decision. The matter is one of the key ethical and social problems of our society. We will not produce a rational and completely satisfactory definition of the defence of insanity to a criminal charge until we are clear on the essential basis of criminal responsibility itself. The process can only be one of the gradual striving towards truth; and truth itself in this area can be little more than the satisfactory reconciliation of many conflicting tensions in our society.

NORVAL MORRIS.*

II. A psychologist's comments.

The decision in *Durham v. United States*[1] is merely one of the many historical signs of the changing attitude of society towards criminal responsibility. At the one end of the historical trend is the so-called *lex talionis* in which a person committing a criminal act is held responsible without any regard to his maturity, state of mind or intent; at the other end is the state in which no one is criminally responsible, punishment being replaced by re-education or therapy for erring members of society.[2] These extremes are "ideal" states which probably have never, and will never, be applied ruthlessly by any actual society. Anglo-American law has gradually been moving towards the latter pole of the above dichotomy (Wechsler calls it "psychiatric crypto-ethics"[3]). Its position at present, as embodied in such decisions as *Durham v. United States* and in the British Royal Commission on Capital Punishment,[4] is a mixed one; i.e., there are certain types of persons who are to be held responsible for their criminal actions (whether as retribution or as a protection for society is irrelevant to this argument) while there are others who because of their mental state are not responsible. As we shall see, psychological responsibility and legal responsibility do not necessarily coincide, and our main purpose here is to provide a context in which to consider whether the *Durham* decision brings these two concepts of responsibility any closer together.

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1 (1954) 214 F. 2d 862.

2 de Grazia points out, in (1955) 22 U. CHI. L. REV. at 348 *et seq.*, that therapy under the latter concept may in fact serve as severer punishment than is normally meted out in criminal convictions — for example, life imprisonment in a mental hospital — and thus the prospect of forcible commitment might be just as strong a deterrent as present-day criminal punishments.

3 *loc. cit.* 375.

4 (1953) Cmd. 8932 (H.M. Stationery Office, London).

The problem is to define those who are not criminally responsible, or as Judge Bazelon would put it, those on whom blame cannot be imposed. From the legal point of view, the prior question must be how to interpret the moral values of society rather than how to evaluate the mental state of the accused. Whether the law should attempt to interpret the current popular opinion in decisions about who are and who are not to be held responsible, or whether it should rely on artificial legalistic formulae, such as the M'Naughten Rules and their various amendments, or on the opinions of psychological experts, is one for jurists to decide. As Morris has put it,[5] "If the psychiatrist perceived his function merely as one of diagnosis of a given mental condition, without having to draw any conclusions from that diagnosis, and the lawyer were then content to apply that information to the given case, applying a test which did not pretend to bear much relevance to psychological fact, there would be no conflict." Failure to keep these distinctions clear has led to confusion in the use made of the expert witnesses by the court, the questions asked of them seldom being both clearcut and psychologically meaningful.

Why does the court call evidence from psychological experts at all? Why does a legal journal, such as this, ask a psychologist to comment on the *Durham* decision? Presumably because it is today believed that scientists can contribute to the clearer definition of the limits of "insanity" as a ground for the exemption or otherwise of a defendant from the normal operation of criminal responsibility. This can perhaps best be achieved by collaboration out of court between jurists, psychiatrists, psychologists, and other scientists whose disciplines are involved, towards the goal of formulating psychologically meaningful questions to help the court elicit the facts which it requires to reach its conclusion. The criteria required for such questions are that (i) they should be relevant to society's requirements regarding criminal responsibility and at the same time should help to sharpen these requirements; (ii) they should not involve psychological assumptions that experts know to be false; and (iii) they should be consistent with the basic procedural and substantive principles of the law.

It is clear that the M'Naughten Rules and their extensions (for example, the "irrestible impulse" rule) have not fully satisfied these requirements, especially requirement (ii),[6] but we now must ask whether the *Durham* decision has helped in this direction. I should very much doubt it, as the key terms in the formula ("product",

5 (1953) 6 RES JUDICATAE, 306.

6 See for example the psychiatric opinions collated by Judge Bazelon in the *Durham* case, at 869-874.

"mental disease", "mental defect") were not sufficiently defined. Unless the court were prepared to leave the whole decision on the responsibility of the accused to expert psychiatric witnesses, it is difficult to see how the Durham formula has clarified anything.

Let us now examine the terms of that decision in the light of each one of the above criteria for determining an adequate formula.

(i) What are society's requirements regarding criminal responsibility? This is a matter of sociological investigation on which little work has been done. However, there can be little doubt that there has been some public trend in recent centuries towards excusing persons of certain mental status from retribution for their criminal acts. This change has been partly due to the gradual acceptance of the Christian principle that retribution is an unworthy motive, and especially so when the wrong-doer, because of his mental status, had no free choice in committing the offensive action (*"Forgive them, for they know not what they do"*). It is abundantly clear, nevertheless, that the demand for retribution is still omnipresent in court decisions; viz., the jury's special reluctance to accept insanity as a defence for particularly outrageous crimes.[7]

The change in the public attitude towards responsibility and punishment has also been affected by the increasing acceptance of the scientific ethos of our age, one of the chief values of which is that science can teach man to manipulate and control nature. In more recent years there has been considerable public acceptance of the application of the social sciences to the manipulation and control of man himself, and this has introduced reformative attitudes towards punishment; for example, suspended sentences, reform and therapeutic detention, probation, and parole. However, there is probably a strong public rejection of the basic assumption of the main body of psychological science, namely, that all human actions and decisions, even free choices, are completely determined by the life history of the "organism-in-its-environment." As knowledge of the determining factors increases, so will the recognition of the possibilities of reformation and crime reduction also increase, but as yet *society still requires the institution of punishment as a self-corrective device for its own mistakes in controlling the genetic, medical, psychological, and sociological determinants of crime arising from its ignorance and resistance to the application of scientific knowledge* (I say this without intending to evaluate the scientific ethos and all that it entails for human values

[7] For example in the *Sodeman* case. The role played by retribution in preserving the self-integrity of the members of society is brilliantly treated in ALEXANDER and STAUB in THE CRIMINAL, THE JUDGE AND THE PUBLIC.

such as freedom, religion, etc.). The educational campaign being waged by psychologists is having some effect in changing public attitudes and beliefs about the consequences of certain social practices, and some of the folk lore about the efficacy of certain types of punishment is gradually dissolving. In the meantime, however, we shall accept the necessity for society to employ punishment for its self-corrective function.

Do we really know what the current social values are on the limits of responsibility? It would be interesting, for example, to see the results of a public opinion survey on the *Durham* decision. And if that principle were accepted, how would the public interpret "mental disease and defect"? For example, what would be the status of such concepts as: Knowledge of right-wrong, temporary insanity, amnesic state, drunkenness, irresistible impulse, mental defect, distraction, etc.? Most of the relevant mental states could probably be put in terms that would be understandable to the layman for the purpose of making a public opinion survey. I am not, of course, advocating that public opinions polls are the only or even the most appropriate way of legislating and administering justice, but am simply suggesting that, since juries are samples (albeit somewhat unrepresentative) of the general public, some public opinion survey studies could help the courts to clarify the type of questions that would be relevant to the requirements of juries when they make decisions.

In the absence of such extra-juristic studies, the decisions handed down by juries could be taken as pointers to public opinion. To this extent, the *Durham* decision, by giving more latitude than previously was granted to juries, is an improvement. But if the jury method is to be the method of involving public opinion in the decisions of the court, then one might say, why not go the whole way and adopt the recommendation of the Royal Commission on Capital Punishment, i.e., "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."[8]

Whether we accept the Durham formula or the even more liberal formula of the Royal Commission, the jury is required to define "mental disease or deficiency." To do this it must either accept a medical definition as provided by a competent psychiatric witness in the case, or it must attempt to define the terms for itself. By attempting to provide operational definitions such as the M'Naughten Rules for the benefit of the jury, the law has intervened in the name of justice

[8] Cmd. 8932, at 116.

to hinder the entirely free representation of public opinion through jury decisions. This would seem to be a necessary safeguard against mob passions and transitory public sentiments.

(ii) The second criterion for an adequate formula concerns the validity of the psychological considerations involved. In this respect, I shall work on the basis of the assumption that the object of the psychological evidence is to determine whether the accused could reasonably have been expected to control his drive to commit the unlawful act. We might note at the outset that the terms "insanity", "psychosis", "mental disease", have no exact and objective meaning. Their application to a person is a subjective judgment on the part of a psychiatrist that frequently is not based on publicly observable or even communicable diagnostic criteria. But in the case of "mental defect" it is possible for the psychiatrist to justify his judgment in terms of the person's performance on a standard intelligence test, and in certain jurisdictions these tests have been given legal recognition. However, most psychiatrists would probably prefer to preserve their discretion in labelling a person "mentally defective" rather than be required to tie their decision down to a mechanically interpreted test.

The M'Naughten formula obviously leaves considerable room for the personal judgment of the expert witness, but it is frequently even then regarded by psychiatrists as being too specific. In the words of the *Durham* opinion, "The fundamental objection to the right-wrong test however is . . . that it is made to rest upon any particular symptoms."[9] Objections have also been raised to this formula in that it does not embrace all types of mental condition that can result in a person committing an unlawful act for which he should not be held responsible. For example, persons who are driven by overpowering tensions to commit acts which in their more sober moments they appear to regret strongly, neurotics with a compulsive need for punishment, or anxiety neurotics in a state of extreme panic.

The concept of "irrestible impulse" has been introduced into the juristic formulae in some legal systems, for example in Western Australia, but as Morris has pointed out,[10] the flexible interpretation that is concurrently being accorded to the M'Naughten formula in British courts probably allows for the inclusion of irresistible impulse provided that the jury is not so outraged by the crime that it insists on a narrow interpretation of the rules.

Does the Durham formula allow for the inclusion of the contentious borderline pathological conditions under the heading "mental

[9] 214 F. 2d at 872.
[10] (1952-4) 6 RES JUDICATAE, 304.

disease or defect?" We do not know yet whether in practice this will be left to the discretion of psychiatric witnesses, or whether the court will once more have to engage in a weary search for some formula to determine whether any particular person is or is not suffering from a mental disease or defect. Through narrow interpretation of this phrase, the operation of the Durham formula could actually prove more rigid and exclusive than sometimes was the case with the earlier formulae.

Inherent in the difference between the Durham and the M'Naughten approaches is a discrepancy between two ways of describing human behaviour, one in terms of the type of person doing the behaving and the other in terms of the situation at the time of the act, including both the person and the environmental pressures acting on him. The first approach is apt to be that of those psychiatrists who are accustomed to labelling people as "psychotics", "neurotics", and "psychopaths", etc.;[11] the latter approach is closer to that of many modern psychologists who explain particular acts as attempts by the person to integrate his contemporary environment as he perceives it with his own needs, habits, and attitudes (both conscious and unconscious). The labelling approach has its value in psychiatric treatment but I would doubt the wisdom of basing on it a consideration of responsibility for the particular act in question. Because of their outlook, many psychiatrists would tend to favour the Durham formula with its emphasis on mental disease, while psychologists can see more merit in the M'Naughten approach which emphasises the cognitive aspect of behavioural causation.

This is not the appropriate place to develop a complete psychological theory to account for a person's behaviour in any particular situation. The conception being used here is not universally accepted by psychologists, but it closely corresponds with that of Lewin and Tolman.[12]

[11] A similar viewpoint is embodied in the comment by Zilboorg: "The first part concludes that judgment must be reversed and the case remanded for a new trial, because the trial judge, disregarding the whole evidence, had merely concluded that there "was no testimony concerning the mental state" of Durham on the date of July 13, 1951. There is the rub. The opinion of the court of appeals rightly and eloquently calls the judge to task for not looking at the situation as a whole and seeing that the court was dealing with a mentally sick individual who had been sick for years and who could not therefore be "of sound mind" on July 13th; of unsound mind on July 12th, and again of unsound mind on July 14th. There is something in this attitude that is both irrational and inhuman. A mental illness, a severe chronic mental illness, cannot be considered as something that enters and leaves a given person at various periods:" 22 U. CHI. L. REV. at 333.

[12] K. LEWIN, in FIELD THEORY IN SOCIAL SCIENCE, (1946) c. 10; E.C. TOLMAN, COLLECTED PAPERS IN PSYCHOLOGY (1951).

Every situation in which a person finds himself may be conceived as a challenge to him either small or great, and in making a mature choice of behaviour in that situation he needs to consider the consequences of the various alternative possibilities. This process is called by Tolman "vicarious trial and error" (V.T.E.). Most choices in the course of every day behaviour do not warrant the exertion of much effort in V.T.E. behaviour, but presumably such effort is required before a person decides to commit an unlawful act, especially when it is an extremely heinous one such as murder or rape. When a person in a normal state of awareness commits an unlawful act he does so either because he chooses to pursue some advantage and risk the consequences, or because he chooses the least undesirable of two or more undesirable actions (for example, self-defence), or because he deliberately chooses to behave in a way that will lead to punishment. But when a person in an abnormal state commits an unlawful act, he might well do so because of the absence of mature V.T.E. behaviour, or conscious ego control; for example, it has been shown that in a state of extreme emotionality the "cognitive field" is narrowed, i.e., V.T.E. behaviour is restricted.[13]

Such a state of mind is equivalent to that which psychiatrists call "ego impairment", but it might be a temporary, even momentary, state (only a moment or two of such a state is required to commit impulsive crimes). "Mental disease" is a state in which ego impairment is severe and frequent or chronic. The description of behaviour given here is similar to that of Alexander and Staub in which it is stressed that the contribution of conscious ego control is a matter of degree. They suggest also that the relative degree of conscious and unconscious participation in the unlawful act should be assessed by an expert.[14] Unlike our approach, the psychiatrists focus on the general condition of ego impairment, rather than on the person's mental condition at the moment of committing the crime.

Possible reasons for restriction of conscious ego control in any situation might be (a) lack of general capacity for this type of behaviour—*mental defectiveness*; (b) temporary loss of perspective in a particular class of situation—*psychopathic conditions, anxiety,*

13 TOLMAN, *op. cit.*, c. 19.

14 This viewpoint can be compared with that of the Committee on Criminal Responsibility and Psychiatric Expert Testimony of the Group for the Advancement of Psychiatry: "Mental illness is a behavioral expression of ego impairment. With this in mind the psychiatrist attempts to take a measure of the ego, translated into some kind of intuition scale and curve . . . The ego impairment would appear to be a direct measure of responsibilities." (Report 26, 6, footnote 21.).

hysterical and compulsive neurosis, states of extreme emotionality; (c) inability to perceive the situation realistically owing to delusions—*functionally and organically induced psychotic states* and certain *self-induced toxic conditions* such as drunkenness and drug intoxication.

Each one of these three causes leads to the same mental condition in the actual situation in which the unlawful act occurred, i.e., the person "did not know the nature and quality of the act" which he committed. Whether each one of the diagnostic labels described above should lead to exemption from criminal responsibility is a social and juristic question, but it must at least be realised that delusions (class (a) above) are only one of several conditions that can impair mental functioning, albeit the most obvious one.

It could be argued that persons in class (b) should be responsible for avoiding the situation where their ability to make mature choice is likely to be restricted in some vital way; for example, a person with sexual psychopathic propensities should not walk along dark streets at night. Similarly, persons who suffer from paranoid delusions when under the influence of alcohol should avoid its use to excess.

Unfortunately addictions and compulsions sometimes prevent people from taking such evasive action to avoid situations where they might commit crimes which they do not wish to commit. But there often are steps which such people can take if they sincerely try to do so; for example, psychological treatment can be sought and alcoholics can join Alcoholics Anonymous. One case was recently reported[15] of a sexual pervert who several times got into legal trouble through his compulsion to obtain sexual gratification by staring at women's legs and feet. He was able to avoid further trouble by obtaining a movie film of appropriate subjects—quite a respectable film according to the law—which he could exhibit to himself at home whenever he required gratification.

There is probably little difference, psychologically speaking, between the persons whose addictions and compulsions do not lead to unlawful action (i.e., in "normal" people) and those where they do lead to such action. Such borderline cases of "mental disease" involve difficult decisions as to whether the person might reasonably have prevented himself from committing the unlawful act, and in practice the decision is inclined to be made in terms of the outrageousness, or otherwise, of the act (retribution?).

It is these borderline cases that constitute the main stumbling-blocks for a psychologically meaningful legal test. My proposed

15 V. W. Grant, (1953) JOURNAL OF ABNORMAL & SOCIAL PSYCHOLOGY, 48, 142.

solution is to abandon the forlorn attempt to distinguish the mentally ill from the mentally well and to deal only with the degree of the disorder operating in the critical situation. It is only in this way that the court can get down to the task of establishing whether the accused could reasonably be regarded as free to choose between committing and not committing the criminal act.

(iii) The juristic criteria are the ones that must prevail in any consideration of an appropriate formula to incorporate both public attitudes and psychological knowledge concerning responsibility. The main difference between the point of view being argued here and that traditionally adopted by the court, following psychiatric trends, turns on the use of the concept "mental illness" or "disease." The law has usually conceived this in the sense of a semi-permanent or chronic condition of the individual rather than an acute disorder in connection with behaviour in some particular situation. It has been argued here that from the psychological viewpoint the distinction between the chronic and the acute state of mental disorder is only one of degree, but whether the law is willing to adopt this viewpoint, or even open the way for it, has yet to be seen. As yet the law has given little attention to temporary mental disturbances in interpreting the rules on criminal responsibility in relation to mental disease, but the analogy is there in the general law as related to *mens rea.* It is difficult to distinguish between the absence of *mens rea* owing to mental disease and its absence in a temporary state when the "mind is not in control of the body", as in so-called "somnambulistic states" (actually states of hysterical amnesia). The statutory provisions that, before responsibility can be attributed for particular crimes, the act must have been performed "knowingly" or "wilfully", are another application of the same principle as that applied in the M'Naughten Rules. The law related to intoxication and provocation in connection with responsibility is also not inconsistent with the viewpoint argued here in relation to ego impairment.

One drawback of the *Durham* decision is that it sharply separates the law related to insanity and criminal responsibility from the rest of the law relating to *mens rea.* The Durham formula provides the court with the required latitude to interpret its policy as it wishes, since the key terms are, as yet, undefined, but it seems unlikely that temporary states of disturbance would ever in practice be recognised under its terms. On the other hand, the M'Naughten Rules, with some minor patching and modification of terminology (and probably even without that), could better serve the purpose. For example, the rule could refer to "ego or mental impairment" instead of "mental disease" and

"as not to be aware of the nature and consequences of the act" instead of "as not to know the nature and quality of the act." Furthermore the "right-wrong" part of the formula should be given less relative importance than the "nature of the act" part as it is less amenable to broad but meaningful interpretation.

The jury itself could be directed to concentrate more on the state of mind of the person at the time of the act than on his "label" ("insane", "defective", "psychopath", etc.). Psychiatric witnesses could present evidence on the psychiatric history of the accused which would provide background evidence for the decision, and they could then indicate whether they felt that the circumstances under which the unlawful act was committed were such as to warrant the plea of "ego impairment" or "mental impairment" for the particular type of person with whom the court is dealing. Such an approach to criminal responsibility may seem to be over-liberal, but it does leave the decision to the "instinctive sense of justice of the community"[16] once the evidence has been presented. The jury could ultimately be charged to decide "whether the capacity of the accused to control his conduct in accordance with the law was impaired so greatly that he cannot justly be held criminally responsible."[17] This rule, in that it does not mention mental disease, is even less restricting than the New Hampshire practice or the Royal Commission formula and it would provide the jury with sufficient latitude to make decisions that would combine society's demands for protection with the humanitarian right of the accused as an individual to obtain justice.

As a postscript I should like to add that having taken along its course the logic of the present orientation of society towards criminal responsibility, we have come to a point where we might well doubt the practicality of the recommendations made. Has not the time come for criminologists to canvass a new approach to the whole matter? A more fruitful approach, for example, would seem to be for the court simply to find, on the facts, whether or not the accused actually committed the unlawful act in question. Then treatment or punishment could be prescribed by experts employed by the court, and carried out under legal control and supervision. Such a procedure would require the eventual abandonment of the present retributive approach to punishment in which the blame or otherwise of the accused needs to be established; it would not, however, necessarily eliminate the deterrent function of legal action.[18] The present day treatment of

[16] Judge Thurman Arnold, quoted in 22 U. CHI. L. REV. at 387.
[17] Wechsler, *ibid.*, at 372.
[18] This suggestion is similar to that made by GUTTMACHER AND WEIHOFER in PSYCHIATRY AND THE LAW.

juvenile delinquency provides the precedent for this new approach, although I must admit that public opinion is probably not yet ready to extend this type of treatment to adults.

RONALD TAFT.*

III. A psychiatrist's comments.

Few laymen would fault the assertion that insanity is what the psychiatrist studies and purports to treat. Mr. Justice Cardozo was doubtless also of this opinion when, in 1928, he said, "Everyone concedes that the present (legal) definition of insanity has little relation to the truths of mental life"; to the writer the chief interest of this statement lies in the apparently implicit assumption that "insanity" is an entity capable of being defined precisely in terms that will be meaningful both to the legal and to the medical professions.

In what is probably the most authoritative psychiatric dictionary in the English language neither mental illness nor mental disease is defined, and the heading "insanity" carries this quotation, "For a branch of learning which consists largely of definition the law is strangely lax in the use of the word "insanity". Unfortunately, the word has no technical meaning either in law or in medicine, ..." But this lack of definition does not necessarily betoken a lack of precision in the psychiatrist's understanding of the nature of the work upon which he is engaged; rather does it imply that the essential function of psychiatry is something other than it is commonly taken to be. Hence if there is not to be misunderstanding of the nature of the difficulty that confronts the psychiatrist attempting to transpose his findings into legal concepts, attention must be paid to the methodology of psychiatry.

"Psychiatry", as a learned judge reminded one expert witness, "purports to be a science." It will be in order therefore to ask, "What properly is the function of a science?"—and to answer "Not to 'understand' "—a loose term at best—"but to predict." The psychiatrist takes as his field the observed behaviour of the human subject and in his treatment of his data—the observed facts of behaviour—he does not—or should not—depart from a strict adherence to the methodology of science. The free-living organism (the human subject) and the environment, taken together, are held to form an absolute system containing an infinity of variables. But science cannot handle an infinite number of variables, so for the purpose of experimentation

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