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CRIMINAL RESPONSIBILITY AND THE KNOWLEDGE OF RIGHT AND WRONG

CARL COHEN*

I

There are a great many areas within the law in which the problem of determining the responsibility of a defendant merges in a confused and confusing way with extra-legal matters, and especially with fundamental questions of ethics. No particular legal problem encounters this complication more directly, or with greater need of clarification, than that of establishing a proper standard for exculpation on grounds of mental disorder, or insanity.

Insanity becomes an issue in the determination of criminal responsibility when, as in the common law, jurists explicitly recognize that guilt involves, not only the commission of the criminal deed (the *actus reus*), but as well its accompaniment by some *mens rea*, or guilty mind. There is no crime, say the judges, without criminal intent, or a state of mind, willful, negligent or otherwise, equally assuring the culpable responsibility of the accused. Of course the determination of what constitutes criminal intent is itself an enormous problem, not to be pursued here. All such particular inquiries, however, go forward on the assumption of the approximately normal healthy human character of the defendant. Whatever criminal intent may be, it can only be present in one who is by accepted standards a responsible agent, in control of his acts, and capable of directing his behavior properly.

Hence the problem of insanity inevitably arises; for one who is insane either cannot physically control his acts in the first instance, or, if in physical control, cannot regulate them in accordance with accepted standards of behavior—due to some compulsion to behave in certain ways, or due to an inability to make sane judgments concerning the character or consequences of his acts. The insane, in short, are not responsible agents; and a criminal intent can only be found in persons whose mental health is such that they are answerable for their behavior. In other words, the defense of criminal non-responsibility by reason of insanity is a specific instance of a more general legal proposition; that no person can be held to answer at law, and be punished, for his illegal deeds unless he has the *capacity* to entertain a criminal intent, to have a “guilty mind.”

This much, however, only raises the problem. For when, in practice, the attempt is made to define, or characterize the insanity that would thus excuse, the issues—legal, psychiatric and moral—become exceedingly

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complex. The growth of the law has seen the development of a good many standards or tests for acquittal on grounds of insanity, the most recent of these raising philosophical questions of the utmost interest. For if the standards of criminal responsibility are based upon tacit principles of ethics and moral epistemology which, if not unsound are so confused as to wreak havoc in the application of the law, as is presently the case, it is time to approach these problems from their foundations, and to develop standards which are at once philosophically more sophisticated, and more nearly in accord with the present state of human knowledge.

Before going on to examine the standards which have been and are applied, it is perhaps well to note that the issues are not nearly so simple as they may at first appear. It is not possible, for example, to resolve the matter merely by reasoning as follows: "The problem of determining mental health is one for experts in that field; let the psychiatrists decide who is insane and who is not. Why confuse that factual question by introducing philosophical issues which have no relevance?" Such an approach, although attractive in its simplicity, is quite inadequate for two reasons: First, although, to be sure, it is to mental medicine that we must go to determine the mental health of the accused, the psychiatrist or psychologist — even assuming the exactitude of his science — is in a position only to describe and categorize, and perhaps to treat the disease or condition from which the patient suffers. But the courtroom is not a hospital; the intricate classifications and complex characterizations of mental disorders by the psychiatrist are constructed with concepts wholly inappropriate for the use of juries consisting of laymen. This is not to say that a psychiatric terminology is irrelevant to the problem of insanity as a defense — far from that; but the contributions of mental medicine, to be utilized by the law, must be put in forms suitable for use within the juridical process, and this is an objective not easily accomplished. Second, and more important, even supposing that the concepts of psychopathology were directly applicable in law, there is a more fundamental problem which the study of mental disorders alone cannot resolve. That is to say, the question of whether an individual is to be excused from guilt because of mental condition is not one which can be answered with the most detailed description of his condition. For there remains the basic problem — on which the medical man *qua* medical man is no authority — *what* is to justify non-responsibility? The question is one of justice, vaguely understood and poorly formulated, to be sure, but at the root a problem in morals none the less.

If the issue is not purely psychiatric, neither is it purely legal. Of course the law, in its process, faces many moral questions — and goes on to answer them with an impressive wisdom, surprising in the light of the often confused terminology and conflicting opinions of juries and judges. But a rough "sense of justice" is made concrete in legislation, and in the

many principles of the common law. On this particular issue, however, the rules of law are out of date and totally inadequate. For just as the psychopathologist, working strictly within the realm of his science, cannot resolve the moral problem of responsibility, so also the jurist, out of substantive legal rules and procedures alone, cannot fashion satisfactory standards of responsibility. It has been the failure of the law to recognize the extra-legal facets of this question—therefore relying altogether too heavily upon precedent and outworn legalisms in this area—which has resulted in a most unhappy situation. The present state of affairs is one in which, to determine non-responsibility by reason of insanity, the law relies upon obsolescent psychology, a confused use of ethical terms, and the mistaken opinions of ancient and venerable but ignorant judges for the formulation of principles which are primitive in character and catastrophic in application.

In a word, the problem of developing appropriate standards for exculpation on grounds of insanity is not “purely” a question of anything. It is a complex matter involving medical, legal, and ethical principles of considerable sophistication.

II

The “tests” which have been applied to determine whether an accused was truly insane, and therefore not responsible, have a weird and fascinating history.¹ Upon the emergence of the common law from the medieval period there are to be found only a set of vague generalizations concerning “madmen” and “natural fools.” The first important definition to arise appears in the work of Bracton, in the 13th century: that a madman is one who does not know what he is doing, who lacks in mind and reason, and who is not far removed from the brutes.² Fitzherbert, a judge of common pleas in the sixteenth century, defined an idiot as “such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, . . .”³ Although Fitzherbert probably did not intend this to be the sole test of idiocy, it came to be used as the “counting twenty pence test” to determine the responsibility of idiots and lunatics. In the eighteenth century, during the trial of one Edward Arnold, the presiding justice held that the accused must not be held responsible for his acts if he is a man that “is totally deprived of his understanding and memory, and . . . doth not know what he is doing, no more than an infant, than a brute or a wild beast. . . .”⁴

1. For a detailed account of the history of these legal tests see WHARTON & STILLE, *MEDICAL JURISPRUDENCE* (1st ed. 1855); GLEUCK, *MENTAL DISORDER AND THE CRIMINAL LAW* chs. 5 & 6 (1925).

2. BRACTON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* (c.1250). See WHARTON & STILLE, *op. cit. supra* note 1, at 510; GLEUCK, *Op. cit. supra* note 1, at 126.

3. See 1 HAWKINS, *PLEAS OF THE CROWN* 2 (8th ed. 1824); GLEUCK, *op. cit. supra* note 1, at 128.

4. *Rex v. Arnold*, 16 How. St. Tr. 695, 764 (1724).

Thus arose what has been called the "wild beast" test of insanity. Another eighteenth century presentation of the standard of insanity is that of the commentator, William Hawkins, who argued that persons not punishable by any criminal prosecution whatever are those "who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, ideots, and lunatics. . . ." ⁵ It is from this time onwards that the knowledge of good and evil, or right and wrong, becomes the central issue in the determination of criminal non-responsibility on mental grounds. The subsequent history of English and American cases dealing with the responsibility of the insane, though it discloses some variations and refinements upon these "wild beast" and "good and evil" tests, presents no significant change in the law until, in 1843, the entire problem is reexamined in the case of Daniel McNaghten. ⁶

We are only concerned here to point out — what a careful analysis of the history of this question would make abundantly clear — that the ancient tests of responsibility have nothing to substantiate them but the crude and ignorant opinions of earlier days. They are not the result of mature and knowledgeable reflection; they are not the authoritative opinions of an informed appellate tribunal; they are not even the result of the careful use of judicial precedent. They are largely the product of efforts on the part of the trial judges to reduce a complex matter to a simple rule. The formulation of these rules has come to be what it has because of its development out of some primitive views of human psychology, and some ethical assumptions which are at least doubtful. During most of this period of scientific treatment of mental disorders was practically unknown, or was at least thoroughly mixed with, if not dominated by, superstitions concerning witches and devils. The result has been that the traditional authorities have repeated, almost verbatim, each other's words and phrases. In short, there is nothing really very authoritative in these tests, nothing very consistent in them; there are no very good reasons why they should not be changed — and numerous good reasons why they should. Yet with very few exceptions, these ancient comments and decisions constitute not only the foundation, but much of the substance of present day English and American law on the subject of insanity as a defense. What efforts have been made to bring it up to date have largely been exerted within this same intellectual framework.

5. 1 HAWKINS, *op. cit. supra* note 3, at 1.

6. McNaghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843). Other accepted spellings of the case style are M'Naghten, or McNaughten. For other early English cases dealing with the insanity problem see: Regina v. Oxford, 9 Car. and P. 525 (1841); Offord's Case, 2 Car. and P. 168 (1831); Hadfield's Case, 27 How. St. Tr. 1283 (1800); Earl Ferrer's Case, 19 How. St. Tr. 886 (1760). See also Bellingham's Case in 1 COLLINSON ON LUNACY 671 (1812). For comment on these early cases see GLUECK, *op. cit. supra* note 1, at 142. For early cases on the same problem in this country see: *In re Bell*, City Hall Recorder N.Y. 85 (1817); *In re Clark*, 1 City Hall Recorder N.Y. 176 (1816).

III

The crudeness, vagueness, and general inadequacy of these tests for insanity made it necessary for some more consistent and authoritative statement of the law to be given. The actual occasion for this statement came with the famous — or infamous — *McNaghten's Case*, in 1843, after which the insanity rule of current juridical application is named.⁷ This *McNaghten* rule — called also the “right and wrong” test for insanity — is today the law in most American jurisdictions; we therefore propose to examine it minutely. The injustice which results from the application of this rule presents a pressing need for remedy; yet nowhere is there a clear and comprehensive statement of the many different grounds upon which it is properly to be criticized. It is time that the *McNaghten* Rule be scrapped, and it is our chief purpose to explain, very clearly, why this is so.

First, the facts of the case. Daniel *McNaghten* was suffering from a severe case of what would be called today paranoia; in him the condition was manifested in an elaborate system of delusions of persecution. Believing that the Prime Minister, Sir Robert Peel, was “out to get him,” he shot and killed Peel’s private secretary, Edward Drummond, whom he believed to be Peel. When brought to trial, medical evidence was submitted to the following effect: that *McNaghten* was suffering from morbid delusions, such that he was “carried away, beyond the power of his own control”; that he no “moral perception of right and wrong”; that his condition could “burst forth with irresistible intensity,” at which time he might suffer “the most extravagant and violent paroxysms.”⁸ The judge’s charge to the jury contained the following statement:

The question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of the opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favor.⁹

The verdict was “Not guilty, on the ground of insanity.” The acquittal of the accused, and the prestige of his victim, combined to bring the *McNaghten* case to public attention — particularly in the House of Lords, where it caused a furor. After lengthy debate, the Lords, exercising their prerogative, drew up certain questions concerning the law of insanity, which were put to the judges of England, in order to obtain from them a clear and distinct rule, laid down by their united authority, with which to guide the future administration of justice. From that day to this it has been the general practice of judges, in charging juries, in cases

7. *McNaghten's Case*, *supra* note 6.

8. *Id.* at 201-02, 8 Eng. Rep. at 719.

9. *Id.* at 202, 8 Eng. Rep. at 719-720.

involving the question of insanity, to use the very words of the answers which were given by the English judges on that occasion.¹⁰

Because these opinions are of such enormous importance, and because we intend a lengthy criticism of the rule which was abstracted from them, we include here, verbatim, four of the five questions, and the answers which the judges gave to them.¹¹

Question 1. What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit?

Answer to Question 1. Assuming that your Lordship's inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of the opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the act committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land.

Question 2. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

Question 3. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?

Answer to Questions 2 and 3. As these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be proved to their satisfaction; and that, to establish a defence 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 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. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the

10. 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND, 153 (1883).

11. McNaghten's Case, 10 Cl. and Fin. 200, 203, 209, 8 Eng. Rep. 720, 722 (1843).

accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know he was doing an act that was wrong: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

Question 4. If a person under insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?

Answer to Question 4. The answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune and he killed him in revenge for such supposed injury, he would be liable to punishment.¹²

From these famous opinions has come the standard upon which criminal responsibility is assigned today. Nearly all states, and almost all

12. The fifth question, with which we shall not be directly concerned, is whether a medical man who had not seen the accused prior to the trial, could be asked his opinions as to the state of the defendant's mind at the time of the alleged crime. The answer was that he could not be asked, since the answer would depend upon the determination of the truth of facts, which are for the jury to decide. Where the facts are admitted or not disputed, the question is "of science only" and may be put.

Although at first plausible, this opinion has the peculiar consequence that, while medical opinion concerning the prior state of the subject's physical health is admissible, (as, for example, the state of his health at the date an insurance policy was effected), medical opinion on the prior state of the subject's *mental* health is not admissible. What seems to underlie this ruling is the unwarranted and mistaken assumption that while physical disorders admit of professional diagnosis, mental disorders do not. Too frequently the further assumption is made that the latter type of case requires no scientific diagnosis, and can be detected by any layman.

other American jurisdictions apply the test of "knowledge of the difference between right and wrong" to determine whether the accused was insane, and therefore not responsible for his conduct. This standard, whose classic statement appears in the answer to the second and third questions above, is called the *McNaghten* rule:

. . . to establish a defence 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 *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* . . . the question has generally been, *whether the accused at the time of doing the act knew the difference between right and wrong*.¹³ (Emphasis added.)

This "right and wrong" test for responsibility has been supplemented, in some jurisdictions, by other additional standards, such as that of "irresistible impulse," to which we will return later; but in only two jurisdictions has the *McNaghten* rule been deliberately and consciously discarded.¹⁴ Ironically, the most recent and most rigorous opinion rejecting the *McNaghten* rule has itself been rejected in turn by almost every court in which it has been considered.¹⁵ Yet the *Durham* opinion is only one of the many criticisms of the *McNaghten* rule which have been registered, over the years, from one viewpoint or another. It is our specific intention to show that from every relevant point of view — psychological, legal, and philosophical — the *McNaghten* rule is crude, inadequate, mistaken and unjust; that it is unsatisfactory in practice, and in theory unsound.

IV

We turn first to the criticisms of the right and wrong test based upon psychological or psychiatric considerations. For it must be kept in mind that mental disorders are diseases (or defects of peculiar kinds) and action to be taken because these conditions exist should be consistent with the best opinion concerning the nature of these conditions. If the mental capacities of the accused in a criminal case are in question, the *extent* to which they are disordered, and the *relations* of these disorders to general mental competence constitute the factual base upon which the decision as to the responsibility of the accused must be made. This, in turn, means that the following two kinds of mistakes must be avoided:

13. *McNaghten's Case*, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843).

14. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954); *State v. Pike*, 49 N.H. (1 Shirley) 399 (1870).

15. The *Durham* opinion has been rejected by the Fifth and Ninth Circuit Courts of Appeals; The United States Court of Military Appeals; and by the highest court of six states. See *Anderson v. United States*, 237 F.2d 118 (9th Cir. 1956); *Howard v. United States*, 232 F.2d 274 (5th Cir. 1954); *United States v. Kunak*, 5 U.S.C.M.A. 346 (1954); *People v. Ryan*, 295 P.2d 496 (Colo. 1956); *Flowers v. State*, 139 N.E. 2d 185 (Ind. 1956); *Thomas v. State*, 206 Md. 575, 112 A.2d 913 (1955); *State v. Kitchens*, 286 P.2d 1079 (Mont. 1955); *State v. Goyet*, 132 A.2d 623 (Vt. 1957); *State v. Collins*, 314 P.2d 660 (Wash. 1957).

1. We must not, in reaching our decision, confuse symptoms with diseases, thereby determining sanity and responsibility, or insanity and non-responsibility, conclusively because of the absence or presence of certain particular symptoms.

2. We must not, in our attempt to understand the defendant's mental condition, put questions to the psychopathologist in terms which make it impossible for him to answer, or to answer with accuracy.

Both of these principles are done violence by the application of the *McNaghten* rule. In what follows we shall make explicit the criticisms upon which this general contention is founded. Comments in group A concern the law on delusion; those in group B concern the use of the knowledge of right and wrong in the determination of legal responsibility.

A 1. It should first be pointed out that the *McNaghten* opinions are very largely concerned with the criminal responsibility of persons suffering from insane *delusions*. This was the case of *McNaghten* himself, and was the question of interest in the ensuing debates.¹⁶ The result has been that delusions have come to be viewed as the sole, or at least the outstanding manifestation of mental disorders. Now, while delusions are a common result of some kinds of mental disorder, they are by no means a result of all such disorders. Therefore opinion concerning the effects of insane delusions upon criminal responsibility make a totally inadequate source for a *general* rule to test the defense of insanity. The answers to the first and fourth questions, clearly, have no applicability to insanity in general, but only to conditions involving delusion. As for the second and third answers, most courts have acted as though they do refer to insanity in general. But that does not really seem to have been the intention of the judges who formulated the answers; for they replied to questions two and three together, and question two is specifically restricted to the cases of persons "alleged to be afflicted with insane delusion respecting one or more particular subjects or persons."¹⁷ Yet the practice of the courts has come to be to apply the answer to the second and third questions to *all* cases of insanity, including types that have nothing to do with delusion.¹⁸

A 2. It is virtually impossible to say that persons suffering from insane delusions are only *partially* insane. The *McNaghten* opinions suffer from the assumption that it is correct to talk about "partial delusion"; that one can be laboring under the delusion that he is being hunted down, and yet not be "in other respects insane." That conditions of mental disorder vary greatly, in degree as well as kind, there is no doubt whatever; but the isolation of particular delusions, and the identification of these with the disease, is indefensible from a psychiatric point of view.

16. See part III of text *supra*.

17. *McNaghten's Case*, 10 Cl. and Fin. 200, 203, 8 Eng. Rep. 718, 720 (1843).

18. See Barnes, *A Century of the McNaghten Rules*, 8 CAMB. L.J. 303 (1944).

That the *McNaghten* opinions make the assumption of the plausibility of partial delusion or partial insanity is explained, in part, by the great popularity, at that time, of the study of phrenology, and the theories of Dr. F. J. Gall, developed in the late eighteenth and early nineteenth centuries. Although phrenology, as a science, was soon to be abandoned, Gall has been described as the founder of criminal anthropology. His leading hypothesis was that the brain consists of many organs, each of which is associated with a particular faculty of the human mind. Each of these organs, and consequently the dependent faculty, was supposed capable of deterioration without general brain deterioration.¹⁹ On such a view, partial insanity might make sense.

Phrenology has long since been discarded; but the notion of partial insanity which was its corollary lingers on in the law, in spite of the fact that recent medical opinion would reject it completely. One authority writes, "There is not, and there never has been, a person who labours under partial delusion only, and is not in other respects insane."²⁰ Elsewhere it is held that, "The theory of partial or limited insanity is untenable; the mind functions as a whole and is disturbed as a whole."²¹

A 3. Supposing that "partial delusion" was the defendant's condition, the opinions go on to make the further psychological blunder of assuming that he would be in a position to reason about his delusions in a normal manner. One suffering from the delusion that he is being unjustly tormented and persecuted is expected to decide in a rational manner whether acts committed as result of this delusion would be contrary to law if the facts believed were true! Of course the accused *may* have been able so to reason; but the assumption that he must have been displays a crude and woefully inadequate appreciation of the disordered mind. Persons suffering from delusions of persecution, say as a result of advanced paranoia, are frequently not able to reason about them. The delusions are themselves the *effects* of a disordered mind—a mind over which the subject has little or no control. When we expect a psychotic to reason about his psychosis we are treating him as though he were an ordinarily sane person, simply mistaken as to the facts of a given situation. Surely we cannot expect him to reason about his delusive mistake as a healthy person does in the case of factual mistake; yet this is exactly what is presupposed in the answers to the questions raised in the *McNaghten* case.

A 4. This leads to a more fundamental criticism of these opinions. The answers given make the general mistake of confusing the symptom with the disease. Delusions of persecution, and such, are only indications of mental disorders; from them we can go on to learn the extent and character of the disorder, and the ways in which *all* of the normal mental

19. For a complete account of Gall's phrenological theories see EAST, *MEDICAL ASPECTS OF CRIME* (1936).

20. EAST, *INTRODUCTION TO FORENSIC PSYCHIATRY* 58 (1927). See also TAYLOR, *PRINCIPALS AND PRACTICES OF MEDICAL JURISPRUDENCE* ch. 18 (10th ed. 1948).

processes have been disturbed. The psychotic is not sick because he has delusions; *he has delusions because he is sick*. It is this inversion of cause and effect which led the judges to assume that all those mental processes exclusive of delusive beliefs were in normal condition — and that therefore the deluded defendant could be held responsible if, supposing the delusive opinions to be true, the act were still a crime. But when delusions are properly understood, as symptoms of a larger and far more complex condition, this type of argument must be abandoned.

A 5. Properly conceived, as symptomatic, the interpretation of delusions as though they were just mistakes of fact is out of the question — because strange, and apparently insignificant delusions may be indicative of the most serious mental disorders. Therefore, the fact that the delusive belief seems to have little bearing upon the act, and that the delusive belief if true would not excuse the act, certainly should not establish the sanity of the accused. It is not the particular delusion which may excuse from criminal responsibility, but the psychopathological condition for which that delusion provides evidence. One critic of the *McNaghten* opinions gives the following example:

A man commits what on the face of it is a cruel and treacherous murder. It is proved that he labored under an insane delusion that his little finger was made of glass. In itself such a delusion has no sort of tendency to excuse such a crime, and has no apparent connection with it, but if physicians of experience were to say that a fixed delusion on such a subject could arise only from deep-seated disease affecting a man's whole view of the world in which he lived, falsifying his senses, rendering him inaccessible to reasoning of the simplest kind, and incapacitating him from performing the commonest and most conclusive experiments, I do not see why they should not be believed.²²

It is these several failures to appreciate the true and complex relations existing between delusions and mental disorders in general which render the reasoning upon these matters in the *McNaghten* opinions now unsound. So much for that portion of the judges' opinions which concern the bearing of insane delusions upon criminal responsibility.

B 1. To the right and wrong test, enunciated in the answer to the second and third questions,²³ the psychological and psychiatric objections are similar, but stronger yet. Here, even more than in the former case, the test is based upon the presence or absence of one particular element — the knowledge of the difference between right and wrong. The presence of this element alone becomes, on this test, both the necessary and sufficient condition of sanity and therefore of responsibility. But from a medical point of view, the many objections which can be raised to this test are all special cases of this general principle: that mental disorder is

21. British Medical Journal, Feb. 16, 1924.

22. 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 157 (1883).

23. *McNaghten's Case*, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722-23 (1843).

not so clear, so simple, or so well understood, that *any single element* — to say nothing of the knowledge of the difference between right and wrong — could be its sole determinant.

Of course it may be argued in reply that the tests of responsibility are simply that and no more, that they do not pretend to face the complexities of psychopathology, that their application involves no claims concerning the defendant's health — just whether he is to be held accountable for his act and punished. This is a sensible distinction to make, for mental disorder is one concept, legal responsibility another; the presence of the one does not necessarily excuse from the other. But this separation of the legal and the psychological must not be carried too far. For the tests of legal responsibility have arisen and developed with a growing consciousness that the strict application of penalties must be tempered by a recognition of the capacities of the offender. It is with this as a goal that the legal rules have grown from their first crudity and generality. Though still crude and general, they have reached a point at which specific features of the situation are attended to: the delusive character of the actor's beliefs, his knowledge at the time, etc. Now the contributions which medical science may make to the continued development of these rules do not, by themselves, solve the juridical problem; but neither can the just solution to that problem ignore them. In the light of what medical knowledge we can obtain, we want to ask: does the *McNaghten* insanity rule provide the best standard for determining the mental disorder which ought to excuse one from criminal responsibility? Does its application select those cases and only those cases in which we would want to say that, because of his mental condition, the accused really should not be held accountable for his acts? From this psychological and psychiatric point of view, the rule is open to the most serious criticisms.

B 2. The standard of knowledge of the difference between right and wrong encounters enormous obstacles in application, simply because of the uncertainty of its meaning, about which more shall be said later. Whatever its meaning, however, it is an extremely awkward standard because its use requires an answer to a question of the following kind: Did the accused *know* some certain thing? But it is extremely difficult to estimate the knowledge of one who is mentally ill; for even supposing we understand the intended sense of "knowledge," the answer depends upon the degree to which the general mental deterioration has progressed in the particular case in question. And even where the condition has been thoroughly and accurately diagnosed, one cannot certainly know what knowledge capacity remains in that instance, since the effects of many specifiable conditions upon the capacities of the patient vary in kind and in degree. It is therefore sometimes possible to make generalizations concerning the individual's capacities, without being able to answer a specific question as to the state of his knowledge.

B 3. As a rule for the determination of insanity the right and wrong test faces the same serious objection encountered in the discussion of delusions: that, however it is understood, absence of knowledge of the difference between right and wrong can only be a *symptom* of mental disorder, and as such not the factor which should determine the responsibility of the accused. Again the confusion of the manifestation of a mental condition with the condition itself leads to an undue emphasis upon this or that feature of the situation, which may lead in turn to an unjust disposition of the case.

B 4. That the use of this rule may in fact result in injustice becomes clear when one considers how well the right and wrong test applies to known cases of serious mental disorders. For there are at least some kinds of mental disease whose effects upon persons are very serious, and surely should abrogate their criminal responsibility, and yet which will not meet the requirements for insanity presented in the courts. The result is pathetic. Instances in point are the relatively recent trials of Albert Fish, in New York, and William Heirens in Illinois.²⁴ In these cases of child dismemberment, and attendant horrors, the defendants, suffering from the most serious of mental conditions, were convicted, and executed or imprisoned for life. They passed the legal test for sanity by knowing the difference between right and wrong, and hence were held criminally responsible for their acts. How many cases of this sort go without recognition or notice is impossible to determine.

The point is that some mental disorders do not result in a breakdown of the subject's knowledge capacities, to whatever extent those capacities can be isolated. When the prosecution, therefore, presents the question: "Did the defendant, at the time of his act, know the difference between right and wrong?" the examining psychiatrist is forced either to give an indeterminate reply, or to answer affirmatively. In cases of epilepsy, for example, increased irritability and infantile reactions to environment may result in criminal acts, where the cause is clearly mental disorder, but the knowledge of the nature, quality, and wrongfulness of the act is yet present. Mental deterioration caused by violent and convulsive epileptic attacks may express itself in the severe disturbance of the emotional life of the patient, and not in the lack of knowledge. In some cases of schizophrenia the patient, having committed some criminal act, behaves and appears as though he knows very well the difference between right and wrong. Cases of paranoia present perhaps the clearest indication of the crudeness of the *McNaghten* rule. Victims of this condition, exhibiting symptoms of fixed suspicions, persecutory delusions, delusions of grandeur, etc., may yet maintain formally correct behavior for the most part, and a clear, coherent train of thought. Since the system of delusions *need not*

24. For an account of the background, psychiatric examinations, and convictions of these and other insane offenders see COHEN, *MURDER, MADNESS AND THE LAW* (1952).

interfere with the orderly and intellectual direction of conduct, one is forced to conclude that some seriously ill paranoids do know the difference between right and wrong. Nor are these cases adequately covered by the delusion tests which stem from the *McNaghten* case, for their frequent inapplicability has already been discussed.²⁵ Ironically, the occurrence of paranoia in persons accused of homicide is not rare — a correlation which increases the need for a re-evaluation of the legal standards of the responsibility of the insane.

B 5. The emphasis upon knowledge as the test of responsibility is indicative of what is perhaps the underlying misconception of the *McNaghten* rule — that the cognitive capacities can be singled out, among mental phenomena, as the proper determinants of sanity and responsibility. Although we do, for purposes of analysis, distinguish the cognitive, conative, and affective aspects of mental life, it is an error to assume, as the *McNaghten* rule does, that these aspects of experience can be separated to the extent that one alone — the cognitive — is the index of mental health. The actual mental experience of persons, well or sick, cannot be broken up so neatly into its constituents. We can no longer assume that reason, or cognition, is the only — or even the prime — regulator of conduct. That the human personality is an integrated unity, in the direction of which all of the modes of experience play some part is now a commonplace. The point is that people may be brought, by insane emotion or compulsion, to do what they themselves know to be wrong.²⁶ Yet that faculty psychology already discussed, so prevalent in the nineteenth century, has colored, through the *McNaghten* opinions, the legal standards of the present day.

B 6. On grounds such as these, the right and wrong test of responsibility has been forcefully and repeatedly condemned by criminologists and psychiatrists.²⁷ These attitudes are well summarized by the Report of the Royal Commission on Capital Punishment:

The *McNaghten* test is based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, but yet commit it as a result of the mental disease. . . . *It is well established that there are offenders who*

25. See part IV, A1-A5 of text *supra*.

26. See MENNINGER, *THE HUMAN MIND* 450 (1937).

27. GUTTMACHER AND WEIHOFFEN, *PSYCHIATRY AND THE LAW* 406-08 (1952); MENNINGER, *THE HUMAN MIND* 449-50 (1937); ZILBOORG, *MIND, MEDICINE AND MAN* 246-97 (1943); REPORT BY THE COMMITTEE ON FORENSIC PSYCHIATRY OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY (1953); REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 103 (Sept. 1953); Glueck, *Psychiatry and the Criminal Law*, 14 VA. L. REV. 155, 161 (1928); Karpman, *Criteria for Knowing Right from Wrong*, J. OF CRIM. PSYCHOPATHOLOGY 376, 379 (1941).

*know what they are doing and know that it is wrong . . . but are nevertheless so gravely affected by mental disease that they ought not to be held responsible for their actions.*²⁸ (Emphasis added.)

V

From the standpoint of the law, and the juridical process, the right and wrong test of criminal responsibility meets objections different in kind but at least as powerful as those arising out of the growth of psychological and psychiatric knowledge. The general conclusion to which these legal criticisms point is that the *McNaghten* rule and its variants, do not meet the minimal requirements for clear, consistent, and authoritative standards, applicable with reasonable stability and justice.

1. Prior to the *McNaghten* case, the law on insanity had developed from the opinions of various single trial judges, none of whom had specifically intended for their principles a generality exceeding reference to the case then at issue. The uncertain value and authority of these tests for responsibility was one of the chief reasons the House of Lords put their questions to the judges of England in the *McNaghten* case. Yet, the authoritativeness of the opinions of these judges is itself open to question. Stephen, in his *History of the Criminal Law of England*, attacks the authority of these opinions on two grounds:²⁹

a. The answers given by the judges do not form a judgment upon definite facts proved by evidence. The point is that answers to hypothetical questions are of dubious value in establishing legal rules, and that answers, to have been most effective and authoritative, should have been given in the form of a specific judgment, and upon facts actually proved in the case.

b. More important is the fact that since the questions were put in such general terms, and since the answers follow the wording of the questions so closely, it is doubtful if these answers can be rightly applied to circumstances in any way different from those described in the questions. Stephen argues that these opinions "leave untouched every state of facts which, though included under the general words of the questions, can nevertheless be distinguished from them by circumstances which the House of Lords did not take into account in framing the questions."³⁰ So, the argument continues, even if the authority of the judges be allowed in this case, any case in which the symptoms differed from those of the delusional system described in the question, would not be bound by these opinions. Its subsequent extension has then been unwarranted.

28. REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT 80, 103 (Sept. 1953).

29. 2 STEPHEN, HISTORY OF CRIMINAL LAW OF ENGLAND 152 (1883).

30. *Id.* at 154.

But, although the authoritativeness of the *McNaghten* rule may thus be called into question, this is a theoretical objection only, since, whatever should have been its application, it has been accepted and acted upon ever since. The right and wrong rule has become the most important element in the English and American law of insanity.

2. If the knowledge of the difference between right and wrong as the test of responsibility is strictly and narrowly construed, as it frequently has been,³¹ it would follow that any effects of insanity upon the conative or affective life of the accused could not be taken into account in deciding whether he is to be held criminally responsible for his act. Now if, as Stephen points out,³² these effects of insanity can never, under any circumstances, affect the criminality of acts by insane persons, the consequences would be "monstrous." If such consequences were intended, one would suppose that more than the implication of such narrow construction would be called for; that is, the mere absence of any other principles is not an adequate support of the exclusive applicability of the right and wrong test.

3. Some general awareness of the "monstrous consequences" of the use of the right and wrong test alone is manifested in the development of the "irresistible impulse" test for criminal responsibility in some jurisdictions. The injustice which results from the exclusive use of the *McNaghten* Rule has caused some judges to argue that a defendant, even if he knew his act was wrong, may not be responsible if, because of his insanity, he had not the power to resist doing it.³³ The development of this "irresistible impulse" test, though it is indicative of the inadequacy of knowledge as a sole criterion of responsibility, is itself an unsatisfactory supplement to the *McNaghten* rule. This for several reasons:

a. It is very difficult to prove that an act is the result of an "irresistible impulse." It may be no less difficult to prove the knowledge of right and wrong on the part of the accused, but that is not the point; judges who feel obliged to accept the authority of the *McNaghten* Rule are loathe to introduce additional tests whose meaning in practice is equally difficult to determine. The disagreements of experts, the difficulty of distinguishing

31. See, e.g., the Appeal of Ronald True, 16 Crim. App. R. 164, 169 (Eng. 1922) where it was said that the "old rigour of the rule in *McNaghten's Case*" had not been relaxed and that these old tests were still in force, and did not include the "irresistible impulse" principle.

32. 2 STEPHEN, *op. cit. supra* note 29, at 159.

33. See, e.g., *William v. State*, 50 Ark. 511, 518 (1888). In order for insanity to excuse "it must appear he was so affected by it as to be unable to distinguish between right and wrong . . . or if he was conscious of the act he was doing and knew its consequences, that he was, in consequence of his insanity, wrought up to a frenzy, which rendered him unable to control his actions or direct his movements." *Morgan v. State*, 130 N.E. 528, 530 (Ind. 1921): "A person may have sufficient mental capacity to know right from wrong, and to be able to comprehend the nature and consequences of the act, and yet not be criminally responsible for his action, for if the will power is so impaired that he cannot resist an impulse to commit a criminal act he is not of sound mind."

between impulses genuinely irresistible to the diseased mind and mere outbursts of anger, the fear that using such test will excuse the commission of most criminal acts — all combine to make irresistible impulse very difficult to establish, and the associated test of responsibility of dubious value.

b. Some have argued that the irresistible impulse test is nonsense because there is no such thing as an impulse which is irresistible — that the impulses of the mentally sick are not irresistible, but merely *unresisted*. The classical statement of this position, by an English jurist, runs as follows:

But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence: the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispensable, you at once withdraw a most powerful restraint — that forbidding and punishing its perpetration.³⁴

In another English case, when asked by counsel for the defendant whether he understood what was meant by kleptomania, the judge is reported to have replied: "Oh yes, and I am here to cure it."³⁵ And again there is the famous question asked when the claim is made that an act was the result of irresistible impulse: "Would the prisoner have committed the act if there had been a policeman at his elbow?" Of course such arguments may be said to beg the question insofar as they assume that these impulses are not irresistible, but simply not resisted strongly enough. On the other hand, since this is the point at issue, one cannot establish the fact that they are irresistible simply by calling them that. And the question of whether some such impulses could be resisted is moot.

c. For reasons such as these, most jurisdictions have refused to apply the irresistible impulse test of responsibility. But perhaps the strongest objection to this test lies not in the reasons which cause it to be rejected, but in its inadequacy as a supplement to the *McNaghten* rule, even when it is accepted. For the acts which occur as the result of "irresistible impulse" (as generally understood) are neither all nor only those acts of insane and therefore non-responsible persons not covered by the *McNaghten* rule. The behavior of some persons by no means insane may sometimes be the result of irresistible impulse, and to that extent the requirement is too strong for its purpose. In other cases, victims of mental disease, knowing the difference between right and wrong in the required sense, may coolly and intellectually plan an act which also cannot be construed as the result of irresistible impulse — an act which is none the less the product

34. *Regina v. Haynes*, 1 F. & F. 666 (1859) (Bramwell B.).

35. Cited in 55 L.J. 121 (1890); GLUECK, *op. cit. supra* note 1, at 265.

of violent mental disorder. To this extent the requirement of irresistible impulse is too weak for its purpose. The point, in short, is that the irresistible impulse test for responsibility—in that its use is a recognition of the inadequacy of the exclusive use of the knowledge test—is a move in the right direction, but is yet a principle of insufficient generality or precision to cope with the complex character of insane behavior.

In a like manner, other makeshift tests for responsibility—such as that of comparing the mentality of the accused to that of a child of fourteen³⁶ etc.,—introduced to supplement the *McNaghten* rule, tend to be crude, haphazard, and inadequate to deal with the subtleties of the problems which arise.

4. So we are thrown back upon the *McNaghten* rule, which is the only rule applicable to alleged cases of insanity in most jurisdictions.³⁷ And this unreasonable emphasis upon the purely cognitive faculties for the determination of responsibility brings us to the most crushing legal objection to the right and wrong test: namely, that its use as the primary standard is a violation of a larger and more important principle already mentioned, that which demands the presence of a *mens rea*, or guilty mind, for every criminal act.

Without seeking the justification of this principle, or undertaking a thorough analysis of it (which it surely deserves), one can immediately grasp its force. In every act which we call criminal there is the outward manifestation, or deed, plus some inward or mental element which makes the deed wrongful. The mental element may have to be the specific intent to commit that crime, or the intent to commit some other crime, or merely some mental state, of negligence or recklessness, sufficient to establish culpability. But in every case for the act to be a crime there must be some *mens rea*. What will constitute a *mens rea* is a question of considerable complexity. Some cognitive elements are surely involved: the accused must have had at least a rough understanding of the circumstances of his action, and the consequences of his action. Some degree of knowledge, varying with the nature of the offense, must be present in order for a *mens rea* to be entertained. But—and this is the core of the present objection to the *McNaghten* rule—*knowledge alone does not establish a guilty mind*. The accused must not only know what he is doing, or what the circumstances and consequences of his act may be—he must also do the act *voluntarily*. Now admittedly the concept of voluntary action is not very clear; yet some such element does and must play an important role in establishing criminal guilt. For only then is the act *his* act, and only then will the courts hold him responsible for it. This distinction has been

36. GLUECK, *op cit*, *supra* note 1, at 209.

37. See, DAVIES, *Irresistible Impulse in English Law*, 17 CAN. B. REV. 147, 165 (1939). For a detailed account of the widespread and exclusive acceptance of the right and wrong test of criminal responsibility see GLUECK, *op. cit. supra*, note 1, at 227-231.

made, with general applicability, by Aristotle and innumerable others; in the law, from the time of Justinian it has been recognized, in some form or other, that really insane persons should not be held answerable because their mental condition makes voluntary action impossible.³⁸ And yet it is just this volitional element, essential to the establishment of a genuine *mens rea*, which the *McNaghten* rule ignores—for it, and its variants, look only or chiefly at the defendant's knowledge of the differences between right and wrong. Whatever that may be, it cannot by itself be enough for fix criminal responsibility.³⁹

The inconsistency which thus results from the application of such tests of responsibility becomes crassly apparent in the charges of some judges to the jury. For in explaining the law it is not unusual to find the general requirement of *mens rea*, or criminal intent, mentioned at the outset of a judge's charge, only to find a later reliance upon the defendant's *knowledge* of right and wrong *alone*, to establish his criminal responsibility. But the consequences of mental disorder upon volition cannot be ignored. Knowledge of right and wrong may be present where yet genuine criminal intent could not be entertained, by virtue of insanity. The overemphasis upon the cognitive aspects of mental life is thus not only erroneous from the standpoint of psychology and psychiatry, but results in legal inconsistencies, and gross violation of very general and well established legal principles.

VI

Underlying the inconsistencies, confusions, and other inadequacies of this approach to criminal responsibility are the ethical and epistemological assumptions which the *McNaghten* rule is based upon—assumptions which, though rarely even noticed, are questionable if not false. Naive beliefs concerning the grounds of knowledge in moral affairs, conflicting opinions concerning the nature of the ethically right and wrong, and confusions with respect to the intended legal significance of these terms—all have contributed to a virtually unintelligible mass of opinions about what the right and wrong test really means, and how it is supposed to be applied. To see how philosophically confused these discussions have become, one must begin with some general distinctions concerning the concepts in question. But first consider once again the specific wording of the classical *McNaghten* opinion:

To establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act

38. 3 ARISTOTLE, *NICOMACHEAN ETHICS* ch. 1, at 1109 b 30 (c. 322 B.C.); JUSTINIAN, *DIGEST* 50, 17, 40 (533).

39. For an account of instances in which mental disorders do not visibly affect cognitive stability, and yet do cause conative instability see Barnes, *supra* note 18, at 312.

he was doing, or if he did know it that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong.⁴⁰

1. The first question, arising immediately, is whether the expected knowledge of right and wrong is a general and abstract knowledge of these matters, or the knowledge of right and wrong with respect to that same act with which he is charged. The judges who voiced the *McNaghten* opinions were themselves conscious of this problem, and held that the specific as opposed to the general application of the test is the more accurate and reliable standard of responsibility. However, although the present usage of the right and wrong test frequently relies for wording upon these classical opinions, this particular preference of the judges for the specific application of the test has on many occasions been ignored.⁴¹ As a practical matter, however, this ambiguity of the rule has not been a serious handicap to its operation, since most jurisdictions do apply it with reference to the particular act in question.

2. But if, to establish his non-responsibility, it must be shown that the defendant did not know that his act was wrong, in what sense is the term "wrong" in this context to be understood? Now this, it is obvious, becomes a sticky business, and again several consequential ambiguities must first be recognized. The first of these is the uncertainty as to the legal or moral significance of "wrong" in the test proposed. Now some criminologists have argued⁴² that this distinction is really not an important one, because, so far as most serious anti-social acts are concerned, law and morals are indistinguishable. It is indeed true that most serious offenses are violations of both moral and legal codes; but the codes are nevertheless distinguishable, and in this context the distinction is most important, for here we are focusing not upon the objective character of the offense, as immoral and/or illegal, but upon the state of the defendant's knowledge concerning the character of that act. And it is perfectly possible for him to have known that it is wrong in one of these senses, and not to have known it was wrong in the other. An insane person may know intellectually, for example, that a certain act is against the law, and yet have no appreciation of its immoral character.⁴³ Therefore the distinction between legal and moral wrong, though its importance in some other contexts is

40. *McNaghten's Case*, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843).

41. See *Cunningham v. State*, 56 Miss. 269, 276 (1879).

42. E.g., GLUECK, *op. cit. supra* note 1, at 220.

43. It has been suggested that the mental disorder which results in the total incapacity to appreciate the right and wrong of any act be called "anethopathy", lack of ethical sense. Karpman, *Criteria for Knowing Right from Wrong*, 2 J. OF CRIM. PSYCHOPATHOLOGY 376, 381 (1941). "In the sense that a mental defective lacks intelligence, so does the psychopath (anethopath) lack moral sense. It is as if it were constitutionally lacking in him, and no amount of training can supply it. In this respect he is not unlike the mental defective, perhaps even inferior to him."

arguable, is surely a very important distinction with reference to the test for responsibility.

And there has been a good deal of confusion on this matter in the actual statements of the principle as judges have presented them. Some of this confusion stems from the fact that in the *McNaghten* opinions it was held *both* that "*If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable . . .*"⁴⁴ (Emphasis added.) *and*, in another answer that "*he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand . . . the law of the land.*"⁴⁵ (Emphasis added.) From this source, therefore, the wrong in question may be interpreted either as moral wrong or as legal wrong. In fact the courts have interpreted the rule in both ways, and some courts have required the knowledge that the act was both morally and legally wrong. Even so fundamental a matter as this has thus been a cause of considerable inconsistency in the application of the tests for responsibility.

3. There are then three different demands which the *McNaghten* test, or its variants, could be making. The sanity, and consequently the responsibility of the accused will be established if:

- (1) he knew the act was legally wrong, or
- (2) he knew the act was morally wrong, or
- (3) he knew the act was legally and morally wrong.

Even if it were known which of these demands was being made, it can be shown that it is virtually impossible to determine whether the defendant had such knowledge. Furthermore, the lack of such knowledge (moral, legal, or both) is exceedingly common even in the case of persons whose sanity has never been called into question — which helps to show how inadequate and inapplicable the *McNaghten* test is as a guide to the determination of criminal responsibility. Consider these three possibilities in somewhat more detail:

(1) Suppose it is the defendant's knowledge of *legal* wrongness which we wish to ascertain. How then are we to go about doing so? We will not be satisfied by simply asking him; nor can we, under the circumstances, assume that his conduct is indicative of his knowledge. What is apparent upon reflection is that, in a vast number of situations, a great number of citizens would not know what is legally right and what is legally wrong. Usually this is due to simple ignorance of the law, and this ignorance is understandable in the light of the complexities and conflicts of our

44. The answer to the second and third questions, *McNaghten's Case*, Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 723 (1843).

45. *Id.* at 209, 8 Eng. Rep. The answer to the first question.

legal system. Therefore, in most instances, the defendant is presumed to know the law; but in this area, where knowledge is the very point at issue, such a presumption *may not* be involved. And of course the right and wrong tests give no indication of just when or why such a presumption should not be applied. The common ignorance of legal wrong, which makes this presumption necessary, certainly bears no relation to the state of one's mental health. In many cases the ignorance of what is legally right and wrong is quite justifiable, as when a case is not clearly covered by law, and has not yet been decided by the courts. If this kind of ignorance of right and wrong were an indication of insanity, most of the judges, and all of the lawyers would have to be committed to an asylum.

It may be objected that all this applies only to borderline cases, where the issue of legal wrongness is truly in doubt, and that the possession of such knowledge is only rarely questionable. To this, two replies may be made:

(a) Often this is simply not the case. What is an obvious legal offense for one, may not be such for another, particularly when there are great differences in the environment, education, and mental ability of the persons concerned.

(b) Even though crimes such as housebreaking and larceny seem to be obviously against the law, it is often impossible to determine whether knowledge of this illegality was had by a defendant of sub-normal intelligence, or whose mental condition is at least very questionable. In such cases, what the subject did is often the best indication of what he knew at the time. Now if we use the nature of his act in order to ascertain what he actually knew, we cannot sensibly use his legal knowledge as a test for the nature of his act and his responsibility. The strange result of such a process would be that in many cases the commission of a crime would produce its excuse. Clearly, this approach will lead us only in circles. Of course this does not mean that we cannot inquire into the defendant's sanity or responsibility; it does mean that we cannot properly use, as a guide to the health of his mind, the state of his legal knowledge.

(2) In most instances, however, in which the knowledge of the difference between right and wrong is used by the courts as the criterion of responsibility, what is meant is a knowledge of the moral, not the legal character of the act. One of the very ablest interpreters of our law, Justice Cardozo, after carefully examining the genesis of this test, was very strongly of this opinion. He argues that it is the answers to the second and third questions of the *McNaghten* opinions⁴⁶ in particular which have formed our law on the subject, and that at that point the judges "expressly held that a defendant who knew nothing of the law would nonetheless

46. *Id.* at 210, 8 Eng. Rep. See also part III of text *supra*.

be responsible if he knew that the act was wrong, by which, therefore, they must have meant, if he knew that it was morally wrong."⁴⁷ Cardozo continues:

But, whether he would also be responsible if he knew that it was against the law, but did not know it to be morally wrong, is a question that was not considered. In most cases, of course, knowledge that an act is illegal would justify the inference of knowledge that it is wrong. But none the less it is the knowledge of wrong, as conceived of as moral wrong, that seems to have been established by that decision as the controlling test. That must certainly have been the test under the older law when the capacity to distinguish between right and wrong imported a capacity to distinguish between good and evil as abstract qualities. There is nothing to justify the belief that the words right and wrong, when they became limited by *McNaghten's Case* to the right and wrong of the particular act, cast off their meanings as terms of morals, and became terms of pure legality.⁴⁸

The inconsistency between the answer to the first and the answer to the second and third of the *McNaghten* questions is thus resolved by Cardozo in two ways: first by the claim that, if the conflict is regarded as serious, it is the latter—specifying knowledge of moral wrong as the essential factor—which retains legal authority; second, by arguing that "the conflict is more apparent than real," because "the answer to the first question, though it seems to make the knowledge of the law a test, presupposes the offender's capacity to understand that violation of the law is wrong." In any event, the upshot of Cardozo's analysis, and the facts of actual legal process both indicate that it is moral, not legal wrong with which the *McNaghten* test and its variants are concerned.

But the problem of determining whether the defendant possessed knowledge of the difference between moral right and wrong is clearly enormous. Yet its difficulty, its complexity, is recognized, if at all, only imperfectly in the courts. Assumptions about the nature of such knowledge are acted upon with a confused understanding of certain important distinctions which have been emphasized by ethical analysts from Aristotle to the present day, and which have the most direct bearing upon these legal issues.

(a) There is first the distinction to be made between an act wrong (in the non-legal sense) because of purely *factual* ignorance or error on the part of the actor (as when one does not know or is mistaken about the actual circumstances or consequences of his act), and an act wrong (in the non-legal sense) because of purely *ethical* ignorance or error on the part of the actor (as when one does not know or is mistaken about what is ethically right or wrong in a given situation.) This distinction the legal process surely recognizes, but, unfortunately, applies in a faulty

47. *People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (1915).

48. *Id.* at 333.

manner. It is a general principle in law — to which, of course, there are some exceptions — that a *bona fide* and reasonable belief in the existence of facts which, if they did exist, would render the act innocent, is a good defense. In the case of the insane, this principle is extended to cover delusive beliefs, which will excuse if, supposing them true, innocence would be established. Now the general principle here is based upon the assumption that while mistakes of fact are common and often unavoidable, mistakes concerning what the law is will not excuse, for every person is presumed, as it is said, to know the law.⁴⁹ The law, and the moral rule which it represents, (as Aristotle might say, the major premise), every man is supposed to know and obey. However, when the defendant's sanity is in question, this is just the supposition that cannot properly be made. For, as we have already tried to show,⁵⁰ the factual beliefs of one whose mental condition is disordered may be integrally related to his inability to appreciate the force of the rule, or to govern his conduct voluntarily. So the law here allows the use of the theoretical distinction between mistake of fact and ethical mistake to obscure the realization that in diseased minds the factual error brought on by delusion is only a symptom of general disorder, and, perhaps, indicative of a non-responsible agent. The inapplicability of this distinction *in just this kind of case* is thus overlooked by the *McNaghten* rule and its variants.

(b) But if the distinction between factual and ethical error is overemphasized in the law, the further distinction between subjective and objective right and wrong is virtually ignored. Out of context, the phrase "knowledge of the difference between right and wrong" could refer to the actor's realization of that difference from the standpoint of his own personal ethical standards. But this the *McNaghten* test does not mean by the phrase, since, understandably, the law is not interested in what ethical views happen to be held by any defendant. And this points to the underlying assumption of the application of this test: that there is some set of objective moral standards, independent of individual preference or circumstance, and open, at all times, to public inspection. Every adult, it is assumed, who is not mentally disordered or deficient, is "old enough to know right from wrong." Now there are several problems raised by such an assumption.

(i) To begin with, while it is not being claimed here that such standards do *not* exist, the question of their existence has been the source of prolonged and profound philosophical dispute. There is little certainty that such objective right and wrong is nonsense; but certainly that such standards are publicly available, if much more widespread, has little more indisputable support. The only point here is that the objectivity of right and wrong is at least open to question. And to that extent the knowledge of the difference

49. The few quasi-exceptional cases are not significant in this context. See CLARK & MARSHALL, *CRIMES* 297 (6th ed. 1958).

50. See part IV of text *supra*.

between the morally right and wrong is a most unsatisfactory test of criminal responsibility, since, wherever the existence of moral standards of just that kind is a matter of genuine doubt, this whole system of establishing the responsibility of mentally disordered offenders will be viewed as without foundation.

(ii) But supposing, as the law does, that such objective wrongness does exist, there are still the questions of deciding what it is, and how it is to be discovered. We are not concerned here with discussing the answers to these questions, or to propose an answer, but to point to the great variety of such answers, and the great differences between them. Access to objective wrong may somehow be got by our understanding — but there have been enormous disagreements not only about how it is got, but as well about what it is, after we have got it. When speaking of the knowledge of *legal* wrong as the index of sanity, we mentioned the peculiar position in which that would place the lawyers and judges; now if the index of sanity and responsibility is to be the knowledge of *moral* right and wrong, how awkward is the position of the philosophers and theologians — and indeed, of everyone who has been puzzled by fundamental ethical questions!

Among normal people there are to be found a great many different conceptions of right and wrong, of degrees of right and wrong, as well as many different levels of conscience. Conscience, as we know it is not anything fixed, but is exceedingly varied and variable, having a great many nuances and variations, and recognizing many different types, degrees, and levels of right and wrong.⁵¹

(iii) Going on to suppose, not only the existence of objective wrong, but almost universal agreement upon its nature and its source — all of which is very questionable — there is the further problem of deciding whether the knowledge of such wrong was actually in the possession of a defendant whose mental health is at issue. We do not mean to raise the spinozistic question of an infinite regress — the successive problems of having the knowledge, having the knowledge of the knowledge, and having the knowledge of the knowledge of the knowledge, etc. But because the original knowledge of the difference between right and wrong is supposed to be an objective test of responsibility, the difficulties met in ascertaining its existence must be recognized. For of course it is just in those cases in which the presence of this knowledge is important — *i.e.*, cases of alleged mental disorder — that the presumption of its possession cannot be allowed. How then decide whether the accused in question had this knowledge? Of what does such “knowledge” consist? Is it simply acquaintance with certain moral rules? But then how determine such acquaintance? And can “knowledge” be treated altogether as a matter

51. Karpman, *supra* note 43, at 376.

independent of its application in practice? Or does the knowledge of wrong perhaps entail the ability to subsume particular cases under general rules? But if so, since the accused is allegedly disordered in mind, which cases must he be able to subsume? And under which general rules? And must one be able to *act* upon such subsumptions for the knowledge to be complete? To such questions there are no universally agreed upon replies. And here we come to a criticism of this entire approach to criminal responsibility which by itself would show the approach to be unsatisfactory — namely, that the application of this test of responsibility demands answers to questions for which there are no reliable answers. One recent inquiry into this matter resulted in the following conclusion:

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.⁵²

(3) It is hardly necessary to add that if the requirement of the *McNaghten* Rule is interpreted to mean that a defendant's knowledge of *both* legal and moral wrong is essential to establish his responsibility, all of the objections which have been raised to each singly may then be raised again.

4. All of these considerations lead to the final and most damaging practical and theoretical objection to the right and wrong tests of criminal responsibility: that, as one outstanding criminologist has put it, "it was conceived in confusion, cradled in confusion, and today, in its maturity, is almost as confused as the most disordered defendants that are to be tested under it."⁵³ That remark was made more than a quarter of a century ago; yet in spite of the advances which have been made in the psychological and legal sciences since that time, the confused state of the law on the responsibility of the insane has improved hardly at all. "Normally, law does not stand still"; one writer remarks, "it develops with national growth, and the increase of scientific knowledge: in the defence of insanity the *McNaghten* rules may be an exception."⁵⁴ The point here is that the *McNaghten* rule is not what it is intended to be; the questions asked and answered in *McNaghten's* case arose because of the need for a clear and definite test or rule. But clarity and definiteness are two qualities which, surely, the right and wrong test does not possess. The result has been not only the unjust disposition of particular cases, but the breakdown in this area of that regularity and stability which is of the very essence of justice under law.

52. REPORT BY THE COMMITTEE ON FORENSIC PSYCHIATRY OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY 15 (1953).

53. GLUECK, *op. cit. supra* note 1, at 226.

54. BARNES, *supra* note 18, at 309.

VII

No one who has wrestled with the problem of developing a standard for the determination of the legal responsibility of the mentally disordered can fail to appreciate how difficult it is to provide an adequate replacement for the *McNaghten*⁵⁵ rule. Each of the many suggestions which have been made — ranging on the one hand from the placement of the decision on the responsibility of the defendant in the hands of medical men instead of courts or juries⁵⁶ to, on the other hand, the abrogation of all rules or tests, allowing the jury simply to make their decision on the responsibility of the accused as best they can on the evidence presented⁵⁶ — each of these has grave faults and much to be said in its favor. The long and difficult struggle with this problem is probably evidence enough that there is no simple rule or formula that will resolve the many difficulties which mental disorder presents to the juridical process. This is just one more field in which the concepts of legal responsibility must be worked out carefully and arduously, in the light of the best knowledge that medical science can provide, the best advice that moral philosophy can offer, and the practical conditions and circumstances presented by the criminal law.

Because psychiatry is not yet a perfectly exact science; because there are so many intermediate cases between the completely insane on the one hand and the perfectly sane (if any) on the other; and above all because the philosophical problems of responsibility are puzzling, and perhaps perpetually so — for all of these reasons and more, the line drawn between the legally responsible and the legally nonresponsible must be somewhat arbitrary.

Whatever the difficulties may be in drawing this line, however, they do not justify the continued use of a test or standard of criminal responsibility which is crude, obsolete, impractical, and unjust. For, as it has been shown here at length, confusion, mistake, inconsistency and injustice are the natural consequences of approaching the problem of the responsibility of the mentally disordered by asking about the defendant's knowledge of the difference between right and wrong.

55. See GLUECK, *op. cit. supra* note 1, at 449.

56. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954); 45 A.L.R.2d 1430 (1954).