REVIEWS

THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE. By John Biggs, Jr. New York: Harcourt, Brace and Co., 1955. Pp. xii, 236. $4.50.

THIS volume is the third in the Isaac Ray Award Series [1] and the first by a lawyer. The Honorable John Biggs, Jr., Chief Judge of the Third Judicial Circuit of the United States, strives to foster understanding between lawyers and psychiatrists by presenting correlatively "a historical picture of the growth of law and psychiatry in general, and in particular the law of homicide and its development in connection with psychiatry."[2]

Judge Biggs' effort comprises six chapters. The first three and part of the fourth deal with the parallel development from primitive times to M'Naghten's trial in 1843. The remainder of chapter four is a most interesting discussion of that famous controversy which Judge Biggs believes produced a "disastrous rule of law."[3] Unlike many writers in this field he does not limit himself to a textual analysis of the M'Naghten rules but places the litigation in its contemporary setting.[4] The trial occurred during a time of great political and social unrest. There had been a number of successful and attempted assassinations of public figures. Indeed, in 1840, Edward Oxford had shot at Queen Victoria herself and had been acquitted as mentally disordered. Then came the attempt on the life of Prime Minister Robert Peel by M'Naghten. The verdict of "Not guilty on the ground of insanity" immediately came under hot attack by the press. Curative legislation was suggested. The propriety of M'Naghten's fate was debated heatedly in Parliament. And Queen Victoria expressed her dissatisfaction with the administration of justice in a letter to Sir Robert Peel. As a result of this ferment, the House of Lords decided "to take the opinion of the Judges on the law governing such cases."[5] Judge Biggs concludes that the M'Naghten rules were thus formulated in response to the pressures of the time and not, as commonly supposed, in the light of the psychiatric knowledge of the day. He adds:

> "If M'Naghten's case had generated less heat, had there been no public outcry, and had the attitude of the Crown been more temperate, I doubt that the law of England would have been forced into a rigid and intractable mold."[6]

1. The other volumes are: OVERHOLSER, THE PSYCHIATRIST AND THE LAW (1953) and ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT (1954).
2. P. xii.
3. P. 95.
4. Judge Biggs acknowledges an indebtedness for much of his background material to Dr. Bernard L. Diamond, the author of a forthcoming book entitled *Isaac Ray and the Trial of Daniel M'Naghten.* P. 219 n.38.
5. P. 103.
6. P. 108.

Another interesting fact about the trial of M'Naghten was the indirect participation of Dr. Isaac Ray, who was later largely responsible for the establishment of the "New Hampshire rule." Ray's famous book, *Medical Jurisprudence of Insanity*, was published in 1838, and on the opening day of the defense, M'Naghten's chief counsel, Alexander J. E. Cockburn, relied upon Ray's treatise and quoted from it at length. Judge Biggs believes that Ray's views carried weight at the trial:

> "Those views were certainly known to the judges and to at least some of the lords and the Queen's ministers. Ray's ideas as to criminal responsibility also must have been widely discussed among members of the bar. They might well have reshaped the law had the circumstances been favorable for sober consideration of their principles."[7]

In chapter five, Judge Biggs briefly discusses eight cases as illustrative of the "existing divergence between law and psychiatry,"[8] and relies upon them to support his twofold conclusion that (1) the M'Naghten rules are "unrealistic and erroneous" and (2) their application constitutes a danger to the public. He finds the rules unrealistic and erroneous in that they permit the conviction of medically insane persons—psychotics, for example, who knew the difference between right and wrong at the time of the crime. This in turn creates a public danger since these medically insane people may be granted probation or released after a short prison term "to commit increasingly serious crimes, repeating crime and incarceration and release until murder is committed. Instead of being treated as are ordinary criminals, they should be confined to institutions for the insane at the first offense and not be released until or unless cured."[9] Judge Biggs' first conclusion misconceives the purpose of the M'Naghten rules. It assumes that they are an attempt to define mental disease by the enumeration of its symptoms. If this were the case then they are clearly unintelligible and presumptuous. But whether a defendant should be punished for his criminal act or acquitted on the ground of insanity is not a medical question. After the psychiatrist has diagnosed a defendant's mental condition the legal question still remains—should he be held responsible? This is a question of a different order. It involves ethical and moral judgments as to whether it is "just" to punish a man who is mentally disordered. Of course, one may take the position that mental disorder ipso facto establishes irresponsibility, but none of the current recommendations for reform goes so far. The M'Naghten rules are open to criticism as prescribing a too limited test of responsibility—that they are "unjust"; but it is fallacious to urge their rejection on the ground that they purport to catalogue symptoms of mental disease or defect.

Judge Biggs' second conclusion assumes that commitment to a mental institution protects the public. His illustrative cases, however, cast more of a

7. *Ibid.*
8. P. 121.
9. P. 145.

shadow upon the state of psychiatry than upon the M'Naghten test of legal responsibility. In at least four of them the defendants had previously been committed to mental institutions and discharged before committing murder.[10]

In his final chapter entitled "Present Trends, Crimes and Punishments, and a Prognosis," Judge Biggs first discusses some of the substitutes recently proposed for the M'Naghten rules—the GAP Report,[11] the British Royal Commission Report,[12] the ALI Model Penal Code proposal,[13] and the test adopted by the United States Court of Appeals for the District of Columbia in *Durham v. United States*.[14] The latter test, while "perhaps . . . not perfect, surely represents the application of modern psychiatric realities in a great federal jurisdiction."[15] His approval of the *Durham* test is not surprising in view of his own advocacy of a similar standard three years earlier in a scholarly dissent.[16]

This is not the place to make a critical evaluation of the various tests of

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10. The cases of *Willard, Arridy, McGee* and *Smith*, discussed at pp. 121, 124, 125 and 126.

11. THE COMMITTEE ON PSYCHIATRY AND LAW OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY: CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY, REPORT No. 26 (May 1954). This Report recommends the following test:

> "No person may be convicted of any criminal charge when at the time he committed the act with which he is charged he was suffering with mental illness as defined by this Act, and in consequence thereof, he committed the act."

Id. at 8.

12. A majority recommended abrogating the M'Naghten test and leaving "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 to be held responsible." ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 116, 276 (1953).

13. Section 4.01 provides:

> (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.

American Law Institute, *Responsibility*, 46 J. CRIM. L., C. & P. S. 450 (1955).

14. 214 F.2d 862, 874-75 (D.C. Cir. 1954):

> "The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire Court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

The *Durham* test has been rejected by the United States Court of Military Appeals in United States v. Smith, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954), and the Supreme Court of Appeals of Maryland in Thomas v. State, 206 Md. 575, 112 A.2d 913 (1955).

15. P. 156.

16. United States *ex rel.* Smith v. Baldi, 192 F.2d 540, 568 (3d Cir. 1951):

> "Changes can be effected and reason can be brought to the law of criminal insanity. The rule of M'Naghten's Case was created by decision. Perhaps it is not too much to think that it may be altered by the same means. . . . We can see no reason why the legal test of irresponsibility for the commission of a crime should not be based upon the principle that if the mental illness of the accused is the proximate, or a contributory cause of the crime, then the accused may not be found guilty of murder."

responsibility.[17] However, two factors that affect the operation of any test should be emphasized. First, it is not always clear to the jury what results flow from an acquittal on the ground of insanity. To avoid any notions that the defendant will be immediately freed from community control the jury should be instructed that an acquittal means that he will be committed to a mental institution until no longer dangerous.[18] This is essential if the jury is to perform its ethical role, whatever the test of responsibility, of deciding whether the defendant should be sent to prison (or executed) or be sent to a hospital.

The second factor to be considered is the "brooding omnipresence" of the death penalty. The insanity defense is rarely raised except in a capital case. In noncapital prosecutions a defendant usually prefers to take his chances on a prison sentence for a limited number of years rather than an indefinite commitment to a state hospital. If the death penalty were abolished, problems of devising a test of responsibility for the mentally ill would be greatly assuaged. While there may be justifiable reasons for retaining the death penalty—I am not convinced that there are—it is important to realize that part of the price exacted by its retention is inevitable confusion in the law relating to the legal responsibility of the mentally disordered.

Judge Biggs closes his final chapter with a number of recommendations that should receive wide acceptance. Among them are: adequate facilities for an exhaustive study of the accused when the issue of mental illness is involved; increased probation staffs and full psychiatric services in the juvenile courts; general adoption of Youth Offender Acts; improvements in the correctional system so that the goal of rehabilitation has some chance of attainment; and interdisciplinary training in law and psychiatry in our educational institutions.[19]

Finally, Judge Biggs observes that "one of the most pressing needs today . . . is further research to the end that the future behavior of the psychopath or so-called psychopathic personality may be ascertained."[20] "Individuals in this category have not been dealt with adequately by either the medical or the legal profession."[21] Few would disagree with these statements. However, his recommendations for dealing with the problem of the psychopath are highly questionable at the present time. He first discusses the various "sex-offender"

17. The various points of view are well represented in the important symposium on the *Durham* case in 22 U. CHI. L. REV. 317-404 (1955).

18. See Taylor v. United States, 222 F.2d 398, 404 (D.C. Cir. 1955):

> "But we think that when an accused person has pleaded insanity, counsel may and the judge should inform the jury that if he is acquitted by reason of insanity he will be presumed to be insane and may be confined in a 'hospital for the insane' as long as 'the public safety and . . . his welfare' require. Though this fact has no theoretical bearing on the jury's verdict it may have a practical bearing."

19. In his list of institutions, at p. 196, giving courses and seminars in Law and Psychiatry Judge Biggs does not mention the Yale Law School, where collaborative work with the Department of Psychiatry of the Yale Medical School has been going on for 25 years.

20. P. 162.

21. P. 163.

laws which provide for the civil commitment of "sexual psychopaths" for indeterminate terms, and acknowledges the criticism that they afford "only a problematical social protection at a great expense in personal liberty."[22] Nevertheless, Judge Biggs believes "that a vast improvement in our criminal law and penological system lies in the direction of . . . statutes . . . which will . . . embrace the apprehending and confinement of psychopaths generally, not only those who present a sexual problem."[23]

It is unfortunate that Judge Biggs did not state in greater detail the many defects in the present sex-offender laws. For example, a recent study concluded that "under prevalent conditions of examination and treatment, valid and objective scientific criteria for commitment or for discharge of the patient do not exist."[24] Nevertheless, under many of these laws a person may be civilly committed for an indefinite term to a penal or hospital type institution on diagnosis and adjudication that he is a "psychopathic sex offender." This can be done despite the fact that he has committed no offense for which he could be imprisoned for more than a short term or, under some of the statutes, no offense at all. These laws reflect a societal interest in the prevention of seriously aggressive sexual offenses and some willingness to rely on expert prophecy. On the other hand, given our legal traditions, it is doubtful whether society would, generally speaking, be willing to authorize the infliction of criminal sanctions on suspicion alone, however well-founded the suspicion might be. Illustrative of this interest in civil liberty are the requirements prescribing that mere proof of intent to commit a crime is not enough to support a conviction for criminal attempt. The intent must be accompanied by overt action reasonably adapted to the criminal end and carried to a point where there is a dangerous probability of success. Notwithstanding the fact that the sex-offender statutes are "civil" rather than "criminal," involuntary hospitalization in a maximum security hospital or penal institution under inevitably poor or nonexistent treatment conditions, contains an overwhelmingly strong punitive element.

It is doubtful whether statutes dealing with psychopaths generally avoid these shortcomings. Perhaps the term "psychopath" is more precise than "sex psychopath," but at least some psychiatrists regard the former as the "wastebasket of psychiatry." There are also grave problems of prognosis, therapy and resources. And unless special institutions with adequate facilities and trained personnel are provided, the result of "channel[ing] sexual and other psychopaths into mental hospitals instead of prisons is more likely to convert the hospitals into prisons than to do the psychopaths any good."[25]

22. P. 166.

23. Pp. 166-67.

24. Hacker & Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CALIF. L. REV. 766, 777 (1955). Other critical appraisals of these laws are: Mihm, *A Re-examination of the Validity of Our Sex Psychopath Statutes in the Light of Recent Appeal Cases and Experience*, 44 J. CRIM. L., C. & P.S. 716 (1954); and Tappan, *Sex Offender Laws and Their Administration*, 14 FED. PROBATION 32 (Sept. 1950).

25. Weihofen, *Crime, Law, and Psychiatry*, 4 U. KAN. L. REV. 377, 390 (1956).

Notwithstanding these criticisms, this is a book worth reading by law students and medical students, by lawyers and psychiatrists. It is clear that Judge Biggs is deeply concerned with the problems of law and psychiatry and is acutely aware of the areas where these disciplines impinge. His ideas and suggestions invite serious consideration by men of good will in both fields of endeavor.

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FOREIGN INVESTMENT AND TAXATION. By E. R. Barlow and Ira T. Wender. Englewood Cliffs: Prentice-Hall, Inc., 1955. Pp. xxv, 481. $15.00.

THE widespread concern with acceleration of economic growth in the world's underdeveloped areas has led, particularly in the United States, to an outpouring of official reports and private studies on the international flow of private capital to such regions. A number of investigations have been concerned not so much with underlying economic conditions as with various aspects of the legal, administrative and socio-political framework within which the process of investment takes place. As formidable obstacles continue to defy efforts to revive an international market for private lending, attention has been concentrated on measures that might be adopted, in both capital-importing and capital-exporting countries, to reduce or offset barriers to the expansion of "direct" investments—investments controlled by business enterprises in the capital-exporting country.

Foreign Investment and Taxation is one of the most recent of such studies and, in certain respects, among the most thorough-going. It was prepared under the auspices of the Harvard Law School's International Program in Taxation, which is in turn a part of that institution's Program in International Legal Studies. As befits the nature of the investigation, the authors bring to bear a background of both economic and legal training, Mr. Barlow being a member of the faculty of the Harvard School of Business and Mr. Wender a lawyer who has devoted much study to the fiscal aspects of international investment.

Like most studies of the "investment climate," this volume gives little attention to the actual scope for direct investment in underdeveloped countries other than to assert that many opportunities for such investment exist.[1] Except in the extractive industries, however, relatively few underdeveloped areas have the basic conditions propitious for a large-scale inflow of capital in this form. Manufacturing for the domestic market encounters severe limits, inherent in the early stage of development; the bulk of capital is needed for the public sector (the scope of which has broadened in many countries), and foreign capital for this sector must, as in the past, be supplied largely by loans, whether

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1. P. xxii.