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"IRRESISTIBLE IMPULSE" AS A DEFENSE IN CRIMINAL LAW

A Criticism Based on Modern Psychiatric Concepts

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THIS IS A CRITICISM of the decision of the Supreme Court of Washington in the case of *State vs. Marsh*.¹ The opinion states that "appellant was accorded a fair trial in every respect, that the trial court committed no error in refusing to give the requested instruction, and that judgment and sentence of the trial court must be, and it is, affirmed." Reference is made to the above decision in detail, the instruction referred to was one requested by the defendant and refused by the trial court. It follows: "You are instructed that if you believe from the evidence that at the time of committing the acts charged in the information, the defendant was suffering from such a perverted and deranged condition of his mental faculties as to render him incapable of distinguishing between right and wrong, or unconscious at such time of the nature of the act charged in the indictment while committing the same, or where although conscious of them and able to distinguish between right and wrong, and to know the acts were wrong, yet his mind and his will the governing power of his mind was, otherwise involuntarily, so completely destroyed that his action was

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¹ 129 Wash. Dec. 49, 185 Pac.(2d) 486 (1947). Marsh was convicted of first-degree murder and sentenced to be hanged. At literally the eleventh hour Governor Wallgren commuted the sentence to ninety-nine years.—Ed.

not subject to it but beyond his control, it will be your duty to acquit the defendant, and in such case your verdict shall be not guilty." This instruction clearly contains the "irresistible impulse plea," viz., "a deranged condition of his mental faculties where, although able to distinguish between right and wrong, yet the governing power of his mind was otherwise involuntarily so completely destroyed that his action was not subject to it, but beyond his control."

The information alleged that Joseph Henry Maish killed LaDonna Toscas by stabbing when she refused his sexual advances; some intent and planning prior to the crime were indicated. In addition to the plea of not guilty, the defendant made the following plea.

- "(1) That at the time and place of the commission of the crime charged, the said defendant was insane or mentally irresponsible.
- "(2) That said insanity or mental irresponsibility still exists.
- "(3) That at said time and place of the commission of said act charged, the defendant was motivated by an irresistible impulse."

During the trial one psychiatric consultant stated that in his opinion Maish was a psychopathic personality with "sexual perversion with a sadistic tendency." A second psychiatrist agreed to the diagnosis "psychopathic personality" and stated that this term applied to "the individual who acts impulsively without thought of consequence and yet has the concept of the difference between right and wrong." He went on to testify that "he would be classified as sane, as knowing the difference between right and wrong." The rejection of the "irresistible impulse" plea by upholding the trial court's refusal to instruct the jury, as noted above, as well as the inadequacy of the psychiatric testimony, which, if adequate, might have enabled the Supreme Court to take a different view of the entire matter, makes it imperative, first, that modern psychiatry's understanding of the nature of human behavior be set forth clearly at this time, and, second, that the apparent conflict between so-called "freedom of the will" and a strict scientific determinism be discussed. In instruction 10 given to the jury this issue appears to be joined, namely, that if the defendant, at the time of the act, was able to distinguish between right and wrong with respect to the act, he was then legally responsible. This implies that knowledge of the difference between right and wrong should enable one to act with free choice and in a responsible manner. It is felt that the tradi-

tional use of the term "freedom of the will" fits the above. Any consideration of the "irresistible impulse plea" and its relationship to legal as well as medical thought makes necessary a consideration of modern psychiatric thought concerning the effects of mental illness on volition as well as mentation. The terms "freedom of choice" and "freedom of the will" need review and explanation, with particular reference to modern dynamic psychiatry's theory of human behavior.

At the time the "right and wrong test" was adopted as a basis for determining legal responsibility in cases where mental illness was used as a defense, psychiatry as a medical specialty was concerned almost exclusively with describing and cataloguing the clinical phenomena of the mentally sick. Until about 1890 practically no effort had been made to explain mental illness on a deterministic basis. The investigations of Freud, which later led to understanding of unconscious mechanisms and led the way to modern psychiatric thought, followed by nearly fifty years the adoption of the "right and wrong test."² When one considers the tremendous strides made by psychiatry since 1890, the adherence by courts to such a doctrine may at first imply criticism to the courts and lawyers alone. However, it is the opinion of this writer that the burden of proof that the "right and wrong test" is outmoded and not in keeping with our present knowledge of the nature of mental mechanisms lies with the psychiatrists.

At the present time, psychiatry has rightfully taken its place among the other medical specialties and can now apply to the understanding of human behavior the rigid determinism which is a fundamental tenet of all science. All of the phenomena of human thought, feeling and behavior, all of the development of personality structure, both in health and in disease, must be capable of explanation and understanding as being the direct result of causal factors of heredity, early psychological conditioning, or later experiences in life. In this there is no place for the fortuitous. Whatever appears to be the result of "freedom of choice" can be demonstrated to be rigorously determined and, in the scientific sense, understandable. By the same token, "freedom of the will," as the term is used in philosophy, has no place here, and what appears to be action taken as the result of a free choice is action directly the result of specific determinants. One might well fall into the error of assuming a hopeless fatalistic attitude in regard to

² The "right and wrong test" is generally regarded as having its origin in the opinion of the House of Lords in M'Naghten's Case, 10 Clark and Fin. 200 (1843).

human behavior unless the matter were carried further. If dynamic psychology assumes a determinism as the basis for all thought and behavior, how can one ever escape from the apparent dilemma of having all one's thought and actions so determined and at the same time exercise free will or choice? In the first place, as Knight³ points out, "Determinism is a theoretical construct which fits the observed data, as demonstrated by predictions which were fulfilled, and which is essential to any psychology which claims to be scientific. The antithesis to this construct is the construct indeterminism—pure chance, chaos. 'Free will' on the other hand, is not on the same conceptual level as are these constructs. It refers to a subjective psychological experience, and to compare it to determinism is like comparing the enjoyment of flying to the law of gravity." The sense of freedom in choosing a course of action is one of the manifestations of mental health. The absence of this sense of freedom is perhaps easier to describe; in attempting to decide trivial matters a person without such freedom is assailed by doubts, fears, inner compulsions, inhibitions, and restrictions which tend to paralyze thought and actions or he is impelled by urges and impulses over which he is unable to remain in control. The healthy person chooses his course of action with a sense of freedom and a feeling that what he does is determined by standards and values which are a part of himself and from which he cannot depart. This sense of "freedom" is the experience of the emotionally mature only. There is a spurious sense of freedom in those who as children or immature adults perform acts which are in defiance of the requirements of reality, but psychiatric study clearly demonstrates that such individuals are not "free" in the healthy sense but are impelled by powerful forces which are not under their conscious control. For instance, one of the aims of modern psychotherapy is to demonstrate to those so driven that such forces exist, and it is the repeated experience of the dynamically oriented psychiatrist in psychotherapy that the presence of instinctual forces not under conscious control do in fact exist, can be brought under control of that part of the personality structure having to do with choice and volition, and finally that the person so "driven" can thereby acquire the sense of freedom of choice of the healthy. Such a person when faced with a choice of action of great importance proceeds unhurriedly to weigh factors before choosing, but he is aware of long accepted determinants within

³ Knight, Robert P., M.D., *Determinism, "Freedom," and Psychotherapy* (August 1946), *PSYCHIATRY* 251-262.

himself which do compel him but which he does not question and does accept freely

Before proceeding, perhaps a brief summary of three basic concepts in dynamic psychiatry may be of help. (1) The concept that in each individual there is an unconscious and unorganized mass of instinctual impulses, most open to observation in the young child, and composed of both sexual and aggressive drives, the uninhibited expression of which would be unacceptable to society; (2) that with time and the influence of inherited and environmental factors there develops from the first an organized part of the personality termed the Ego which exercises the functions of learning, perception, intelligence, judgment, memory, and discrimination; (3) there occurs rather early an internalization of the restricting and restraining attitudes of the parents which is set up within the personality structure. Dynamic psychiatry terms this the Super-Ego, a good practical synonym for it being the "conscience." The growth of each of these portions of the personality is determined by all of the inherited and environmental factors bearing on the personality. A harmonious interrelationship between these three forces is present in mental health. It follows that a sense of freedom is a result of such harmonious interrelationship and is a natural by-product of maturity. Instinctual forces seeking expression are allowed to enter consciousness and reach motility or action only if acceptable to the Ego. The Ego is strong enough to exercise such control and is guided by a set of dicta represented in the Super-Ego. The final result is behavior which gratifies instinctual demands on the one hand and the requirements of conscience and society on the other. The choices of action of such a person feel "free" to him, even though they are vigorously determined by the interplay of forces within him. It goes without saying that all of us do not have the good fortune to have experienced the necessary causal factors leading to healthy integration. Again quoting Knight,⁴ "The fortunes of good parentage, physical health, financial advantage, and opportunity are inequitably distributed, and the man-made rules fall quite short of the ideal of maximum satisfactions for each person consistent with the rights of others. In such an imperfect world every variety of human being is produced, with perplexing problems of crime, insanity, incompetency, and neurotic suffering, to mention only those which immediately concern the psychiatrist."

⁴ *Id.*

In considering the psychiatric testimony in the *Maish* case, there is no wish to criticize the competency of the witnesses, but I believe that it was not elaborated sufficiently. One opinion that Maish was a "psychopathic personality with sexual perversion with a sadistic tendency" should, in my opinion, have been elaborated as follows: Psychopathic personality is a term applied to an individual who is mentally sick in the true sense of the word in that, because of the vicissitudes of inheritance, inadequate parental care, and severe early psychic traumata, the growth and development of his Ego, that portion of his personality structure having to do with volitional control, has been markedly disturbed and affected to such a degree that sexual and aggressive impulses surge into consciousness, are temporarily uncontrolled, and pass into action which is frequently at odds with the demands of his own conscience and of society.

Another witness voiced the opinion that Maish was a "psychopathic personality" and that the term is one applied to "the individual who acts impulsively without thought of consequence and yet has the concept of the difference between right and wrong." I agree that the psychopathic personality has the concept of the difference between right and wrong, and as a matter of fact believe it can be demonstrated that it is quite rare for those mentally sick to be unable to distinguish the difference between right and wrong so far as knowing it is concerned. I do disagree, however, that the psychopath acts "without thought of consequence." Careful history and examination of such individuals show that there is an attempt to control the impulse which threatens to overwhelm the Ego and that there is some thought of the consequence; however, the impulse is so powerful that the weak Ego is unable to maintain this control so that the instinctual drive is allowed to pass into action.

An attempt has been made to show that the belief that "freedom of the will" or freedom of choice is the natural consequence of a knowledge of right and wrong at the time of a criminal act is untenable in the light of present day understanding of human behavior, and that so-called "irresistible impulses" are as surely a manifestation of mental illness as are disorders of thinking. Such acts represent the direct or disguised expression of either sexual or aggressive instinctual drives and have passed into action due to the immaturity and inadequacy of the part of the personality having as its task the proper expression and control of such instincts. The inadequacy of this part of the per-

sonality, the Ego, is due to inheritance or early or late environmental factors beyond the control of the individual, especially during his developmental years. It is felt that the nature of the dynamic inter-relationship of forces within the personality of the defendant leading to his act was not properly and sufficiently explained and demonstrated. Every tenet of modern psychiatry points toward the acceptance of the "irresistible impulse" plea as a proper defense in criminal law. That such a defense constitutes a threat to the security of society does not stand up under the light of experience, and therefore has not been discussed here.

The defendant's act as described in the excerpts from the trial quoted in the opinion of the Supreme Court appears to represent a poorly and immaturely planned act in which gross error of judgment was present and where both sexual and aggressive instinctual impulses, though altered and perverted, passed into action. The self-evident weakness of the Ego, which was unable to resist these impulses, was a manifestation of mental illness as truly as any symptom of any illness. It is therefore felt that the defendant's plea of "irresistible impulse" represents the true explanation of his act and is the only one compatible with modern scientific knowledge of mental illness.

One of the foundations upon which criminal law is based is the concept that criminal acts are morally wrong and that the offender should be punished. Modern psychiatry, with its theory of human behavior, regards all criminal acts as products of abnormal personality structure and development. It is evident that this constitutes a fundamental difference between the disciplines of law and psychiatry. There certainly is no difference of opinion when it comes to the question of the necessity of segregating the offender against society from that society in which he is evidently incapable of adjustment. However, while it is hoped that the day will come when all offenders will be regarded as sick and treated as such, it is obvious that this is not possible now for practical reasons. Nevertheless, the adherence to a judicial opinion of 1843 in the "right and wrong" test is in itself an indictment of our courts; it is also an indictment of psychiatry for its failure to present its case with sufficient force and clarity. Surely the "irresistible impulse" plea should be recognized by our courts. Such a step would constitute a much-needed advance in legal practice and would be in keeping with our present understanding of human behavior.