A Psychiatrist Looks at the Durham Decision

John Richard Cavanagh
A PSYCHIATRIST LOOKS AT THE DURHAM DECISION*

by

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Never have the medical and legal professions made a greater effort to reach accord over mutual problems than at the present time. In spite of this genuine and continuing effort they are still far apart. There are a number of factors which constitute an almost insurmountable barrier to mutual professional understanding. The first of these is the lack of a common language. This interferes with communication. The second factor is a difference in the basic training of each discipline.

The difficulty of communication is a serious one. The Report of the Group for the Advance of Psychiatry on Criminal Responsibility (which will be identified in further references as the GAP Report) clearly recognizes this difficulty:

In pursuit of this study the Committee has met with manifold difficulties; foremost, the magnitude of the problem and in no less measure the task of mediating a communication between two systems of language and abstraction exemplified in the law and psychiatry.

Discussion between lawyers and psychiatrists will help to overcome some of this difficulty especially if each group will clearly define its terms in words understandable to the other. Psychiatrists particularly have refused to accept certain legal terminology. Zilboorg says for example:

The psychiatrist—qualified to be a forensic psychiatrist—would act against the ethical principles of the profession if he accepted the concept of legal insanity; for clinical psychiatry does not know of such a condition, never saw it,

*Editor's Note: The Editors wish to call to the attention of the reader that "A Psychiatrist Looks at the Durham Decision" by Dr. Cavanagh; "Freedom of the Will and the Irresistible Impulse" by Dr. Nolan; and "A Proposal for a Fountainhead of Rationality" by Miss Yeager and Mr. Consalvo are to be read conjointly as different phases of the Durham Case. The facts of the Durham Case are presented in the student comment.

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and after almost two hundred years of clinical investigations seriously doubts its existence.²

Some of this difficulty is understandable, but certain words such as insanity and unsoundness of mind have real meaning and should not be rejected because they are not "medical terms and have no medical meaning."³

The difference in education is equally important. The training of the physician is directed toward the end of complete reliance on his own resources until the eleventh hour when the need of consultation arises. He is also trained to accumulate facts sufficient to arrive at a conclusion (or diagnosis), and then to act upon this decision. The lawyer, on the other hand, is educated and trained to recognize that there are two sides to every problem, either of which he may be called upon to advance or advocate.

The primary concern of the psychiatrist is the health of the individual patient, whereas the concern of the lawyer is the protection of the individual and the community from the effects of mental illness. It is here that the two professions come closest together. The link which attaches them is the human being over whom they are both concerned.

There is a basic egotism in both professions which is a further barrier to accord. Each feels that it is best equipped to understand the problems involved and is impatient with the other. Many psychiatrists feel ignored. For example, Dr. Lowrey states:

I have been told by judges, even recently, that they hear psychiatric testimony only because it is the law, but do not allow the testimony to influence their own decisions.⁴

The egotism of some psychiatrists causes them to speak authoritatively for the whole profession when they are merely expressing a personal opinion. In this way the impression is given by a few who verbalize easily that they authoritatively speak for the whole profession. This leads to confusion because to the more literal legal mind a scientific discipline does not permit such wide divergency of opinion as there seems to be. To a large extent psychiatry is still an art and although there are wide areas of agreement on basic facts there is considerable disagreement once one gets beyond these.

The lawyer who tries to increase his knowledge of psychiatry by reading may easily go astray. No amount of reading can give psychiatric insight without clinical training. Neither discipline can solve the other's problems—neither discipline can ever fully understand individual differ-

ences within the field of the other. The difficulties must be resolved by mutual and patient cooperation. This cooperation is now being achieved.

*Definition of terms*

As indicated above many psychiatrists have been very resistant to the acceptance of certain legal terms because they say that they have no real psychiatric meaning. Such rigidity on their part is, I believe, unwarranted. There is no reason why the psychiatrist should not make a real effort to understand what the law means by such terms as *insanity*, *unsoundness of mind* and *incompetency*. The law, on the other hand, would do well to attempt to understand what a psychiatrist means when he speaks of a psychosis and a neurosis. Lawyers would profit also if they will realize that there is more than one viewpoint in psychiatry, and in giving consideration to changing medico-legal concepts should investigate also these divergencies of psychiatric opinion.

Before any intelligent mutual discussion can be profitable some semantic understanding between the disciplines is absolutely essential. Many psychiatric terms, although they have definite meaning to a physician as a result of his experience, are very elusive of exact definition. This discouraging fact was expressed by Lord Blackburn more than fifty years ago when he commented:

> I have read every definition (of insanity) which I could meet with and never was satisfied with one of them, and I have endeavored in vain to make one satisfactory to myself. I verily believe it is not in human power to do it.  

There are certain psychiatric terms such as *psychosis* which almost defy definition and this is rendered more difficult by differences of opinion within the profession. With a full appreciation of these difficulties and with complete humility I will attempt to formulate certain definitions which may at least serve as a starting point for discussion.

A. **Mental disease**

The Courts in the *Durham Case* defined mental disease as follows:

> We use (mental) *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.

There are in this legal definition several difficulties for a psychiatrist; namely, the use of the word *disease*, the failure to further define *mental disease* and the repetition of the words *mental disease* at the end of the definition.

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In regard to the word "disease": The use of the word disease is confusing because the average person, including many medical practitioners, are accustomed to think of disease as a condition in which there is an underlying organic pathology. A disease in its usual connotation is something which has a definite etiology, a definite course, and a definite termination, e.g., lobar pneumonia. The use of the term disease in regard to mental disorders promotes this concept. This is not a true concept. There are a large group of mental disorders in which no tissue pathology has ever been demonstrated. The term could properly be used in reference to the somato-psychic disorders (or organic psychoses) in which the psychic manifestations arise secondary to the basic physical pathology. The majority of mental disorders however have no such demonstrable organic pathology and are due to disturbed methods of thinking, feeling, willing and acting. This is certainly true of most of those mental disorders which come to the attention of the courts.

The term disease is also misleading because it leads to the misconception that each psychic disorder must have some specific cause, e.g., as the specific cause of tuberculosis is the tubercle bacillus. This is not true. In reference to this term, Hinsie and Shatzky make this comment:

It is not considered in keeping with the available facts to refer to a psychosis as a disease, since the term disease is traditionally concerned with pathology of tissues. For want of a better term, psychiatrists speak of mental disorder when they refer to pathology or the psyche.6

Psycho or mental disorders are a matter of degree. They are not specific disease entities. In other words, mental and emotional disorders are quantitative and not qualitative disturbances of the psychic processes. The maladjustments of normal people differ from those of the mentally ill either in duration or degree of departure from the average normal performance. There is convincing proof that mental abnormality is an exaggeration of a normal process. For example, the schizophrenic may develop from an excessive indulgence in introversion and phantasy. Many people have an inherent urge to blame others for the mistakes they have made. Paranoid people do this to excess. It might be said that the mentally ill are just like ourselves, only more so. There is considerable evidence that this opinion is shared by many psychiatrists. Fromm-Reichmann, for example, maintains that the difference between normal individuals and psychotics is one of degree and not of kind. She states:

Further justification for my not discriminating between the use of experiences gained in the treatment of the more serious mental disorders of the psychotic and those of the milder forms of problems in living of the neurotic stems from another conviction. It is my belief that the problems and emotional difficulties of mental patients, neurotics or psychotics, are, in principle, rather similar to one another and also to the emotional difficulties in living from which we all

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suffer at times. Should these difficulties become so great that a person is unable to resolve them without help, thereby feeling the need for assistance, he may become a mental patient in need of psychotherapy.

I have put this statement at the beginning of this book because of my firm belief that the first prerequisite for successful psychotherapy is the respect that the psychiatrist must extend to the mental patient. Such respect can be valid only if the psychiatrist realizes that his patient's difficulties in living are not too different from his own. This statement is not just a humanitarian or charitable hypothesis but a scientific conviction. There are various well-known psychiatric facts which point in this direction.7

Preston also contends that the normal and abnormal do not differ qualitatively but quantitatively. He writes:

In the following chapters I hope that you will find references to me, to yourself, and to your friends. This does not mean that we are all mentally sick. All that it means is that the mentally sick are people much like you and me, using the same mechanisms that you and I use, but using them more rigidly and less appropriately.8

Mercier likewise maintains that normals and abnormals differ in degree and not in kind. He states:

Between these pathological states and the healthy ideal state to which we have opposed it, there are possible an almost infinite variety of intermediary states.9

Klein, discussing the nature of mental hygiene, while differentiating health from disease discusses the problem of the normal man and of the abnormal. He inquires whether it is "just a matter of degree" that segregates the normal from the abnormal or whether it is something "discontinuous and qualitative rather than continuous and quantitative." He observes:

As has already been suggested, the popular view is to dispose of the problem by means of a normal-abnormal dichotomy as contrasted with what many psychologists regard as the more "scientific" distribution curve approach. For these psychologists the abnormal is just an extreme form of the normal. There is no difference in kind; there is only a difference in amount, like the difference between a small and large loaf of bread. According to this conception the abnormal is merely an exaggeration or quantitative distortion of the normal.10

Lastly, White remarks:

Abnormal personalities are not mysteriously set apart from the normal. Their various peculiarities represent exaggerations of what is to be found in every human being. They are therefore well suited to enlarge our understanding of the whole process of personal adjustment. If we know what can go wrong in human development, we are the wiser in making it go right.11

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From the above it is evident that many authorities maintain that abnormal mental conditions are merely exaggerations of the normal, i.e., they are quantitative and not qualitative deviations from the normal.

In view of this evidence, the term disease as applied to mental conditions should be dropped because it is misleading. The term mental disorder or mental illness is better and more in accord with the facts.

Defining mental disorder in terms of progression towards improvement or deterioration is only partly valid. It should also be defined in reference to its severity and the degree of loss of reality sense it brings. It would seem desirable to include in the definition the distinction between neuroses, character disorders and psychoses. This is especially important because the neurotic individual would, in terms of the Court's definition in the Durham Case, have a mental disease. He might therefore be considered irresponsible for his criminal offense. It would be desirable, therefore, to discard the use of the term mental disease entirely and to seek some better definition which would give a distinction between the more serious and less serious mental disorders. Its use in no way helps to clarify the situation and if a psychiatrist were to testify that a neurosis is a mental disease (which it is in terms of this definition), it could only produce confusion. Actually this decision of the Court would seem to put the burden on the jury as to whether the offender was psychotic or not. This is a task which it is ill-equipped to perform. Isaac Ray is quoted frequently and favorably by the Court in its decision. His comment on juries in sanity hearings is therefore doubly interesting. His attitude is thus described by Zilboorg:

Ray's views on juries in criminal cases in which the plea of insanity is imposed are fresh and daring. He says that juries are "manifestly unfit" to solve the question of insanity in a criminal case. For a jury "to decide a professional question of a most delicate nature and involving some of the highest interests of man, is an idea so preposterous, that one finds it difficult, at first sight, to believe that it ever was seriously entertained."\footnote{\textit{One Hundred Years of American Psychiatry,} published for The American Psychiatric Association, Columbia University Press, 1944, p. 534.}

In reference to the term "mental disease":

Even if we were to accept the term disease, when it is modified by mental there are further difficulties. There are four large groups of mental disorders: the psychoneuroses, the psychoses, personality or character disorders and the somatopsychic disorders (organic psychoses). The somatopsychic disorders may be omitted from consideration in this regard because they are covered in another part of the definition (defect). This, however, still leaves three markedly different conditions, each one of which might be referred to as a mental disorder (mental disease) or mental illness. One can only surmise that the court is using the term as...
signifying a psychotic state (nearest legal equivalent, unsound mind) because only a very limited group of psychiatrists would consider that either the psychoneurotic or the individual with the personality disorder should be considered irresponsible for criminal acts. If the court intends to include all of these groups in the term mental disease there cannot fail to be endless confusion and chaos. There is nothing in the definition of the court which helps to clarify this important point.

In reference to the court’s repetition of the term mental disease. This would seem to be defining the term in similar words. This part of the definition would read more clearly if it were written “or the residual effect of a physical disease of the nervous system.”

It may be that mental disease is repeated to indicate that in certain mental diseases after they have persisted for a period lead to mental defect. If this is meant there is no scientific basis for this belief.

Mental defect in this part of the definition seems to indicate defective brain tissue. For this there is ample clinical evidence except as noted above in regard to mental disease. Mental defect would include mental deficiency as it is usually understood. Here again the criteria for irresponsibility are liberalized because if the individual were a high grade moron who was quite aware of what he was doing, the psychiatrist would have to testify that he was suffering from a mental defect. This could easily mislead the jury. This part of the court’s definition suffers from the same defect as the first part in that it fails to take into account variations in severity. All individuals over the age of forty probably have some cerebral arteriosclerosis. This would not be likely to cause severe clinical manifestations except in a relatively small group. Most people over sixty find it a problem. In both cases it is a defect.

For practical purposes the psychiatrist who is asked whether a certain subject is suffering from mental disease or defect under the decision has three courses of action:

1. To ask for a delimitation of the terms.
2. To assume that the court intended to indicate a disturbance of psychotic proportions and answer accordingly.
3. To answer yes if the subject showed any psychiatric disorder, however mild. He could then hope that he would be permitted to explain the nature and severity of the disorder.

Although the decision states that the use of the new criteria will permit the psychiatrist to speak in a frame of reference with which he is familiar, it offers no guarantee that the attorney will not pick irrelevancies out of his testimony and treat them in a way designed to confuse the jury. Just lately while I was testifying as an expert witness in the case of a clearly schizophrenic patient, the corporation counsel picked up that
part of the examination report in which the patient’s intelligence was tested and went through the arithmetic tests to which the patient had given perfect answers. After each problem he would insist, “Now, Doctor, isn’t that perfect?” To which one could only answer “Yes.” At each such response he would turn to the jury with glee. He ended up by stating to the jury that the doctor had said that the man was of unsound mind and yet they had just heard me say that his answers to my questions were not only correct but perfect.

Therefore it would be desirable to completely discard the term mental disease in favor of mental illness or mental disorder.

B. Mental illness

Even this term leads to difficulty of definition because it covers such a wide field of disorders. These would include, as noted above:

a) Psychoneurotic disorders  
b) Psychotic disorders  
c) Personality disorders  
d) Somatopsychic disorders. These were formerly called organic psychoses but are now also frequently called acute or chronic brain syndromes.

Definition of these terms is not within the scope of this paper. Standard psychiatric texts should be consulted. Mental illness (as described above) is a deviation from an average norm. It is an exaggeration or loss of what are considered normal characteristics. It would seem legitimate therefore to define illness in terms of a deviation from the normal personality (see below). This presents another difficulty because there would undoubtedly be disagreements as to what constitutes normality. Since I started to describe only one man’s opinion I would offer the following as a descriptive definition of the normal individual.

The Normal Personality

The normal individual is one who:

1. is free of symptoms  
2. is unhampered by mental conflict  
3. is able to maintain a satisfactory working capacity  
4. is able to love someone other than himself

The normal personality should also include:

1. Orientation toward future goals, that is, an average regard or concern for the future. Mentally ill people are characteristically defective in this regard, e.g., psychopathic husbands who make insufficient provisions for the family future, and hysterical patients who live only for their present gratification.

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2. Reasonable satisfaction from daily activities. Average people ordinarily derive a certain satisfaction from daily life. Abnormal people are typically unhappy and there is generally no sufficient reason that adequately explains or justifies their unhappiness.

3. Exterior conduct, substantially conforming to the standards of the group.

4. The ability to recognize and correct mistaken ideas and attitudes. All people make mistakes and entertain false beliefs, at least for a time, but normal individuals can be brought to understand the falsity of their position. This is frequently not so in the abnormal; for example, the paranoid individual who believes himself the victim of a sinister plot, and the neurasthenic individual who believes himself the victim of strangely contradictory and incurable pains, can hardly be dissuaded from his false ideas.

5. A well-balanced emotional life. Practically all people have occasional emotional upsets or suffer from various types of emotional strain, but the abnormal individual is pathologically and almost continuously influenced by his emotions.

6. The ability to adjust oneself to environmental changes. The normal person may thus be defined as one who conforms to the average human being in his methods of thinking, feeling, willing and acting, is reasonably happy, emotionally balanced, and adjusted and oriented toward future goals. Mental illness may, therefore, be defined as that condition in which an individual for a more or less prolonged period of time, to a greater or lesser degree, deviates from the average human being in ways of thinking, feeling, willing and acting, or is unreasonably unhappy, or emotionally unstable and unadjustable, or poorly oriented toward future goals.

It must be understood that this is a very general definition designed to cover all forms of emotional and mental illness.

There is no clearly fixed or well defined line between mental normalcy and abnormalcy, and, in many instances, prolonged study is necessary to make the distinction. The point of departure from the range of normality into the area of mental illness in many cases is a matter of clinical judgment and it is here where there are no clearly defined boundaries that disagreements between psychiatrists are likely to occur. This is inevitable and will be comprehensible if the quantitative difference of mental disorders is understood. The difference between a psychosis (q.v.) and a less serious disorder may be a fluctuating one and not constant or fixed.

15 Ibid., p. 21.
The GAP Report gives the following definition of mental illness:

Mental illness shall mean 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.\textsuperscript{16}

This definition is unsatisfactory because it defines severity in terms of committability. This is defective because it confuses medical and legal terminology and makes no distinction between mental illness and unsound mind.

C. Responsibility

Webster's Dictionary defines responsible as "capable of determining one's own acts, capable of being deterred by consideration of sanctions or consequences." Menninger uses the word responsibility in the sense of punishability, "responsibility in the legal sense means punishability."\textsuperscript{17} Jacoby\textsuperscript{18} states: "In order that a person who has committed a punishable wrong may be held responsible for his act, it is necessary to assume he possesses sufficient insight to enable him to recognize the punishability of the unlawful deed." Webster\textsuperscript{19} in speaking of responsibility states: "This distinction has given rise to the legal concepts of responsibility, the basis of which rests upon the relation of the mental condition of the person to his knowledge of the nature and quality of the act, and whether or not he had sufficient power of will to restrain the impulse to commit the act. Criminal law has been evolved to deal with the type of behavior which we call crime, the object of the laws being the protection of the public and the individual."

According to Davidson:\textsuperscript{20}

"To escape responsibility the defendant must show that 'He was laboring under such a defective reasoning from disease of the mind as not to know the nature and quality of the act; or if he did know it, that he did not know he was doing what was wrong.' This is the McNaghten Formula and it is the basis of determination of criminal responsibility in almost every State of the Union and in the Federal Courts." He continues: "It is frequently alleged that the law is inconsistent for supposing that a person could be legally insane and mentally sane, or vice versa. However, this is not the state of affairs. When a psychotic patient is

\textsuperscript{17} Menninger, William C., THE HUMAN MIND, 1937, 2nd ed., p. 449.
\textsuperscript{19} Webster, Ralph W., LEGAL MEDICINE AND TOXICOLOGY, Philadelphia: W. B. Saunders Co., 1930, p. 299.
convicted of crime he is not thereby declared to be 'legally sane.' He is merely held to be legally 'responsible,' that is, 'answerable' for his acts. The distinction between insanity and responsibility is perfectly valid. As every psychiatrist knows, some psychotic patients do respond to fear of punishment or promise of reward (that is, they are 'responsible'—they respond) and others do not. There is a vast sociologic difference between these two groups of psychotic persons.” Hinsie and Shatzky do not define the term responsibility, although they do describe the McNaghten Formula. Henderson and Gillespie discuss the matter but give no definition of their own. Overholser and Richmond, Noyes and Skottowe, fail to define responsibility.

So much for some of the authorities. Most of the psychiatric texts fail to discuss the subject because they consider responsibility a strictly legal consideration.

Responsibility in its derivation means ability to react to a situation, that is to respond to punishment or to be deterred by punishment. There is frequent failure to understand the difference between responsibility and guilt. I am presumptuous enough to believe that I can detect this error in the GAP Report. It seems to presume that the psychiatrist who says that an individual is responsible is finding him guilty. How else is one to understand such a statement as the following:

Often the psychiatrist learns too late that the existence of psychosis as such at the time of the offense does not automatically exempt the offender from punishment. He knows that the psychosis about which he is testifying involves a very distinct appreciation of society's judgments of "right and wrong" but finds too late that in affirming this he has answered so as to convict the defendant. Only in cases of disturbed consciousness or of idiocy can the psychiatrist make honest replies to the McNaghten test questions.

This concept is certainly in error. The examination of an individual to determine his responsibility for his acts is clearly a psychiatric function regardless of what method is used to come to this conclusion. Having arrived at such a conclusion the psychiatrist has concluded his part in the matter. The further determination of whether the individual is guilty is a matter for the judge and jury. Guilty is defined by Webster's Dictionary as "justly chargeable with, or culpably responsible for the fault or crime." Comparison of these two definitions, i.e., for responsibility and guilt should remove all doubt as to their distinct difference. Responsibility does

not mean punishability. It means only that the individual, whose responsibility is under examination, at the time he performed a certain act or acts, was in such a state of mental health that he was able to act freely on the basis of a proper subjective evaluation of his act or acts in accordance with objective reality. This is the evaluation which the psychiatrist is asked to make. If, on the basis of this opinion, the individual is punished it is a separate action in which the psychiatrist plays no part.

This last statement requires further discussion. To be responsible the individual must be able to distinguish subjective ideas of right and wrong from the objective reality of right and wrong. In other words, a person may judge subjectively that he was doing right whereas objectively he was doing wrong. For example, a man may have the idea that the speed limit on a highway was seventy miles per hour, whereas, if he read the highway signs he would realize that the limit was fifty. If this man were driving his car at sixty-five miles per hour, subjectively, he would believe himself to be doing right whereas a highway patrolman might catch up to him and tell him that he is breaking the law.

To carry this example further. The man who believed that the maximum speed on the highway was seventy miles per hour (whereas the maximum really was fifty) might drive his car at eighty miles per hour. In this case, he still has a misapprehension of the maximum speed, yet he knows that eighty miles is excessive and that he is doing wrong.

Let us take another possibility. Suppose that the maximum speed on the highway is still fifty miles per hour but the driver believes the maximum speed to be forty. Subjectively he will believe himself to be doing wrong, whereas objectively he is doing right.

There is a fourth possibility: Suppose the maximum speed limit is still fifty miles per hour. The man has a misapprehension of the speed limit and believes it to be forty miles per hour. He, therefore, decides to keep within limits by driving at thirty-five miles per hour. In this last case the driver is subjectively right, and he is doing right in the objective order.

There are thus four possibilities on the judgment of right and wrong:

1. A man may believe subjectively that he is doing right, whereas the act itself is wrong.
2. A man may believe subjectively that he is doing wrong and the act itself is wrong.
3. A man may believe subjectively that he is doing wrong, whereas the act itself is right.
4. A man may believe subjectively that he is doing right and the act itself is right.
Responsibility for his act will be based upon the patient's subjective judgment of himself as acting rightly or wrongly. But there is little doubt that when reference is made to the Right and Wrong test of responsibility, the question of right and wrong here refers to the right and wrong of the objective order. That is to say, the mentally ill man has misapprehensions of objective reality, like our driver in the first possibility. The presence of misrepresentations of reality does not in itself relieve a man of responsibility. It would, however, if this misapprehension was due to mental illness. It will undoubtedly relieve him of any guilt, if he sincerely believed, on the basis of his misrepresentations, that he was doing right.

I would like to repeat at this point that it is the role of the psychiatrist to determine this responsibility; it is the role of the court to determine guilt.

To illustrate what I am talking about, let me refer to the Durham case.

According to the psychiatric testimony, Durham had the following symptoms: "He was hearing false voices. He suffered from hallucinations. He believed that others (employees and others) in the store talked about him, watched him. (He believed) the neighbors did the same, watching him from their windows, talking about him."

According to his mother's testimony "he seemed afraid of people." But note what Durham concludes from these premises: there ought to be steel bars on his bedroom windows—which is a perfectly consistent subjective conclusion on the basis of the misjudgments he has already made.

When the psychiatrist is attempting to determine the criminal responsibility of a mentally ill patient, he should consider a further point: Was the decision to commit the crime directly connected with the patient's mental state? Simply because an individual has some mental derangement it does not mean that he is incapacitated in every respect. The derangement manifests itself frequently in only one area. For example, a person who suffered from an obsessive-compulsive reaction in the field of sex may have diminished responsibility for a sex crime, but there would be no reason to affirm that the same individual was less guilty than anyone else if he were caught robbing a bank.

It is the charge of the psychiatrist, then, to determine five things in reference to the responsibility of his patient:

1. Is the patient mentally ill?
2. If so, to what extent?
3. Was the criminal act directly connected with the mental illness?
4. If so, what were the subjective misjudgments upon which the patient based his decision?
5. Did the patient subjectively believe that his act was right or wrong?
It cannot be overemphasized that the role of the psychiatrist is to determine responsibility. It is here that his work ends. The court will be asked to determine guilt.

D. Unsound Mind (Insanity)

This is a legal and not a psychiatric term, and since it is a legal term it is best defined in legal language. As I stated above, the law is concerned with the protection of the individual and the community. There is no law which requires an individual to seek treatment merely because he is ill. The law is concerned not with treatment, but with protecting the public from damaging or dangerous effects of illness; for example, in cases of communicable disease.

It would be well, however, to remind psychiatrists in the words of Glover that the law is not primarily interested in psycho-pathology; it rarely goes further than to characterize certain end products of psychic tension (behavior) as socially undesirable and reprehensible, and to charge and sentence the offender accordingly. Even when, as in the case of the M’Naghten Rules, the law established a relative immunity from punishment for offenders suffering from some form of mental disorder, its concern is less with the actual state of mind of the individual than with the lack of social responsibility ensuing therefrom.

Being of "unsound mind" therefore means to the lawyer and to the court for example in terms of the laws in effect in the District of Columbia, "I believe .................. is incapable of managing .... own affairs, and is not a fit person to be at large or to go unrestrained, and if permitted to remain at liberty in the District of Columbia, the rights of persons and property will be jeopardized or the preservation of public peace imperiled and the commission of crime rendered probable and that .................. is a fit subject for treatment in a hospital by reason of .... mental condition." These are the words on the certificate that a lay person is required to sign. It is horrifying to most of them and meaningless as applied to a senile or arteriosclerotic patient, at least in most of its terminology. Efforts to modify it have been unsuccessful. To this legally unsophisticated psychiatrist the same ends could be achieved and members of the patient’s family would suffer less psychic trauma if the certificate merely stated, "I believe .................. is incapable of managing .... own affairs because of mental illness. I believe that .................. should be in a hospital because of this so that .... may be given proper supervision and care.” However, in the District of Columbia it is on this basis only that an individual can be committed to a mental institution. There are similar conditions in other jurisdictions. The distinction therefore between the term psychosis and unsound mind is a legitimate one. The psychotic individual, although ill,

27 Ibid., p. 4.
cannot be committed to a mental institution against his will unless he fulfills the legal criteria for unsoundness of mind. In the legal sense, *unsoundness of mind* and *insanity* are synonymous and should be so understood. According to Clark's Criminal Law, *insanity in its legal sense* is "Any defect or disease of the mind which renders a person incapable of entertaining a criminal intent; since a criminal intent is an essential element of every crime no person who is so insane that he cannot entertain it is criminally responsible for his acts."

The Encyclopedia Britannica defines insanity in these words:

This term ordinarily connotes more or less severe unsoundness of mind. Though its loose usage is almost synonymous with mental disease, scientifically the term should only be applied to the mental condition of an individual who, through socially inefficient conduct, has to be placed under supervision and control. The mind is the mechanism by means of which we adapt adequately to our environment and when, through its derangement, conduct is exhibited which the community looks upon as evidence of disease and as implying irresponsibility, the individual concerned is said to be insane and the law steps in to certify him as such. Strictly speaking, then, insanity is really a social and legal term and not medical. Mental illness is a broad concept which may include very efficient members of society. No satisfactory definition can therefore be arrived at, since it would be necessary to define what we mean by insanity, which would involve us in equal difficulties.

The terms "unsound mind" and "insanity" should therefore be limited to those mental states which are sufficiently severe to require supervision and control in a mental hospital, even without the individual's consent, in order to protect him from himself or to protect others in the community from the effects of his illness.

### E. Commitment

This again is a legal term which means that the individual being considered by the court as of "unsound mind" should remain in a mental hospital until his condition is such that he has "recovered" so that he may live in the community without danger. The methods of commitment are different in various jurisdictions. Some legal formality is necessary to constitute "the due process of law" required by the Fifth Amendment to the Constitution before an individual may be deprived of his liberty. This is the real meaning of the legal procedure. No one can be committed merely because he needs treatment. He must be of *unsound mind* in the legal sense.

### F. Psychosis

This term is extraordinarily difficult to define although its meaning is well understood by psychiatrists. Its definition is attempted by very

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28 Clark, CRIMINAL LAW, quoted by Overholser and Richmond, Op. Cit., p. 211.
few authors. For example, Henderson and Gillespie, Noyes and Overholser and Richmond make no attempt to define the term.

Hinsie and Shatzky define a psychosis as:

In current psychiatry, a mental disorder of a more or less special kind, which may or may not be associated with an organic disease. . . . A psychosis is usually a severer type of mental disorder in the sense that all forms of adaptation (for example, social, intellectual, professional, religious, etc.) are disrupted. In other words, the disorganization of the personality of the individual is extensive.

Davidson defines a psychosis as:

In operation, the same as insanity; theoretically, a severe mental disturbance of any sort. Insanity is a legal term indicating some kind of mental incapacity. In practice, however, to call a man psychotic is to call him insane, and various forms of insanity such as dementia praecox, melancholia, etc., are all psychoses. Judges occasionally "split the hair" and say that a certain patient has a psychosis, but that he is not insane. This is what the court does when it orders a release from the hospital of a patient who is admittedly psychotic. The judge in theory says that while the patient has a psychosis, he is not insane. But as a practical matter, what the court really means is that the psychosis (insanity) is not of such degree as to require confinement. The true distinction is between certifiable and non-certifiable insanity, rather than between insanity and psychosis.

The Technical Manual gives this definition:

A psychosis, excluding those of organic origin, is the pathological resultant of a conflict exhibiting itself in social behavior. From the standpoint of disordered mental functioning, it is the expression on the part of the individual of his type of reaction to the conditions of his environment.

Billings, following Meyer, states:

The major reactions or major psychoses, or merely the psychoses, are characterized as being disorders of the whole mentally integrated person. That is, they are sweeping reactions that in general so derange the socially organized personality as to interfere with self-conduct to the obvious detriment and hazard of the patient and of others, and to the extent of requiring treatment and care, even against the patient's will. These reactions, just as in the case of the minor reactions, may be transitory or lasting, stationary or progressive, and structurally or functionally determined. The major reactions in general do not involve the personality merely as major degrees of development deficiency or of psycho-pathological instability.

Skottowe has this to offer:

When the changes in thought and feeling or in the sensorial or intellectual functions become intense and pervade all the aspects of mental activity more or less extensively the patient's sense of values becomes seriously altered, compared with that of his fellow men. He no longer sees the external world in the same terms as they do, and although he may or may not realize that some-

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35 OUTLINE OF NEUROPSYCHIATRY IN AVIATION MEDICINE, War Department Technical Manual, TM 8-325, 1940, p. 32.
thing strange is happening to him, he no longer "talks the same language" as mentally healthy people. Mental illness of this degree arising in a previously healthy individual is known as a psychosis.\(^{37}\)

Noyes and Hayden define a psychosis as "A major form of mental disorder resulting in considerable disturbance of personality."\(^{38}\)

The Encyclopedia Britannica gives the following definition:

"Strictly speaking, the term psychosis means a state of mind, a concrete psychical process or a mental act; but is now generally used to signify an abnormal state of mind. This definition needs qualification, however, since the technical use of the term in psychiatry is confined to certain forms of mental disorder which can be distinguished from states of congenital mental deficiency on the one hand, and from "borderland" conditions or neuroses on the other. A distinction should be made between "psychosis" and "insanity," which in popular and legal language signifies that an individual, owing to his state of mind, is unable to manage himself or his affairs, is in need of care and control and is not to be held accountable to society for his actions. Psychosis, on the contrary, is a strictly medical term; it refers to a type of mental illness with certain intrinsic characteristics, assuming various forms, and due to a variety of causes. It does not necessarily lead to serious disturbances of behaviour, and there are many individuals who though not insane in a legal sense are nevertheless the subjects of a psychosis.\(^{39}\)"

After reviewing these various definitions I would like to submit the following definition:

"A psychosis is either a temporary or prolonged grave deviation from normalcy in judging, feeling, reasoning and/or willing. It is the result of the individual's failure to adequately solve his conflicts. The condition may be characterized by deep seated personality disorganization, by disturbed or inappropriate emotions, delusions, hallucinations, seriously irregular conduct, lack of insight, loss of contact with reality, and other symptoms.\(^{40}\)"

G. Irresistible Impulse

This term has been defined variously both by the courts and by psychiatrists. One court for example spoke of it as "deprivation of will power to choose whether to do the act or refrain from doing it."\(^{41}\) Another court described the irresistible impulse as a cause of irresponsibility if "by reason of mental disease he had so far lost the power to choose between right and wrong and avoid doing the act that his free agency was destroyed."\(^{42}\)

It is the Army court-martial manual which provides the definition which appears to me most descriptive. It reads as follows: "A person

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\(^{39}\) *ENCYCLOPAEDIA BRITANNICA*, *Op. Cit.*, Vol. 18, pp. 721D.


\(^{41}\) *Delaware v. Jack*, 58 Atl. 853 (Del.).

\(^{42}\) *Parsons v. Alabama*, 2 So. 854 (Ala.).
is not mentally responsible unless he was so free from mental derangement as to be able concerning the particular acts charged both to distinguish right from wrong and to adhere to the right.43

Most of the court decisions make some reference to defective action of the will, e.g., "his free agency was destroyed"44 or "deprived of will power to choose whether to do the act or refrain from doing it."45

In the *Durham* case the Court of Appeals quoted as follows:

The modern doctrine is that the degree of insanity which will relieve the accused of the consequences of a criminal act must be such as to create in his mind an uncontrollable impulse to commit the offense charged. This impulse must be such as to override the reason and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong. The mere ability to distinguish right from wrong is no longer the correct test either in civil or criminal cases, where the defense of insanity is interposed. The accepted rule in this day and age, with the great advancement in medical science as an enlightening influence on this subject, is that the accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible impulse, which means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong.46

Following this description the court points to the fact that some have been misled into the belief that this condition produced "only sudden, momentary or spontaneous inclinations to commit unlawful acts."47 I doubt if this naive belief was held by many psychiatrists. No one skilled in clinical psychiatry would believe that an individual could act with homicidal intent one moment and have been perfectly normal a few minutes before and be perfectly normal a few minutes later.

The choice of words used in the term is unfortunate. The word *impulse* is incorrect. It leads to misunderstanding. A better word would be *urge*. In this meaning the term is more understandable. With this connotation the following example given by the Court becomes more understandable,48 but not in the way that the Court understood it:

The sufferer from (melancholia, for example) experiences a change of mood which alters the whole of his existence. He may believe, for instance, that a future of such degradation and misery awaits both him and his family that death for all is a less dreadful alternative. Even the thought that the acts he contemplates are murder and suicide pales into insignificance in contrast with what he otherwise expects. The criminal act, in such circumstances, may be the reverse of impulsive. It may be coolly and carefully prepared; yet it is still the act of a madman.

The court then concludes that the irresistible impulse test is defective

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because it gives no recognition to mental illness characterized by brooding and reflection. Could it be that the court is misinterpreting its own quotation?

The example quoted would seem to this writer a perfect example of what would be considered an irresistible impulse (urge). The depressed individual broods over his imagined degradation and misery, he reflects on the future, and the feeling, perhaps aggravated by some environmental circumstance, suddenly intensifies and he yields to the thought that death for himself and family would be better than the degradation they are about to face. So he kills them. The urge which he had previously resisted suddenly overwhelms him and he acts. He feels that his act is right. Is not this the definition of irresistible impulse?

The term _irresistible_ should also be discussed. In order to do this it will be necessary to speak briefly of the will.

_The Will_

This should not be a new subject to lawyers. _The whole theory of criminal law is based on the idea of freedom of the will, i.e., the freedom of an individual to act or not to act_. If an individual does not have this freedom then he should not be punished because the act of which he is guilty was not his responsibility. It is on this theory that "insanity" is a defense in a criminal case. The individual’s freedom to act is considered lost because of his mental illness. Menninger states in this regard:

> The legal problem of responsibility evidently involves the philosophical problem of “free will.” Philosophy still debates the difficult issues of the question, and science can hardly give a final answer to them now. But the law stubbornly maintains that the question is closed. According to the law, all persons of certain categories possess absolute freedom of will, and all persons of other categories possess none. Neither science nor philosophy can accept such a conclusion.⁴⁰

In spite of many opinions to the contrary, it is clear to those who recognize the freedom of the will that it is not merely a philosophical problem but a daily practical one. To many psychiatrists the will is a theologico-metaphysical concept. This puts it for them beyond the pale of scientific consideration. It is hard to understand how anyone, no matter what his metaphysical background, could fail to recognize the existence of human responsibility and who does not act on this assumption. This responsibility is easily recognized if one gives a moment of thought to these facts.

1. Everyone recognizes his own responsibility.
2. Everyone holds others responsible for various injuries or damage which one has suffered at their hands.

3. Everyone acts upon the belief in the power of his own initiative. These three factors plus one's daily experience in the matter of free choice add up to free will.

The freedom of the will should be thoroughly understood by all those who deal with people. Absence of free will makes man a machine, or an animal neither one of which would be considered responsible. Determinism is strongly emphasized by a number of the authorities quoted by the court. If man's acts are determined then he cannot be held responsible and no one should be punished for his acts. This would make all criminals sick people.

The GAP Report states this belief clearly:

Many dangerous persons are essentially undeterrable and it is the business of psychiatry to supply the law with such knowledge as is necessary to detect such persons among whom may be counted several classes of mentally disordered offenders. In the trial, the M'Naghten formula does not determine realistically who such persons are. Many undeterrable offenders are treated as if they are "sane" and sent to prison to be released at the termination of sentence, free to repeat the cycle. As matters stand, as a device of criminal law administration, the Rules touch only a fraction of undeterrably mentally ill. In this there is no security for the law-abiding community.

This author perhaps inadvertently indicates the criminal's free choice when he states that he is "free to repeat the cycle."

The following author would do away with the court entirely. In place of the court we would have a psychiatric clinic:

The problem (of crime) obviously involves the complete social-economic structure and the tendencies of contemporary American civilization. . . . The only hopeful approach to the problem of criminal conduct lies in the application of a scientific individualized approach which has rehabilitation and reconstruction as its end in place of the traditional impersonal and more or less mechanical procedure that characterizes the legal approach to these problems. . . . It would not seem altogether visionary to think of the future court of criminal law as approaching more closely the characteristics of a clinic in human maladjustment. I believe that one can look forward to a day when these courts will indeed become social clinics for the amelioration and possibly the solution of the problems of adjustment to civilized communal living. They will then be dominated by a spirit of scientific inquiry, using every available facility for the promotion of meliorative and curative ends. These courts will be run by adequately trained people who will be subject to the same kind of professional scrutiny and supervision as is the physician of today.

The freedom of the will is not entirely overlooked. The court, in the Durham case itself, pays at least lip service to the concept of free will when it commented:

The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called mens rea), commit acts which violate the law, shall be criminally responsible for those acts.

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GAP, p. 4.


Dr. Overholser, writing in *One Hundred Years of American Psychiatry*, says:

A voluntary application is a form of contract which is valid if the patient is competent and is acting of his free will.54

**The Will and Irresistible Impulse**

The expression "irresistible impulse" connotes a distortion of the power of the will itself. This is an inaccuracy. It is not the power of will itself that has been distorted. If the patient had entertained reality judgments which were different from those he did have, he might have chosen to act in another manner. The distortion is not of the will, but of the whole person—as I hope to show by a brief outline of the psychosomatic unity of the human person.

Man is a being who possesses a vast number of capacities. These are divided into three broad genera: intellectual, sensile, vegetal. The intellectual activities are those of intellect and will. The sensile involve the external and internal senses plus the whole gamut of emotions; the vegetal involve his activities of nutrition, growth and reproduction. All of these capacities necessarily tend toward their natural goals which are called their natural goods. In the case of the will there is only one irresistible object—i.e., the infinitely good. That is to say, if the intellect recognized an object as being the infinite good, the will would have no other choice than to accept it. On the other hand, if the intellect recognizes an object as less than infinitely good, the will is free to accept or to reject the object.

The will tends to accept any good which is less than infinite if the intellect does not recognize in the acceptance, a threat to an even greater good. This is the way in which intellect and will would act in an emotionally mature individual. The intellect would have a regulating and integrating role over the sensile and vegetal activities.

However, we must keep in mind that intellect and will are not the only capacities of the whole human person. He is an emotional, sensile and vegetal being as well as intellectual. The person may choose to cultivate his sensile life at the expense of the intellectual. In such a case the person may establish fixed habits whereby his emotional capacities react more readily than the intellectual, and the emotional obtain their satisfaction at the expense of the person as a whole.

The regulating and integrating rule of the intellect is never a despotic one over the lower powers, even in the most perfectly integrated human personality. Its rule is rather a democratic one. That is to say, the lower

54 *One Hundred Years of American Psychiatry*, p. 542.
powers have some autonomy of their own, and if they are not regulated, will break out and take over the person. But even here the question of responsibility is not to be ignored. If an individual's life is a chaos of emotions, we cannot say that he has lost his will power. What should be said is that the individual has not exercised his will power, not that his will was overrun. In determining guilt the question will arise: "To what extent did the person knowingly allow his emotions to take the ascendancy?"

If his emotional life is emphasized at the expense of his higher powers, it may be due to a number of factors, such as poor training by his parents. This would be a mitigating factor so far as guilt is concerned. On the other hand, an individual may have allowed his emotions to take over simply because he chose the path of least resistance. In this case, he would be far more guilty than in the other.

In both of these last two cases we should speak of an "unresisted" urge but never of an "irresistible" urge.

In brief, the will is indirectly influenced by the emotions and unconscious factors but never coerced. The will acts on the basis of conscious judgments and inclines toward the judgment which is presented to it as good.

A great deal of the confusion on psychic determinism in modern psychiatry has arisen because Freud thought that he had shown once and for all that free will is an illusion. He based this on his explanation of a number of psychic activities, such as the connection of thought associations, the origin of neurotic symptoms, of slips of the tongue, and acts of forgetting, among others. But anyone who understands Freud's theories and who simultaneously understands the doctrine of free will, will immediately see that the instances offered in proof against free will do not pertain to the question. The conditions upon which an individual makes a free decision are all in consciousness at the time that he makes the decision. That is to say the premises upon which he decides to act, or not to act, are in his field of consciousness. These thoughts are influenced by other unconscious factors which are not directly available to the man making the decision. However much these conscious thoughts may be influenced by unconscious factors, it still remains true to say that the individual's decision is based upon those thoughts immediately available in consciousness. This is true for both the psychotic and for his more normal confrere. Every human being is influenced but not coerced by the unconscious. The difference between the normal man and the psychotic is the degree of influence which is exerted on his actions by the unconscious. In the normal man the power of reason has control over the urges arising from unconscious sources. In the psychotic, the power of reason yields its place more readily to the urges of the unconscious. Thus reason is
unseated because its control has been usurped by the lower powers. Just why reason is overwhelmed in the psychotic depends on a large number of factors, the most important being the loss of proper subjective judgment which permits the effects of childhood trauma, more immediate environmental influences, psychic threats, faulty habits, and other traumatic psychological experience to gain access to the conscious without the usual controls. As I have said before, the normal and the abnormal minds do not differ qualitatively but quantitatively. The sensitive conscience of the psychotic may lead to swift and terrifying behavior.

It should be clearly understood when I speak of free will that I do not maintain that *all* acts of man are free. On the contrary, there are many acts which a man performs which are not free. Only those acts which follow deliberation are free acts. That is why the philosopher distinguishes between an *actus humanus* and an *actus hominis*. Human acts (*actus humanus*) are those specific acts resulting after a man exercises his human power of deliberation. Acts of a man (*actus hominis*) are those actions which take place without deliberation, e.g., reflex activity, digestive activity, response to stimuli, growth. Habit and bodily appetites may influence the judgment which precedes the act of the will and consequently may strongly influence its action. The will in this latter case, although influenced, is not coerced. In regard to the lack of freedom in reference to certain acts, Mercier has this to say:

> . . . all acts performed by man are not free. Only those acts are free which are the fruit of reflection. A very large percentage of acts, then, even in the most serious life, are not free because done without thought; a larger percentage are suggested simply by the imagination, controlled by passion or self-interest, or are due to routine. In the second place, it is a mistake to imagine that free acts are purely arbitrary, proceeding from a will that acts without a purpose. Truly man may be unreasonable if he likes. But in point of fact, in by far the majority of cases, men are not unreasonable, but allow themselves to be actuated by a purpose. Thus, not to speak of the last intention—the seeking after supreme happiness—the instinct of self-preservation, the instinct of propagation, the natural love of parents for children, of children for parents, the striving for well-being, or for personal interest, are all so many motors to the will to which it generally responds without making a deliberate choice.65

Freedom of will does not mean merely arbitrariness as if the will simply moved at random without receiving influences. On the other hand, we should not say that these influences coerce the will into a position where it can choose only one alternative. We all know how often we have had the chance to choose between two motives and we may have chosen something which at the time was less desirable than something else. For example, going to work at the office on a pleasant day, instead of playing golf. Most of the arguments against freedom of the will are based on a nineteenth century concept of Newtonian physics, or upon the

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law of the conservation of energy. In back of the doctrine of psychic determinism is the nineteenth century philosophy of mechanism which Freud adopted uncritically from his contemporaries. Freud himself was not a philosopher, as he pointed out somewhat ironically in his own autobiography. Nineteenth century mechanism has been rejected because in more recent times even in the physical universe it can no longer be held that there is absolute determinacy. We are referring, of course, to the Heisenberg Principle.

It is a mistake for a philosopher to predicate of all reality some principle which applies to only a segment of reality, just as it would be for a botanist to say that since tomatoes and lemons are both fruit, anything he says about tomatoes will apply equally to lemons. This is why the philosopher who understands freedom of the will ignores the Heisenberg Principle as a proof of free will. Yet Sheldon Glueck, for example, who is quoted by the court as an authority, quotes Sir Arthur Eddington, who is a physicist, as giving evidence that free will is now a distinct possibility.

The Psychopathic Personality

Before concluding this discussion of irresistible impulse (better described as unresisted urge) let us consider it in reference to the psychopath. The psychopath knows the difference between right and wrong, his subjective judgment is correct but he has no feeling for right and wrong. He is amoral, he has no ethical sense. If we accept then the concept of irresistible impulse as the ability to distinguish right and wrong but inability to adhere to the right then we have a perfect description of the psychopathic personality. Therefore a clear defense for every psychopath would be the irresistible impulse. In this instance the “policeman at the elbow test” would not apply because the psychopath would act with the policeman at his elbow.

Neither would the “policeman at the elbow” test apply in a true case of obsessive stealing because the true obsessive neurotic would probably conceal his activities but in doing so suffer severe anxiety. This test is, however, a good one because if the act would not be performed with a policeman at the elbow it is certainly not irresistible. Even in the genuine obsessive compulsive state the individual is able to resist but only at the cost of severe anxiety.

The definition of unresisted urge (irresistible impulse) which seems best is: an unresisted urge is one which, because of mental illness, so far causes the individual to lose his power of choice in regard to particular acts that in spite of the fact that he may recognize an act as wrong, he

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feels so impelled to act that he is unable to adhere to what he considers right.

Put in philosophical terms this could be expressed as follows: An unresisted urge is one which has developed so excessively at the expense of the other psychic powers that in comparison to this urge the other powers exert negligible influence upon reason when it is called upon to make a judgment. This urge occupies the focal point of consciousness. Because it occupies this central point, it becomes the basis upon which the intellect represents an object or some course of activity as desirable to the will.

In other words, this urge has developed to such a degree that its occupancy of the whole field of consciousness for the individual precludes the entrance into consciousness of other notions which might tend to represent the urge as undesirable. Since the urge is presented to the will only as something desirable to fulfill, the individual wills to satisfy the urge. This occurs not as an isolated temporary mental illness but as part of a continuing illness which both antedates and succeeds this particular act. Instances of acts of short duration are more likely to be the result of sudden passion or anger and are not properly considered under this title.

The concept of irresistible impulse adds very little to the usual consideration of responsibility in mental illness.

Is the distinction between "right and wrong" a symptom? This statement which was made frequently by the Court in the *Durham decision* certainly needs clarification. A symptom is a subjective manifestation of disease. This question of right and wrong then could hardly be a symptom.

For the second time it may be presumptuous of me to raise the question as to whether most of those who have written on this subject may not be wrong. It would seem to me however that the judgment of the psychiatrist as to the patient's ability to distinguish right from wrong is a psychiatric opinion based on his total study of the personality of the patient. In this sense it is certainly not a symptom. It is the conclusion reached as a result of a complete study. As far as the patient is concerned it is not a symptom. Lacking insight, he is convinced that he is right, so that in his opinion there is no question of right or wrong.

Much stress is laid in the court's opinion upon the limited portion of the personality studied in arriving at the conclusion as to the responsibility of the criminal. This seems very much akin to saying that the surgeon who is amputating a leg for diabetic gangrene is ignoring the
rest of the patient when he operates on him. His concern at the moment is the gangrenous leg, because it endangers the total economy of the patient. Society's concern with the criminal is his inability to live in the community without endangering it. Cure for the whole comes later; the immediate danger should be treated first. The immediate concern of the law is the protection of society.

These statements require some explanation. In the first place, how does the will function in the psychotic person? To explain this let us consider how one arrives at a conclusion of right and wrong.

The individual is subjected to many forces, principally those from the environment and those from his unconscious. He may not be fully aware of the significance of either of these and, of course, both are affected by habit. If he has been accustomed by training to act in a certain way he is likely to act in that way. If he has previously reacted in an antisocial way each succeeding antisocial act becomes easier to perform as it becomes habitual. (On the other hand, moral conduct becomes easier as it is habitually performed.)

In any case, when a judgment is formed it is arrived at by ideas of which the individual is fully aware. These conscious thoughts are the only ones available to the patient (and to the psychiatrist) in arriving at an understanding of what ideas influenced the judgment which caused the individual to act in such a way as to get into the hands of the law. The question of responsibility hinges upon these ideas which influenced the judgment which lead to the act. It is for this reason that I feel that the ability to distinguish right from wrong is not a symptom but a deduction arrived at by a study of the total facts available about the patient.

Suppose we consider for a moment what can happen if we apply only the criterion of "mental disease" and see where it leads. Then we could arrive at the ridiculous conclusion that there are no criminals but only sick people and that no one has any responsibility for crime. These quotations will help to amplify this statement:

He (the criminal psychopathologist) cannot accept the concept that the criminal is normal and sane, because he sees that the criminal is guided by much the same unconscious forces as the neurotic and psychotic, the criminal act being in the nature of a symptom, the manifestations of which the criminal cannot control and the basic reasons for which escape his insight.58 Neither can it longer be maintained that the criminal is a sane person, a responsible agent who can profit by punishment but instead one must look for the motives behind the criminal deed and recognize that these motives are entirely unconscious, and therefore cannot be reached by punishment.59

(A further extension of our knowledge of the forces of unconscious life invites a corresponding extension of its application in legal welfare to a number of persons whose antisocial behavior does not fit into the current medical descrip-

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59 Ibid., p. 386.
tion of the psychotic and who are likewise beyond the legal definition of in-
sanity. With the increasing acceptance of psychological knowledge a larger
part of society should be exempt from mere imprisonment, and at the same
time removed by commitment from the opportunity for destructive behavior.\textsuperscript{60}

These authors seem to feel that the presence of any form of mental
disease from neurosis to psychopathy to psychosis to criminality would
excuse one from responsibility. They are not the only ones who feel that
way. If we begin to look into all the unconscious factors in the personality
there would not be enough psychiatrists to look for them—they are not
readily found. Or are we to have the psychiatrist act as an oracle to
prophesy what these factors would be if they could be elicited? Is this
what is meant in the GAP Report when it is stated that the psychiatrist
should be allowed to speak freely in a psychiatric frame of reference?

Only chaos can come to society if we are to take into account all the
unconscious influences which affect the personality in criminal cases.

\textit{The Unconscious}

Although the court itself does not mention unconscious influence as
such, it speaks freely of “other areas of the personality” than the cognitive
as influencing mental life. \textit{“The science of psychiatry now recognizes that a
man is an integrated personality and that reason, which is only one element
in that personality, is not the sole determinant of his conduct. The right-
wrong test, which considers knowledge or reason alone, is therefore an
inadequate guide to mental responsibility for criminal behavior.”}\textsuperscript{61} The
GAP Report, however, which is quoted favorably by the court makes
frequent reference to the unconscious:

As a rule, the defendant “knows” the facts of his crime and knows its unlawfulness and consequences, but he does not know the unconscious basis for it. The task of the psychiatrist is to perceive the unconscious basis of the unlawful act and the nature of the inner conflict, but in action the law would confine his exploration to the familiar territory of the conscious.\textsuperscript{62} The unlawful act may be a surface manifestation of a more profound psychic disturbance, an indicator of breakdown in a system of psychic adaptive defenses erected to balance inner conflicts. In such cases, the act is not the conflict itself but a token, overdetermined compromise lived out in an attempt to attain relief from tension. This is the pattern of pathological behavior with which the psychiatrist is particularly concerned. If the psychiatrist is to discover the basis of such unlawful behavior, to understand the offender, and serve a purpose in the trial, he must go beyond the act itself and evaluate the total personality both in its conscious and unconscious aspects.\textsuperscript{63}

There can be little doubt that one of the other areas of the personality which the Court feels should be explored in determining responsibility is the Unconscious. For the sake of members of the legal profession a brief description of the unconscious may be appropriate.

\textsuperscript{60} GAP, \textit{Op. Cit.}, p. 2.
\textsuperscript{63} \textit{Ibid.}, p. 2.
According to Zilboorg:

The unconscious is no mind at all. It is a bundle of impressions, impulses, feelings, and presentations which is what they appear to us to become only when they enter consciousness; otherwise, they remain more or less primitive, both in substance and in form. That is why the most civilized man seems to betray the presence of so many primitive drives...they always find a way to come out to the surface, even though in a highly modified form. When the civilized man of today, weary of the daily tasks of living, turns away for a rest, either by falling asleep or by wandering off in the undirected semi-somnambulistic slumber of day dreams, he finds himself in the midst of a swarm of images and preposterous, illogical, meaningless, self-contradictory events. He kills without anxiety; he is frightened without apparent reason; locomotives fly like birds and corpses come to life. The whole complexity of the primitive, magic intertwining of impulses, usually out of reach of one's consciousness, comes to the surface.

Zilboorg’s description is that of the part of the unconscious mind which Freud calls the id.

Here is William Menninger’s description of the id:

The id, the infantile part of the person, can be described by saying, “it wants.” The phrase is in the third person because the id includes that part of all of us which often we would rather not claim—our most primitive self. It is in the unconscious. In the commonly expressed phrase “Something within me made me do it,” the “something” refers to the id. The id “wants” because it represents that part of every person that is selfish, that makes unreasonable demands, that gives rise to spontaneous, uncontrolled, and primitive behavior and wishes. In response to the id’s request (whatever it may be) the conscious part of the personality—the ego—answers “I will,” or “I will not.” The ego represents rationality, the judgment and the will power that decides whether or not to accede to the demands of the id...

The conscious ego has the continuous function of maintaining contact with the external world and of attempting to help the personality adjust itself to the demands placed upon it by the environment. Simultaneously it must control the superior strength of the id and guide and appropriately modify its expressions of hate and love.

Regarding these emotions which are in the id, Strecker and Appel have the following to say:

It is clear that the emotions constitute a remarkable force for good or evil. . . Whenever a force is so gigantic and awful in its potentialities, it should be surrounded by protective barriers and subjected to inhibiting criteria. The only available criterion is the check of the intellectual mind. In other words, human conduct must not only be determined by feeling, but it must also be guided by thinking. The moral is: “look before you leap,” or “think before you act.” The only solution is to restrain at least partly impulsive behavior. This is not easy; in fact, it is extraordinarily difficult. Sometimes the emotions spur us on so strongly and so rigidly that they do not give us time to think and, often, the feeling which prompts the act is not accessible to conscious analysis. Nevertheless, effort forms habit. A reasonable amount of self-knowledge, plus honest striving, will make us eventually, at least in some degree, the masters of what we do instead of slaves of unadulterated emotions.

These are the forces which the court wishes to liberate upon the
jury. A professionally untrained person might well be overpowered by these evil influences. One must remember that these forces are under some degree of control even in the more severe psychoses. When they are offered in explanation of a neurotic disorder even those more wary than the average lay person may be misled.

Primitive thinking indulged in by the psychotic may indeed consider cause and effect as two immediately related events. In practice the effect of the unconscious does not lead to immediate conscious action. There are interposed certain conscious controlling elements. In the psychotic there would be little difficulty in determining the individual's responsibility or lack of it. In the neurotic this immediate cause and effect relationship is simply not there. There may be some regressive thinking but there still remains conscious control of which the conscience or superego, are part. As long as such control remains the individual is to some degree responsible. These conscious factors are the important elements in the function of a judgment which leads to action. The unconscious influences but does not coerce the conscious. The will remains free and as long as the will is free the individual is in some measure responsible. His measure of responsibility is dependent upon the falsity of the subjective judgments upon which his act depended.

CONCLUSION

1. The danger of the Durham decision is that it opens the door too wide. It allows a psychiatrist to testify to any theory which he may hold. It then leaves to his persuasive effect upon the jury whether the individual is to be considered irresponsible or not. It offers nothing specific for the jury to consider.

2. The decision attempts to do what it states in its own opinion no court can do, i.e., to define insanity.

"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."7

3. The Court has attempted to define it in terms of no symptoms at all and in terms which are so confusing that they cannot be understood by most psychiatrists.

4. The court is attempting to throw aside a test which took 2,000 years to devise and which has been used successfully for over a hundred years in favor of a poorly worded and vague concept. Its vagueness is well attested by the confusion which has been apparent since its publication.

5. The decision, by introducing the unconscious to the jury, endangers the whole basis of the criminal law, viz., that we are responsible for our acts. Abolish the freedom of the will and we have the doctrine of determinism.

6. If we are determined then we are not responsible. If we are not responsible punishment will have no effect.

7. If then all criminals are merely sick people who need treatment, who is to treat them and where? Psychiatry has no treatment for them.