Volume 7 | Issue 1 Article 8

1961

Criminal Law - Insanity - Test for Criminal Responsibility

Michael R. Bradley

eavesdropping of wiretaps, the essential wrong is the same. Even though wiretapping is not condemned by the letter of the Constitution it seems that it should be construed to fall within the prohibition of its spirit. As Mr. Justice Douglas has said, "Unless and until *Schwartz* is overruled, the beneficient effect of § 605[42] will be stultified by the admission of tainted evidence in state trials. The privacy of the individual, history assures us, can never be protected where its violation by state officers meets with reward rather than punishment."[43]

John B. Lieberman, III

CRIMINAL LAW—INSANITY—TEST FOR CRIMINAL RESPONSIBILITY.

United States v. Currens (3d Cir. 1961).

Defendant was convicted in the United States District Court for the Western District of Pennsylvania for a violation of the National Motor Vehicle Theft Act.[1] On appeal, defendant urged the adoption of the Durham test[2] of criminal responsibility. The Court of Appeals decided that a charge on the issue of criminal responsibility in terms of the McNaghten rule and the irresistible impulse test was prejudicial error, and *held* that defendant was entitled to a new trial with the criminal responsibility issue to be determined by the following test: whether the jury was satisfied that at the time of committing the prohibited act, defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated. *United States v. Currens,* 290 F. 2d 751 (3d Cir. 1961).

At present the most widely used test in the United States for criminal responsibility is still the McNaghten rule.[3] This is the famous "right-wrong" test which, although criticized since its adoption, has withstood the onslaughts of psychiatrist[4] and lawyer[5] alike. The nineteenth century

42. See note 33 *supra.*

43. Pugach v. Dollinger, 365 U.S. 458, 81 S. Ct. 650, 653 (1961) (dissenting opinion).

1. 18 U.S.C. § 2312 (1958).

2. Durham v. United States, 214 F. 2d 862, 874, 875 (D.C. Cir. 1954). "The rule . . . is simply that an accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect."

3. McNaghten's case, 10 Clark and Finnelly 200, 8 Eng. Rep. 718 (1848). The defendant must be "labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, he did not know what he was doing was wrong."

4. Guttmacher, *The Psychiatrist as an Expert Witness,* 22 U. CHI. L. REV 325 (1955); Roche, *Criminal Responsibility and Mental Disease: Medical Aspects,* 26 TENN. L. REV. 222 (1959).

5. BIGGS, THE GUILTY MIND (1955); Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham and Beyond,* 41 A.B.A.J. 793 (1955).

psychiatric theories of a "compartmentalized" mind[6] (separate compartments for the intellect, will and emotions) were not adequately embodied in the McNaghten rule, since it determined criminal insanity solely on the basis of impairment of the intellect, and neglected the will and emotions. An attempt to solve this insufficiency resulted in the suggestion of an "irresistible impulse" test.[7] But the word "impulse" has connotations of a sudden emotional reaction, and so was criticized as not taking into account those mental disorders characterized by brooding and reflection. The nineteenth century "compartment" theory has now generally been replaced by an "integration" theory,[8] which asserts that the whole human personality is interrelated and that any disease or defect of one part affects the entire person. The New Hampshire Supreme Court as early as 1869 rejected the McNaghten rule and substituted what it felt was a test[9] encompassing the "integration" theory and bringing the legal concept of insanity abreast of contemporary psychiatric principles, yet leaving the criminal responsibility issue to the jury. However, this decision had little effect on the criminal law in the United States until the United States Court of Appeals for the District of Columbia in 1954 adopted the now famous "Durham," or "disease-product" rule[10] which that court said was "not unlike" that adopted by New Hampshire in 1869. According to *Durham,* if defendant's alleged criminal act was the *product* of his mental disease, he is not criminally responsible. The decision provoked a vast amount of comment both favorable and unfavorable.[11] The favorable comment stemmed from those who were anxious to see the McNaghten rule completely abolished and supplanted by a test which brings medical and legal concepts of insanity closer to a synthesis.[12] The unfavorable comment criticized the vagueness of *Durham* and what was claimed to be a lack of reality in denoting the mental disorder as the *cause* of the crime.[13]

6. Glueck, *Psychiatry and the Criminal Law,* 14 VA. L. REV. 155 (1928); Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham and Beyond,* 41 A.B.A.J. 793, 794 (1955).

7. According to the irresistible impulse test, the defendant is not guilty by reason of insanity, even if he knows his act was wrong, if "he is yet by an *insane impulse* . . . irresistibly driven to commit it." State v. Felter, 25 Iowa 67, 82, 83 (1868).

8. *Op. cit. supra* note 6.

9. ". . . whether there is such a mental disease as dipsomania, and whether defendant had that disease, and whether the killing of Brown was the product of such disease, were questions of fact for the jury." State v. Pike, 49 N. H. 399, 407 (1869).

10. Durham v. United States, *supra* note 2.

11. Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists,* 41 IOWA L. REV. 485 (1956); Guttmacher, *The Psychiatrist as an Expert Witness,* 22 U. CHI. L. REV. 325 (1955); Zilboorg, *A Step toward Enlightened Justice,* 22 U. CHI. L. REV. 331 (1955). But see Hall, *In Defense of the McNaghten Rules,* 42 A.B.A.J. 917 (1956); Wertham, *Psychoauthoritarianism and the Law,* 22 U. CHI. L. REV. 336 (1955). "This Court has no desire to join the courts of New Hampshire and the District of Columbia in their 'magnificent isolation' of rebellion against McNaghten . . ." Andersen v. United States, 237 F. 2d 118, 127 (9th Cir. 1957).

12. Zilboorg, *A Step toward Enlightened Justice,* 22 U. CHI. L. REV. 331 (1955).

13. Wertham, *Psychoauthoritarianism and the Law,* 22 U. CHI. L. REV. 336 (1955).

Since 1954, the District of Columbia court has attempted to clarify its rule,[14] especially by further elucidation of the causation principle. That court has stated that, "The short phrases 'product of' and 'causal connection' are not intended to be precise . . . they mean that the facts concerning the disease and the facts concerning the act are such as to justify reasonably the conclusion that 'but for this disease the act would not have been committed.' "[15] Like the New Hampshire rule, *Durham* has been largely shunned by other jurisdictions,[16] though Maine has recently adopted the rule by statute.[17] Now the United States Court of Appeals for the Third Circuit has replaced the McNaghten and irresistible impulse tests with its new rule in a lengthy, explanatory opinion.

To legally punish an accused, it must be shown that he committed the guilty act (*actus reus*) with the requisite guilty mind (*mens rea*).[18] For the *mens rea* requirement to be satisfied, the defendant must have known that the act was wrong and nevertheless freely have chosen to do it.[19] It would violate this basic principle of Anglo-American law to hold a person criminally responsible for acts the occurrence of which he was not free to prevent. Although the concept of free will is philosophically controversial, the criminal law must operate on the basic premise that it does exist,[20] that man has the ability to determine his actions and that they are not determined for him. So the law-breaker is not legally responsible who does not know that his act is wrong or could not freely choose to conform his act to the requirements of law. Mental disorder may, if sufficiently severe, negate the *mens rea* requirement to such an extent that the law, recognizing the lack of capacity, will excuse guilt. Certainly not every mental abnormality (for example, mild neurosis) should relieve one of criminal responsibility. However, a moral judgment, based on contemporary ethical and scientific standards and stated in legal terms as to "how much" or "what degree" of mental abnormality will excuse guilt, is necessary. The Third Circuit's moral judgment is expressed in the instant case. This judgment emphasizes and focuses the court's attention on the criminal responsibility issue — whether the defendant had substantial capacity to *conform* his act to law[21] (thus to

14. See especially, Carter v. United States, 252 F. 2d 608 (D.C. Cir. 1957); Douglas v. United States, 239 F. 2d 52 (D.C. Cir. 1956).

15. Carter v. United States, 252 F. 2d 608, 617 (D.C. Cir. 1957).

16. Black v. United States, 269 F. 2d 38 (9th Cir. 1959); State v. Crose, 88 Ariz. 389, 357 P. 2d 136 (1960); State v. Taborsky, 147 Conn. 194, 158 A. 2d 239 (1960); People v. Carpenter, 11 Ill. 2d 60, 142 N.E. 2d 11 (1957); Commonwealth v. Chester, 337 Mass. 702, 150 N.E. 2d 914 (1958); Commonwealth v. Woodhouse, 401 Pa. 242, 164 A. 2d 98 (1960); State v. Goyet, 120 Vt. 12, 132 A. 2d 623 (1957). See also, Note, 5 VILL. L. REV. 138 (1959).

17. ME. REV. STAT. ANN., Ch. 149, §§ 38-A, 38-B (1961).

18. PERKINS, CRIMINAL LAW, 725 (1957).

19. *Id.* at 653.

20. See Judge Burger's concurring opinion in Blocker v. United States, 288 F. 2d 853, 865 (D.C. Cir. 1961).

21. The *Currens* Rule is thus a modification of the American Law Institute's MODEL PENAL CODE § 4.01, "Mental Disease or Defect Excluding Responsibility. (1) A person is not responsible for criminal conduct if at the time of such conduct

satisfy the *mens rea*) — rather than the mental disorder of the defendant, which the Durham rule[22] emphasizes. *Durham* also limits the jury's evaluation of the issue of *choice* by using the word *product*, thus attempting to formulate the elusive concept of causal relationship between the alleged act and a mental disease or defect. In a sense, every act of a mentally diseased person is a product of his disease in some degree. To allow so fluid a concept to be the jury's standard of criminal responsibility might allow some criminals, who could *conform* their conduct to law, to be classed as insane because their act was in some way a *product* of their disease. On the other hand, the instant opinion recognizes the pressing problem of recidivism in the criminal law. Under the McNaghten rule, those with impaired wills were not considered insane, and so received prison sentences and were returned to society uncured, ready to commit more serious crimes. The present opinion suggests that anyone lacking substantial capacity to conform his conduct to law should be institutionalized indefinitely until he could be safely returned to society.[23] Lest it be misunderstood, it should be pointed out that the *Currens* rule does not turn a field of law over to psychiatrists, but rather seeks the aid of psychiatry to solve a perplexing legal problem. According to the opinion, expert psychiatric testimony should stress the entire personality of the accused, and questioning should be designed to expand rather than narrow such testimony. "The defendants entire relevant symptomatology must be brought before the court and fully explained."[24] This testimony should be as limited in technical psychiatric jargon as possible, while emphasizing the compulsions which direct the mentally disordered mind on a path strange to reality. The most difficult practical problem with any criminal responsibility test is bridging the gap between the expert psychiatric testimony, stated in medical terms, and the legal test, stated in legal terms, in a way that can be meaningful to a lay jury. A point not sufficiently covered by the opinion is the problem of just how to explain the terms "mental disease or defect" to the jury.[25] Should the jury merely be referred to the testimony on disease and defect, or should an accepted legal definition of the terms be developed? Although the new rule seems to be almost too simply stated, it could be very effective if properly developed by the court in later decisions, and accepted as a long overdue improvement by an open-minded legal system. It is stated in terms that the attorney, judge and juror can understand, and establishes a flexible legal standard by which the jury can decide the ultimate issue of criminal responsibility.

Michael R. Bradley

---

as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or *to conform his conduct to the requirements of law.*" (Tent. Draft No. 4, 1955). (Emphasis added).

22. Durham v. United States, *supra* note 2.

23. United States v. Currens, 290 F. 2d 751, 767.

24. *Id.* at 772.

25. For a criticism of *Durham* on the same point, see Judge Burger's concurring opinion in Blocker v. United States, 288 F.2d 853, 865 (1961).