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# THE M'NAGHTEN RULE: A RE-EVALUATION

DANIEL WARD\*

[Ed. Note. This article is a synopsis of an address presented by Mr. Ward at the Symposium on Insanity as a Defense in Criminal Law held at Marquette University in the Fall of 1961. A transcript of the original address is on file in the *Law Review* Office, Marquette University Law School, 1103 W. Wisconsin Ave., Milwaukee, Wisconsin.]

The conventional and traditional summation of the rules from *M'Naghten* has been the so-called M'Naghten rule to the effect that the defendant accused of crime is not criminally responsible unless he was able to distinguish between right and wrong in respect to the particular act with which he is accused and also that he have had the ability to so distinguish at the time of the alleged commission of the act.

I think it might be appropriate to say before we discuss further the question of M'Naghten, that it seems important in any discussion of law, . . . that the policy of the law and the society which the law serves determines under what conditions an act prohibited by law may be deemed to be non-criminal. That is a matter resting within the province of the law and those who interpret and administer the law. . . . We do have certain circumstances in which an ordinarily criminal act is regarded by the law as non-criminal. . . . I think it is proper that the law does have the right to prescribe what is criminal and what is non-criminal. It may seek advice from other sciences, rather disciplines, but ultimately the responsibility of the determination is that of the law itself. . . . I do think it proper and germane that we say, certainly as an historical matter, that our law, Anglo-American law, does have moral and ethical instincts in wells from which it draws. Certainly, in fields of criminal responsibility we have historically accepted the Judeo-Christian notion of culpability being founded upon an understanding of the act, and, secondly, a free volition of act that is part of our historical tradition so far as the law is concerned.

With respect to this moral instinct, . . . your Wisconsin Supreme Court in a concurring opinion by Justice Hallows,<sup>1</sup> said criminal law and responsibility are based upon the facts that an individual human being is mentally free to exercise a choice between possible courses of conduct in respect to those acts condemned by the law and therefore is morally and legally responsible.

In the same vein, the United States Court of Appeals, in *Sauer v.*

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<sup>1</sup> *Kwosek v. State of Wisconsin*, 8 Wis. 2d 640, 100 N.W. 2d 339 (1960).

*United States*,<sup>2</sup> said in part that whatever we may conclude to objectives of the criminal law, one traditional result has been punishment. . . . The criminal law is grounded upon the theory that in the absence of special conditions, individuals are free to exercise a choice between possible courses of conduct and hence are morally responsible. Thus, it is moral guilt that the law stresses.

To laymen as well as to the vast majority of lawyers the rules [M'Naghten] have seemed sound and efficient instruments in the determination of the important issues involved. Their survival for more than a century in many countries is a further index of their validity. Yet, almost from the day they were published, the rules have been subjected to an unremitting criticism by medical men and psychologists.

[From the psychiatrist's point of view] the right and wrong test represents antiquated and outworn medical and ethical concepts, whereas the question of responsibility carries with it a metaphysical implication. The remedies, especially punishment upon which the law seems to repose its faith are hangovers, as it were, from old theological and moral ideas that have survived their period of usefulness in this 20th century civilization.

The law itself has the right to determine what it will accept from other sciences or arts or disciplines and the law is responsible for the determination of who will be adjudged criminally responsible and who will be exempted from responsibility. Solicitor General Sobeloff, writing in the *American Bar Journal*,<sup>3</sup> and speaking of the difficulties of the psychiatrist in dealing with legal terms and concepts, said in part that when a psychiatrist is forced to adopt a vocabulary of morality and ethics, he is speaking in what to him is a foreign language. . . . When he (the psychiatrist) presents demands that there be certain ideas of his discipline accepted in the law, then he must translate his ideas, his concepts, his vocabulary into the vocabulary and the ideas of the law. And I revert, of course, to the notion that the primary responsibility of what shall be adjudged to be the law shall be the responsibility of the law itself.

In 1954, the United States Court of Appeals for the District of Columbia, announced that M'Naghten was inadequate even when coupled with the irresistible impulse test and announced a new rule which, as Judge Basilon wrote, is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.<sup>4</sup> This was a rule at variance with M'Naghten. . . . The court in *Durham* said that this new rule, this rule of product, was being an-

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<sup>2</sup> 241 F. 2d 640 (9th Cir. 1957).

<sup>3</sup> Sobeloff, *Insanity and the Criminal Law: From M'Naghten to Durham and Beyond*, 41 A.B.A.J. 793 (1955).

<sup>4</sup> *Durham v. United States*, 214 F. 2d 862 (D.D.C. 1954).

nounced as a complement to the rule of M'Naghten which earlier had been adopted in the District of Columbia and as a supplement and addition to the irresistible impulse test which also had been adopted in the District of Columbia. However, parenthetically I might observe that my opinion is that as it stands, you cannot have the three standing in the true sense in the District of Columbia. The *Durham* rule, that if the act is the product of mental disease or defect, certainly vitiates or possibly overcomes consideration being given to the *M'Naghten* rule. Certainly, if it can be found that the act complained of is the product of mental disease or defect then there should be no consideration whatsoever of *M'Naghten*, and there should be no consideration of the irresistible impulse. In other words, if the act was the product, then it is entirely irrelevant whether or not the defendant knew right from wrong with respect to the individual act. It is entirely irrelevant whether the act was willingly committed—whether it was an act of volition on the part of the defendant.

It . . . [offers] only the faintest hint of direction to the jury in its search for the facts relevant to responsibility. The jury must make determinations about degrees of impairment or disease that puzzle the experts themselves. But the emphasis of the *Durham* test is on the question of causation—the product. And here too the jury can do no more than speculate. And finally, the *Durham* test ignores cognition. It ignores the rational element of purpose—of conduct; or it best insinuates it under a spacious mantle of verbal imprecision. It ignores the question that is crucial from the perspective of the law: Whether the accused was competent to make the relevant moral decision.

In *Kwosek v. State of Wisconsin*,<sup>5</sup> referred to previously, Justice Hallows said:

The *Durham* rule, while paying lip service to 'freedom of the will,' is so broad that it ceases to be a practical and workable test under the jury system. While the subject of much discussion and hailed by some psychiatrists, generally those of the psycho-analytical school, the *Durham* rule has not been followed by some eight state and two federal circuit courts which have had the occasion to re-examine this question. Over 50 years before the *Durham* case, this court rejected the 'product test' in *Eckert v. State*, 114 Wis. 160, 89 N.W. 826 (1902).<sup>6</sup>

The Justice then went on to say:

The *Durham* rule's great weakness is that it provides no legal standard by which a jury can test conflicting medical and psychiatric testimony or by which the jury can evaluate such opinions. Psychiatrists differ radically in their theories of mental illness, of the nature of man, and of the mental process. They range

<sup>5</sup> *Supra* note 1.

<sup>6</sup> *Id.* at 653.

from those who contend all criminals are insane in some sense of the word and no one is responsible for his acts, to those who believe man is endowed with the power of self-control which may be destroyed or impaired by a mental disease or defect through no fault of his own. The determinists and some psychoanalysts consider man's actions to be so influenced or controlled by urges, impulses, and the subconscious as to be caused or determined without any power within man to control or choose his course of conduct in any situation. Other psychiatrists believe that man is a highly complex, integrated personality with the power of self-choice and determination, and whose mental process has a unity of perceiving, apprehending, judging, and willing which may be interfered with by a disease or defect of the mental order through no fault of his.<sup>7</sup>

We would not say, we could not say, we should not say that *M'Naghten* is a perfect rule. There are difficulties in *M'Naghten*. One of the greatest criticisms has been that *M'Naghten* appears to consider only cognition and not volition. It is said by some, although there are decisions which strongly dispute this, that the so-called right from wrong test too sharply limits the expert in giving his opinion evidence. It is confined within the rigid binds of right from wrong, and it does not permit him to present to the jury other psychiatric observations and data which may be pertinent. But what should be done? Because *M'Naghten* is not perfect should it be discarded in toto? Should its concepts concerning a moral basis in Anglo-American law be discarded? I think not. Because to do so would be of course to upset an attempt to destroy the tradition upon which our law is founded. And that would not be a purely historical thing either, because lawyers, knowing community sentiment and the moral feelings of the community apart from the mores, in the great majority would say that *M'Naghten* correctly reflects the community feeling toward things which the criminal law brands as criminal.

The major relevant conclusion of the above analysis is that the *M'Naghten* rules are sound and essential principles of penal responsibility. This is an implication of the theory of the integration of the self. So long as the theory stands, the only possible criticism of the rules is that though valid and necessary, they are not sufficient. Indeed, it is also implied in psychological theory that the *M'Naghten* rules are defective and lacking in any reference to the emotional and volitional aspects of conduct. This has been long recognized. The rule should therefore be amended to include explicitly what is now stated in instructions, but only inadequately and occasionally by informed judges. The amended rule should include the present tests, but these should be in significant juxtaposition to a simple description of the integration of the various func-

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<sup>7</sup> *Id.* at 653, 654.

tions of the personality. These amended rules would continue the present emphasis on irrationality as the principal criterion of insanity. The formulation suggested above, implemented by an informed administration of the law, would provide a new interpretation of what criterion which would probably be approved by most psychiatrists.