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NOTE

MENTAL DISEASE AS A JUSTIFICATION FOR RELIEF FROM THE CONSEQUENCES OF AN ACT: SOME COMMENTS ON THE LEGAL CRITERIA

INTRODUCTION

In 1956 the Minnesota Supreme Court decided the case of Anderson v. Grasberg,¹ the philosophy of which would seek a radical change in the law of insanity. The facts were these: A husband and his wife had owned real property in joint tenancy. The husband killed his wife. The heirs of the wife brought an action to impose a constructive trust for their benefit upon one half of the property on the theory that the husband's right of survivorship was barred by the doctrine that no man should benefit from his own wrong. The supreme court reversed judgment in favor of the heirs holding that the husband was suffering from a mental disease at the time of the killing and that "sufficient causal relation" was shown between the mental disease and the act to warrant a finding without further trial that the husband had not committed a wrong which would deprive him of his right of survivorship.

As a preliminary to any discussion of a disordered mind in a legal context, terms must be defined. "Mental disease" will be used to mean both congenital defects of the mind and those defects which arise in the mind postnatally whether caused by trauma, lesion, or gradual deterioration. In general, that term will be used to convey the medical idea of the disordered personality. "Insanity" will signify that "unsoundness of mental condition" (mental disease) which "with regard to any matter under action, modifies or does away with individual legal responsibility or capacity."²

The test of insanity used by the supreme court in the Grasberg case is the same as that adopted by the United States Court of Appeals for the District of Columbia in Durham v. United States.³ The Durham case held that defendant, tried for housebreaking, should be found not guilty by reason of insanity if the jury should determine that his unwarranted entry was the "product" of a diseased mind. The factors necessary to a finding of insanity under

¹ 78 N.W.2d 450 (Minn. 1956).
² Webster, New International Dictionary (2d ed. 1947).
³ 214 F.2d 862 (1954).
this test are (1) that defendant had a mental disease at the time of the act and (2) that his diseased mind caused the act.

The effect of the Durham case was the abandonment of the old M'Naghten Rules as bases for determining insanity in criminal cases. Under the M'Naghten Rules the jury must acquit because of insanity, if it find (1) that defendant was suffering from a mental disease at the time of the act and (2) that the mental disease deprived him either of the knowledge of the nature and quality of the act or of knowledge that his act was wrong. The M'Naghten Rules with some variation are presently used in almost every common law jurisdiction. The most significant variation is the addition of the “irresistible impulse” test which will be discussed below. Only the District of Columbia and New Hampshire use the Durham “mental disease test” in criminal cases.

The Minnesota Statutes provide that insanity of a defendant in a criminal case must be determined by the M'Naghten Rules. Because the Grasberg case involved civil law rather than criminal, the supreme court did not find it necessary to apply the M'Naghten Rules. On his appeal, defendant had not argued that the mental disease test should be applied; the supreme court used it on its own initiative, despite the expression of legislative purpose in a closely allied area. The court reasoned that in civil cases the consequences of judgment are different from those in criminal cases and thus the statutory approval of M'Naghten for criminal cases was not binding in adjusting the rights of private litigants. The court then criticized M'Naghten as too strict and approved Durham as better able to reflect modern psychiatric theory.

The Grasberg case indicates that the reproaches directed at the M'Naghten Rules by psychiatrists are beginning to have more than sporadic effect. Whether their effect is good or bad, however,

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4. The M'Naghten Rules take their name from the case that instigated their promulgation. M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843). The Rules were issued by the judges of England upon the request of the House of Lords.

5. See Weihofen, Mental Disorder as a Criminal Defense 51 (1954).

6. Id. at 51-52 and authorities there cited.

7. Fourteen jurisdictions add the irresistible impulse test to the M'Naghten Rules. Ibid.


10. Anderson v. Grasberg, 78 N.W.2d 450, 461 (Minn. 1956) (dissenting opinion).

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has not yet been decided either by lawyers\textsuperscript{12} or psychiatrists.\textsuperscript{13} This Note will attempt an appraisal of the \textit{Grasberg} case in an effort to demonstrate the benefits and inadequacies of the mental disease test in view of the traditional legal criteria of insanity. The discussion will begin with a brief outline of the nature, function, and purpose of the doctrine of insanity. Then the presently used tests of insanity in the criminal law will be criticized in the light of the discussion of the function of the doctrine of insanity. Following the discussion of the criminal law, analysis of the \textit{Durham} rule as it was applied in \textit{Grasberg} will conclude the Note.

\textbf{The Nature of the Defense of Insanity}

In order to determine a proper test of insanity in any area of the law the reason for the existence of the defense of insanity must be recognized. No matter where the question of capacity arises, in a criminal or in a civil case, the law in answering the question decides whether the state of mind accompanying the significant deeds of the party should prevent imposition of legal consequences upon him. In most areas of the law deeds alone do not cause legal consequences.\textsuperscript{14} In addition to the actions of the party the law must find present a certain state of mind, or it will refuse to impose liability or responsibility.

It is thus evident that law regards man as capable of taking various courses of action when a given set of circumstances presents itself. Man may choose to contract, to inflict injury, or to dispose of his property. The premise upon which the law proceeds in requiring a showing of a certain state of mind precedent to its imposition of liability on an individual is the assumption that men are governed in their actions not only by mechanical heredity and chance environment but also by some portion of what may conveniently be called "free will." Free will, though its existence in man may not actually be provable, is an expedient and necessary assumption in keeping social order.\textsuperscript{15} Even if it be conceded that the


\textsuperscript{14} There are of course exceptions to this statement, such as the strict liability of tort law and the "public welfare" offenses of the criminal law. The latter will be briefly alluded to below.

conduct of man is given origin solely by his heredity and environment, government may obtain its desired results by trusting upon the people the knowledge that the law regards them as having the ability to choose a particular course of action, and that legal relationships and responsibilities will follow conscious, voluntary action. In this manner one of the environmental factors composed by the law for the people is the knowledge that chosen action has legal effect. Even under a philosophy of complete determinism which regards man as a puppet formed of heredity and controlled by environment the law may justify its assumption that man's will is free by regarding that assumption as nothing more than a puppet string.

Thus the standard of social conduct established by the law is that certain chosen action will have legal effect. The effect given is fitted to the purpose that government wishes to accomplish. For antisocial actions punishment is prescribed to deter the offender from repeating his act, to deter others from the same action, to rehabilitate the offender, to incapacitate him for the protection of society, and to satisfy the need of the public for vengeance. For breach of agreements solemnly entered into, enforcement or damages are demanded to stabilize trade and commerce. Neither actions alone nor choice alone will cause the legal effect. The law requires a showing of both action and choice.

Action is shown quite easily by sensory proof. The showing of choice, however, is a more difficult matter, since it is not something capable of perception by the senses. We can only infer from sense perceptions of outward conduct that choice was or was not present. The jury is an ideal body to draw these inferences, since it, at least theoretically, is composed of men who make choice and are therefore able to recognize it.

Although choice, literally, is either completely present or completely absent, the law has provided that the mental factors making up the state of mind in which choice is present in the legal sense will vary with the particular type of case before the court. In cases involving major crime the element of choice is designated by the enigmatic \textit{mens rea}, the factors of which differ with the crime.\footnote{Alexander and Staub, The Criminal, the Judge and the Public 70-71 (1931).}
\footnote{See Wechsler and Michael, \textit{A Rationale of the Law of Homicide II}, 37 Colum. L. Rev. 1260, 1264-1325 (1937).}
\footnote{Guttmacher and Weihofen, \textit{Mental Incompetency}, 36 Minn. L. Rev. 179, 195 (1952).}
\footnote{II Stephen, History of the Criminal Law of England 94 (1883).}
In tort cases a showing of intent may be required, or if negligence is alleged the choice of conduct which is later determined to have been careless causes liability. Whatever the peculiar element of choice required in a particular case may be, the lack of certain mental elements, such as volition or knowledge, must be shown if the actor is to have his action escape the consequences imposed by the law.

The forces which are recognized by the law as capable of removing choice also vary with the particular type of case. Undue influence over a testator may set aside his will. In criminal cases a defendant will be relieved from punishment if he was compelled to commit the prohibited act by a physical force which he was unable to resist. A mental disease which disrupts one of the faculties essential to choice in such a way that choice could not be exercised should excuse actions of the actor in both civil and criminal cases.

**INSANITY IN THE CRIMINAL LAW**

The interjection of the plea of insanity may appear at various stages in a criminal proceeding. Defendant may object that he is incapable of preparing an adequate defense because of present mental unsoundness or that following trial he should not be sentenced because of his incapacity. The most controversial aspect of the doctrine of insanity within the criminal law is, however, the actual defense to the accusation of guilt—that defendant should be acquitted because at the time he committed his criminal act he was insane.

In recent years the controversy has largely arisen from the broadside criticism by psychiatrists of the presently used tests of insanity. These doctors, supported by some lawyers, assert that they should be given a greater role in the determination of responsibility. The range of that greater role asked for has varied with the asker. Some would go so far as to set up a jury of psychiatrists to decide the entire question of responsibility. The thesis general to these reformers is that human behavior should be judged by the

23. Weihofen, Mental Disorder as a Criminal Defense 459-60 (1954)
24. The most outspoken of these is Gregory Zilboorg as he speaks in The Psychology of the Criminal Act and Punishment (1954).
25. See Sobeloff, Insanity and the Criminal Law: From McNaughten to Durham, and Beyond, 41 A.B.A.J. 793 (1955)
26. Smith, Criminal Law in the United States, in Correction and Prevention 112 (1910)
real experts in the field, the psychiatrists. They reason that the mind of man is the proper subject of their investigation only and that since they have made extensive study of the mind, they should be given the job of determining responsibility. To gain proper perspective in evaluating these suggestions it is necessary to ascertain the real functions of the two professions involved, law and psychiatry.

Laws of course are by definition the rules that govern society. The rules of the common law are those that have developed over a long period of time through experience in resolving conflicts between public and private interests. Psychiatry is a therapeutical science; its main function is the curing of present disorder. It deals with the individual and not with the needs of the whole of society. Law, on the other hand, though dealing with the individual, must look to the need of society for a broad system of social regulation in order to fulfill its function. Law must establish its own rules for social conduct. Psychiatry may properly give advice as to who comes within the law's already established rules of social order, but psychiatry in its narrow sphere of individualized cause and effect is not a proper body to dictate society's standards. Psychiatry may also present arguments for a change in the law's social standards, which of course should be considered on their merits; but to be acceptable, these changes must, in the judgment of the makers or interpreters of the law, reflect proper respect for the maintenance of social order. The objections made to psychiatry's projected transgressions are equally applicable in the civil law area, but as yet the influence has been strongly felt only in the criminal law.27

The standard for proscription of human conduct which the law has already developed recognizes that a prohibited antisocial act is not a crime unless it is accompanied by a mental element, which may vary with the crime alleged. The element of the mind required for common law crimes and most statutory crimes28 is broadly classed as mens rea, guilty mind. It is differently identified according to the crime under consideration, but generally it may be said that certain elements of knowledge and volition are common to mens rea wherever its necessity appears.29

Before elaboration of the discussion of major crime which in-

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27. The inroads are most apparent in the field of criminology, where treatment on a psychological basis has done away with many of our traditional means of handling offenders. For an excellent criticism of this trend see de Grazia, The Distinction Of Being Mad, 22 U. Chi. L. Rev. 339 (1955).
28. See Miller, Criminal Law § 20 (1934).
volves mens rea, some discussion of crime which does not require a showing of mens rea is warranted by the need for clarity. There are some facets of the law which purportedly do not look for a particular mental state as a precedent condition to legal consequences. In the criminal law these take the form of "public welfare" offenses. Liability for such offenses is said to be strict, it depends only on the answer to the question whether the defendant has performed the prohibited act. It is doubtful, however, that imposition of this form of liability represents a policy judgment that no principle of justice requires a guilty mind in these cases. The rationale probably lies in the likelihood that the violator in fact had a punishable state of mind, the usually small penalty involved, the great frequency of violation, and the expense of judicial proceedings and difficulty of proof inherent in making state of mind an element of the offense, all of which because of expediency combine to override the basic premise that choice is an element of crime. The question of the soundness of this or any other rationale for the public welfare offenses is not pertinent here, this discussion will center mainly around traditional major crimes, those which require the showing of mens rea as an essential.

The requirement that mens rea must accompany an antisocial act if it is to be deemed criminal may be restated thus: the law will not punish choices that result in socially unacceptable conduct unless in the process of choice the individual has had free range of selection from the mental factors of mens rea. One who does not fully choose to perform a prohibited act should not be punished if the reasons for his punishment have been removed by the elimination of full choice. Those defending on the ground of insanity will normally be hospitalized until cured if successful, and punished if unsuccessful. To the extent that the purpose of punishment is to rehabilitate the offender or remove him from society, the purpose will be accomplished by hospitalization. If the offender lacks the ability to choose, he is non-deterrable and punishment for the purpose of deterring him from repeating his offense is senseless. The purpose of public vengeance or retribution, even if a rational purpose of punishment, cannot justly be applied to one without choice. While it may be argued that strict liability would provide the max-

30. Included are offenses such as selling adulterated food, traffic violations, and violations of building regulations. See Hall, General Principles of Criminal Law 281-86 (1947).
31. Miller, Criminal Law 72 (1934).
32. See Hall, op. cit. supra note 30, at 281-86.
33. See note 17 supra.
mum deterrent to the public in that free choosers might commit crimes hoping to defend by persuading a jury that they lacked the ability to choose, the argument seems more academic than realistic. Traditional concepts of justice aside, it is unlikely that any greater deterrent would be worked on the public's future choices by punishment of those without choice.

The elements of mens rea are those factors which the law must find in the mind of the criminal defendant at the time of the act in order to convict him for choice of antisocial action. Exactly what these elements are has been the subject of definition and redefinition throughout the history of civilized criminal law. The present status of definition finds the courts going from case to case varying the requirements slightly with slight variations in the nature of the crime. It may be said, however, that mens rea in general means intentional, conscious volition. The accused must intend the act and know that its effect will be wrong. For this he must have knowledge of its nature and probable consequences and he must wish that those consequences follow his commission of the act. He must be inwardly aware of his operations and he must experience the emotion, sensation and thought normal to mankind when he contemplates his action.

It has been objected in the past that the law considers the mind of the defendant as separated into defined compartments, one performing the knowing or cognitive function, another the willing function, etc. Psychiatry considers the mind of man an integrated unit. One facet of it cannot be disordered without having the disorder affect the rest. In attempting to define the mental elements which show a guilty mind, however, the law does not propose to separate one function of the personality from another. It merely

34. See Levitt, The Origin of the Doctrine of Mens Rea, 17 Ill. L. Rev. 117 (1922).
35. See Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1932).
36. For many crimes which purportedly require a mens rea to be shown, true intention is not an element. Crimes based on "gross" negligence are of this nature. See Hall, General Principles of Criminal Law 215-46 (1947) where such crimes are described as actually requiring recklessness. Recklessness is said to be a form of intention in that the actor knows that his conduct increases the risk of harm, but he does not desire the harm, and thinks he can act, despite the increase of risk, without causing harm.
37. Generally these elements of mens rea are established by a chain of inferences which give rise to presumptions. He who acts is presumed to have intended his action and the natural and probable consequences of his action. Levitt, Extent and Function of the Doctrine of Mens Rea, 17 Ill. L. Rev. 578 (1923). That these presumptions are rebuttable is seen from the doctrines of insanity, infancy, compulsion, etc.
38. White, Insanity and the Criminal Law 104 (1923).
39. Ibid.
seeks the symptoms that it has through historic development deemed indicative of a guilty mind. The showing of the lack of one symptom suffices to excuse on the ground that the mind is not guilty. No compartmentalization is attempted. The law by its analytic definition seeks only evidence of an innocent personality.

The law has long recognized that one of the forces which may cause the removal of the mental elements necessary to criminal conviction is the mental disease. If a mental disease so disrupted the mind of the defendant at the time of his antisocial act that his mind lacked any of the elements of mens rea, he must be acquitted on the ground of insanity. Within this framework of legal theory the mind of the defendant is always considered the cause of the act, but if mental disease has caused a change in the mind so that it can no longer be considered guilty the defendant is not responsible.

**Criticism of Presently Used Tests**

*Durham*

Against this discussion of what the test of insanity in criminal law should be, the inadequacies of the present tests can be pointed out. The relatively recent test used in *Durham v. United States* gives the psychiatrist some of the reform he wants, since it allows him to give the jury his full opinion about the mental condition of the defendant, which, as will be seen, is not the case under the *M'Naghten* test. It will be recalled that the *Durham* test excuses antisocial conduct if the act of the defendant was a product of a diseased mind. In asking whether a diseased mind caused the act of the defendant the courts using this test ignore the very thing at issue according to traditional concepts of what factors constitute a crime. A showing that the mind is diseased cannot logically show that the mind is innocent (that mens rea is absent). Something more remains to be proved. It must be shown that the mind is not a guilty mind. When mental disease is the vehicle by which a defendant tries to show his innocence of mind, what is actually attempted is a showing that the mind is lacking in the symptoms of guilt because the intellectual, emotional, and volitional processes are atypical. But it is only when the aberration is such that the intent, malice, or will of defendant is not manifested in the same conscious manner as they are in man generally, that defendant should

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40. See Glueck, Mental Disorder and the Criminal Law 123-38 (1925).
41. It was so intended by the *Durham* opinion. See 214 F.2d 862, 871-72 (1954).
be acquitted as insane. Similarly, a determination that the mental disease affected the mind so as to produce the act does not answer the question whether the mind was guilty. The objection to be made against Durham is that it does not relate to the logical structure of the definition of crime—action plus mens rea. The question it asks (did the diseased mind cause the act?) is utterly disconnected from this traditional framework. Durham would illogically attempt to set the defense of insanity on a plane with the defense of innocent mind, when historically the former has always been a subdivision of the latter. The Durham opinion itself recognized this problem but was unable to solve it with anything more than an assertion.

"The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called mens rea), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility."42 (Emphasis added.)

M'Naghten

The major criticism of the M'Naghten Rules lies in their narrow substance and strict administration. Some psychiatrists feel constricted on the witness stand when asked to interpret the state of mind of a particular defendant according to the M'Naghten Rules. They object that they are not permitted by the courts to explain the full mental status of defendant. In some cases they are allowed only to give a yes or no answer to the question whether defendant knew his act was wrong.43 The M'Naghten Rules would probably be better administered if the experts were allowed to give full explanation of the defendant's personality before being required to answer the particular questions concerning knowledge of right and wrong. Such a procedure would seem to facilitate a more accurate answer by the jury.

Correction of the administration of the M'Naghten Rules, however, would not eliminate the present inadequacy of the defense of insanity in the criminal law. The very substance of the rules, is

42. Durham v. United States, 214 F.2d 862, 876 (D.C. Cir. 1954). Here the court appends a footnote which lends no support to the quoted proposition, but merely states the fact that those who are found insane may be committed for an indefinite period to a mental institution.
too shallow to engulf the entire search the law makes for mens rea. M'Naghten asks only whether the mind of defendant is so conditioned that it is unable to know facts necessary to a finding of mens rea. A particular defendant may have had knowledge of the nature and consequences of his act and may have known that his act was wrong, but mere establishment of those facts will not establish mens rea. Mens rea as we have seen is not restricted to the cognitive capacities of the mind. A satisfactory test of insanity must also recognize that an ordinarily guilty mind may be rendered innocent by lack of the necessary volitional factor of mens rea.

Irresistible Impulse

That a mental disease is capable of causing the distortion of the will follows naturally from the theory of the integrated personality. This realization by lawyers has given rise in at least fourteen states to the "irresistible impulse" test which is administered in conjunction with the M'Naghten Rules.44 This test relieves the defendant of responsibility if he committed his criminal act upon an impulse made irresistible by mental disease, even though at the time of the act he knew that what he was doing was wrong.45 The irresistible impulse test reflects a realization that the volitional aspect of the mind may be conditioned by mental disease.

The nature of the will is defined by Webster as "the total conscious process of effecting a decision."46 Volition is the action of willing, it is the experience of deciding on a certain course of action.47 The nature of that experience differs, however, according to the psychological theory of behavior endorsed. The Behaviorist theory of the mind imagines man's actions as a spontaneous reaction to the factors of heredity and environment.48 As such, action is not controllable by the personality, in a given situation, a given set of hereditary and environmental factors will always result in the same course of action. The Mentalist theory of human behavior views man's actions as controlled by a less definable will. In a given situation, a given set of hereditary and environmental factors will result in courses of action which may vary according to the purposes the individual consciously seeks to effect.49 The "will" of the criminal law's mens rea is probably closer to the definition

44. Weihofen, Mental Disorder as a Criminal Defense 51 (1954).
45. Id. at 52.
47. Ibid.
48. See Glueck, Mental Disorder and the Criminal Law 95-107 (1925).
49. Ibid.
of the Mentalist, since that view of the word is predominant in popular understanding. Men probably do regard themselves as capable of pursuing different courses of action in given circumstances.

If all factors of heredity and environment are viewed as the stimuli of action, the process of willing is seen as a selection from those stimuli, and that selection determines the nature of action. Only those stimuli are operative which enter the consciousness, i.e. the present awareness of the individual. The subconscious is the reservoir of past experience and of innate character. Given circumstances will operate as a conscious factor which call other stimuli from the subconscious.

A mental disease may condition the mind so that stimuli which lead to innocent action are blotted from the mind or stimuli of criminal action are exaggerated. If the stimuli that lead to innocent action are removed, leaving only those capable of inducing crime, the defendant is unable to act innocently. Thus, the disorder of the will the law must look for is a compulsion to a criminal course of action from within the mind; the option to act innocently is eliminated because the environmental factors inductive to innocent reaction in the given situation are eliminated. This theory recognizes that the mind is integrated and that the mental disease is not an outside force but rather a description of the mind.

While the irresistible impulse test is commendable in its recognition that disorder of volition renders an act innocent, criticism may be directed to its manner of recognition. This test pictures the “impulse” as a force of itself which causes the act. But the mind is the mover of the body, not some supposed third force such as an impulse. The mind must give rise to any action taken after presentation of stimuli to the conscious and reaction to those stimuli take place within the mind. What is probably meant by “irresistible impulse” is some dominant stimulus of criminal action. If that stimulus becomes dominant because of the diseased condition of the mind, defendant should be relieved of responsibility. But use of the word “impulse” implies that the ascendancy of the criminal stimulus must have been instantaneous if insanity is to be found. Such a test would ignore the major psychoses which produce gradually mounting obsessions eventually culminating in criminal action.50 Therefore, by overlooking the possibility that a gradual

domination of innocent stimuli by criminal stimuli may take place within the mind, the phrase “irresistible impulse” mispictures the nature of the diseased will. A proper test of disorder of the will must provide relief for both the gradual and the spontaneous removal or exaggeration of pertinent conscious stimuli through mental disease.

Synthesis and Suggestions

A proper test of mental incapacity in the criminal law should be an attempt to ascertain whether the defendant had the mind of a criminal when he acted. When it is shown that the mind of the defendant was diseased at the time of his act the law must yet determine whether his mind was guilty. With each type of case that arises some variation in the definition of a criminal state of mind will be necessary in order to match the scope of the search that the present law makes for mental elements in finding action criminal. In all crimes, however, which require a finding of mens rea precedent to punishment, a general test of insanity can be given to the jury. This test is based on the theory that some elements of mens rea do not vary with the particular crime charged.

Defendant should be acquitted on the ground of insanity if the jury determine from the evidence (expert and other) that defendant’s mind was, at the time of the act, in such diseased condition that (1) he did not know the nature and quality of his act or (2) that if he did know the nature and quality of the act, he did not know that it was wrong. In the giving of this test, the search for mens rea made by the traditional M’Naghten Rules is retained. In addition to this, a search for the criminal will must be made. A mental disorder can affect either the stimuli of innocent action, the stimuli of guilty action, or the process of reacting to stimuli. The Mentalist’s view of the reacting process, which probably would be endorsed by the law has no exact definition, and for that reason lapse into less exact language may be necessary under the third subdivision of this aspect of the test. Semantic shortcomings, however, are mitigated by the fact that, by hypothesis, the concept of free will is something normal men understand in reference to their own choices of action and which, therefore, members of the jury can recognize in others. The proposed test is

51. The proposed test is framed in the terms used in the development of the text discussion and is not intended to be the form which jury instructions would take. The actual instructions should be phrased in non-technical terms to the extent consistent with clarity, and explanation of technical terms should be given in the course of expert testimony, or in the instructions or both.
The jury must acquit the defendant if it find that at the time of his criminal act he was suffering from a mental disease which:

1. removed from his conscious mind the stimuli which the jury finds would have induced innocent action despite whatever stimuli of criminal action it should determine to have been present within his mind; or

2. exaggerated the stimuli inducing criminal action so that they outweighed the stimuli of innocent action, or

3. made him incapable of choosing a different course of action, even though sufficient stimuli of innocent action were presented to his conscious mind to outweigh his conscious stimuli of criminal action.

It is recognized that some would object to this “liberalization” of the defense of insanity on the theory that liberalization will reduce the deterrent effect of the sanction of the law. This objection is based on the hypothesis that those contemplating criminal acts will proceed with their plan in reliance on their ability to feign lack of volition. As indicated above, it is believed that few, if any, criminals are this calculating. Also, the stigma which (unfortunately) attaches to one mentally diseased and the prospect of being committed to a mental institution will, of themselves, have a deterrent effect. Finally, if the definition of crime is to continue to require a showing of mens rea and the lack of volition is to continue to indicate an innocent mind, the law cannot refuse the accused the opportunity to show that he is not what the law accuses him of being.

CONCLUSION

The Grasberg case is important precedent for a possible undermining of the present tests of insanity in the civil law. The application of the Durham test to all areas of the law is possible because of its disregard for the peculiar mental element the law deems important in each field. The test might easily be rephrased so that the question asked is “did the diseased mind cause the making of the will” or “the commission of the tort.”

The application of the Durham rule to the civil law is subject to the same criticism made of its application to the criminal law. In the fields of torts, contracts, wills, guardianship, divorce, etc., the courts and legislatures have evolved mental requirements which capacitate the party for the act he does, thus giving rise to legal consequences. The mental disease may remove some symptom of

52. Weihofen, Mental Incompetency, 36 Minn. L. Rev. 179 (1952).
the mind which the law deems necessary in order to give a particular act legal consequence. But changing existing tests of insanity in the civil law to the phraseology of Durham could only result in the desertion of traditional law as it has been adapted to the needs of society.

In the Grasberg case the court apparently was concerned with the inadequacy of the M’Naghten Rules and chose the Durham test as the only available alternative. The court had to decide the issue, whether defendant should benefit from killing his wife despite the equitable doctrine that no man should benefit from his own wrong. The court began properly by searching for the mental elements of a "wrong" as that term is used in the doctrine.

"If the killer is found to be insane at the time of the killing he could not have the requisite intent and the principle of profiting from one's own wrong is inapplicable."

Thus the court required itself to find that mental disease eliminated the guilty mind of the defendant before allowing him his full right of survivorship. But the Grasberg opinion fails as utterly as does Durham to establish a connection between the mental disease test and the requirements of mens rea. The majority is quite unclear as to the device of logic it used to cross the gap between the question asked by its test and the question whether the mental elements of a "wrong" were present in the defendant.

Although it is well that the court recognized the deficiency of the M’Naghten Rules, it is unfortunate that it did not attempt to devise a test of insanity consistent with the traditional concepts of responsibility and capacity.

53. Anderson v. Grasberg, 78 N.W.2d 450, 457 (Minn. 1956).
54. See Anderson v. Grasberg, 78 N.W.2d 450, 461 (Minn. 1956).