THE FLOWERING OF NEW HAMPSHIRE

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After eighty-five years of practically unnoticed existence, the New Hampshire rule governing mental responsibility for crime[1] has, within one year, found sudden favor on both sides of the Atlantic. On this side, the Court of Appeals for the District of Columbia has, in *Durham v. United States,* adopted the New Hampshire rule expressly. In England, the Royal Commission on Capital Punishment in September 1953 recommended abrogating the *M'Naghten* (right-and-wrong) test, and leaving "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."[2] This would seem to eliminate even the New Hampshire requirement that the criminal act must have been the "offspring or product" of the disorder.

I

The central question raised in the minds of lawyers by the *Durham* decision and by the Royal Commission recommendation is, is this new rule a good thing? Is it better than the older rule it would replace?

Any answer must be speculative. Eighty-five years' experience in New Hampshire has not produced any data that is useful for comparative purposes. New Hampshire is a small state and, happily for it, has apparently not had much criminal data to supply. Moreover, it does not seem to keep very adequate records of such crime as it has.[3] So far

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[1] The New Hampshire rule is that there is no legal "test" of mental irresponsibility. The question in each case where the insanity defense is set up is whether at the time of the act the defendant had mental capacity to entertain the required criminal intent, and whether he did in fact entertain that intent. This question is one of fact for the jury. The court should leave it to the jury in each case to decide: (1) whether the prisoner had a mental disease; and (2) if so, whether the disease was such as to take away capacity to form or entertain the criminal intent. State v. Pike, 49 N.H. 399 (1869); State v. Jones, 50 N.H. 369 (1871).

[2] Royal Commission on Capital Punishment, Report, 116, 276 (1953).

[3] To the Royal Commission's questionnaire, asking for statistics on the number of murders known to the police, number convicted of murder, etc., New Hampshire replied that "no information is available." Royal Commission on Capital Punishment, Questionnaire, Question 30.

as the insanity defense is concerned, there has not been a reported case since the two cases in which the "New Hampshire rule" was established, in 1869 and 1871. I do not know whether anyone has ever made a study of how the New Hampshire rule actually works at the trial court level, or whether there have been enough insanity cases in New Hampshire to serve as a basis for a valid study.

The essential argument of the court in the *Durham* case is that the right-and-wrong test is defective in that it rests criminal responsibility solely on reason or knowledge. Since a person is now regarded as an integrated personality whose conduct is not determined solely by reason, a misleading emphasis on the cognitive function "requires court and jury to rely on what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility."[4] Even more fundamentally, the test is wrong in resting criminal responsibility on *any* particular symptom. "In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role. . . ."[5] The court quotes Professor John Whitehorn of Johns Hopkins Medical School, to the effect that it is impossible to set forth a crystal-clear statement of what constitutes insanity:

> The medical profession would be baffled if asked to write into the legal code universally valid criteria for the diagnosis of the many types of psychotic illness which may seriously disturb a person's responsibility, and even if this were attempted, the diagnostic criteria would have to be rewritten from time to time, with the progress of psychiatric knowledge.[6]

Under the right-and-wrong test, the medical expert is not allowed to restrict himself to stating his diagnosis, his conclusion, and his reasons therefor; he must address himself to a concept that has no validity in his eyes. Even when he tries to answer the question that the law chooses to regard as all-important, he is expected to do so categorically; his interpretations and explanations are likely to be ignored. Did he know right from wrong—yes or no? That's the question, and the answer is all that really counts. This is an over-simplification that dismays the doctor. The District of Columbia Court of Appeals is no doubt correct in believing that the new rule will avoid such over-simplification and permit the doctor to present his diagnosis in scientific language. This is probably the most important point in its favor.

[4] Pp. 871–72.

[5] P. 872.

[6] Memorandum to Maryland Commission on Legal Psychiatry, quoted in Guttmacher and Weihofen, Psychiatry and the Law 419–20 (1952).

Another advantage of the new rule is that it is broad enough to include psychopaths—if the medical witnesses will consider them mentally disordered. Psychopathic personality is an important factor in various crimes, in which the psychopath "acts out" his aggressive reactions against society.[7] Yet most psychopaths are not "insane" within the meaning of the traditional tests of criminal responsibility. It is even a question whether they can be said to be suffering from a mental disease or mental defect.[8]

Dr. Robert Waelder says that outside a central core of conditions in which the sense of reality is crudely impaired and inaccessible to the corrective influence of experience—for example, organic psychoses, schizophrenia, and manic-depressive psychoses, in which the patients are confused or disoriented or suffer from hallucinations or delusions—outside these, there is a fringe area of conditions which may, or may not, be considered diseases of the mind, and among these he includes psychopathies. "Whether or not a psychiatrist is willing to classify any one of these conditions as diseases of the mind," says Dr. Waelder, "depends more on his philosophy than on any factual question that can be settled by observation and reasoning."[9]

The rule would give a new latitude to psychiatrists in expressing opinions, and would also give new latitude to the jury. This was perhaps the main objection expressed by the minority members of the Royal Commission, who felt it would be unwise to dispense with all legal "tests" and leave the jury to determine on the evidence whether the accused was irresponsible. They felt that this would leave too difficult an issue for the jury. "The advantage of a formula," they said, "is that it serves to limit the arbitrary element and to promote uniformity, as well as to help the jury to decide between conflicting views."[10] Francis Wharton had made essentially the same point in criticizing the New Hampshire rule many years ago.[11]

[7] Ibid., at c. 5.

[8] "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." P. 875.

[9] Waelder, Psychiatry and the Problem of Criminal Responsibility, 101 U. of Pa. L. Rev. 378, 384 (1952).

[10] Royal Commission on Capital Punishment, Report, 287 (1953).

[11] Professor Wharton said the jury is not capable of establishing the definite and consistent rules regarding responsibility which are required, for at least three reasons: "(1) It does not form a continuous body, prepared for its office, as are our courts of justice,

Another difficulty lies in the fact that the issue before a criminal court is not mental disorder, but legal responsibility. The legal profession has been pointing this out to medical critics for many years. It took a bit of educating. Dr. Isaac Ray, for example, who was very largely responsible for the establishment of the rule in New Hampshire, confused the issue by using the ambiguous word "insanity" in a way which enabled him to skip back and forth between two meanings: (1) what we would call mental disorder today; and (2) such degree of mental disorder as deprives a person of criminal responsibility.[12]

Today, the psychiatrists who have been working most closely with the legal profession on this problem understand the point. Dr. Robert Waelder, for example, states the distinction between mental disorder and criminal responsibility very clearly. It is curious that just as we have taught the point to the psychiatrists, we seem to ignore it ourselves.

The *Durham* opinion slips into this ambiguity when it undertakes to state its "fundamental objection" to the right-and-wrong test:

> The fundamental objection to the right-wrong test, however, is not that criminal responsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation, but that it is made to rest upon any particular symptom. In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role, not merely one for which they have no special competence [citing medical authorities on the impossibility of formulating "universally valid criteria for the diagnosis of . . . psychotic illness. . . ."][13]

In the first sentence, the court is talking about "criminal responsibility," a legal concept. But by shifting to the ambiguous word "insanity" in the second sentence, the court is able to make a statement that is true of mental disorder as a medical scientific concept, but not necessarily true of the legal concept of responsibility. Perhaps "irresponsibility" should be held to be coextensive with "mental disorder,"

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by prior study. (2) The reasons of its decisions are not given, so that these decisions can form the basis of future decisions. Each decision stands by itself, not controlled by those which preceded it, and not controlling those which succeed. (3) There is no 'supreme' jury, by whom the decisions of 'inferior' juries can be corrected and systematized." 1 Wharton and Stillé, Medical Jurisprudence 180 (5th ed., 1905).

[12] 6 Ray, The Medical Jurisprudence of Insanity (3d ed., 1953); Ray, The Law of Insanity, 4 Am. L. School Rev. 236, 246–47 (1870). On the danger of confusion arising from the use of the ambiguous term "insanity," see Weihofen, Mental Disorder as a Criminal Defense 4–6 (1954). An excellent statement of the distinction between mental disorder and criminal responsibility is that of Professor Jerome Michael, Psychiatry and the Criminal Law, 21 A. B. A. J. 271 (1935).

[13] P. 872.

but when legal authority is so overwhelmingly to the contrary, some open and cogent arguments seem called for.

Even apart from this distinction between legal responsibility and mental disorder in a medical sense, and assuming that the two are to be equated, it is not enough under the new rule that medical experts conclude that the defendant was suffering from mental disorder; it must also appear that the criminal act was the "product" of the disorder. There may be cases where the person is suffering from a very serious mental disorder, epilepsy, for example; and the criminal act was not induced by the disorder, but was a conscious and deliberately planned undertaking motivated by the hope of gain. There is no reason for permitting the mental condition to affect the question of his responsibility as a matter of law, if it did not affect it as a matter of fact.

The requirement that the act be the product of the disorder is only a way of saying that there must be a causal connection. And presumably the rule requires *proximate* cause, as the law requires elsewhere. Medical men could perhaps testify in many cases that the defendant's mental condition was *a* cause of his criminal conduct; but will they be able to say it was *the* (the *proximate*) cause?

What we regard as *the* cause of any phenomenon depends on our viewpoint or the purpose we have in mind. From the viewpoint of the ordinary private medical practitioner, the cause of any pathological manifestation is that which he must deal with if he is to cure his patient. To a medical research scientist, however, the cause is that which must be dealt with if the disease is to be eradicated, or others prevented from succumbing to it. To a penologist or criminologist, the cause is likely to be something wholly different, some social phenomenon that *his* discipline is competent to work on.

Where certainty is difficult, the rule governing burden of proof is likely to be decisive. If the defendant has the burden of convincing the jury that the act *was* the product of the disorder, uncertainty will work to hold him guilty. If we want to resolve the doubt in favor of the defendant, we could adopt a formula such as was proposed by the British Royal Medico-Psychological Association in 1923: put to the jury whether the defendant committed the act, whether or not he was at the time insane, and if so, whether the crime was *unrelated* to his insanity.[14] Since modern psychiatry rests on a unitary conception of personality, psychiatrists will rarely feel able to say that any of a

[14] 1923 Report of Committee on Insanity and Crime 31-32 (Cmd. 2005).

person's behavior is unrelated to the nature of his personality. Where the person is mentally disordered, and the criminal act is one which seems to have no rational motivation, it is logical to conclude that it probably was the product, or "offspring," of his disorder. And most psychiatrists today would say that murder is in most circumstances such abnormal behavior that when it occurs in a person showing other signs or symptoms of abnormality, the more probable conclusion is that the killing was the product of the disorder.

Another device for manipulating the burden of proof is by the use of presumptions. A passing phrase in the *Durham* opinion itself suggests one possibility. The court, quoting from an 1895 decision of the United States Supreme Court, says

> [O]nce the issue of insanity is raised by the introduction of "some evidence," so that the presumption of sanity is no longer absolute, it is incumbent upon the trier of fact to weigh and consider "the whole evidence, including that supplied by the presumption of sanity. . . ."[15]

The implication that the presumption of sanity is to be "weighed" as evidence raises a serious question.[16] It is doubtful whether the court of appeals (or the Supreme Court in the earlier case) deliberately intended to hold that the presumption of sanity is to be weighed against actual evidence of mental disorder. At a later point in the *Durham* opinion, the court states the instructions to be given the jury in cases involving the issue of mental irresponsibility, and it there says nothing about the presumption or its weight, but merely says the jury should be told:

> If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity.[17]

[15] Pp. 868–69, quoting from Davis v. United States, 160 U.S. 469, 488 (1895).

[16] Consult Weihofen, Mental Disorder as a Criminal Defense 216–19 (1954); Gausewitz, Presumptions in a One-Rule World, 5 Vand. L. Rev. 324 (1954); McBaine, Presumptions, Are They Evidence?, 26 Calif. L. Rev. 519 (1938); Morgan, Techniques in the Use of Presumptions, 24 Iowa L. Rev. 413 (1939); Morgan, Further Observations on Presumptions, 16 So. Calif. L. Rev. 245 (1943).

[17] P. 875.

However, Massachusetts has deliberately adopted the view that "the fact that a great majority of men are sane, and the probability that any particular man is sane, may be deemed by a jury to outweigh, in evidential value, testimony that he is insane."[18] Massachusetts, like the District of Columbia, holds that the presumption of sanity holds only until a reasonable doubt is raised, and that the ultimate burden is on the prosecution to prove sanity. But Massachusetts is apparently unwilling to follow this rule to its logical consequence, that doubtful evidence is sufficient to shift the burden to the prosecution. Some courts, when they feel that the evidence of insanity is too slight, hold that it is insufficient to raise a reasonable doubt. The Massachusetts way is to say that the presumption or inference of sanity is in the nature of evidence and may "outweigh" evidence to the contrary.

The burden of proof may be distributed in any way that seems desirable. The defendant may be required to (1) raise a reasonable doubt; (2) convince the jury that he is probably insane; or (3) that he is highly probably insane; or (4) that he is almost certainly insane.[19] Purporting to give weight to the presumption or inference of sanity is merely an indirect way of increasing the burden placed on the defendant. How the burden should be distributed is basically a question of public policy, involving underlying assumptions and attitudes concerning the concept of "guilt," political prejudices concerning the relative values and demands of individual freedom and public safety, the availability of institutional and other facilities, and other factors having nothing to do with psychiatry. It is not a medical question at all.

II

Prior to 1953, the New Hampshire solution to the problem of mental irresponsibility had been recommended by a few writers from time to time—by Sir James Stephen in England and Joel Bishop and Dr. Isaac Ray in America, by the British Medico-Psychological Association in 1923 and by a committee of the American Institute of Criminal Law and Criminology in 1917.[20] But it had never been squarely

[18] Commonwealth v. Clark, 292 Mass. 409, 415, 198 N.E. 641, 645 (1935); Commonwealth v. Cox, 327 Mass. 609, 100 N.E. 2d 14, 16 (1951).

[19] McBaine, Burden of Proof: Degrees of Belief, 32 Calif. L. Rev. 242 (1944).

[20] 2 Stephen, History of the Criminal Law of England 97 (1883); 1 Bishop, Criminal Law 268-69 (9th ed., 1923); 1923 Report of Committee on Insanity and Crime 31-32 (Cmd. 2005), quoted in Singer and Krohn, Insanity and Law 294 (1924); Keedy, Insanity and Criminal Responsibility, 30 Harv. L. Rev. 536 (1917); Keedy, Criminal Re-

adopted anywhere outside its state of origin, except perhaps in Montana,[21] nor was it even seriously considered for adoption anywhere else. In most states, the courts have never paid it any attention whatever.[22]

What is the reason for the sudden attention now being shown to Judge Doe's octogenarian wallflower? Is the happening of the *Durham* case and the Royal Commission's Report within a year of each other mere coincidence? I am inclined to think not. Rather, these developments seem to me a vindication of Professor George Dession's prophecy made in 1938, that "the infiltration of psychiatry—and of psychiatrists—into the administration of criminal law" will one day be recognized as "overshadowing all other contemporary phenomena" in its influence on the evolution of criminal justice.[23]

Psychiatry has become a popular science. Wealthy patients today talk about sessions with their psychoanalysts as they used to talk about their operations. The rest of us meet psychiatry in the person of the school or family counselor, industrial personnel officer, or psychiatric social worker, and in novels and movies. The potential criminal is likely to encounter psychiatric service at various times in his life other than when he is being tried for crime. One consequence is that we rely much less than we did in 1843 on the criminal trial to sift out mentally irresponsible offenders.

Another consequence is that when the question is submitted to a court, it is increasingly resolved by resort to expert psychiatric diagnosis. The law in the books still supports the proposition that experts are not entitled to any greater weight than nonexperts on the question

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sponsibility of the Insane, 12 J. Crim. L. & Criminology 14 (1921). See also Ploscowe, Suggested Changes in the New York Laws and Procedures Relating to the Criminally Insane and Mentally Defective Offenders, 43 J. Crim. L. & Criminology 314 (1952).

[21] The Montana court has cited the New Hampshire cases with approval, but it is not certain that it has actually adopted the same rule itself. After reviewing the Montana cases, a note-writer in the Montana Law Review concluded that the court "has wavered between the right and wrong test, the irresistible impulse test, and the . . . New Hampshire rule." Note, 1 Mont. L. Rev. 69 (1940). See State v. Peel, 23 Mont. 358, 59 Pac. 169 (1899); State v. Keerl, 29 Mont. 508, 75 Pac. 362 (1904); State v. Narich, 92 Mont. 17, 9 P. 2d 477 (1932).

[22] Only a few reported cases have been found in which counsel urged adoption of the New Hampshire rule, and in these it was definitely rejected. People v. Hubert, 119 Calif. 216, 51 Pac. 329 (1897); State v. Craig, 52 Wash. 66, 100 Pac. 167 (1909); Eckert v. State, 114 Wis. 160, 89 N.W. 826 (1902).

[23] Dession, Psychiatry and the Conditioning of Criminal Justice, 47 Yale L. J. 319 (1938).

of mental condition. But the fact is that we rely today largely on the experts, and largely on *official* experts. Not only in the American states, but throughout the civilized world, the issue of mental condition is more and more often determined by the court's appointing impartial experts to examine the person and report, or by turning him over for observation and examination to a clinic attached to the court, or to a state department of mental health, or to a state mental institution. In addition, the parties in Anglo-American procedure are of course allowed to bring in their own expert witnesses; a lawyer is not likely today to try by lay testimony alone to convince a court of his client's mental disorder.

This resort to psychiatrists has profoundly affected our outlook on many subjects, of which crime and criminals is only one. In court and out, the psychiatrists have educated us in at least the rudiments of psychiatric thinking. At first, the impact of the psychiatric outlook was felt on isolated, specific problems. Under the aegis of psychiatric teaching, we have made special provision for alcoholics, for youth, for sexual psychopaths (although here popularization of psychiatric concepts seems to have outrun more cautious psychiatric expert judgment). For alcoholics, we have come to feel that a night in the drunk tank is not an effective cure, and that cure is a better objective than repeated and ineffective punishment. For youth, we have adopted juvenile court procedures, based on the state's interest as *parens patriae,* to salvage its young citizens in danger of becoming social liabilities, and we do so largely by therapeutic methods rather than by criminal punishments. For sexual offenders, a number of states have tried a decriminalized procedure for commitment to a mental institution, instead of proceeding with criminal charges (although the most recent fashion in this field is to employ the psychiatric investigation after criminal conviction and before sentence). Mental defectives are made the subject of special treatment in England and in some of our states.[24]

Although we have been able largely to compartmentalize our thinking about each of these problems, it was inevitable that sooner or later we should see that the thinking underlying these "exceptions" had

[24] In England, under the Mental Deficiency Act, the court may order removal of a mental defective convicted of criminal offenses (other than murder) to appropriate institutions instead of passing sentence. Royal Commission on Capital Punishment, Report, 118 (1953). The Virginia statute has been judicially construed to treat the feeble-minded differently from others tried for crime. Jessup v. Comm., 185 Va. 610, 39 S.E. 2d 638 (1946).

broader application, undermining our traditional general premises concerning responsibility and punishment. In criminal cases involving the insanity defense, the concept of "knowledge" of the nature and quality of the act and of its wrongfulness is stretched to accommodate psychiatric thinking. The person who is able to say that his act was wrong, but whose knowledge is not "fused with affect" and assimilated by the whole personality, who is not able to "identify" with his victim and who has no real appreciation of the enormity of his act, may be declared by the psychiatric expert witness not to understand the nature and quality of his act or that it was wrong; or the doctor may simply equate the law's concept of "insanity" with "psychosis," and declare any person suffering from a major form of psychosis to be insane. As a result of this stretching process, and probably also of a growing humanitarianism, the established right-and-wrong test is probably a good deal less strictly interpreted in practice today than it was even a generation ago, even though the wording has not changed.

This process has perhaps gone farther in England than it has in this country. Although the right-and-wrong test stems from an English case (actually, merely an advisory opinion), the present practice in England in effect comes down to pretty much what the New Hampshire rule or the Royal Commission recommendation would provide expressly. This is so because of the cumulative effect of three steps in the English procedure:

(1) A much larger percentage of persons charged with crime is found "unfit to plead," that is, so mentally disordered at the time for trial that they are held incompetent to conduct their defense and therefore to stand trial.

(2) Although the wording of the *M'Naghten* rules remains unchanged, their application and interpretation are much more liberal today than even 20 or 25 years ago.

(3) Perhaps the most important modification, and the one that Americans are least likely to be cognizant of, is the use of the Prerogative of Mercy, especially to reprieve murderers condemned to death. The death sentence is mandatory in England on a conviction of murder, but less than half of those so condemned are actually executed. This practice has the effect of reducing the *M'Naghten* rule to a smaller area than would be true if it stood unalleviated by the prerogative function. While the pardoning power of the American governors is similar in nature, in no American state has that power been developed to anything like the extent of the British Prerogative of Mercy.

But sooner or later, this sort of stretching and piecing out of the traditional "test" of mental responsibility reaches its limits. Sooner or later, those engaged in the stretching process become impatient of its artificiality if not downright dishonesty, and begin to demand a frank recognition of what is actually being done.

Perhaps the new interest in the New Hampshire rule is an indication that we are reaching that stage, a stage when we are no longer satisfied to say that while we know that the *M'Naghten* rule is outmoded, it nevertheless works well enough because expert witnesses and juries stretch it in cases where it ought to be stretched; a stage when we begin to demand that the formulation of the rule be brought into line with what we think should be done and what we are in fact doing to an increasing extent.