CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY

Formulated by
The Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry

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The Committee has undertaken within its competence a limited study of the issue of criminal responsibility and mental illness, of certain procedural practices, and of the functions of psychiatry as a discipline affecting its determination. The Committee offers several proposals for change. 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.*

In scope this report considers the following:

I. The Place of Psychiatry in the Determination of Criminal Responsibility and Mental Illness.
II. The M'Naghten Rules.
III. The Ethical Position of the Psychiatric Expert Witness.
IV. Summary Conclusions and Recommendations.

I. The Place of Psychiatry in the Determination of Criminal Responsibility and Mental Illness.

Although the M'Naghten Rules have a history of over one hundred years in the American judicial system, psychiatric expert testimony in capital cases has brought little satisfaction to either the lawyer or the psychiatrist. These two professional groups, moreover, have not arrived at a common basis for criticism so that the resulting discussions have been nebulous with little interchange in communication. And, as might be expected, the voluminous record of the contentions between them usually fails to disclose a realistic examination into the nature of the problem. But a recent and rapidly developing knowledge of mental life now challenges traditional concepts and brings the central issue of responsibility and mental illness into sharper relief.1

Any attempt at a fresh approach would be hopeless except for the fact, insufficiently stressed in the tedious arguments over doctrine, that there has been a basic agreement that there are areas wherein the individual is not legally accountable for his conduct. Moreover, there is agreement that some part of the determination of responsibility should be subjected to the expert opinion of the psychiatrist as witness. In modern practice expert psychiatric testimony is employed in every trial in which mental illness is raised as a defense. It is abundantly clear that not all individuals are accountable—even the M'Naghten Rules accept this—and that the problem involves more than "common sense." The psychiatrist can contribute much on the subject of behavior as it affects the legal issue of responsibility. It remains for the path to be cleared for him to fully communicate to the Court his knowledge in meaningful terms.

Attacks upon the law by psychiatrists and the defense of the legal position by lawyers have engaged a disproportionate share of our attention and exertions at the expense of significant psychological insights which can no longer be ignored. A re-examination not only of the basic premises of the criminal law but also of its actual operation is needed if lawyers and psychiatrists are to attain a better intercommunication and understanding. In assessing certain legal practices, it is proper to point out that on paper rules are one thing, but in action they are frequently something else. Thus, the manner of their employment has significant implications in the partisan group tensions of the trial.2 In the adversary process neither the limitations nor the actual contributions of psychiatry have been reckoned with realistically. A formidable difficulty that confronts both psychiatrist and lawyer is the simple fact that the investigator is inside instead of outside his material. One cannot investigate the inner nature of man by

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*The Committee is indebted to the following consultants who contributed to its exploratory studies: Hon. John Biggs Jr., Chief Judge, United States Court of Appeals, Third Circuit, Wilmington, Del.; Dr. Robert Waelder, Psychoanalyt, Philadelphia; David M. Barrell, Esq., Freeport, Ill.; Thomas M. McBride, Esq., Philadelphia; Michael von Moschikzer, Esq., First Assistant District Attorney, Philadelphia; Prof. Herbert Wachler, Columbia University, New York City; Prof. Louis B. Schwartz, University of Pennsylvania Law School, Philadelphia; Prof. Arthur R. Pearce, University of Pennsylvania Law School, Philadelphia; George H. Dessen, Lines Prof. of Law, Yale University, New Haven, Conn.

The Committee acknowledges that in this inquiry there remain unresolved areas of disagreement. Three consultants do not concur with the Committee's views and recommendations as set forth in the report for which the Committee takes sole responsibility.

1"It is only within the last few years that psychiatry has been formally invited by legal, administrative and executive authorities to intervene in the problems of crime. It worked its way into penal and legal procedures from the outside, by modifying public opinion and by throwing light on problems of delinquency in the course of purely medical studies, and the formal invitation comes when a generation of lawyers, prison commissioners and legislators has grown up in the intellectual tradition which social studies have created. Psychiatry, therefore, brings into its contacts with law a tradition of its own, cutting across the preconceptions of law and government which come from the pre-scientific tradition of society." Alex Comfort, Authority and Delinquency in the Modern State, Routledge and Kegan, Paul, London, 1950, p. ix.

2"Of the great gap between the law in books and the law in action not even a first year law school student needs to be told; it is but an aspect of the wide gulf between precept and practice in every activity in which human beings with all their frailties have a part." Vanderbilt, Arthur T., Men and Measures in the Law, Knopf, New York, 1949, p. 37.
the same methods employed in the investigation of external nature. The study of human motivations is inextricably tied to those of the investigator since he is himself a part of the social structure, within and through which all motivations take form.

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, overdefended 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. With such orientation and in such context he should be prepared as witness to convey his insight to the Court and Jury. The law, however, does not allow the psychiatrist to communicate his unique understanding of psychic realities to the Court and Jury. More often, the mutual quest for the "whole truth" cannot get past a barrier of communication which leaves the psychiatrist talking about "mental illness" and the lawyer talking about "right and wrong."³

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 description of the psychotic and who are likewise beyond the legal definition of insanity. 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.⁴

As expressed in contemporary law, responsibility is regarded as a function of the intellect, of conscious volition with definable boundaries and degree. Modern psychiatry recognizes the role of the intellect, but would give to the emotions and the unconscious a greater weight in the balance of forces in mental life, and would assert that their boundaries and degree are not readily ascertainable. Turning again to the legal view, it seems to be premised upon the impossible notion that responsibility is something possessed by and possessing the individual. In this sense, responsibility is a materialization of guilt as determined in earlier days when a defendant was examined for the stigmata of demonism. If such were demonstrated, the defendant was guilty.

Even today, as Mercier correctly observes, responsibility is "not the quality of the person who has inflicted pain, but a demand on the part of others that he shall suffer."⁵

Such a frame of reference compels us to take the social group emotional response into account. We have here the spectacle of the group versus the individual, not simply in terms of moral values, but in terms of often irrational personal interactions.

II. The M'Naghten Rules.

In Anglo-American jurisprudence the M'Naghten Rules occupy a terminal position in a series of legal tests of responsibility first dimly developed in the 14th Century in England when insanity first became a defense to a crime.⁶

The Rules were formulated with reference to a specific case to define a change in the relationship between society (the Crown or State) and the "crim-

⁴In the fore part of the 17th Century, Coke formalized the absence of felonious intent or purpose to the "madman," and from such assumption that the "will is taken for the deed," enunciated that no felony or murder could be committed by a "madman.
⁵In 1800 Lord Erskine obtained an acquittal of Hadfield (27 How. St. Tr. 1282) on the jury's acceptance of the argument that the existence of a circumscribed delusion negated responsibility, and on its disregard of its right and wrong formula. Two other cases before the M'Naghten case attracted notice, those of Bellingham in 1812, and Oxford (Rex vs. Oxford C.P. 528) in 1840. In both, the defendant appeared to have identical types of delusional mental disorder, but Bellingham was convicted and Oxford acquitted on the defense of insanity. Such results throw little light on the problem.
inal." This change refers to the fate or disposition of a defendant, owing to something that existed within him. The Rules departed from the inflexible position that for doing X the punishment was Y, and ventured to examine certain aspects of the defendant's behavior to conclude that for doing X the judgment of society would not be Y but something different. For the moment, the essential point is not how this was rationalized, but the fact that official attention was focused on the defendant's actions and his thoughts about them, thus extending far beyond a mere surface description of the forbidden act.

The crystallization of the right and wrong test was achieved in the reaction to the sensational M'Naughten case tried in England in 1843. The acquittal of M'Naughten on the grounds of insanity invoked a debate in the House of Lords which at length proposed five questions to the fifteen Judges of England regarding the law of insanity. The answers of the Judges can be reduced to two rules to determine the responsibility of a person who pleads insanity as a defense to a crime:

(1) "To establish a defense on the ground of insanity it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as to not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." 7

This rule was amplified with the comment that the knowledge of right and wrong refers to "the very act charged" rather than to "knowledge" in the abstract.

(2) "Where a person labors under partial delusions only and is not in other respects insane," and commits an offense in consequence thereof, "he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion existed were real." 8

The M'Naughten Rules framed in 1843 did not constitute a decision upon an actual case but were given extra curiam and adopted in due course by the American Courts, with the exception of New Hampshire and possibly Montana.

In 29 States the M'Naughten formula is the solitary test among 17 others, and in American Military Law, it is still the main test supplemented by the "irresistible impulse test." 9

Two applications of the test questions are employed in the State Courts. In one the defendant to be excused must be incapable of knowing the nature and quality of the act and in the other he must be incapable of knowing right from wrong as to the act charged, and some Courts have held that there is no distinction in meaning between these two phrases. 10 Keedy 11 points out that the responses of the Lords were specifically limited to a case "afflicted with an insane delusion" as was M'Naughten, and also that the test announced by the Judges was the same as given to the jury by the Presiding Judge in the trial of M'Naughten. In effect what was at first limited to a specific system of paranoid delusions was extended as a declaration of comprehensive law on insanity, applicable to any case presenting the defense of mental illness. This generalization has been of no less discomfort to legal scholars than to medical men who must grapple with it in open court. Many have joined in condemnation of the action of the Judges upon "specific pathological notions" which only re-

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7 Weihofen, Henry, Insanity as a Defense in Criminal Law, Commonwealth Fund, New York, 1933, p. 28.
8 ibid. p. 28-29.
9 The M'Naughten Rules in the Federal Courts. The Federal Courts early adopted the M'Naughten Rules and referred to them repeatedly in their opinions. For example, in 1951 the Circuit Court for the District of Massachusetts in the case of United States v. McIlvee, 26 Fed. Cas. No. 15.679, charged the jury that the defendant was entitled to the defense of insanity only if "... he (was) under such delusion as not to understand the nature of his act, or, to know that he (was) doing wrong, or ... to discern that his act (was) criminal and deserving punishment..." See also United States v. Holmes, a decision by the Circuit Court for the District of Maine, 26 Fed. Cas. No. 15.383 (1858).
10 Weihofen. op. cit. p. 43-44.
motely conform to present day psychiatric conceptions.\textsuperscript{12, 13}

It would be well, however, to remind psychiatrists in the words of Glover\textsuperscript{14} that "the law is not primarily interested in psychopathology; 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."

Nevertheless, outside of the courtroom the law is very much concerned with psychopathology, either before or after trial. Before trial it may be necessary to have a psychiatric judgment of the offender's mental capacity to stand trial, but the law does not require the psychiatrist to pass medical judgment within the narrow dimensions of the M'Naghten formula. Nor is he so restricted when he passes upon the mental condition of the convicted offender for the purpose of sentencing, or after sentence upon the imprisoned offender.\textsuperscript{15} Thus, pretrial and posttrial the M'Naghten Rules are ignored. In dealing with any psychotic person, except one on trial for a criminal offense, the law does not separate the sane from the insane on the basis of knowledge of right and wrong. If such were the case, few if any commitments for mental illness could be secured. Before and after trial the psychiatrist is called upon to give his professional judgment in a manner consistent with his competence. In the trial his contribution is inadmissible.

Yet precisely here its function is most essential. Many dangerous persons are essentially untamable 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 untamable 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 untamable mentally ill. In this there is no security for the law-abiding community.

The Rules place a premium on intellectual capacity and presuppose that behavior is actuated exclusively by reason and untrammeled choice. On the one hand, this overemphasizes the importance of the intellect, reason and common sense; on the other hand, it underemphasizes the emotional pressures that energize behavior. Actually, in the psychic effort to rationalize forbidden behavior with reality, reason and choice are more often observed in bolder relief after the act.

The Rules are applied to the case in which knowledge that the act is "wrong" may be the very inducement to its commitment. This is a frequent observation in children's behavior and common enough in many neurotic adults. And, "... except for totally deteriorated, drooling, hopeless psychotics of long standing, and congenital idiots—who seldom commit or have the opportunity to commit murder—the great majority and perhaps all murderers know what they are doing, the nature and quality of their act, and the consequences thereof, and they are therefore 'legally sane' regardless of the opinion of any psychiatrist."\textsuperscript{16} This consideration poses a difficult

\textsuperscript{12}Weihofen, op. cit. p. 31.
\textsuperscript{13}Royal Commission on Capital Punishment. September 1953, Page 102. Paragraph 290. H. M. Stationery Office, London. Mr. Justice Frankfurter gave the following statement to the Royal Commission: "... The M'Naghten Rules were rules which the Judges, in response to questions by the House of Lords, formulated in the light of the then existing psychological knowledge. ... I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated. ... If you find rules that are, broadly speaking, discredited by those who have to administer them, which is, I think, the real situation, certainly with us—they are honoured in the breach and not in the observance—then I think the law serves its best interests by trying to be more honest about it. ... I think that to have rules which cannot rationally be justified except by a process of interpretation which distorts and often practically nullifies them, and to say the corrective process comes by having the Governor of a State charged with the responsibility of deciding when the consequences of the rule should not be enforced, is not a desirable system. ... I am a great believer in being as candid as possible about my institutions. They are in large measure abandoned in practice, and therefore I think the M'Naghten Rules are in large measure sham. That is a strong word, but I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say, 'We'll just juggle them.' ... I dare to believe that we ought not to rest content with the difficulty of finding an improvement in the M'Naghten Rules. ..."
\textsuperscript{15}During the period 1931-1941, one out of every 42 felons sentenced to the Eastern State Penitentiary in Philadelphia was mentally disordered to a commitable degree or developed such a condition. Many such individuals were probably psychotic on admission to the penitentiary and likely so at the time of their trial and sentence. but none presented a defense of insanity. This group represented a limited order of psychiatric screening and segregation from the general prison population which otherwise abounded in unexplored mental disorder. The record of 287 such mentally disordered prisoners indicates that only in exceptional instances did the trial court take cognizance that the accused was a mental suspect, when in fact one out of four of the group had an available documented history of mental illness prior to last arrest. This group accounted for 199 crimes against the person, of which 47 were homicide and 42 sex offenses. The group had engaged law enforcement agencies and the resources of the taxpayer to the extent of 1,503 arrests, 964 convictions, and 20 parole violations. The offender's average age upon last conviction was 30, indicating the potentiality for future social danger. These cases had an average record of five arrests and three convictions. Summary reflections of this sampling lead to the disputing realization that in each case the court overlooked at least five chances to find out the kind of person with whom it was dealing, that by omission, each offender was given other opportunities for crime, including murder, and that not until the mental disturbance had attained such flagrant appearance and threat did the court finally meet the problem realistically.
problem for the psychiatrist as witness under the present system wherein he must answer questions according to a tacitly understood convention. When the "knowledge of right and wrong" or "of the nature and quality of the act" question is put, the psychiatrist witness knows that if he answers "yes" he is saying that the defendant is legally sane whereas, for example, he may know from his technical insight and careful examination that the defendant is mentally ill and committed his offense out of unconscious need of punishment. This leaves the witness with his intellectual honesty at stake and with no escape. For suppose he answers "no"—the defendant did not know the difference between "right and wrong." Now he has given the "legal" answer which conveys the psychiatric truth; the defendant is mentally ill. Next comes the cross-examination and the psychiatrist finds that he cannot relate any vital information about the defendant without contradicting himself. Such an imposition is not expressly intended by the law in words: it is nevertheless inherent in the law in action.

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 M'Naghten test questions. 17

No entities of mental disorder can be abstracted out of matters solely confined to the faculty of "knowledge" as explicit in the Rules. The test questions are not consistent with the experience of the psychiatrist as a scientist though they do have a meaning to him as a member of the community. Thus, the psychiatrist witness finds himself in a dual role, one as scientist who brings technical information to the trial, in the outcome of which he must be disinterested; the other, as member of a social order who shares with his fellows its value judgments in answers to any questions of right and wrong.

Neither the Bench nor the Bar nor the Public seems aware that the test questions do not test mental disorder, but are a test of legal responsibility, i.e., a device intended to facilitate the determination of guilt. 17 In capital cases with the issue of mental disorder as a defense, this determination is pivoted on the answers of the psychiatrist on either side, and may have the effect of placing the experts themselves on trial. To the jury the replies of the psychiatrist cannot be free of the implication that the test questions are medical criteria; in fact, the psychiatrist cannot be free either, since the test questions are addressed to him as a medical expert. As matters stand, the test questions have the effect of vesting the psychiatrist with the juryman's function. It may be contended that the test questions exact only medical opinion as to the right and wrong. "knowledge," from the psychiatrist and that from his answers the jury formulates the verdict. This is indeed the intention, but there is no escaping the fact that the moment the psychiatrist answers the issue of "knowledge" he has simultaneously answered to the jury on a non-medical issue of legal responsibility.

Courts do not now permit the attorney to ask the medical witness whether in his opinion the defendant is responsible or irresponsible, holding this would be usurping the Court's function. But, the judge does permit, in fact he often insists, that the attorney read the legal formula of responsibility as laid down by statute or decision and then ask the expert whether the defendant does or does not fit this narrow legal concept. This permits the expert to answer a question that had previously been held objectionable, by the simple device of translating it into other terms. But it is after all the same question. Such obliquity is further compounded by the requirement of the M'Naghten formula that the medical expert translate his psychiatric findings into ethical terms of knowledge of right and wrong, before the lawyer translates them into responsibility and irresponsibility.

III. The Ethical Position of the Psychiatric Expert Witness.

The problem of the psychiatrist not only engages him as a participant in the trial but also imposes upon him a private ethical reckoning. The pivotal assumption of the Rules is that a disorder of the cognitive faculty (knowledge) is the only basis for the determination of responsibility. This confines the psychiatrist to an exceedingly short tether and it is usually his undoing. He is put to the exercise of relating his medical data to an unrelatable requirement.

The ethical issue is clear here. It is the "using" of the psychiatrist. In Zilboorg's words, "... the problem would suggest that there is something immoral in this forcible conversion of the psychiatrist to formalistic concepts of legal insanity—concepts which certainly have no clinical existence in psychiatry or in life itself, and which exist on paper only in our penal codes. ..." 18, 19

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17The test questions may be given responsive answers in cases involving actual disturbances of consciousness as in epilepsy, intoxications, delirium, fugue states, true amnesias, and in organic encephalopathies. The grossly feebleminded person is presumed not to have acquired the knowledge of a responsible person.


19In a recent dissenting opinion handed down in U. S. Court of Appeals for the Third Circuit, U. S. ex rel. Smith vs. Baldi. 192 F. 2d 540, 549, October 26, 1951, the dissenting judges saw fit to make note of the method employed by the lone psychiatric examiner. "... prior to giving his testimony he had examined Smith on two occasions for about 'an hour' in the prison—about eight and a half months after the commisison of the crime. The examination consisted largely of talking with Smith, observing his demeanor and reading his confession to him to discover whether or not he could distinguish between right and wrong." The dissenting Judges further observed that "the law, when it required the psychiatrist to state whether in his opinion the accused is capable of knowing right from wrong, compels the psychiatrist to test guilt or innocence by a concept which has almost no recognizable reality." (Italics ours.)
A second assumption of the Rules is that the existence or absence of such “knowledge” is readily determinable by the methods of psychiatry. This assumption is unwarranted. There is no developed scientific method of determining the existence of such “knowledge” of the nature and quality or the right and wrong as related to an act, or the lack of it. Nevertheless, the law in effect compels answers to invalid questions of “knowledge,” which cannot be met.

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.

IV. Summary Conclusions and Recommendations.

From the foregoing the Committee recognizes that in the interest of a comprehensive criminal justice, psychiatric expert testimony is indispensable and that its employment will likely increase; that the psychiatrist has an obligation and a competence to take part in its rational administration. But widespread dissatisfaction with this process as it exists calls for a renewed mutual collaboration of lawyers and psychiatrists in the re-examination and reappraisal of basic legal concepts, of the procedures governing expert testimony, and of the present state of our knowledge of psychic life.

A. LIMITATIONS OF THE PSYCHIATRIST AS EXPERT WITNESS. The Committee submits that present day knowledge of mental life limits the psychiatrist in the following respects:

1. He cannot fit any scientifically validated entity of psychopathology into present legal formulae of insanity. He cannot determine scientific method the existence of “knowledge” as implied in the legal tests, excepting in cases of disturbed consciousness or profound mental deficit.

2. He cannot testify in any manner in terms of moral judgment. Any testimony beyond professionally recognized medical data descriptive of the defendant’s mental status, and informative to the court and jury, is beyond the province of the psychiatric expert testimony. Any expert testimony containing value judgments, viz., statements impugning the rightness or wrongness of behavior, of dislike, disapproval, disgust, or of defense, approval, or acceptance, has authoritative impact upon those charged with the making of verdicts. To be of social utility, and to be scientifically valid, all expert testimony should be free of moral and value statements.

3. He cannot within the framework of present court requirements determine degrees of legal responsibility calibrated to medical degrees of psychopathology. The severity of ego impairment manifest in symptoms or in acts appears to be a measure of lessened responsibility, but psychopathological features do not lend themselves to the making of a reliable and teachable guiding scale. The majority of offenders do not exhibit frank symptoms and are more often counted among borderline problems of diagnosis and analysis. Any attempt to scale responsibility in terms of symptoms will inevitably lead to endless forensic contentions over degree, fractions and percentages of responsibility.

B. THE COMPETENCE OF THE PSYCHIATRIST AS EXPERT WITNESS. The Committee submits that the psychiatrist as expert is competent to do the following:

1. He can predict behavior of the mass statistically and determine with fair accuracy the classes of undeterrible persons. He can predict the tendency of behavior in the individual and with fair accuracy determine his deterrability.

2. He can with fair accuracy determine the degree of disorder of the accused relating to:
   a. The present mental state of the accused as it is relevant to his capacity to appreciate the significance of the charge and to cooperate in the preparation of his defense.
   b. The causal connection of the mental state and the act charged.

3. He can make advisory recommendations for suitable disposition of the convicted.

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25Circular Letter No. 225 of the Group for the Advancement of Psychiatry reports the tabulation and preliminary impressions gained from a questionnaire on capital punishment, distributed to the membership of GAP, comprising 150 members of whom 86 made returns. From this sampling of North American psychiatry the Committee on Psychiatry and Law was able to develop general conclusions of which several follow:

1. Only a few psychiatrists have an established competence in dealing with criminal matters.

2. American Courts assume that any psychiatrist is qualified to testify affecting the disposition of an offender. A clearly defined and accepted standard of expertness is wanting.

3. Psychiatrists avoid giving testimony in criminal cases.

4. The psychiatric profession is in need of better definition of the actual role of the psychiatrist in the trial.

31Mental illness is a behavioral expression of ego impairment. With this in mind, the psychiatrist attempts to take a measure of the ego, translated into some kind of intuitive scale and curve, which enable him to refer to the severity of the illness and to anticipate the effect of treatment. By corollary, the ego impairment would appear to be a direct measure of responsibility. Ego impairment implies lessened control in maintaining behavioral norms of social interaction. In law, such would be the basis of exculpation. The offender with impaired ego is said to have diminished responsibility. On this level of abstraction the lawyer and psychiatrist can agree. The psychiatrist can determine that ego impairment exists and the lawyer can transpose the fact into his terms of intent and responsibility. Beyond this neither can move since in this area of observation no meaningful dimensions and scale have been worked out; thus, the question of how much is left unanswered. The matter is less troublesome by “common sense” criteria in the case of the manifestly normal or of the manifestly psychotic, but such are exceptional—the routine case is that of the intermediate borderline which cannot be fitted into either normal or psychotic.
C. PROPOSALS FOR PROCEDURAL BETTERMENT. It is not beyond the resources of the law to remove barriers to realistic psychiatric testimony. The law can do much by:

1. **Elevating standards of expertise of witnesses.** There is little to bar American Courts from accepting any licensed practitioner as an expert in matters of psychopathology. Despite the advances made in specialization, and the establishment of Boards of Certification, the appearance in Court of unqualified experts is more the rule than the exception. The matter of standards is chiefly the responsibility of the Court which has the power to insist on higher qualifications of witnesses.

2. **Providing procedures to eliminate the withholding of essential data from either side not constitutionally protected.** Partisan experts seldom if ever jointly examine the accused and share the same collateral sources upon which, in part, their opinions are established. Since they do not possess the same data, it is almost certain that they cannot meet in agreement—they cannot be judging the same material and observation. Adoption of such procedures requiring the disclosure of the same data to both sides would protect the accused and elevate expert testimony. This has a beginning in the practice of the public defender who with public funds seeks out essential evidence, and could be extended whereby all essential medical evidence is made equally available to both sides.23

3. **Insulating the expert witness from issues of moral judgment.**

4. **Providing facilities equipped for exhaustive study of the accused when there is presented the issue of mental condition.** Forensic clinical psychiatry has had scant recognition by the criminal courts in the United States. A few court clinics are in operation as agencies for diagnostic screening and for nominal advisory assistance to the courts in matters of disposition. In the overall scope of administration the Courts employ psychiatrists only on occasion. Court psychiatry has yet to be recognized and developed as a clinical specialty and as a social research discipline. With few exceptions court psychiatry is mediocre, largely because the Courts have done little to provide inducements.

Hurried examinations and observation of offenders in prison cells, commonly without privacy, in some instances in the presence of an attorney, are conducive neither to good psychiatry nor as a career incentive to the well-trained psychiatrist.

The Committee submits that good court psychiatry requires no less than the minimum standards of civil practice. Minimum standards are as follows:

a. Observation of the offender in a facility under psychiatric administration.

b. A minimum-maximum term of observation to be determined by mutual agreement between the Courts and the psychiatric facility.

c. Provision of facilities for psychologic testing.

d. Provision for social service case work.

e. Provision for laboratory adjuncts including electroencephalography.

f. Provision for consulting services of medical specialists.

g. Organization of such services to operate in accordance with established standards of practice, diagnosis, supervision, and reporting; to provide for interval evaluations and to promote teaching and social science research.

5. **Adopting the principle of deferring sentence in every case in which a question of mental disorder is raised.**

D. LEGAL PSYCHIATRIC CURricula. The Committee recommends that in institutions of learning there be established joint curricula for the instruction of law and medical students in the fields of common interest touched upon in this report, and that there be established facilities for multi-disciplinary research in law and psychiatry. Such collaborative programs would bridge the long standing insular separation of law and psychiatry.

E. THE M'NAUGHTEN RULES. The Committee recommends the abolition of the M'Naghten Rules and the substitution of a procedure based on the following principles:24

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1. "Requiring notice of the name and address of any expert to be called and thus eliminating 'surprise' witnesses.

2. Requiring the person to be examined to submit his person for examination by the experts.

3. Permitting the filing of written reports, the conferring together of the experts and the filing of joint reports.

4. Allowing expert witnesses to speak in terms of inferences or conclusions without the use of the hypothetical question and so allowing them to testify in ordinary language which the judge and the jury can understand.

These recommendations are included in the Uniform Expert Testimony Act, the adoption of which is urged. The authors further solicit the legal profession to adopt the Model Code of Evidence, which would give the trial judge more discretion and control over the conduct of the case, liberalize the rules of hearsay, and allow hospital and other records and learned books to be admitted in evidence."

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CONCLUSIONS

(I) (Mr. Fox-Andrews dissenting) That the text of responsibility laid down by the M'Naghten Rules is so defective that the law on the subject ought to be changed.

(II) That an addition to the Rules on the lines suggested in paragraph 317 is the best that can be devised, consistently with their primary object, for improving them; and (Mr. Fox-Andrews dissenting) that it would be better to amend them in that way than to leave them as they are.

(III) (Dame Florence Hancock, Mr. Macdonald and Mr. Radzinowicz dissenting) That a preferable amendment of the law would be to abrogate the Rules and to leave the jury to determine whether at the time of the act the accused was suffering
1. That the substitute provide that the psychiatrist be permitted to explain fully the basis of his medical opinion.

2. That mental disorder not be regarded as a constant quantity.

3. That there be embodied in the substitute no medical or psychological theories.

4. That the substitute should not limit the defense to any mere categorizing of mental disorder by form or by symptom.

5. That the substitute clearly separate the legal and medical functions of the trial.

The Committee recommends the following bill:

SECTION I. 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.\(^{24}\)

SECTION II. When mental illness is a defense:

No person may be convicted of any criminal charge when at the time he committed the act with which he is charged he was suffering with mental illness as defined by this Act, and in consequence thereof, he committed the act.\(^{26}\)

from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible.

(We shall also recommend (paragraph 356) that, whether the M'Naghten Rules are retained, or amended or abrogated, it should be made clear that mental deficiency no less than disease of the mind is a possible cause of irresponsibility.)

\(^{24}\)In substance this definition is extracted from the Pennsylvania Mental Health Act.

\(^{25}\)The psychiatrist can meet the requirements for the defense if he does so in his own terms. The central legal issue of the trial is the proof that the accused committed the act charged. The central psychiatric issue is the actual determination of the mental status of the accused; the joint issue is the rational disposition of the defendant. The psychiatrist can answer the condition—"in consequence of such illness he committed the act."—not in the sense that mental illness causes the crime, but in the sense that mental illness vitiates the normal capacity for control.

\(^{26}\)In reference to the above requirements for a defense, the following questions, among others, are appropriate in the examination of the expert witness:

a. What is the nature of the mental illness?

b. In what respect does the defendant's mental illness differentiate his behavior from that of a person who is not mentally ill?

c. What connection, if any, is there between the defendant's illness and the act charged?

SECTION III. When the defendant is acquitted on the defense of mental illness, such a finding shall be recorded as part of the verdict.

SECTION IV. When such a verdict is recorded, the Court shall immediately commit the defendant to a public institution for the custody, care and treatment of cases of the class to which the defendant belongs, and the defendant shall not be discharged therefore unless and until the Court has adjudicated that he has regained his capacity for judgment, discretion and control of his affairs and social relations.

The Committee further recommends the adoption of the provisions contained in the following bill:\(^{27}\)

SECTION I. Summoning of Witnesses by Court. Whenever prior to the verdict the issue of mental illness of a defendant is raised, the Court may call disinterested, qualified experts to testify in limine or at the trial\(^{28}\), and if the judge does so, he shall notify counsel of the witnesses so designated, giving their names and addresses. The witnesses called by the Court may be examined regarding their qualifications and their testimony by counsel for the prosecution and defense. Such calling of witnesses by the Court shall not preclude the prosecution or defense from calling other expert witnesses. The witnesses called by the judge shall be allowed such fees as in the discretion of the judge seem just and reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found.

SECTION II. Written Report by Witnesses. When the issue of mental illness has been raised in a criminal case, each expert witness who has examined or observed the defendant, shall prepare a written report regarding the mental condition based upon such examination or observation. The written report prepared by each witness summoned by the Court shall be submitted to the Court and to the attorney for the defense and to the prosecuting attorney.

\(^{27}\)Adopted from the recommendations of the American Institute of Criminal Law and Criminology, October 22, 1914, reported by the Committee on Insanity, Edwin R. Keedy, Chairman.

\(^{28}\)The following States have statutes providing that the trial judge may appoint disinterested witnesses to testify in a case where insanity is set up as a defense: California (civil or criminal), Indiana (criminal), New York (criminal), Ohio (criminal), Rhode Island (civil or criminal), and Wisconsin (criminal). Communication of Professor Edwin R. Keedy.
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