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Criminal Law—Insanity Defense to First Degree Murder Charge—M'Naghten Reaffirmed

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to some degree. Where the facts are identical with those of the *Connors* case (dismissal before opening statement), the rule contended for by the dissent could probably be applied without prejudice to the defendant. At the opening-statement stage, the defendant reveals the theory of his case. Past this point, any dismissal by the court will usually prejudice the defendant's conduct of his defense in the second action because the prosecution will be able to prepare its case to meet the defense.[33]

The court did not explicitly consider or discuss these matters in the *Connors* opinion. Such considerations appear to be material for they furnish a rational basis for the application of the rule of *Connors* to other fact situations where dismissal might prejudice a defendant because trial courts will be discouraged from participating in the conduct of a trial in an adversary role. On the other hand, the *Connors* decision will tend to discourage the trial court from ordering dismissals which, in fact, would be in the interests of justice. It is suggested that the court might have been more precise and should have framed a rule giving further recognition and consideration to the policy arguments, thereby giving the trial courts guidelines within which to resolve the dilemma (between the statutory rules and the *Connors* decision).

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Insanity Defense to First Degree Murder Charge—M'Naghten Reaffirmed. Don Anthony White, a Negro in his mid-twenties, was convicted of first degree murder by a King County jury. In *State v. White*,[1] the Washington Supreme Court (three judges dissenting) affirmed the conviction and sentence which directed that the death penalty be imposed.

At trial, the defendant admitted beating the deceased woman in the laundry room of the Yesler housing project on the morning of December 24, 1959. It was established that she died as a result of this beating. The accused defended on the basis of mental irresponsibility.[2]

The evidence established that defendant White had never seen or known of the victim prior to the fatal beating. An exhaustive presenta-

[33] Note that a rule to the effect that a dismissal will bar a second action only if the defense has made its opening statement would force defense counsel to make an opening statement in every case, thus further implicating the court in trial tactics.

[1] 160 Wash. Dec. 554, 374 P.2d 942 (1962).

[2] RCW 10.76.010 provides: "Any person who shall have committed a crime while insane, or in a condition of mental irresponsibility, and in whom such insanity or mental irresponsibility continues to exist, shall be deemed criminally insane . . . ." RCW

tion of White's life history was submitted showing a deprived environmental background and an inability since childhood to control his behavior or to conform to society's standards.[3] Two psychiatrists and a psychologist testified on behalf of the defendant. This expert testimony indicated that White (1) "had a psychotic schizophrenic reaction which is chronic, recurrent, and episodic."[4] (2) At the time of the killing, White's contact with reality was non-existent; his knowledge of right and wrong had no influence on his behavior, and he had no power to resist emotional impulses.[5] The defendant's medical experts declined to state whether White knew right from wrong at the time the crime was committed.[6]

The state called a psychiatrist in rebuttal who testified that White was a "sociopathic individual" but "was in a position to distinguish between right and wrong, and therefore, in terms of the law, is responsible for his action."[7] The court instructed the jury not to interpret the witness' reference to the right and wrong test as an authoritative definition of the insanity test. The jury was instructed as follows:

> If the defendant is to be acquitted upon his plea of mental irresponsibility or insanity, he must convince you by a preponderance of the evidence that, at the time the crime is alleged to have been committed, his mind was diseased to such an extent that he was unable to perceive the moral qualities of the act with which he is charged, and was unable to tell right from wrong with reference to the particular act charged. . . .[8]

The given instruction was based on the *M'Naghten*[9] test which does not include a lack of volitional control in the criminal insanity defense. On appeal the defendant assigned as error the failure of the court to

10.76.030 provides: "If the plea of insanity or mental irresponsibility be interposed . . . the court shall instruct the jury . . . that in case a verdict of acquittal of the crime charged be returned, they shall also return special verdicts finding . . . (2) whether they acquit him because of his insanity or mental irresponsibility at the time of its commission . . . ."

[3] As early as 1951 when White was fourteen, there were indications of serious psychological difficulties. A comprehensive psychiatric and psychological evaluation of White at the Ryther Child Center indicated that the boy was in serious need of treatment. The doctor making the report predicted that if White were not treated, he would end up either in a mental institution or in prison. State v. White, 160 Wash. Dec. 554, 583-84, 374 P.2d 942, 960 (1962).

[4] *Id.* at 585, 374 P.2d at 961.

[5] *Ibid.*

[6] A psychiatrist's competence to answer this question is subject to considerable doubt because psychiatry, being a science, does not purport to answer ethical questions of "rightness or wrongness." See United States v. Currens, 290 F.2d 751 (3d Cir. 1961).

[7] State v. White, 160 Wash. Dec. 554, 578, 374 P.2d 942, 957 (1962).

[8] *Id.* at 581, 374 P.2d at 959.

[9] M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

instruct the jury in terms of section 4.01 of the American Law Institute's Model Penal Code. Under this standard the jury would have been instructed:

> [T]he defendant is not responsible for the crimes charged herein if at the time of said crimes, as a result of mental disease or defect, he lacked *substantial capacity* either to appreciate the criminality of his act, or *to conform his conduct to the requirements of law.*[10] (Emphasis added.)

The instruction concerning the criteria for mental irresponsibility was crucial because "there was substantial evidence from which the jury could have found that appellant could not control his own behavior, even though, at the time, he knew the difference between right and wrong."[11]

An intent on the part of the actor to commit the prohibited act is an essential ingredient of most crimes. The presence of this mental element necessarily implies that the actor have a capacity for conscious awareness at the time the crime was committed. This basic mental capacity plus the actual intent constitute the *mens rea.*[12] The various criteria which have been developed to determine what forms of mental irresponsibility negate the requisite *mens rea* all assume some capacity for conscious thought.[13]

The *M'Naghten* rules represent the development of the common law in this area at the middle of the nineteenth century. They originated from questions put to the Judges of England in 1843 by the House of Lords as a result of official concern over the acquittal, by reason of insanity, of Daniel M'Naghten who had shot and killed Sir Robert Peel's private secretary, the secretary being mistaken for Sir Robert. In answer to the propounded questions, the judges answered:

> [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused

[10] State v. White, 160 Wash. Dec. 554, 582, 374 P.2d 942, 959 (1962). The Court of Appeals for the Third Circuit adopted a very similiar test in United States v. Currens, 290 F.2d 751 (3d Cir. 1961).

[11] State v. White, 160 Wash. Dec. 554, 583, 374 P.2d 942, 960 (1962).

[12] See generally, Sayre, *Mens Rea,* 45 HARV. L. REV. 974 (1932).

[13] The defense of "automatonism" may be available to exculpate a defendant who is incapable of forming the requisite intent even though he might not fall under a conventional insanity defense. In Regina v. Charlson, [1955] 1 All E.R. 859, an accused charged with assault with intent to commit murder presented evidence tending to show that he had a cerebral tumor and that a person in such condition is subject to outbursts of impulsive violence which he is incapable of controlling. The jury was instructed that if the defendant's actions were purely automatic and if he had no control over the movement of his limbs, he was not to be held criminally responsible. A verdict of "not guilty" was returned.

> 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.[14]

The Washington court adopted the *M'Naghten* standard in 1909[15] and applied it mechanically during the next forty-eight years without considering the availability of a more suitable test.[16] The court early determined that a defendant in Washington must establish his mental irresponsibility by a preponderance of the evidence.[17] The defendant must show "that he was unable to perceive the moral qualities of the act . . . *and* was unable to tell right from wrong with reference to the particular act charged. . . ."[18] (Emphasis added.) Thus, the view in Washington is a stricter requirement than *M'Naghten,* which includes the disjunctive "or," rather than the conjunctive "and."[19]

In 1909 the Washington legislature enacted a statute abolishing the insanity defense in criminal trials.[20] The statute was struck down by the court in *State v. Strasburg*[21] as depriving a defendant of liberty without due process of law and being violative of a defendant's right to trial by jury under the State constitution. The court indicated that:

> the sanity of the accused, at the time of committing the act . . . [is] as much a substantive fact, going to make up his guilt, as the fact of his physical commission of the act . . . . [I]f he had no will to control the physical act of his physical body, how can it in truth be said that the act was his act.[22]

In 1947 the Washington court rejected a proposal to graft the "irresistible impulse" defense onto the *M'Naghten* rules[23] as has been

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[14] M'Naghten's Case, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843).

[15] State v. Craig, 52 Wash. 66, 100 Pac. 167 (1909).

[16] *M'Naghten* was applied in the following cases with no attack made on the wisdom of the test: State v. Cogswell, 54 Wn.2d 240, 339 P.2d 465 (1959); State v. Putzell, 40 Wn.2d 174, 242 P.2d 180 (1952); State v. Rio, 38 Wn.2d 446, 230 P.2d 308 (1951); State v. Odell, 38 Wn.2d 4, 227 P.2d 710 (1951); State v. Maish, 29 Wn.2d 52, 185 P.2d 486 (1947); State v. Davis, 6 Wn.2d 696, 108 P.2d 641 (1940); State v. Henke, 196 Wash. 185, 82 P.2d 544 (1938); State v. Schneider, 158 Wash. 504, 291 Pac. 1093 (1930); State v. Schafer, 156 Wash. 240, 286 Pac. 833 (1930).

[17] State v. Clark, 34 Wash. 485, 76 Pac. 98 (1904).

[18] State v. White, 160 Wash. Dec. 554, 581, 374 P.2d 942, 959 (1962).

[19] See People v. Sherwood, 271 N.Y. 427, 3 N.E.2d 581 (1936), holding that the use of the conjunctive in instructing the jury on the insanity defense was reversible error under the New York statute prescribing the disjunctive.

[20] Wash. Sess. Laws 1909, Ch. 249, § 7. "It shall be no defense to a person charged with the commission of a crime, that at the time of its commission, he was unable by reason of his insanity . . . to comprehend the nature and quality of the act committed, or to understand that it was wrong . . . nor shall any testimony or other proof thereof be admitted in evidence."

[21] 60 Wash. 106, 110 Pac. 1020 (1910).

[22] *Id.* at 119, 110 Pac. at 1024.

[23] State v. Maish, 29 Wn.2d 52, 185 P.2d 486 (1947).

done in some jurisdictions.[24] Under this defense a defendant might be acquitted if his "reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong."[25] This test exculpates a defendant if he lacked the volitional capacity to control his actions. The Washington court's reason for rejecting the test rested upon the supposed difficulty of application by a jury.

State v. Collins[26] represents the first serious attack on the *M'Naghten* test in Washington. The assault was made on the basis of the now famous *Durham*[27] case decided in the District of Columbia in 1954. With strong overtones of equating moral blame with criminal responsibility to the exclusion of all other considerations, *Durham* adopted the "product" test first applied in New Hampshire in 1870.[28] The *Durham* rule provides that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[29] The rule as subsequently applied in the District of Columbia is merely one of causation in fact, the defendant being entitled to a verdict of "not guilty by reason of insanity" if he would not have committed the offense "but for" or "except for" the mental disease.[30] In *Collins,* the Washington court rejected this test, reasoning that it lacked standards and would be difficult for a jury to apply. The court did, however, express dissatisfaction with the *M'Naghten* rules and announced that "on the question of the existence of a better method to determine . . . [criminal] intent than the right and wrong test, we have an open mind."[31]

State v. White represents the next serious attempt to persuade the Washington court to discard *M'Naghten.*

The Objective of Criminal Law. In the *White* case the court indicated that "the basic purpose of the criminal law [is] to minimize

[24] For a digest of mental irresponsibility criteria in all United States jurisdictions including compilation of those jurisdictions which have adopted the "irresistible impulse" defense, see WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 129-73 (1954).

[25] Smith v. United States, 36 F.2d 548, 549 (D.C. Cir. 1929).

[26] 50 Wn.2d 740, 314 P.2d 660 (1957).

[27] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[28] State v. Pike, 49 N.H. 339 (1870). It is of interest to note that the Washington court considered and rejected the *Pike* rule in State v. Craig, 52 Wash. 66, 100 Pac. 167 (1909).

[29] Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

[30] Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957).

[31] State v. Collins, 50 Wn.2d 740, 754, 314 P.2d 660, 668 (1957).

crime in society."[32] The deterrent effect of penal sanctions is considered a valid and effective method of accomplishing this aim.[33] The court adopted a general statement by Professor Wechsler indicating that:

> The purpose of the penal law is to express a formal social condemnation of forbidden conduct, buttressed by sanctions calculated to prevent it . . . by their impact on the general imagination, *i.e.*, through the median of general deterrence. Considerations of equality and of effectiveness conspire to demand that sanctions which are threatened generally be applied with generality upon conviction. . . . Responsibility criteria define a broad exception. The theory of the exception is that *it is futile thus to threaten and condemn persons who through no fault of their own are wholly beyond the range of influence of threatened sanctions* of this kind. So long as there is any chance that the preventive influence may operate, it is essential to maintain the threat.[34] (Emphasis added.)

The court thus announced its purpose as minimizing crime in society. The approved method is through the deterrent effect of criminal sanctions, but a "broad exception" to this method is recognized in those situations where a person, because of his mental condition, is "wholly beyond the range of threatened sanctions." The crucial issue becomes one of selecting a test of mental responsibility best designed to implement the court's avowed purpose.

In Search of the Test for Mental Responsibility. The object of a criminal proceeding is to affix guilt upon those who violate society's criminal prohibitions. A major purpose of psychiatry is to rehabilitate the mentally ill; "blame fixing" is not involved in the analysis. This basic incompatibility in viewpoint makes it difficult to devise a test of criminal responsibility which is compatible with the objective of penal law and yet can utilize enlightened psychiatric opinion.

The *M'Naghten* rules have been widely criticized on the ground that the test considers only the rational facet of the personality and does not take into account the volitional and emotional aspects.[35] Modern psychiatry recognizes man as an integrated personality and regards as unrealistic attempts to compartmentalize his faculties and consider

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[32] State v. White, 160 Wash. Dec. 554, 594, 374 P.2d 942, 966 (1962).

[33] But see Andenaes, *General Prevention—Illusion or Reality?* 43 J. CRIM. L., C. & P.S. 176 (1952) where the threat of detection is considered crucial.

[34] Wechsler, *The Criteria of Criminal Responsibility,* 22 U. CHI. L. REV. 367, 374 (1955).

[35] HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 519 (2d ed. 1960).

only certain facets.[36] Given this view, psychiatrists complain that the *M'Naghten* rules place them in a "strait jacket," the right-and-wrong criteria not allowing them to testify within the realm of their competence.

The accused's whole personality is relevant to the inquiry under the *Durham* formula and thus unrestricted psychiatric testimony is material. Implicit in this test however is the rejection of the deterrent theory. Under *Durham* a defendant who, at the time the crime was committed, had capacity for choice and control but nevertheless failed to exercise that control might be exculpated if the act were found to be a "product" of his mental disease. The Washington court has rejected *Durham* as being inconsistent with the desired policy of social control.[37]

In the *White* case then, the court was confronted with the problem of fashioning a test which would allow realistic psychiatric evaluation to be considered; which would exculpate a defendant if his mental condition rendered him beyond the reach of deterrence by criminal sanctions; and which would allow the desired degree of "social control" consistent with the deterrent theory. At the outset the court narrowed the choice to either the Model Penal Code test or its restricted version of *M'Naghten.*

The *M'Naghten* test was reaffirmed in the *White* case. The court concentrated on whether *M'Naghten* is adequate to further the desired social objective, not whether the Model Penal Code test might be better. By this analysis the court reached a result inconsistent with its objective.

The court's only criticism of the Model Penal Code test was by analogy to the "irresistible impulse" test (which also contains the volitional element). The court stated that the "irresistible impulse" test had been rejected in *State v. Maish*[38] because of the extreme difficulty in application and that "with regard to capacity to control one's behavior, it would appear that there is no more psychiatric certainty today. . . ."[39] The court necessarily assumed that *M'Naghten* was easier for a jury to apply. The validity of this assumption is far from clear.

Psychiatric testimony concerning volitional capacity and the inte-

[36] For judicial acceptance of this viewpoint see United States v. Currens, 290 F.2d 751 (3d Cir. 1961).
[37] State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957).
[38] 29 Wn.2d 52, 185 P.2d 486 (1947).
[39] State v. White, 160 Wash. Dec. 554, 594, 374 P.2d 942, 966 (1962).

gration of various aspects of an accused's personality is relevant under the Model Penal Code test. It would seem under this standard that a jury would have more pertinent and reliable information upon which to base a decision than under the right-and-wrong criteria where the competence of expert testimony is doubtful.

In reaching its result in the *White* case the court relied on the argument that the legislature "has established a policy in this state that only the most extreme degree of insanity will relieve a defendant of criminal liability."[40] The court found this legislative intent in the 1909 statute which the *Strasburg* case declared unconstitutional the following year.[41] The legislature has been silent on the subject ever since. Under these facts, the court's discovery of a legislative policy to strictly limit the insanity defense is of doubtful merit. The Washington statute concerning the mental irresponsibility defense[42] does not set out the criteria for finding mental irresponsibility,[43] and thus the test must be provided by the judiciary. The court's reliance on this theory represents a regression from the *Collins* position that upon the discovery of a more suitable insanity test it might be adopted.

The court further reasoned that:

> *M'Naghten* is preferable to the . . . [Model Penal Code] test in that the *M'Naghten* rule better serves the basic purpose of the criminal law —to minimize crime in society . . . [A]ll who might *possibly* be deterred from the commission of criminal acts are included within the sanctions of the criminal law.[44] (Emphasis added.)

This position is patently inconsistent with the principle that "it is futile . . . to . . . condemn persons who . . . are wholly beyond the range of influence of threatened (criminal) sanctions. . . ."[45] The result is also inconsistent with the basic *mens rea* concept which "is based on the assumption that a person has a capacity to control his behavior."[46]

The Washington court recognized that there can be no guilt without the requisite mental capacity. It endorsed the idea that only those having the mental capacity to be deterred by penal sanction ought to be held responsible. And the court was fully aware that,

[40] *Id.* at 591, 374 P.2d at 965.
[41] Wash. Sess. Laws 1909, Ch. 249, § 7.
[42] RCW 10.76.010.
[43] In some jurisdictions the standard is provided for by statute. *E.g.*, N.Y. PENAL LAW § 1120 provides: "A person is not excused from criminal liability as an . . . insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as: 1. Not to know the nature and quality of the act he was doing; or, 2. Not to know that the act was wrong."
[44] State v. White, 160 Wash. Dec. 554, 594, 374 P.2d 942, 966 (1962).
[45] *Id.* at 593, 374 P.2d at 966.
[46] United States v. Currens, 290 F.2d 751, 773 (3d Cir. 1961).

> Under the given instruction, the defense of not guilty by reason of mental irresponsibility is not available to a person who has the ability to understand the nature and quality of his acts, but, because of mental disease or defect, is somehow unable to control his own behavior.[47]

Yet in implementing the "social control" policy by subjecting to criminal sanctions all those who might *possibly* be deterred, an accused who is not in fact capable of being deterred may be convicted.

Conclusion. Under the Model Penal Code test an accused may be found "not guilty by reason of mental irresponsibility" if "he lacked substantial capacity either to appreciate the criminality of his act, or to conform his conduct to the requirements of law." It is submitted that this test is more appropriate than the court's restricted view of the *M'Naghten* rules to determine a defendant's mental responsibility. By this standard the admission of complete psychiatric data is relevant to the inquiry. It is consistent with the concept of *mens rea* based on the assumption that a person has the basic capacity to control his own behavior and to choose between alternatives. And it is consistent with the policy of deterrence and social control which appears to be paramount in the Washington court's analysis.

JOHN H. BINNS JR.

Proximate Cause in Negligent Homicide. Defendant was charged with negligent homicide under RCW 46.56.040[1] for causing the death of a pedestrian through the operation of a motor vehicle.[2] The trial jury found the defendant guilty, but the trial judge entered an order arresting judgment and, in the alternative, granting a new trial. From this order the state appealed. In his trial memorandum, the judge ruled as a matter of law that the evidence was insufficient to show any causal relation between the defendant's state of intoxication and the resulting death to a pedestrian. The Washington Supreme Court in a 5-3 decision reversed and remanded with instructions to enter judgment upon the verdict of the jury. The court held that there was sufficient evidence for the jury to find that each element of the offense charged had been proved beyond a reasonable doubt.

[47] State v. White, 160 Wash. Dec. 554, 582, 374 P.2d 942, 959 (1962).

[1] RCW 46.56.040: "When the death of any person shall ensue within one year as a proximate result of injury received by the operation of any vehicle by any person while under the influence of or affected by intoxicating liquor . . . the person so operating such vehicle shall be guilty of negligent homicide by means of a motor vehicle."

[2] State v. Costello, 59 Wn.2d 325, 367 P.2d 816 (1962).