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Psychology, Mental Illness, and the Law–Alcoholics and Drug Addicts

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PSYCHOLOGY, MENTAL ILLNESS, AND THE LAW*  
LEE SILVERSTEIN**  
V. ALCOHOLICS AND DRUG ADDICTS

In the foregoing discussion of commitment of the mentally ill one special group was intentionally omitted—the inebriates. The West Virginia statute defines an inebriate as "any person over the age of eighteen years who is incapable or unfit to properly conduct himself or herself, or his or her affairs, or is dangerous to himself or herself or others, by reason of periodical, frequent or constant drunkenness, induced either by the use of alcoholic or other liquors, or of opium, morphine, or other narcotic or intoxicating or stupefying substance."61 The statute goes on to provide for commitment of inebriates upon the same basis as mentally ill persons with a similar complaint and hearing before the mental hygiene commission. The statute does not make it clear whether inebriates are regarded as mentally ill: the provision concerning inebriates is included in the chapter on mentally ill persons, but is placed in a separate article on inebriates and criminal mentally ill. When an inebriate is committed, it is for a minimum period of thirty days. He is to be released "... when, in the opinion of the superintendent of the institution, he has received the maximum benefit from such hospitalization." However the inebriate does not forfeit his legal capacity, as does the mental patient who is committed for an indeterminate period.62

In 1955 thirty-one persons charged with inebriation appeared before the Kanawha County Mental Hygiene Commission, and twenty-four of them were committed. Similar figures obtain for earlier years.63 From these statistics it may be roughly estimated that 300 persons are charged with inebriation each year in West Virginia and 225 committed. This is about 16 percent of the total of persons committed for all causes. This estimate for West Virginia is only a few percentage points higher than the national figure of 12 percent of all first admissions to mental hospitals.64 The great defect in the method of dealing with alcoholics in West Virginia,

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* The first part of this article appeared at 60 W. VA. L. REV. 55 (1957).
** Member of the Kanawha County Bar.
61 W. VA. CODE c. 27, art. 6, § 1 (Michie 1955).
62 Ibid. Cf. art. 5, § 4. See text at note 45 supra.
63 For 1954 the figures were 28 and 21 respectively, and for 1953 they were 34 and 27. These figures were gathered by the Kanawha Welfare Council.
64 GORMAN, EVERY OTHER BED 221.
as in most other states, is that present techniques of treatment do not effect a lasting cure. Fortunately there is evidence that new drugs may help cure alcoholism and drug addiction as well as mental illness.65

The ambivalent legal approach to alcoholism—now a minor crime, now a form of mental illness—reflects the changing public attitude toward the problem. The old moralistic view was that drunkenness was wicked and that the excessive drinker should be punished. This attitude is slowly giving way to the more modern view that the inebriate is usually a person who is emotionally disturbed, and in severe cases mentally ill.66 This modern, psychologically oriented view was adopted in West Virginia by the Legislative Interim Committee to Conduct Study of Alcoholism and Alcoholic and Drug Addicts:

"Occasionally alcoholism appears to be directly related to a psychotic or feebleminded condition. In many cases it is obviously a reflection of less grave but still very severe personality disorders. Often the average person would see no serious psychosocial maladjustment in the uncontrolled drinker he knows and yet it is difficult to envisage the illness without the existence of underlying problems in the inner life of the individual and in his environment.

" . . . .

"It would seem safe to say that most alcoholics are dependent and impulsive people whose inadequate relationships with people early in their lives made them especially vulnerable to tensions and pressures in later life. They are apt to be basically lonely and egocentric and to have been deprived of the rewarding experience of close relationships with those about them. Feelings of unworthiness and anxiety may be masked by a thin veneer of enforced gaiety, competitiveness, etc. This veneer is deceptive to others and even to the individual, and the struggle underneath may not become apparent until an alcoholic pattern is well established. Even then, the underlying problems and the alcoholism itself may be denied by the afflicted person (just as most of us may avoid recognizing personal inadequacies)."67

The committee estimated that there are 33,000 alcoholics in West Virginia, of whom about five-sixths are men. The rate is about

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65 Id. at 282-28.
66 FOX AND LYON, ALCOHOLISM—ITS SCOPE, CAUSE AND TREATMENT (1955); YAKIBAS, ALCOHOLISM IS A SICKNESS (1950); HAGGARD AND JELLINER, ALCOHOL EXPLORED (1942).
29 alcoholics for each 1000 adults. About one-fourth of the alcoholics have developed physical or mental diseases or both as a result of prolonged drinking. The committee submitted a questionnaire about the problem of alcoholics to various interested groups in the state. The great majority of those who responded felt that additional services or facilities were needed in the state for the prevention of alcoholism and the rehabilitation of alcoholics. It is significant that there are more arrests in the state for offenses involving alcohol than for all other offenses combined.\(^68\)

The committee concluded that "The present use of our State Mental Hospitals is generally unproductive as a treatment program and should be regarded as a stop-gap measure." Hence the committee recommended that an independent commission on alcoholism be established, with authority, among other things, to encourage and coordinate services at the local community level, to carry on a broad educational program, to work for prevention and early treatment, and to establish a pilot outpatient clinic in a large center of population, with a staff consisting of "a part-time psychiatrist, a part-time internist, a full-time social caseworker, a full-time secretary receptionist, and a consulting psychologist who might be employed on a fee basis."\(^69\)

Because of limited funds the legislature has not yet created an independent commission on alcoholism. However in 1957 the legislature did take a step in this direction by authorizing the new department of mental health to establish a program for alcoholics.\(^70\) The statute closely follows the recommendations of the interim committee.

Fortunately for West Virginia there are very few drug addicts in the state. This may be because most of the state is distant from large cities and from the seacoast. The legislative interim committee concluded that drug addiction is not a problem in the state. Now and then an addict appears before a mental hygiene commission and is committed to a mental hospital.\(^71\) At the national level there are two somewhat different approaches to the problem of narcotics, corresponding to the two different attitudes toward alcoholism. One approach is punitive, looking upon addiction as

\(^{68}\) Id., passim.  
\(^{69}\) Id. at 43-44.  
\(^{71}\) In Kanawha county there is about one case a year.
a crime. Taking this approach, Congress has greatly increased the penalties for importation and sale of narcotics, especially sale to juveniles. Under the terms of legislation enacted in 1956, a defendant who is guilty of selling heroin to persons under 18 years of age is subject to a fine of as much as $20,000 and a prison sentence of at least ten years and as much as life, except that the jury may direct that the penalty be death.\textsuperscript{72}

This punitive approach has been strongly criticized by Dr. Herbert Berger, chairman of the Committee on Alcoholism and Narcotics of the New York State Medical Society.\textsuperscript{73} Dr. Berger is a spokesman for the other attitude toward drug addiction, the attitude that the addict is a sick person rather than a criminal. A different part of the federal statute on narcotics evinces this attitude: treatment centers for drug addicts have been established at Lexington, Ky., and Fort Worth, Tex. Persons guilty of addiction or other prisoners who are found to be addicts may be sent there for treatment and rehabilitation.\textsuperscript{74} The centers also accept voluntary patients, who of course do not forfeit their civil rights.\textsuperscript{75} A young addict who is apprehended may be permitted to apply for voluntary treatment, thus "keeping his record clean." Dr. Berger explains that one reason for the punitive legislation is that the public erroneously believes that narcotics incite the addict to violent crime, whereas in reality narcotics are a sedative rather than a stimulant. The typical addict is a person who is "... shy, uncompetitive, and congenitally incapable of facing adversity. He is a procrastinator, avoiding decisions and forever seeking to escape from his environment. While this is unnatural behavior, it is rather difficult to criticize: one finds it so frequently among us all. He closely resembles the food addict and is blood brother to the alcoholic. His abnormality is lessened and he approaches conformity while on drugs. ...\textsuperscript{76} Without condoning drug addiction Berger points out that our present laws deny to the addict any legal source of drugs, thus forcing him to buy in the underworld at extremely high prices. Profits are fabulous: an ounce of heroin purchased for $5 in China has sold for as much as $8,000 in New York City.

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\textsuperscript{73} Berger, \textit{To Dispel the Nightmare of Narcotics}, N.Y. Times Mag., July 8, 1956, p. 12.
\textsuperscript{74} 58 STAT. 699 (1944), 42 U.S.C. § 259 (1952).
\textsuperscript{75} 58 STAT. 701 (1944), as amended, 62 STAT. 1018 (1948), and 70 STAT. 622 (1956), 42 U.S.C. § 260 (Supp. IV, 1957).
\textsuperscript{76} Berger, \textit{supra} note 78.
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In order to get enough funds to satisfy his daily need for drugs, the addict often drifts into petty crime, such as bookmaking, running numbers slips, pilfering, or prostitution. The worst harm the addict does in society is introducing new persons to the habit, often juveniles, so that the addict may earn sufficient commissions on sales to these neophytes to assure his own daily supply. Thus our present punitive law fails to eliminate addiction and at the same time it keeps alive a flourishing illicit traffic in narcotics. To solve the narcotics problem Berger recommends establishment of more clinics on the federal pattern, staffed by "nurses, pharmacists, psychiatrists, vocational guidance experts, religious counselors, sociologists, psychologists, and physicians," except that in areas where there are only a few addicts, a single physician could carry out all these duties. These clinics should operate on the theory that the addict is a mentally sick person who is to be rehabilitated without drugs if humanly possible, but with them if nothing else can be done. Addicts should be encouraged to submit to voluntary hospitalization or outpatient treatment. This sort of approach to the problem has been successful in the United Kingdom. In that country there are only 279 known addicts, and the law permits them to be treated by physicians who may write prescriptions for them for narcotics. Hence there is no criminal system of illegal distribution and no proselytizing of new addicts.

Thus with the problem of drug addiction, as with the problem of alcoholism we see that efforts are being made to explain the habit in terms of psychology and to look upon the habitue as a sick person rather than as a criminal. Rehabilitation and not punishment is the modern approach.

VI. COMMITMENT OF MENTALLY ILL CRIMINALS; THE PROBLEM OF SEX OFFENDERS

There is still another group of persons who are sent to the mental hospitals—those who have perpetrated crimes. (In this section the verb "commit" is used only in the sense of "hospitalize". Also the term "mentally ill criminal" is used to designate persons who are committed by criminal courts and penal institutions, even though strictly speaking such persons are not criminals because they lack mens rea.) To be sure, some persons whose behavior violates the criminal law are committed to mental institutions by the civil

17 Id. at 20.
proceedings discussed above. Indeed, as a staff psychiatrist at the Menninger Foundation has pointed out, "Some of our patients are distinguishable from many of those on trial or in prisons only by the fact that a charge has not been filed against them." In this section we shall be concerned not with the lawbreakers who are civilly committed, but with persons who are committed at a pre-trial or post-conviction stage of a criminal proceeding.

Let us consider first those persons charged with crime who prior to trial are found to be mentally ill. The West Virginia statute provides: "If any person charged with or convicted of crime be found, in the court before which he is charged or was convicted, to be mentally ill, and if such court shall order him to be confined in one of the state hospitals, he shall be received and confined in it." Note that the determination of sanity is to be made by the court in these cases, not by the mental hygiene commission as in civil cases. In practice the court may decide this question by sending the defendant to a state mental hospital for examination and report, by calling in a local psychiatrist, or even by referring the question to a jury, as was done in the recent Linger case at Weston. Obviously the first two methods place considerably greater reliance on medical experts than does the third method. In other jurisdictions, as we shall see below, there are highly developed procedures for pre-trial psychiatric examination. The writer recommends that the West Virginia legislature study the present statute and consider an amendment spelling out a specific and uniform procedure for the trial courts to use in determining whether the defendant is mentally ill. By contrast the parallel section for the mentally defective criminal is quite specific, declaring that the court shall appoint two physicians to examine the defendant and ascertain whether he is mentally defective. As noted previously, the criminal who is found mentally ill must be held in jail while awaiting transfer to the mental hospital, whereas his fellow sufferer who is up for civil commitment—and who may have behaved in exactly the same way but not been arrested—is to be held in jail only in an emergency or when no other facilities are available. Our statute seems to be exactly backwards here—if the mentally ill per-

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79 W. VA. CODE c. 27, art. 6, § 2 (Michie 1955).
80 Id. art. 10, § 2(b).
81 Id. art. 6, § 2.
82 Id. art. 5, § 5. See text at note 41 supra.
son is so disordered that he has perpetrated a crime, that ought to be more reason, not less, for keeping him in restraint in a hospital or rest home rather than in jail. By contrast the mentally defective criminal fares much better: the court is to designate a reputable person "to convey such mentally defective person to the school and to protect such person until such time as he or she can be conveyed to the institution."83

A second group of mentally ill criminals consists of those who have been convicted and sent to prison and who become ill during a prison sentence (or whose pre-existing illness is then recognized for the first time). The West Virginia statute, as amended in 1957, provides that the warden of the prison shall send such a person to a state mental institution for examination.84 Presumably the term "institution" includes the West Virginia training school for mental defectives. This interpretation of the statute is appropriate when it is read in pari materia with chapter 27 on mentally ill persons, which includes an article on the training school and mental defectives. Thus the term "hospital" when used in the section on mentally ill convicts would include the training school. At the hospital an examining board observes the convict for a period of 30 days and determines whether he is mentally diseased. If the decision is negative, the convict is returned to prison. If positive, the board sends a detailed report of its findings to the county court of the convict's home county; thereupon the county court convenes the mental hygiene commission to decide whether the convict should be committed to the hospital. The commitment order is usually granted, since the statute directs the mental hygiene commission to give full faith and credit to the report of the examining board. If the convict recovers mental health before his sentence expires, he is returned to the prison with credit on his sentence for time spent at the hospital. On the other hand if his sentence has expired, he is simply discharged from the hospital.

It should be mentioned that in some states and in the federal system the prisons have a psychiatrist and a psychologist on their staff and may even have a psychiatric ward at the prison.85 These experts are helpful in providing guidance and counsel preliminary to parole or discharge.

83 Id. art. 10, § 2(b).
A third group of mentally ill criminals are those who go to trial and are acquitted on the ground of insanity. (Note that "insanity" is a legal term implying a sharp and clear division between the sane and the insane person. Psychiatrists deny that there is any such clear division and prefer the term "mental illness" or "mental disorder." This point will be further discussed below.) Defendants so acquitted, like those found mentally ill prior to trial, are required to wait in jail until they can be committed to the hospital. In the next section we shall consider the legal tests of insanity which are used in criminal cases.

The problem of sex offenders may be viewed as a special phase of the problem of mentally ill criminals. In 1957 the legislature of West Virginia, following the example of some 20 other states, enacted a special law applying to sex offenders. Included are persons convicted of incest, crime against nature (unnatural sexual relations with another person or with an animal), rape, obscenity, indecent exposure, and appropriate cases of contributing to the delinquency of a minor. If a person is convicted of any of these crimes, the court may turn him over to the department of mental health for pre-sentence "social, physical, and mental examinations." If the department "recommends specialized treatment for the person's mental or physical aberrations", the court either (1) commits him to the department for appropriate treatment at a mental hospital, or (2) places him on probation with the condition that he receive appropriate outpatient treatment at a psychiatric clinic. A person who has been committed to the department may be recommended for parole if it appears "that he is capable of making acceptable adjustment in society." The department is given authority to petition the court to order that the sex offender be confined for as long as five years beyond the maximum sentence provided for the offense, and to petition the committing court for confirmation of such an order. A hearing is to be held on the petition, at which the defendant is entitled to be present with counsel and expert witnesses; jury trial,

86 See Biggs, The Guilty Mind 139-42 (1955), quoting an interesting cross-examination of a psychiatrist that illustrates the difficulty of making sharp distinctions. See also Overholser, The Psychiatrist and the Law 45.
87 W. Va. Code c. 27, art. 6, § 2 (Michie 1955). See text at note 81 supra.
90 Id. § 6.
91 Id. § 10.
92 Id. §§ 12-13, 15.
however, is not permitted.\textsuperscript{93} The court is to appoint counsel for indigent defendants. (It would seem that counsel should be paid counsel, in accord with the defender statute,\textsuperscript{94} since indefinite commitment is as serious a deprivation of liberty as incarceration.) The department of mental health is required to review all cases of commitment at least once each year. It is possible, however, that a sex offender could be confined for life, by a series of orders for continuing commitment obtained every five years by the department of mental health.

There are several noteworthy things about this new statute. First it recognizes that of the whole mass of sex offenders, some should be accorded psychiatric treatment in preference to incarceration or ordinary probation. Here we have a new departure in penology in this state. This leads to the next point—that the statute seems to assume that sex offenders are more likely to be suffering from mental disorder than are criminals as a whole. It may well be asked whether persons who violate the sexual mores of society are any more likely to be mentally ill than those who violate the general mores. The answer lies perhaps in the nature of sex crimes, which are often irrational and queer, thereby suggesting mental illness. (In some states "sexual psychopath" laws have been enacted in an emotional atmosphere because of the shocking or disgusting nature of sex offenses\textsuperscript{95} but this did not occur in West Virginia.) Some states have applied the principles of mental examination of criminals and of indeterminate sentence to much broader classes of criminals, as we shall see below. In evaluating the West Virginia statute one should bear in mind that sex criminals are not a distinct group, but a heterogeneous collection of various kinds of personalities, since many different kinds of mental disorders can cause sexual deviations.\textsuperscript{96} For instance, the 60-year old man who is charged with contributing to the delinquency of a small girl may be a psychotic suffering from senile arteriosclerosis. Exhibitionism or indecent exposure is often the result of a compulsive neurosis deriving from early childhood relationships. And there are at least three kinds of persons who commit rape: the homosexual who overcompensates, the sadistic person, and the generally aggressive per-

\textsuperscript{93} Id. § 14.
\textsuperscript{94} W. Va. Code c. 62, art. 3, § 1 (Michie 1955).
\textsuperscript{95} Overholser, The Psychiatrist and the Law 48-50.
\textsuperscript{96} Guttmacher and Weihofen, Psychiatry and the Law 113 ff.; East, Sexual Offenders, in Mental Abnormality and Crime 177. See also Katz and Thorpe, Understanding People in Distress c. 6-7 (1955).
son who also commits other crimes such as burglary.97 Thus the new statute is fallacious if it assumes that sex offenders are a similar, homogeneous group. Also the psychiatrists affirm that many crimes other than sex offenses may have a sexual element or may be explained in terms of the basic sex drive. Despite these caveats about the new statute it should be regarded as a progressive piece of legislation. Indeed, it may be viewed as the first step toward enactment of a more general statute authorizing or even requiring commitment for observation of additional classes of criminals. In Massachusetts, for instance, pre-trial psychiatric examination is had of persons who are charged with a capital offense or who have previously been convicted of a felony, or who have twice previously been indicted.98 This is the famous Briggs law, first adopted in 1921. According to a study made in 1950 of 500 Briggs-law cases selected at random, 18% of those examined were found to be mentally ill, mentally defective, or of borderline mentality.99 Sweden, Denmark, and various other countries have similar laws providing for pre-trial medical examination of offenders to determine their mental condition.100 Massachusetts in addition has a “defective delinquent” law, first adopted in 1911, which authorizes a district attorney, at any time prior to the final disposition of a case, to apply for commitment of any defendant over the age of 15 who is charged with a crime, other than murder, which creates a danger to life or limb.101 The alleged defective delinquent is then examined by a psychiatrist, and if his finding is affirmative, a hearing is held to determine whether the defendant should be committed to an appropriate institution.102 Some states, such as Minnesota, have enacted legislation permitting civil commitment of dangerous sexual psychopaths independently of any criminal proceeding.103 The United States Supreme Court sustained the constitutionality of the Minnesota statute against objections that it denied due process and equal protection.104 It would seem, a fortiori, that the West Virginia statute is constitu-

97 Guttmacher and Weiropen, op. cit. supra note 96, at 116-117.
104 Minnesota v. Probate Court, 308 U.S. 270 (1940).
tional since it applies only where the defendant has been arrested and charged with crime.

The new West Virginia statute and comparable statutes elsewhere may also be viewed as a new approach to the problem of the habitual criminal or recidivist. (Professor Brown, in his careful study of the West Virginia habitual criminal statute made for the legislature, reports that the present statute is so harsh and severe that it is largely nullified in practice; moreover, when the statute is strictly applied, this results in discriminatory treatment of some criminals as compared with others with like records).\textsuperscript{105} Since experience has shown that prison life fails to reform such persons, the new legislation affords an opportunity to see whether psychiatric treatment and counselling will be more effective. This may lead one to ponder such things as the proper objectives of criminal law, the best methods of prison administration, and the nature of the criminal. Not only is the law a seamless web; in its ultimate problems it is a part of a greater web comprising all the social sciences.

VII. INSANITY AS A CRIMINAL DEFENSE

Our discussion now brings us to the situation where the defendant offers to prove that he is not guilty by reason of insanity. (On the use of the term "insanity" see text at note 86 supra. It is significant that the defense of insanity is usually presented only in capital cases, typically murder, because when on trial for a lesser offense, the defendant usually prefers the possibility of a fairly definite prison term to that of an indefinite stay at a mental hospital and the later stigma of having been there.\textsuperscript{106})

One of the important problems now being discussed in the field of criminal law is the problem of responsibility. When should the defendant be excused because of mental illness or defect? (In the next section we shall consider the related question of when the defendant should be excused because of youth.) This subject is the focal point of a great part of the recent writing on psychology and the law. Few rules of law are being subjected to as much criticism at present as is the McNaghten rule.\textsuperscript{107} This rule is the


\textsuperscript{106} Satten, The Concept of Responsibility, 4 Kan. L. Rev. 361, 368 (1956); Weihoffen, The Urge To Punish 143.

\textsuperscript{107} The name McNaghten is spelled at least four different ways. In the original report it is spelled "M'Naghten". Also the rule is sometime called the rules or the test(s).
classic common-law test of insanity. It is the law in the majority of the states, England, Canada, and most of the rest of the common-law world.108 It was declared to be the law of West Virginia in State v. Harrison in 1892 in the following language:

"A person partially insane is yet responsible for a criminal act, if at the time of the act he knows right from wrong, and knows the nature and character of the particular act and its consequences, and knows that it is wrong and is hurtful to another, and deserves punishment. In such case no mere irresistible impulse to do the act will exempt him from criminal responsibility for such an act..."109

Fourteen states and a few other jurisdictions accept as a corollary to the McNaghten test the "irresistible impulse" test.110 This test the West Virginia court specifically rejected in the last sentence quoted above. Under this corollary the defendant may be found insane, even if he did know the nature and character of the act and that it was wrong, if in addition it can be shown that he could not resist his impulse to do the act.

The critics of the McNaghten rule point out that it is based on the state of medical knowledge of England in 1843. They urge that the rule should be discarded, or at least reworded in favor of a rule which is consonant with modern scientific knowledge. Indeed, almost all of the science of psychiatry has been developed in this century. Thirty-six years ago the late Judge John C. McWhorter of Upshur County put the argument for modernization very clearly in his provocative essay, "The Test of Criminality as to Acts of Insane Persons—Is it Law, Barbarism or Both?":111

108 See text infra at note 143.
109 36 W. Va. 729, 730, 15 S.E. 982 (1892). Cf. the language of the original, Daniel M'Naghten, 10 Cl. & F. 200, 209, 8 Eng. Rep. 718 (1843): "The jury 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 crimes, 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 the committing of 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." It will be noted that the West Virginia test adds to the original the requirements that the defendant know the act is hurtful to another and that it deserves punishment. I will not comment on these differences, because in this state there are so few cases that in practical effect the difference in wording is probably insignificant.
"Whatever may have been the status of mental science when the Harrison Case was decided and whatever may have been the learning of the court on that subject at the time, it is certainly now well established that insane persons may have keen perceptions of right and wrong and may know the nature and character of their acts, whether they are wrong and whether they are hurtful to others, and understand clearly that they are wrong and may deserve punishment; and yet, in the grasp of a homicidal mania, the inhibitory thought may be so tardy and the will power so paralyzed, as to render such persons at the particular moment utterly incapable of choosing and following an opposite course.

"Laws shielding insane persons from criminal punishment simply reflect the conscience of an enlightened humanity which revolts at the idea of treating so harshly and cruelly such unfortunates. This refined, humane sentiment certainly rests upon the moral irresponsibility of such persons, not only on account of their incapacity to know right from wrong, but also on account of their mental incapacity to choose and follow the right course at the time of the act. It is their lack of moral responsibility that exempts them, and this moral irresponsibility may arise from their mental inability to choose and follow, as well as to know, the right from the wrong course."

Those who would reform the McNaghten rule may be divided roughly into two groups. The first group consists of those who would merely reword the rule so as to clarify it and include the concept of inability to control one's conduct (the idea of irresistible impulse, but broader). Judge McWhorter and the American Law Institute's Model Penal Code represent this viewpoint (to be discussed below). The second group proposes a more radical change: those in this group would altogether discard the McNaghten rule in favor of a simply worded test of responsibility based on psychiatric knowledge, such as the test adopted in the Durham case, viz., the defendant is not responsible if his conduct was the product of mental illness (this case will be discussed below).

Let us examine these proposals in more detail. First, however, it should be noted that the McNaghten rule itself does not mean the same thing to all people. Some, particularly its more severe critics, say that the rule fails to take account of the defendant's ability to control his conduct even when he knows the nature and character of his act and knows that it is wrong. These critics point to the development of the irresistible impulse corollary as a recognition that the McNaghten rule standing alone falls short
in this respect. Furthermore, they say, even with the irresistible impulse test added, the McNaghten rule still falls short for two reasons: (1) irresistible impulse suggests a sudden urge, whereas in reality the impairment of a person's capacity to control his antisocial desires may develop gradually so that his control gives way in a moment of unusual stress; (2) the rule fails to take account of the unconscious mind, which is a potent force in determining conduct.112 By contrast some authorities aver that the McNaghten rule itself, properly interpreted, includes lack of capacity to control one's conduct.113 Professor Hall, for example, would substitute the following rule for the McNaghten rule:

“A crime is not committed by anyone who, because of a mental disease, is unable to understand what he is doing and to control his conduct at the time he commits a harm forbidden by criminal law. In deciding this question with reference to the criminal conduct with which a defendant is charged, the trier of the facts should decide (1) whether because of mental disease, the defendant lacked the capacity to understand the physical nature and consequences of his conduct; and (2) whether, because of such disease, the defendant lacked the capacity to realize that it was morally wrong to commit the harm in question.”114

It is significant that Hall does not regard this as a change in the McNaghten rule but merely a clarification of its true meaning.

In defense of the McNaghten rule it is said that in practice it is not strictly applied, hence just decisions usually result. Some of the witnesses who appeared before the British Royal Commission on Capital Punishment observed that juries apply the rule liberally where proof of mental illness is strong, whereas in the borderline cases if the mentally ill defendant is convicted, he may nevertheless be saved from imprisonment on the advice of a medical examination after trial or be saved from execution by a reprieve from the Home Secretary.115 Justice Frankfurter, appearing before the same Commission, commented that much the same practice is common in some American states, except that the governor stands in the place

112 On the unconscious mind, see text following note 12 supra.
113 Hall, Psychiatry and Criminal Responsibility, 65 Yale L.J. 761, 774 (1956); Davidson, Criminal Responsibility; the Quest for a Formula, in Psychiatry and the Law (Hoch and Zubin eds. 1955); 2 Stephen, History of English Criminal Law 171 (1888).
114 Hall, supra note 113, at 781.
of the Home Secretary.\textsuperscript{116} However, Frankfurter went on to comment as follows:

"If you find rules that are, broadly speaking, discredited by those who have to administer them . . . then I think the law serves its best interests by trying to be more honest about it . . . to have rules which cannot rationally be justified, except by a process of interpretation which distorts and often practically nullifies them . . . is not a desirable system . . . I am a great believer in being as candid as possible about my institutions. They are in large measure abandoned in practice, and therefore I think the M'Naghten Rules are in large measure shams. That is a strong word, but I think the M'Naghten Rules are very difficult for conscientious people, and not difficult enough for people who say, 'We'll just juggle them.'"\textsuperscript{117}

We now consider the view that the McNaughten rule does not include the test of capacity to control one's conduct and that the rule should be changed to include this concept. The American Law Institute proposed the following basic rule on responsibility in its \textit{Model Penal Code}, tentative draft No. 4 (1955):\textsuperscript{118}

"Section 4.01. Mental disease or defect excluding responsibility

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

"(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

"Alternative formulations of paragraph (1).

"(a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible.

"(b) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or is in such state that the prospect of convic-

\textsuperscript{116} See also \textit{Robinson, Law and the Lawyers} 74-79 (1935).
\textsuperscript{117} \textit{Id.} at 102; also appears in \textit{Frankfurter, Of Law and Men} 95 (1956).
\textsuperscript{118} The draft, with appendices, appears in 46 \textit{J. Crim. L.}, C. & P.S. 450 (1955).
tion and punishment cannot constitute a significant restraining influence upon him.”

This formulation of the rule is subject to possible future amendment by the American Law Institute; however, the thorough study and discussion which preceded the presentation of the draft, as well as the outstanding ability of Professor Wechsler, the reporter, argue that the final form will be similar to the principal formulation above. The Supreme Court of Mexico has recently adopted a rule very much like that formulation, declaring that even if the defendant knew the nature and quality of his act and that it was wrong, he nevertheless cannot be found guilty “if by reason of disease of the mind, defendant has been deprived of or has lost the power of his will which would enable him to prevent himself from doing the act”.

A few years before the American Law Institute study of criminal law was launched in the United States, a Royal Commission on Capital Punishment was created in England to study the question of abolition of capital punishment and related matters. The Commission was made up of a distinguished group of subjects headed by Sir Ernest Gowers. The Commission decided to include in their study insanity and mental deficiency as criminal defenses, since it was believed that the existence of capital punishment sometimes encouraged the use of these defenses. After a very thorough study and after hearing the testimony of medical and legal representatives and public officials, the Commission reached the following conclusions: (1) that the test of responsibility laid down by the McNaughten rules is so defective that the law ought to be changed; (2) if the rules are amended, it would be desirable to add a test of volition, i.e., that the accused should be exonerated or held only partially responsible if he was incapable of preventing himself from committing the act (the minority of the Commission members were in favor of going no further than this change in the law, a view quite similar to the ALI proposal; the New Mexico court

120 See text at note 106 supra.
121 The first three conclusions are found in the COMMISSION’S REPORT 116 (1958).
122 The doctrine of partial responsibility is the law in Scotland. Cf., MORELAND, THE LAW OF HOMICIDE 298 et seq. (1952); he proposes to classify mental disorder into degrees for purposes of administration of criminal law, with only mental disorder of a high degree being permitted as a defense to the most heinous crimes.
123 Supra note 119.
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cited the Royal Commission minority view); (8) that a preferable amendment would be to abrogate the McNaghten rules and "leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not be held responsible"; (4) whatever rule is used, mental deficiency should be expressly assimilated to insanity in relation to the question of criminal responsibility;124 (5) the judge should have the power to raise the issue of insanity when the defense does not do so;125 (6) the present system of medical inquiries after conviction should be retained as a safeguard in those cases in which neither the defense nor the judge raises the defense of insanity.126

Although in England the recommendations of the Royal Commission have been largely rejected by Parliament, they have had some influence in this country, especially in the literature on insanity and the law. In Durham v. United States,127 the Court of Appeals of the District of Columbia relied in part on the Royal Commission Report in overruling the McNaghten irresistible impulse test and declaring a new test of insanity.

Indeed, the Durham case is the rallying point for those who would completely discard the McNaghten rule. Few cases in recent years have excited more widespread attention and comment.128 In the Durham case the court said that henceforth the test would be "simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect..."129 The case is well worth reading as an illustration of the extent to which nonlegal materials may be used in a judicial opinion.130 Also it is remarkable in that the part of the opinion declaring the new test appears to be obiter dicta, since the court could have decided only the question of which side had the burden of proof of insanity once this defense was presented. Also, the case was apparently reargued for the purpose of developing the more important question. It looks as though the court of appeals wanted to overrule the McNaghten-

125 Id. at 156.
126 Id. at 129.
127 214 F.2d 862 (D.C. Cir. 1954).
129 214 F.2d 874.
130 See section I supra.
irresistible impulse test and seized on this case as a vehicle for doing so. Such is the judicial process. The Durham rule does have some American precedent: a similar test was announced in New Hampshire in 1869,131 apparently partly on the basis of correspondence between Justice Doe and Dr. Isaac Ray, a leading psychiatrist of that day.132 Professor Weihofen enthusiastically urges adoption of the Durham rule in other jurisdictions.133 Solicitor General Sobeloff, (now a judge on the Fourth Circuit Court of Appeals) approved the Durham decision in a very good article.134 Leading forensic psychiatrists have approved the decision,135 although it does not go as far as the recommendation of the Group for the Advancement of Psychiatry that the test simply be: “No person shall be convicted . . . when at the time he committed the act . . . he was suffering from mental illness.” Mental illness is defined as “an illness which so lessens the capacity of the person to use . . . his judgment, discretion and control in the conduct of his affairs as to warrant his commitment to a mental institution.”136 Judge Biggs of the Third Circuit Court of Appeals, who has made a thorough study of the subject of insanity and the law, approves the Durham rule but fears that certain language in the opinion may lead to difficulty in future administration of the rule.137 Justice Douglas believes the significant thing about the Durham rule is that it “enables the psychiatrist to testify in his own language and to give evidence that is relevant by the standards known to him.”138

Advocates of reform of the McNaghten rule, taking a comparative law approach,139 point to the law of various European countries as being more enlightened than the McNaghten rule. In the

132 Reik, The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease, 63 YALE L.J. 183 (1953).
133 Weihofen, THE URGE TO PUNISH, passim.
Netherlands, Denmark, Norway, and Sweden the test of responsibility is whether the defendant had a mental illness or mental defect at the time he committed the act. The answer to these questions is determined upon medical evidence. This test is similar to that proposed by the Group for the Advancement of Psychiatry. In Belgium, France, Italy, and Switzerland the defendant is not responsible if he lacked understanding and control of his act. Thus in all these countries the test of responsibility is more in conformity with current psychiatric knowledge than is the McNaghten test. In the common-law world, the conventional McNaghten rule obtains in Canada, New Zealand, India, Pakistan, Ceylon, and three states of Australia. The McNaghten rule plus the irresistible impulse test obtains in South Africa, Southern Rhodesia, and the other three states of Australia.

If so much is wrong with the McNaghten rule, why then has it not been changed before now? Various explanations have been offered. Some say the courts have merely adhered to precedent in the more conservative common-law tradition. Hall declares that the McNaghten rule conforms to common sense, reflecting the intelligent thinking of generations. Moreland asserts that the procedural difficulties of administering any other rule would be very great. Weihofen offers the explanation that the McNaghten rule reflects the attitude of society that the offender should not “get off” on grounds of insanity when he has committed a serious crime, except in very clear cases. This attitude he calls “the urge to punish” and compares it to the desire for capital punishment. A change in the rule, Weihofen believes, calls for a more humane and informed public attitude about crime and mental disorder. A psychiatrist offers the related viewpoint that the criminal law with its “legal machinery of guilt-fastening and penalty-imposing” is a continuation of traditional methods of rearing children rather than a rational choice of constructive social action in dealing with offenders.
British psychiatrist expounds the theory that the criminal law is a deterrent to keep the average person law-abiding rather than merely the criminally inclined.\textsuperscript{148} It follows that trial and sentencing is a symbolic ritual in which the criminal is the scapegoat for the law-abiding members of the community. And at this point the argument broadens into more general questions that vex society, questions of crime and criminology that are beyond the scope of this paper. It is to be hoped that more and more lawyers will read books and articles on criminology, for it should be recognized that progress in the law cannot come merely from looking backward at the precedents and extending to new situations the principles there found.

What does all this mean for West Virginia? Does our state have the best rule it could have on insanity and the law, from the point of view of justice to the accused? Should the rule be applied to juveniles, as it was in a recent case at Wheeling? (This case will be discussed in the next section.) Does the rule apply to the mentally defective as well as the mentally ill? In view of the Durham decision and the growing pressure from the kind of legal and medical opinion which influenced this decision, it seems probable that many courts will be asked to reconsider their tests of insanity. Whatever decision the Supreme Court of Appeals or the legislature of West Virginia makes when the issue is presented, there will certainly be plenty of material, legal and nonlegal, to work with. Recently the Ninth Circuit Court of Appeals rejected the Durham rule, preferring to abide by the McNaghten precedent.\textsuperscript{149} On the other hand, Minnesota has cited the Durham case as authority in an unusual civil case.\textsuperscript{150} A husband and wife owned a farm as joint tenants with right of survivorship. The wife had children by a former marriage. The husband killed the wife, and in a prosecution for murder he was found insane at the time of trial and therefore could not be prosecuted. The children by the former marriage brought suit for declaration of a constructive trust in their favor as to half the real estate. The lower court applied the right-wrong

\textsuperscript{148} West, A Psychological Theory of Law, in Interpretations of Modern Legal Philosophies 767 (Sayre ed. 1947).

\textsuperscript{149} Anderson v. United States, 237 F.2d 118, 127-28 (1956). The issue was not presented squarely and probably did not receive the attention it deserved. Moreover, the persuasiveness of the opinion is somewhat lessened by an unseemly tone of sarcasm.

\textsuperscript{150} Anderson v. Grasberg, 78 N.W.2d 450 (Minn. 1956) (5-2 decision). See Comment, 45 Geo. L.J. 520 (1957).
test in determining whether the husband was insane at the time of the homicide, concluded that he was insane, and held for the plaintiffs. The supreme court reversed, saying "We feel that the better rule to be applied to the case before us is that the slayer will not be barred from taking the property where his unlawful act was the product of mental disease."\textsuperscript{151} The court explained that this holding did not change the rule in criminal cases.

VIII. Juvenile Delinquency and Child Welfare;
Juvenile Courts

Juvenile delinquency and child welfare are two faces of the same coin. The purpose of child welfare legislation is to promote the mental, physical and social health of children, thus tending to prevent delinquency. On the other hand when guidance and supervision are needed for the juvenile offender, the juvenile courts and industrial schools depend on the social worker specializing in child welfare. It is appropriate to consider juvenile delinquency at this point, for alongside the postulate that the mentally disordered are not to be held responsible for crime stands the related postulate that immature offenders are likewise to be excused, since they have not developed full responsibility—or at least that these young people are to be treated in special ways appropriate for their years.

Few problems are more in the public eye at present than juvenile delinquency. In 1953 a special subcommittee of the Judiciary Committee of the United States Senate was appointed to study the problem. This subcommittee reported that, according to figures compiled by the Children's Bureau of the Department of Health, Welfare, and Education, the number of children appearing in juvenile courts increased from 300,000 in 1948 to 435,000 in 1953, and that only ten per cent of this increase could be attributed to the increase in juvenile population.\textsuperscript{152} Figures for Kanawha County, West Virginia, correspond to the national trend: the number of youths appearing before the Kanawha Juvenile Court increased from 103 in 1950 to 244 in 1954.\textsuperscript{153} The Senate subcommittee also reported that there are at least three juvenile offenders known to the police who are not referred to juvenile courts for each offender who is referred there.\textsuperscript{154} For the year 1956 the F. B. I. reported that major

\textsuperscript{151} 78 N.W.2d 461.
\textsuperscript{152} S. Rep. No. 61, 84th Cong., 1st Sess. 5 (1955).
\textsuperscript{153} Kanawha Welfare Council, Our Troubled Children 6 (1957).
\textsuperscript{154} Note 152 supra.
crimes in the United States increased by 13.3 per cent over 1955, and that nearly 46 per cent of the arrests in such cases in urban areas were of juveniles under 18 years of age. In 1953 more than half of all automobile thefts were committed by juveniles.\(^{155}\) While delinquency was at one time chiefly a big-city problem, this is no longer true; delinquency in jurisdictions of less than 100,000 increased by more than 50 per cent from 1948 to 1952, while increasing only 29 per cent in jurisdictions of 100,000 or more.\(^{156}\) A representative of the American Psychological Association told the Senate subcommittee that "For every juvenile who actually engages in delinquent behavior—or who is caught in delinquent behavior—there are hundreds or thousands who may have delinquent tendencies or who fail in subtle and socially harmless, but still dreadfully crippling ways, to make a full and creative adjustment to life."\(^{157}\)

A large amount of material is available on the subject of juvenile delinquency.\(^ {158}\) From the many studies which have been made certain conclusions may be drawn. First is that the delinquent is usually a person who is in conflict with himself, his parents, the community, or a combination of these. These conflicts are caused by the various forces which interact to shape the personality of the child in his first five or six years. One of the most important influences is the child's relationship with his parents. When this relationship is poor or is disrupted, the child feels rejected and may become hostile, suspicious, and aggressive. Studies have shown that it is not so much the broken home which breeds delinquency as the home in which the child is rejected.\(^ {159}\) Another important factor is the neighborhood: such undesirable features as overcrowding, lack of sanitation, and presence of adult and juvenile lawbreakers usually characterize slum neighborhoods, whether found in the older dwellings in a city or along the banks of a creek leading up the hollow. It takes unusual parental leadership to produce well balanced children in such an environment.\(^ {160}\) Another factor is the physical continuity of the home: too frequent moves make a child feel rootless. One 13-year old delinquent complained, "We've moved


\(^{157}\) Quoted in Fine, 1,000,000 Delinquents 26 (1955).

\(^{158}\) The works of Sheldon and Eleanor Glueck are outstanding, such as Unraveling Juvenile Delinquency (1951).

\(^{159}\) Fine, 1,000,000 Delinquents 75-82.

\(^{160}\) Beck, supra note 156, at 13.
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so much in the last few years that I don't know where I belong. I have no friends. They've made their own lives before I get there."¹⁶¹ Also such handicaps as defective mentality, organic disease of the nervous system, abnormal size for one's age, and speech defects may cause delinquency insofar as they "impair the child's success in society."¹⁶²

Still another factor is the morality of the adult community.¹⁶³ When adults flout the law or greatly overemphasize the material gains in life, they set a bad example for youth. Consider the typical attitudes of adults toward violation of traffic, parking, and highway regulations. And what about the federal income tax? Too many adults set an example of "not getting caught." Also the periodic scandals in state, local, and even national government are disillusioning to youth.¹⁶⁴ Nor are business and labor groups without blame in this connection, as recent congressional investigations have revealed. This descripton of the moral climate of the United States should strike home to lawyers, for they stand in positions of leadership in the local community and in government at all levels, and they often advise the conduct of their clients for good or ill. Indeed, the ethics of lawyers themselves are a part of the moral environment; it is noteworthy that the American Bar Association is currently making a comprehensive re-examination of the canons of ethics with a view to extending them to cover new kinds of situations.¹⁶⁵

Such are the chief causes and patterns of delinquency. What are the solutions to the problem? Just as the causes of delinquency are many, so also are the methods of prevention and control.¹⁶⁶ There are two general approaches, treatment of the individual and improvement of the general environment.¹⁶⁷ These two approaches overlap to some extent. The individual approach emphasizes such things as child guidance clinics, "big brother" projects, and better juvenile courts and state training schools (the term "reform school"

¹⁶¹ Fine, 1,000,000 Delinquents 100.
¹⁶² Pearce, Physical and Mental Features of the Juvenile Delinquent, in Mental Abnormality and Crime 280 (Radzinowicz & Turner eds. 1944).
¹⁶³ Fine, 1,000,000 Delinquents 115.
¹⁶⁶ The Kanawha Welfare Council offered 52 proposals. Our Troubled Children 67-73 (1957). The council is an association of social agencies, civic groups, public officials, and interested citizens.
is being discarded). The environmental approach favors better recreational facilities, slum clearance and urban renewal plans, and improvement of the public schools, e.g., in training teachers to recognize and help potential delinquents. At times new legislation is proposed to combat delinquency, such as the recent war on "comic books." Another example is the statute recently adopted in West Virginia imposing civil liability on parents for their children's acts of willful destruction of property. While laws of this kind help property owners, they are often ineffective in helping the child, since the original cause of his delinquency remains untreated.

Juvenile Courts. Of special interest to lawyers and judges is the juvenile court movement. The first true juvenile court was established in Chicago in 1899, although there had been forerunners elsewhere before that time. The idea gradually spread to other states, until by 1945 there were juvenile courts in every state. The juvenile court is a court of equity, and the juvenile is a ward of the court. The latter concept may be traced to the historic theory that the king was the ultimate parent of all minors and that he acted in loco parentis for their welfare. Roscoe Pound has called the juvenile court "the greatest advance in judicial history since the Magna Charta." A judge of the Children's Court of Westchester County, New York, wrote as follows:

"The general philosophy of the juvenile court rejects the theory that we are engaged basically in the enforcement of the criminal law. Primarily these courts were created to shield children from criminal court surroundings; to bring them into new tribunals where they might be considered not as criminals,

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169 Gellhorn points out that there is no proof that reading comic books causes juvenile delinquency. Indeed, no reading is a more pressing danger than bad reading. Gellhorn, Individual Freedom and Governmental Restraints 103 (1956).
171 Fine, 1,000,000 Delinquents 137; U.S. Children's Bureau, Social Security Adm., Dept of Health, Education, and Welfare, Parents and Delinquency (Witmer ed. 1954).
but as children in need of aid, protection, and guidance; tribunals in which a new type of individualized justice might be practiced, dependent not upon the offense committed, but upon the needs of the child; tribunals where programs of education and social work designed for the rehabilitation of homes would supplant time-dishonored sentencing of children and the further breakdown of the home.

"The entire emphasis was placed upon the integration of moral training, education, social work, and physical and mental hygiene in the court or authoritative setting. A new concept appeared—the concept of a legal tribunal wedded to the social sciences; a combined socio-legal institution. . . ."  

The system of juvenile courts in West Virginia leaves much to be desired. Provision for juvenile courts was first made in 1915, and the law was considerably revised in 1936 and again in 1939 as part of a general statute on child welfare. The legislature conferred juvenile court jurisdiction upon the circuit court or a subordinate court of record in each county. Jurisdiction of the juvenile court is limited to petitions to have a child declared delinquent or neglected, as defined by statute. (Proposed expansion of this jurisdiction will be discussed below.) The statute also provides: "Except as to a violation of law which if committed by an adult would be a capital offense, the juvenile court shall have exclusive jurisdiction to hear and determine criminal charges, including a charge of violation of a municipal ordinance, against a person who is under eighteen years of age at the time of the alleged offense." The juvenile court may retain continuing jurisdiction of such offenders until they reach the age of 21, unless they are discharged or are committed to a correctional or other institution. The effectiveness of the age provision has apparently been undermined recently by a court decision and an opinion of the attorney general.

\[\text{177} \text{W. Va. Acts 1915, c. 70; W. Va. CODE c. 46A (Barnes 1923).}\]
\[\text{180} \text{W. Va. CODE c. 49, art. 5, § 1 (Michie 1955).}\]
\[\text{181} \text{Id. § 2.}\]
\[\text{182} \text{Id. § 3.}\]
\[\text{183} \text{Id. art. 5, § 2, and art. 1, §§ 3, 4.}\]
\[\text{184} \text{Id. art. 5, § 3.}\]
\[\text{185} \text{Id. § 2.}\]
\[\text{187} \text{W. Va. OPER. ATT'TY GEN., Feb. 22, 1957. See Note, "Exclusive" Jurisdiction of the Juvenile Courts, 59 W. VA. L. REV. 862 (1957). The Wade case held that the circuit court need not transfer a juvenile burglary case to itself sitting as juvenile court, since this would be a needless formality. The Attorney General then opined that the juvenile court statute does not preclude prosecution of juveniles in the circuit court.}\]
A decision such as this tends to obscure the difference in treatment which the legislature intended as between adult and juvenile offenders. Part of the philosophy of the juvenile court is lost when the juvenile is tried in open court like an adult offender.

The juvenile court statute also provides that a child under 16 shall not be confined in a jail or police station, except that if he is over 14 and has been committed to an industrial home or correctional institution, he may be held in the "juvenile department" of the jail while awaiting transportation.\(^\text{183}\) Few counties provide a suitable "juvenile department", hence children are held in common jails in many places in this state.\(^\text{184}\) Moreover some of the child shelters—the places where delinquent and neglected children are supposed to be held temporarily—fall short of desirable standards. Frequently the county courts for political reasons appoint poorly qualified persons as superintendents. Often the atmosphere of these shelters is more that of a prison than a shelter. The statute lacks any provision for supervision of the shelters by the state child welfare authority, and even the local authority may give advice only at the instance of the county court.\(^\text{185}\)

The Department of Public Assistance, through its Division of Child Welfare, plays an important part in administration of the juvenile courts. Unfortunately relations between the juvenile court judges and the D. P. A. are often strained;\(^\text{186}\) this trouble seems to stem in part from a difference in professional viewpoint and in part from unsatisfactory statutory provisions. Social workers from the Child Welfare Division usually prepare the petition to have a child declared delinquent or neglected.\(^\text{187}\) The local child welfare director and his assistants serve as probation officers for the juvenile court,\(^\text{188}\) whereas prior to 1936 the juvenile judge could appoint his own probation officers.\(^\text{189}\) A child welfare worker serves as parole officer for a youth paroled from a state industrial school—often without the knowledge of the juvenile judge who sent the youth

\(^{183}\) W. VA. CODE c. 49, art. 5, § 15 (Michie 1955).
\(^{184}\) Calhoun, Report of Committee on Juvenile Delinquency, W. VA. BAR Ass'n 1956 Ann. Rep. 50, 54. The subject was on the program for the 1957 meeting. See generally McCormick, Children in Our Jails, 261 ANNALS 150 (1949); Fine, 1,000,000 Delinquents 285.
\(^{185}\) W. VA. CODE c. 49, art. 6, § 13 (Michie 1955).
\(^{186}\) Calhoun, supra note 184, at 53. See Hammond v. Dep't of Public Assistance, 95 S.E.2d 345 (W. Va. 1956).
\(^{187}\) W. VA. CODE c. 49, art. 5, § 7, and art. 6, § 1 (Michie 1955).
\(^{188}\) Id. art. 5, § 17.
\(^{189}\) W. VA. rev. CODE c. 49, art. 2, § 5 (1931).
there. A neglected child may be committed to the custody of the D. P. A.\textsuperscript{190} The juvenile judges complain that the child welfare workers have divided loyalties, sometimes following the policies of the D. P. A., which employs them, rather than the policies of the juvenile court. On the other hand the social workers complain that some judges lack a basic understanding of modern concepts of child welfare. To help this ambivalent situation it would be well to restore to the juvenile judge the power to appoint his own probation officers, as recommended by Judge Calhoun's committee of the West Virginia Bar Association.\textsuperscript{191} This is the practice in most states.\textsuperscript{192} It is anomalous that the circuit judge may appoint his own probation officers but the juvenile judge may not. Of course all probation officers should be properly qualified persons selected according to merit and removable only for cause. It has also been proposed that only specially qualified lawyers should serve as juvenile judges.\textsuperscript{193} A few states have created a state-wide juvenile court with a small number of judges who if necessary go on circuit, hearing only juvenile cases.\textsuperscript{194} This reform assures greater uniformity in disposition of juvenile cases throughout the state as well as usually increasing the competence of the judges.

Another proposal for improvement of juvenile courts is that their subject matter jurisdiction be expanded. The omnibus child welfare bill presented to our legislature in 1955 would have added exclusive jurisdiction of adoptions and concurrent jurisdiction of custody matters (habeas corpus proceedings). Another kind of extension is to add jurisdiction over parents of juvenile offenders,\textsuperscript{195} as might have been done in the new West Virginia statute imposing civil liability on parents for vandalism of their children.\textsuperscript{196} Another possibility is to remove from the juvenile court statute the exception for offenses which if committed by an adult would be punishable

\textsuperscript{190} W. VA. CODE c. 49, art. 6, § 4 (Michie 1955).
\textsuperscript{191} Note 184 supra, at 54.
\textsuperscript{193} Fine, 1,000,000 \textit{Delinquents} 278.
\textsuperscript{196} W. VA. Acts 1957, c. 1; W. VA. CODE c. 55, art. 7A (Michie Supp. 1957).
by death. 197 The mere act of homicide or rape 198 does not transform a juvenile into an adult; on the contrary such behavior merely shows that the juvenile has serious emotional conflicts, or possibly a mental illness or defect.

At least two juveniles have been indicted for murder in West Virginia in recent years. One case involved a 15-year old boy in Nicholas County who pleaded guilty and was sentenced to the state penitentiary. 199 The other involved a 14-year old boy at Wheeling who pleaded not guilty, presenting insanity as his defense. 200 The boy was sent to Weston State State Hospital for psychological and psychiatric examinations. The psychological report said in part:

“This is an emotionally immature individual who deals with situations in an apparently passive manner, lacking in flexibility or alterations of behavior despite any circumstances. Feelings of insecurity and rejection cause a trend toward inhibiting emotional response. There is dependency upon the mother figure and antagonism toward the father. He is unable to identify himself with others in a satisfactory manner and may resort to overt behavior to compensate.”

The psychiatric report said in part:

“It is our opinion that the subject, a constitutionally defective immature identical twin, was insane before, during and after the commission of the confessed criminal act, and bereft of reason, and as a result of this mental disorder or insane state of mind, he was unable to know that the act was wrongful, nor could he have refrained from so doing by reason of mental defect. He is in need of further hospitalization. . . .

“Did he know the nature and quality or character of the particular act? Yes. He knew what instruments or weapons to select to use, how to use them for the purpose unconsciously demanded, but he did not know, could not know, how this compelling and required satisfaction could be or would be achieved; he was directed and controlled once the floodgates of unconscious control were broken by a blind, unreasoning


200 State v. Thomas Williams, not reported (Intermediate Court, Ohio County, 1956). The discussion of this case is based on a letter from Judge David A. McKee, dated Jan. 29, 1957, and enclosures, a letter from Dr. H. Sinclair Tait dated Feb. 20, 1957, and letters from William Callahan, defense counsel, dated Jan. 14 and Feb. 18 1957.
fury, sadistic in nature, uncontrolled, and this urge, this internal energy, basically sexual and with no relationship to time, had to be unconsciously satisfied, i.e., he was forced, because of the aforementioned defect of reason and loss of any defenses by the very nature of this urge or energy, to achieve internal satisfaction, peace of mind, by means of killing. This individual has still to work out his basic internal needs with respect to his available resources, which are still defective and inadequate, and he has not been restored to sanity."

At the trial this state psychiatric report was permitted to be introduced only as defense testimony, while the prosecution presented strong evidence by prominent psychiatrists from Wheeling and Pittsburgh that the defendant was sane and that his behavior stemmed from character defect rather than a psychosis. (This illustrates the sort of battle of expert witnesses which psychiatrists object to\textsuperscript{201} and which may be somewhat bewildering to the jury.) Instructions based on the \textit{McNaghten} rule\textsuperscript{202} were given, and the defendant was found guilty of first degree murder and sentenced to the penitentiary at Moundsville.

The criticism of the \textit{McNaghten} rules set out previously\textsuperscript{203} seems to apply especially in this case, since there was strong evidence of mental disorder. Moreover the jury may have felt that the public desired a conviction,\textsuperscript{204} because of the shocking character of the homicide (the victim was a 13-year old chum who was struck with a brick, beaten with a board, and finally stabbed in the stomach). If the law had permitted the case to be tried by the juvenile court,\textsuperscript{205} a medically oriented decision might have been acceptable to the community; also the sensational publicity attendant upon the trial could have been avoided.

In commenting upon the case Judge McKee expresses this view:

"In conclusion, may I suggest that it would well behoove society to turn its attention and service to prevention by providing institutions where neglected children can be trained in good character instead of finding mental defect to excuse

\textsuperscript{201} \textit{Guttmacher and Weihofen, Psychology and the Law} c. 11; Davidson, \textit{Forensic Psychiatry} c. 22 (1952). Cf. the Continental system of court-appointed expert medical witnesses, the Massachusetts law (text \textit{supra} at note 98), and current proposals of the American Bar Association for appointment of medical experts by the court from a panel selected by the local medical association. These plans tend to eliminate the battle of experts.
\textsuperscript{202} As declared in State v. Harrison, 36 W. Va. 729, 15 S.E. 982 (1892).
\textsuperscript{203} See text at note 111 \textit{supra}.
\textsuperscript{204} See text at note 146 \textit{supra}.
\textsuperscript{205} See text at note 175 \textit{supra}.

\hspace{1cm}
wrongdoing. Of course, a subject whose animal instincts have
developed, who has no moral stamina or self-restraint is men-
tally subnormal, but this is character defect and not a mental
disease and must be remedied by character training. Fear of
consequence is, and always will be, the only deterrence from
wrongdoing for those of bad character and society must be
protected and we dare not put the welfare of one individual
ahead of public welfare. I call attention to the extent to which
free nations are going in spending money and training men to
inspire fear in the minds of aggressive nations and keep them
in restraint.\textsuperscript{208}

In this connection it is significant that a treatment center for
emotionally disturbed children is being established at Charleston
to serve West Virginia, being located at the former Hillcrest home
for tubercular children.

Before leaving the subject of juvenile offenders and juvenile
courts we should consider the post-juvenile or young adult offend-
ers.\textsuperscript{207} The youth authority developed in California and other jurisdic-
tions may be regarded as an upward extension of the juvenile
court concept to include those a few years older. In West Virginia
the establishment of a forestry camp for boys in the 16-21 age
 bracket is the first step in this direction.\textsuperscript{208} The American Law
Institute proposes as a part of its Model Penal Code a provision
permitting specialized correctional treatment for young adult of-
fenders.\textsuperscript{209} In England the Borstal system for youthful offenders,
named for the town where the plan was first tried, has yielded
very good results. Essential to such programs are flexible adminis-
trative provisions in the governing statute and employment of com-
petent personnel at the youth camps.

IX. CONCLUSION

Space permits only brief mention of other topics, some of which
are equally as important as those developed here. In the field of
probation and parole, for instance, a very effective working rela-
tionship has been developed between the courts and social workers.
Although the first probation law was adopted by Massachusetts in

\textsuperscript{208} Letter to the author dated Jan. 29, 1957.
\textsuperscript{207} See generally Bloch and Flynn, Delinquency c. 16 (1956); Teeters
\textsuperscript{209} Tent. Draft No. 7 (1957). The appendices to this draft describe the
various youth authorities, especially that of California.
1878, only three other states had followed suit by the time the first federal law was enacted in 1925.\textsuperscript{210} In West Virginia the first effective probation and parole law was enacted in 1939; it provided for a director of parole and a field staff to supervise parolees.\textsuperscript{211} The present parole system is hampered by lack of funds, hence the case load of most parole officers is too large for them to do a first-rate job. The three-man board of parole, successor to the director, now requires that parole officers have considerable training or experience in social work.\textsuperscript{212} Probation, as distinguished from parole, has been well developed in some counties of the state, but in others is scarcely used at all. Thus when two similar crimes are committed in two different counties, one defendant may get probation while the other gets a sentence in the county jail or state penitentiary. Only 29 of the 55 counties have regular probation officers (and some of these are also employed as state parole officers); in the other counties probationers are variously required to report to the sentencing judge, the sheriff, a deputy sheriff, and even a lady court reporter.\textsuperscript{213} Probation ought to be further developed in all counties of the state with well-trained probation officers in charge, in the interest of uniformity of administration of justice and better rehabilitation of criminals.

In the area of domestic relations the attitudes of psychology and social work are pressing hard on traditional legal ideas. It has become widely recognized that counselling with family welfare agencies will help prevent some divorces, and somewhat the same technique is being tried by the courts themselves in Illinois and New Jersey.\textsuperscript{214} Reconciliation is especially desirable where minor children are involved. Adoption is a field where there is sharp conflict between the traditional legal viewpoint and that of the social worker. The social worker is interested in placing the child in a home where he not only will be loved and will be cared for financially, but where in addition he will match the parents insofar as possible in mental and physical characteristics, and above all, where the parents are emotionally mature people with a strong marital relationship. (As lawyers we are aware of those unfortunate children who are placed in homes which are later disrupted by divorce or other

\textsuperscript{210} Chute and Bell, Crime, Courts, and Probation, intro. (1956).
\textsuperscript{213} Id. at 35-38.
marital difficulties.) Placement by well-meaning doctors, lawyers, or relatives is opposed by social workers as unfair to the child, in that a home ill suited to the child may thwart the most desirable development of his capacities. The revision of the child welfare law proposed in 1955 would have limited the placement of children to licensed children's agencies and the Department of Public Assistance itself.\footnote{\textsuperscript{215} A statute following this principle has been enacted in California and is being advocated in many states.}

For the torts of an insane person the traditional common-law rule imposes strict liability regardless of the degree of insanity; this is the overwhelming majority view in the United States today (the civil law exonerates the insane tort-feasor). A recent article reviews the cases and urges that the law be changed at least to correspond to the McNaghten rule, so that a person who would be excused from a crime because of insanity would also be excused from the tort.\footnote{\textsuperscript{216} The problem of automobile accidents (the 1,000,000th highway death in the United States was registered recently) is being considered from the viewpoint of psychology. "Studies of thousands of accidents, made possible by the Allstate Grant for Driving Research at Iowa State College indicate that \textit{emotional disturbances and improper attitudes of drivers are a major cause of accidents.}"

Perhaps the time is not distant when the privilege of driving a car will be denied those whom tests show are emotionally immature or prone to have accidents because of a neurosis.

Another situation germane to our subject is that where a will or contract is challenged on the ground that the testator or promisor was incompetent.\footnote{\textsuperscript{218} A somewhat related problem is that of the not quite incompetent beneficiary of a trust; in some states old age alone is enough to justify appointment of a guardian, whereas in others strong evidence of incompetency must be shown.\footnote{\textsuperscript{219} And suppose a person possessed of his faculties wishes to set up a trust

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which shall take effect only if he becomes totally incapable of managing his business affairs, as in the event of accident or serious illness.\textsuperscript{220} The present law does not permit any such arrangement, although it would seem a desirable reform in view of changing conditions.

Some of the legal realists have proposed to re-examine the whole judicial process in the light of psychology. Cardozo's classic \textit{The Nature of the Judicial Process} (1922) was perhaps the beginning of this study. The late Judge Jerome Frank was probably the foremost writer in this field.\textsuperscript{221} For example, he wrote recently that psychiatry and psychology might be useful in the trial of cases in determining whether a witness erred in his original observation, his subsequent memory of it, or his communication of it in court.\textsuperscript{222} The case for psychology was boldly put by the late Edward S. Robinson: "Every legal theory, insofar as it is more than the statement of an arbitrary statute or rule of procedure, is a theory about the human mind and human behavior..."\textsuperscript{223}

Whether one approves or disapproves the growing interaction between psychology (and related disciplines) and law, one must recognize that this interaction is going on. It therefore behooves lawyers and judges to learn more about psychology in order that they may understand and thus control and direct this movement as intelligently as possible.\textsuperscript{224}

\textsuperscript{220} Wyden, \textit{A Vacuum in Our Law}, 95 \textit{Trusts \\& Estates} 879 (1956).
\textsuperscript{221} Frank, \textit{Law and the Modern Mind} (1930), and \textit{Courts on Trial} (1949).
\textsuperscript{222} Frank, \textit{Judicial Fact-Finding and Psychology}, 14 \textit{Ohio St. L.J.} 183 (1953).
\textsuperscript{223} \textit{Law and the Lawyers} 50 (1935).
\textsuperscript{224} See the helpful suggestions for reading in Fay, \textit{The Practical Role of Psychiatry in the Effective Practice of Law}, 29 \textit{Temp. L.Q.} 827 (1956).