not in the sense that guilt or shame are impossible for this defendant, since he feels guilty if he does not pay a gambling debt, and he felt ashamed to have done such a clumsy job in the bank robbery as to get caught, but the content of his superego is that of a professional criminal. In other words, it is not so much that he lacks a conscience in the functional sense but that he lacks a properly informed conscience, as St. Thomas would say. The causal analysis of this man's criminal makeup is not essentially psychiatric or psychological in the clinical sense but is primarily sociological.

Diagnosis: 000-x62 Sociopathic personality disturbance, dys-social reaction.

Perhaps the best way to begin discussion of this common hoodlum is to quote the American Psychiatric Association's de-

138. It is far easier to feel that an individual afflicted with neurophysiological aberrations is not blameworthy than it is to reach a similar conclusion about another individual who is genetically endowed with or has otherwise acquired a particularly explosive temper. There is little logic in this, and it is difficult to establish a defensible category of excusable bad temper.

scription of his mental disorder:

Dyssocial reaction applies to individuals who manifest disregard for the usual social codes, and often come in conflict with them, as the result of having lived all their lives in an abnormal moral environment. They may be capable of strong loyalties. These individuals typically do not show significant personality deviations other than those implied by adherence to the values or code of their own predatory, criminal, or other social group.¹³⁹

We do not suppose that most experts would call this condition a mental disease. We are wary, however, of how long this state of affairs will continue. It is now viewed as a mental disorder, presumably in this case a shorthand designation for an aberrancy in adjustment to existing social and cultural values. Since mental disease has no confining definition, we cannot be certain that this disorder will not become a disease, at least in the sense that it will be viewed as something susceptible of psychiatric treatment. Being declarative, surely criminal responsibility cannot be made to rest on medical opinion of appropriateness of treatment.

CONCLUSION

At this point it should be obvious what we believe the virtues of *M'Naghten* to be. The phrase "defect of reason" provides a test that, consistent with the remainder of the criminal law, allows a judgment as to whom we cannot reasonably expect to comply with the law. This test has both legal and psychiatric virtues. In terms of the legal system, it isolates those persons whose sense of reality and ability to think rationally is crudely impaired. This, in turn, is that group that is popularly viewed as insane. Their acquittal will not offend the community sense of justice nor will it impede the other functions of the criminal law.

In psychiatric terms, the phrase "defect of reason," which we have translated in current psychologese as impairment of cognitive ego-functions, including particularly perception of reality and ability to think logically and coherently, addresses itself to the distinction between psychoses and neuroses. Psychoanalytically the degree of ego weakness or strength, the extent to which the ego's cognitive functions are overwhelmed by the combination of pressures from the id and the external world, is the touchstone of psychosis.

139. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL 38 (1952).

While more refined formulations may be possible, it is our contention that the 124-year-old *M'Naghten* rule with its focus on cognitive impairment is sounder from the standpoints of the purposes of the criminal law, of present psychiatric knowledge, and of ease of judicial administration than any of the newer tests. We have noted the difficulty of giving meaning to terms such as "mental disease", "substantial inability to conform," and "product." Whenever the effort is made to make these terms consistent with general social views of responsibility, a retreat to *M'Naghten* is required. If the drafters of rules of criminal responsibility for the deranged are to remain true to general principles of responsibility, they must take account of societal views on the blameworthiness of conduct engaged in by mentally abnormal persons and of the effect of ignoring those views on the utility of the criminal law. It may be that to do this is to embrace consistency at the expense of substance and that the policies thought to support criminal sanctions are merely myths which have held us in thrall too long. But this position is better addressed to the criminal law as such and not to a small, in this respect indistinguishable, portion of it.