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CRIMINAL INSANITY

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Mental capacity becomes relevant to the criminal law as soon as a peace officer apprehends a person who has committed an anti-social act. Policemen, and later prosecutors, must decide whether the offender is "well" (sane), responsible for his acts, and the proper subject of criminal proceedings or whether he is "sick" (insane), not responsible for his acts, and the proper subject of civil commitment or similar process.¹ These are threshold questions in criminal law enforcement. If criminal processes are used, then the trial stage presents twin questions: whether an accused is capable of standing trial,² and whether he was insane at the time he allegedly committed the act. After trial, some jurisdictions such as Washington,³ condition their appeals by the question: is the defendant mentally able to aid counsel?⁴ If defendant is unable to aid counsel on appeal, then his appeal is delayed until he has recovered sufficient mental competence. In this day of court-assigned counsel, rather than *pro se* appearances, this rule seems to be poorly advised because defendants actually play minimal roles in preparation and presentation of appeals,⁵ and because delaying an appeal creates a formidable obstacle in getting a reversal of unjustified convictions; furthermore, delay creates obvious injustices for wrongly convicted persons.⁶ After appeal, the criminal corrections process is conditioned by questions about a person's competency to be sentenced,⁷

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¹ See A. GOLDSTEIN, *THE INSANITY DEFENSE* 171-91 (1967) [hereinafter cited as GOLDSTEIN]; Morris, Book Review, 43 WASH. L. REV. 623 (1968).

² For discussion of this requirement and of Washington's position, see Morris, Book Review, *supra* note 1.

³ *State v. Jones*, 57 Wn. 2d 701, 359 P.2d 311 (1961); see Annot., 49 A.L.R. 807 (1927).

⁴ *E.g.*, *Williams v. State*, 135 Tex. Crim. 585, 124 S.W.2d 990 (Tex. Crim. App. 1938), and *People v. Skwirsky*, 213 N.Y. 151, 107 N.E. 47 (Ct. App. 1914). The reason for the rule is the fear that if defendant cannot aid in the appeal then, if the appeal proceeds, possible grounds relevant to a reversal will be lost forever, and the integrity of the appellate procedure will be impaired.

⁵ See *Suttles v. Davis*, 215 F.2d 760 (10th Cir. 1954).

⁶ See Note, *Appellate Proceedings Stayed During Insanity of Accused*, 56 COLUM. L. REV. 133 (1956).

⁷ The test of mental competency to be sentenced is very similar to the test of competency to stand trial: Is the convicted-accused capable of aiding counsel on any matters relevant to his sentence? See H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE*, 431-33, 459 (1954) [hereinafter cited as WEIHOFEN]. Furthermore, it would have little, or no, deterrent value to sentence an insane convicted-accused while he was incapable of understanding the meaning of his sentence.

and if competent, about his mental capacity to carry out his sentence,⁸ parole⁹ or to appreciate his execution.¹⁰

This article will not deal with the different concepts of criminal insanity applicable at various stages in the criminal law process. Instead, it will focus on one concept: the concept of insanity at the time of the act, commenting on Washington materials wherever possible.¹¹

CONTEXT OF THE INSANITY DEFENSE

One of the fundamental premises underlying modern Anglo-Saxon criminal law is that an individual must be responsible for his actions before he is criminally liable.¹² If he is responsible, he is capable of serving as an object of blame. Curiously, there has been little discussion in the literature of the criminal law on the criteria under which the legal concept of "being responsible" is appropriately invoked.¹³

⁸ In Washington, if an accused is found guilty, sentenced and then found insane, the sentence can be suspended until the convicted-accused recovers his sanity; whereupon, the sentence can be reinstated. See *State v. Wilson*, 69 Wash. 235, 124 P. 1125 (1912); *State v. Schrader*, 135 Wash. 650, 238 P. 617 (1925); and *State v. Davis*, 6 Wn. 2d 696, 108 P.2d 641 (1940).

⁹ See Comment, *Influence of Mental Illness On The Parole Return Process*, 59 MICH. L. REV. 1101 (1961).

¹⁰ See *Grossi v. Long*, 136 Wash. 133, 238 P. 983 (1925), where a jury found defendant sane at time of the act; he was convicted of murder in the first degree, and sentenced to be hanged. Prior to execution he was found insane, and execution was stayed until sanity was restored, whereupon execution of defendant could then take place. Note, also, *State v. Davis*, 6 Wn. 2d 696, 717, 108 P.2d 641, 650 (1940), and *In re Lang*, 77 N.J.L. 207, 71 A. 47 (Sup. Ct. 1908), and Annot., 49 A.L.R. 804 (1927). One court has put it quaintly, that "The plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place or as a merciful dispensation." *Laros v. Commonwealth*, 84 Pa. 200, 211 (1877), and see, WEIHFEN at 459-70 (1954), and Hazard & Louisell, *Death, The State And The Insane: Stay of Execution*, 9 U.C.L.A. L. REV. 381 (1962).

¹¹ See generally D. Niles, *Insanity And Mental Illness In Criminal Cases In Washington* (1961), (unpublished article in University of Washington Law Library).

¹² "The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts." *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954). See P. BRETT, *AN INQUIRY INTO CRIMINAL GUILT* 37 *et. seq.* (1963); H. M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958); Livermore & Meehl, *The Virtues of M'Naghten*, 51 MINN. L. REV. 789, 790-99 (1967); cf. H.L.A. HART, *PUNISHMENT AND THE ELIMINATION OF RESPONSIBILITY* (1962). But compare the dissent of LUKAS, *A CRIMINOLOGIST LOOKS AT CRIMINAL GUILT, SOCIAL MEANING OF LEGAL CONCEPT* 113, 151-52 (E. Cahn ed. 1950).

¹³ For beginning explorations see, e.g., Bibliography, *Criminal Responsibility*, 1 ISSUES IN CRIMINOLOGY 158 (1967), and H.L.A. HART, *THE MORALITY OF THE CRIMINAL LAW* (1964), *PUNISHMENT AND THE ELIMINATION OF RESPONSIBILITY* (1962), *LEGAL RESPONSIBILITY AND EXCUSES IN DETERMINISM AND FREEDOM* (Hook 1961); Bazelon, *The Concept of Responsibility*, 53 GEO. L.J. 5 (1964); SCHLICK, *WHEN IS A MAN RESPONSIBLE* (1939); Hart, *Prolegomenon to Principles of Punishment* in 60 ARISTOTELIAN SOC'Y PROC. (1959); Hart, *Ascription of Responsibility and Rights* in 49 ARISTOTELIAN SOC'Y PROC. 171-94 (1949); Wasserstrom, *H.L.A. Hart and the Doctrines of Mens Rea and Criminal Responsibility*, 35 U. CHI. L. REV. 92 (1968); see also G. WILLIAMS, *THE MENTAL ELEMENT IN CRIME* (1965);

Surely, these are fundamental notions¹⁴ which should be explored.

Without determining the criteria for legal blameworthiness, the law has proceeded on the robust assumption that all persons are sane, competent and responsible for their acts, unless evidence shows the contrary.¹⁵ Proceeding in this way naturally focuses attention on the concept of insanity at the expense of developing clear formulations regarding legal responsibility and competency. Without clear ideas on the latter, it is no wonder that current tests of the insanity defense can be described as "vague and confused."¹⁶

Three states have tried to eliminate the defense.¹⁷ This course of action is sometimes advocated by those who believe that the question of legal insanity is solely a psychiatric question, and that it should be answered by a panel of psychiatric experts.¹⁸ These people usually hold that the concept of blameworthiness is outmoded, and should not be part of our criminal law. But each attempt at abolition has proved to be a failure.

Washington's attempt is instructive. In 1909, Washington's legislature passed a statute declaring that insanity at the time of the act was not a defense to a criminal charge.¹⁹ A case then arose in which

G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* (2d ed. 1961); A. HARDING, *RESPONSIBILITY IN LAW AND MORALS* (1960); BRETT, *AN INQUIRY INTO CRIMINAL GUILT* (1963); Benn, *An Approach to the Problems of Punishment*, 33 *PHILOSOPHY* 325 (1958); Flew, *The Justification of Punishment*, 29 *PHILOSOPHY* 291 (1954); Hall, *Psychiatric Criminology: Is It a Valid Marriage: The Legal View*, 16 *BUFFALO L. REV.* 349 (1967); H. MORRIS, *FREEDOM AND RESPONSIBILITY* (1961); Quinton, *On Punishment*, 14 *ANALYSIS* 1933-42 (1954); Wilson, *Freedom and Compulsion* in 67 *MIND* 60 (1958).

¹⁴ *E.g.*, CAL. PEN. CODE § 26 (West 1955) states that children, idiots, lunatics and insane persons are not considered "persons...capable of committing crimes"; but this does not go very far toward giving us an appreciation of the law's notion of responsibility, because one must determine what constitutes insanity and then, regarding all other persons, the usual presumptions of competency and responsibility prevail. *Cf.* MODEL PENAL CODE, art. II (Prop. Off. Draft, 1962). I have located no comparable section in Washington.

¹⁵ *See, e.g.*, State v. Mays, 65 Wn. 2d 58, 66-68, 395 P.2d 758, 764-5 (1964); State v. Bonner, 53 Wn. 2d 575, 335 P.2d 462 (1959); State v. Hartley, 25 Wn. 2d 211, 170 P.2d 333 (1946).

¹⁶ WEIHOFEN at 1 (1954).

¹⁷ State v. Lange, 168 La. 958, 123 So. 639 (1929); Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931); State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910); *Cf.* Davis v. Britt, — Ark. —, 420 S.W.2d 863 (1967); *see* Dubin, *Mens Rea Reconsidered; A Plea for a Due Process Concept of Criminal Responsibility*, 18 *STAN. L. REV.* 322, 387 (1966). Goldstein & Katz, *Abolish the Insanity Defense—Why Not?* 72 *YALE L.J.* 853 (1963).

¹⁸ *See, e.g.*, B. WOOTEN, *CRIME AND THE CRIMINAL LAW* (1963); P. ROCHE, *THE CRIMINAL MIND* 273-74 (1958); McCORD & McCORD, *PSYCHOPATHY AND DELINQUENCY* 186-87 (1956); MANNHEIM, *CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION* 94 (1952).

¹⁹ 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, idiocy or imbecility to comprehend the nature and quality of the act committed, or to

a defendant was convicted of first degree assault. He had tried to interpose an insanity defense, but it was not allowed by the trial court because of the statute. On appeal, the Washington Supreme Court held that the statute was unconstitutional, abridging article 1, section 21 of the State Constitution: "The right of trial by jury shall remain inviolate."²⁰ The court reasoned that mens rea and the insanity defense were deeply entrenched notions in the Anglo-Saxon heritage of our criminal laws; that to be labeled "guilty" a man must first be capable of forming a guilty intent; that this is a jury question; that this was the state of affairs when Washington adopted its Constitution, and that "[t]o take from the accused the opportunity to offer evidence tending to prove this fact [insanity], is, in our opinion, as much a violation of his constitutional right of trial by jury as to take from him the right to offer evidence before the jury tending to show that he did not physically commit the act or physically set in motion a train of events resulting in the act."²¹ Mr. Justice Holmes has observed that "even a dog distinguishes between being stumbled over and being kicked . . ."²² Therefore, "guilty but irresponsible" is an impermissible contradiction in terms. Inherent in the concept of guilt is the implication of responsibility, and a man has a constitutional right to have his guilt or innocence determined by a jury of his peers. Thus, Washington's experience is instructive on at least three points: (1) that attempts to abolish the insanity defense will fail for constitutional reasons; (2) that a person's responsibility for a crime is for jury determination, and (3) that since a panel of psychiatric experts will not qualify as a jury of one's peers, psychiatric "treatment tribunals"²³ would not be allowed to decide whether an accused was insane at the time of the act.²⁴

understand that it was wrong; or that he was afflicted with a morbid propensity to commit prohibited acts; nor shall any testimony or other proof thereof be admitted in evidence.

Ch. 249, § 7, [1909] Sess. Laws of Wash. 11th Sess. 891.

²⁰ State v. Strasburg, 60 Wash. 106 at 112, 119, 110 P. 1020 at 1021, 1024 (1910) and due process of law, *id.* at 112, 123, 110 P. at 1021, 1025.

²¹ *Id.*, at 119, 110 P. at 1024 (1910). In short, there can be no crime without criminal intent, *i.e.*, mens rea. *But compare* State v. Lindberg 125 Wash. 51, 215 P. 41 (1923).

²² O. W. HOLMES, THE COMMON LAW 3 (1881).

²³ See B. WOOTTEN, CRIME AND THE CRIMINAL LAW (1963); B. WOOTTEN, SOCIAL SCIENCE AND SOCIAL PATHOLOGY (1959); Kubie, *Research in Judicial Administration: A Psychiatrist's View*, 39 B.U. L. REV. 157 (1959).

²⁴ Failing this, some jurisdictions set up a bifurcated trial. If an accused pleads not guilty by reason of insanity, and also enters other pleas, California requires that he first be tried on the other pleas, conclusively presuming an accused sane during this "guilt" trial, then, if found guilty, the accused is tried separately on the insanity defense, before the same or a different jury. CAL. PEN. CODE § 1026

It should be emphasized that the law's definition of "insanity" is legal, not medical. Contrary to arguments advanced by medical critics, the law does not seek to identify and excuse those persons who are medically "insane," nor is there any reason that it should. The medical and legal conceptions of insanity are really quite different, and different social policies underlie them.²⁵ A psychiatrist's task is to relieve, or cure, defects of the mind, and not to draw a sharp legal line through various mental ailments separating the "insane" from the rest. True, he may classify a patient as paranoid, schizophrenic, manic-depressive, senile psychotic or parietic; however, he need not draw a sharp line between sanity and insanity. But the law draws such a line when it distinguishes between conviction and acquittal.²⁶

HISTORICAL ORIGINS OF THE INSANITY DEFENSE

A clearer comprehension of the problems inherent in the insanity defense is facilitated by historical understanding. Early English law did not allow the insanity defense. Furthermore, there seems to have been no general requirement of a guilty mind.²⁷ The *Leges Henrici* (1100 to 1135) reveal that the general principle of criminal liability

(West 1956). But, as has been shown, this method fails in one important respect. In the first trial, the "guilt" trial, mens rea is necessarily implicated, and, of course, therefore, so is the mental ability of the accused. To determine a defendant's guilt without admitting evidence of his mental state at the time of the crime would be a denial of due process of law. See *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959); *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949), cert. denied, 338 U.S. 836 (1949).

This bifurcation results in two trials over substantially the same material. For excellent commentary, see Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF. L. REV. 805 (1961).

²⁵ G. WILLIAMS, CRIMINAL LAW 442-46 (2d ed. 1961).

²⁶ Contrary to popular, and some professional psychiatric, beliefs, Freud recognized the value of the criminal law, and was neither against the concept of blame-worthiness nor punishment: "There are innumerable civilized people who would shrink from murder or incest, and who yet do not hesitate to gratify their avarice, their aggressiveness and their sexual lusts, and who have no compunction in hurting others by lying, fraud and calumny, so long as they remain unpunished for it; and no doubt this has been so for many cultural epochs." S. FREUD, THE FUTURE OF AN ILLUSION 19-20 (Jones ed. 1928). Freud stoutly maintained that "culture must be defended against the individual, and its organization, its institutions and its laws, are all directed to this end..." *Id.* at 9-10; 19 S. FREUD, STANDARD EDITION OF COMPLETE PSYCHOLOGICAL WORKS 208 (Strachey ed. 1961); and see H. HARTMAN, PSYCHOANALYSIS AND MORAL VALUES 15 (1960).

²⁷ It appears that the genesis of the doctrine of mens rea "is to be found in the mutual influences and reactions of Christian theology and Anglo-Saxon law." Levitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117, 136 (1922); but see Agretelis, "Mens Rea" in Plato and Aristotle, 1 ISSUES IN CRIMINOLOGY 19 (1965), where it is argued that the intellectual roots of the mens rea doctrine are properly located in the moral philosophy of Plato and Aristotle. Actually, it was first mentioned as a legal principle in the Code of Hammurabi (Circa 1790 B.C.). In this code if a man killed another and swore it was unintentional, he was merely fined according to the rank of the deceased.

did not require fault or a guilty mind (*mens rea*); ill intent, however, was a necessary element in proving perjury.²⁸ *Mens rea* appears to have entered the criminal law via the crime of perjury.²⁹ By the thirteenth century proof of an intentional element was necessary to convict for felony.³⁰ We can trace the beginnings of the insanity defense from this time.

Initially insanity was not a trial defense. The English Crown began using total and complete insanity as the basis for granting pardons to persons convicted of homicide.³¹ A clear formulation of the initial test of insanity is lost in history. It appears that madness was the governing idea. Madmen were not looked upon as persons, but were considered akin to beasts, or brutes, because they lacked reasoning powers. These ideas gave rise to the infamous "wild brute" or "wild beast" test of insanity.³²

By Edward I's reign (1272-1307) the concept of insanity penetrated the trial process. Absolute and complete insanity functioned to mitigate punishment.³³ Finally, by the time of Edward III (1327-1377),

²⁸ Early criminal law developed out of the blood feud, and was grounded in the desire for vengeance. Vengeance, of course, seeks a blameworthy victim. But, this need not mean a victim possessing an evil design, *i.e.*, a *mens rea*. There are numerous passages in the law on the ancient books pointing to criminality in certain cases without criminal intent. For discussion see 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 50-54 (1927); Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 975-82 (1932).

²⁹ Sayre, *supra* note 28, at 983 n.30, perceptively points out that the introduction of *mens rea* into the crime of perjury goes back to a sermon on oaths by St. Augustine (James 5:12); see 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 476 n.5 (1898).

³⁰ The earliest systematic attempt to describe criminal responsibility in English criminal law was finished about 1256 by HENRY DE BRACON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE*. It contains many passages showing the necessity of a guilty mind for felony conviction. See Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 983-89 (1932).

³¹ J. BIGGS, *THE GUILTY MIND* 83 (1955). This worthy book presents an 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. It is based on Judge Biggs' lectures given as recipient of the Isaac Ray Award which is presented annually by the American Psychiatric Association to one who "has made a laudable contribution to the improvement of the relationship of law and psychiatry." I rely, in part, on Judge Biggs for the following historical sketch.

³² Guttmacher attributes the "wild beast" test to Bracton. Guttmacher, *A Historical Outline of the Criminal Law's Attitude Toward Mental Disorder*, 4 ARCHIVES OF CRIM. PSYCHODYNAMICS 668 (1961); as do S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 126-27 (1925), and J. BIGGS, *THE GUILTY MIND* 82 (1955). But as Platt makes clear in Platt, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 ISSUES IN CRIMINOLOGY 1 (1965), Bracton's "wild beast" test was misinterpreted by English courts. Bracton used the Latin term "brutis" to mean brutes, *i.e.*, animals, who lack reason; he did not intend, or use it to associate the insane with wild beasts seized with diabolical possessions, and hence, originated the wild beast myth of insane persons.

³³ J. BIGGS, *THE GUILTY MIND* 83 (1955); see S. GLUECK, *MENTAL DISORDERS AND THE CRIMINAL LAW* 125 (1925); Eliasberg, *Urge and Motivation in Criminology*, 43 J. CRIM. L.C. & P.S. 319 (1952).

if one could prove that he was completely "mad" then he successfully could defend against a criminal charge.³⁴ By 1581, the relationship between a guilty mind and criminal responsibility was well established, and the lack of a guilty mind constituted grounds for denying criminal responsibility.³⁵ But insanity, to qualify as a defense, had to be complete and continuing, not partial or temporary.

In 1736 Sir Matthew Hale's highly influential *History of the Pleas to the Crown* was posthumously published. Following Coke, Lord Chief Justice Hale distinguished between two independent forms of insanity: partial and total. According to Hale "absolute madness," which he believed to be a total deprivation of memory and reason, would function as a defense to a criminal charge because the person charged could not be said to have had the required "*animo felonico*." For him, such human beings were not "persons," but brutes.³⁶ Hale also stated that partial insanity equally could function as a defense to a criminal charge, but "this is a matter of great difficulty." Probably the defense of insanity at the time of the act was unavailable to any accused who exhibited any sign of rationality at his trial.

This view appears to be verified by the instructions given in *Arnold's* case which allowed only total and continuing insanity to function as a defense. Under a delusion, and believing that he had been injured by him, Edward Arnold shot Lord Onslow. Mr. Justice Tracy in summing up the "wild beast" test of insanity to the jury used language strikingly similar to *M'Naughton's* test, and practically eliminated the possibility of partial insanity:³⁷

³⁴ J. BIGGS, *supra* note 33 at 83.

³⁵ *Id.* Judge Biggs quotes Lambard in his *Eirenarcha* (a handbook for justices of the peace) as saying: "If a mad man or a natural foole, or a lunatike in the time of his lunacie, or a child y apparently hath no knowledge of good nor uil do kil a mā, this is no felonious acte, nor anything forfeited by it... for they cannot be said to haue any understanding wil. But if upō examinatiō it fal out, y they knew what they did, & y it was ill, thē seemeth it be otherwise." *Id.* at 84. One should recall that "lunacy" literally was believed to have been caused by the moon, *i.e.*, moon-madness, and the locution "the time of his lunacy," probably refers to the phase of the moon that was supposed to have affected the person. *E.g.*, M. HALE, *HISTORIA PLACITORUM CORONAE* 30 (1847). Judge Biggs believes that the above quoted paragraph from Lambard is the origin of the "knowledge of good and evil" test of insanity. *Id.* But see ROYAL COMM'N ON CAPITAL PUNISHMENT, REPORT 397 (1953).

³⁶ This may be a strand in the misinterpretation of Bracton's "wild beast" test of insanity. Hale wrote: "...these dementes are both in the same rank; if they are totally deprived of the use of reason, they cannot be guilty ordinarily of capital offenses, for they have not the use of understanding, and act not as reasonable creatures, but their actions are in the condition of brutes." M. HALE, *HISTORIA PLACITORUM CORONAE* 31-2 (1847).

³⁷ The Trial of Edward Arnold, 16 State Trials 695, 764-65 (1723). Mr. Justice Tracy added that "...punishment is intended for example, and to deter other persons from wicked designs; but the punishment of a madman... can have no example." *Id.*

If he was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, though he committed the greatest offence, yet he could not be guilty of any offence against any law whatsoever; . . . a mad man . . . must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment, . . .

Evidence admitted at trial demonstrated that Arnold had been suffering from a severe mental illness, but, nevertheless, he was found guilty and sentenced to death. What may have been decisive is that Arnold showed signs of rationality; for example, he could write and had purchased a gun. Arnold, at the request of Lord Onslow, was "respited" and spent 30 years in jail where he died.

The case of James Hadfield³⁸ in 1800 was a dramatic milestone for the insanity defense. Hadfield, a soldier recognized for bravery and once an orderly for the Duke of York, tried to assassinate King George III in a box of the Theatre Royal and was indicted for high treason. Hadfield had sustained head wounds during battle³⁹ and was subject to delusions. He believed that the world was coming to an end; that he was a savior of man, and that like Jesus Christ, he, Hadfield, must sacrifice himself as a martyr. Because he had no desire to commit suicide, the best way to martyr himself was to assault the King. At trial, Hadfield's counsel observed that Hadfield appeared to have been "cut across all the nerves which give sensibility and animation to the body."⁴⁰ The prosecution showed that Hadfield displayed many signs of rationality; *e.g.*, he had cleverly concealed his pistol and had purchased slugs and gunpowder for it. Thus, under the views set forth by Sir Matthew Hale and Mr. Justice Tracy, the prosecution contended that Hadfield was neither an idiot nor a madman, for Hadfield was not "afflicted by the absolute privation of reason."⁴¹ Hadfield's counsel anticipated modern developments in the rules of insanity. He argued that a man could know right from wrong, could understand the nature of the act that he was about to commit, could manifest a clear design and foresight in planning and executing that act; yet, if he had a defective mental condition that produced, or

³⁸ Hadfield's Case, 27 State Trials 1281 (1800).

³⁹ "The point of a sword was impelled against him with all the force of a man urging his horse in battle." *Id.* at 1320.

⁴⁰ *Id.*

⁴¹ *Id.* at 1286.

was the cause of the act, then he ought not be held criminally responsible for it.

Before completion of trial Lord Kenyon, the Chief Justice, suggested to the prosecution that the trial terminate because "if a man is in a deranged state of mind at the time, he is not criminally answerable for his acts."⁴² The prosecution accepted the suggestion whereupon Lord Kenyon stated to the jury, "... I believe it is necessary for me to submit to you, whether you will not find that the prisoner, at the time he committed the act, was not so under the guidance of reason, as to be answerable for this act, enormous and atrocious as it appeared to be."⁴³ The jury found Hadfield not guilty, "he being under the influence of insanity at the time the act was committed."⁴⁴ Hadfield was continued in custody. Thus, the test of criminal insanity had taken a dramatic step away from the "wild beast" formulation that had been set forth in *Arnold's* case.

The decision in *Hadfield's* case is important for two reasons. It clearly held that insanity at the time of the act would excuse. An insane defendant need not be completely and continually deprived of all indicia of rational functioning in order to avail himself of the insanity defense. Yet, this conclusion must be tempered by the fact that at trial Hadfield looked as though he were totally deranged; this could not help but have influenced bench and jury. Secondly, the test of insanity did not turn on whether defendant was a "wild beast" or on whether defendant had the ability to distinguish right from wrong. While remaining part of the test of insanity, the capacity to distinguish good from evil was not the decisive consideration on the insanity issue.

Between 1812 and 1840, three major cases appeared which turned the development of the insanity defense back towards the "wild beast" test by requiring a total absence of conscious awareness at the time of committing the act. In these cases defendants had been charged with murder and had pleaded insanity. They all suffered from severe mental disorders of varying degrees. One of the defendants was found guilty and executed, and the other two were acquitted.⁴⁵ This, then, was the general development of the major precedents up to 1843 when

⁴² *Id.* at 1353.

⁴³ *Id.* at 1355.

⁴⁴ *Id.* at 1356.

⁴⁵ Trial of John Bellingham, reported in 1 COLLINSON, *IDIOTS, LUNATICS, AND OTHER PERSONS NON COMPOS MENTIS* 636 (1812); *Rex v. Offord*, 172 Eng. Rep. 924 (1831); *Regina v. Oxford*, 9 Carr. & P. 525, 545 *et seq.* (1840).

the celebrated case of *The Queen Against Daniel M'Naughton*⁴⁶ was decided.

Daniel M'Naughton, a Scot wood-turner, who posthumously has been described as "an extreme paranoid entangled in an elaborate system of delusions,"⁴⁷ assassinated Edward Drummond, secretary to the Prime Minister, on the mistaken belief that Drummond was the Prime Minister, Sir Robert Peel.⁴⁸ Three judges sat at his trial, accompanied for one day by Prince Albert, Queen Victoria's consort, who probably sat with the court as her emissary.

The Queen had more than an ordinary interest in M'Naughton's case and the insanity defense.⁴⁹ M'Naughton's assassination of Drummond on January 20, 1843, marked the fifth attack on the English Crown or its officers since the turn of the century. Hadfield tried to assassinate George III in 1800.⁵⁰ In 1813 Bellingham killed the Chancellor of the Exchequer.⁵¹ Oxford, in 1840, had shot at Queen Victoria but escaped punishment through a successful plea of the insanity defense.⁵² Twice in 1842 attempts were made on the life of Queen Victoria,—once in the presence of Prince Albert by a crazed youth named Francis who was convicted, but whose death sentence was commuted to life imprisonment; and once by a youth named Bassett

⁴⁶ *The Queen Against Daniel M'Naughton*, 4 State Trials, N.S., 847 (1843). For a radio dramatization of M'Naughton's original trial, see Glueck, *Mental Illness and Criminal Responsibility*, 2 J. SOC. THERAPY 134 (1956); for an historical account, see Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility*, 54 CALIF. L. REV. 1227 (1966).

⁴⁷ S. GLUECK, *LAW AND PSYCHIATRY* 44 (1964). Guttmacher and Weihofen say that M'Naughton was "under the influence of a form of mental disorder symptomized by delusions of persecution, in which Peel appeared as one of the persecutors," see their *PSYCHIATRY AND THE LAW* 403 (1952).

⁴⁸ Why did M'Naughton err, shooting Drummond instead of Peel? "M'Naughton had come from Glasgow, and it was said that when the Queen was in Scotland, Sir Robert Peel invariably rode in the royal carriage and Mr. Drummond in Sir Robert's own carriage." CASSELL, PETER & GALPIN, 7 CASSELL'S ILLUSTRATED HISTORY OF ENGLAND 580 (circa 1864). Thus, M'Naughton seems to have identified Drummond as Peel. Judge Biggs reports that Peel wrote a letter to the Queen stating that a police inspector had talked with M'Naughton the day after the shooting: "I suppose you are aware who is the person whom you have shot?" M'Naughton replied: "Yes—Sir Robert Peel." J. BIGGS, *THE GUILTY MIND* 98 (1955) quoting 1 BENSON, *THE LETTERS OF QUEEN VICTORIA, 1837-1861*, at 571 (1907). "The prisoner had no animosity against Sir Robert Peel, for whom he is said to have mistaken Mr. Drummond." *The Queen v. Daniel M'Naughton*, 4 State Trials, N.S., 847, 899 (1843).

⁴⁹ The letters of Queen Victoria show that she and many members of the English ruling class believed that the attempt to assassinate Peel may have been plotted by the Anti-Corn Law League; the Corn Laws were held in disrepute generally; thus, Queen Victoria had sovereign and personal interests in M'Naughton's trial. 1 BENSON, *THE LETTERS OF QUEEN VICTORIA, 1837-1861*, at 570, 577, 585-87 (1907).

⁵⁰ Hadfield's Case, 27 State Trials 1281 (1800).

⁵¹ Trial of John Bellingham, reported in 1 COLLINSON, *IDIOTS, LUNATICS, AND OTHER PERSONS NON COMPOS MENTIS* 636 (1812).

⁵² *Regina v. Oxford*, 9 Carr. & P. 525, 545 *et seq.* (1840).

who was seen to have pointed "a pistol at the Queen's carriage," and was imprisoned for 18 months.⁵³

At trial, during March 3 and 4, 1843, nine medical witnesses testified to the effect that M'Naughton was insane, and portions of Dr. Isaac Ray's then recently published book on forensic psychiatry were quoted to the court. The selections from Dr. Ray's book attacked Lord Hale's test of criminal insanity and the English cases upon which it was based.⁵⁴ The testimony was so convincing⁵⁵ that Chief Justice Tindal came close to directing a verdict of insanity, saying to the jury: "...I cannot help remarking, in common with my learned brethren, that the whole of the medical evidence is on one side, and that there is no part of it which leaves any doubt on the mind."⁵⁶ He then instructed the jury on the test of insanity⁵⁷ and committed the case to the jurors who found the defendant "not guilty, on the ground of insanity."⁵⁸ Thereupon, M'Naughton was committed to Broadmoor, a mental institution, where he later died.

The London newspapers, the House of Lords and Queen Victoria⁵⁹

⁵³ For discussion, see J. BIGGS, *THE GUILTY MIND* 98-100 (1955).

⁵⁴ See, e.g., *The Queen v. Daniel M'Naughton*, 4 State Trials, N.S., 847, 878-9, 882-91 (1843). Dr. Isaac Ray, in 1838, published his *Medical Jurisprudence Of Insanity*, and established himself as the Father of American forensic psychiatry. I. RAY, *A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* (1838).

⁵⁵ "We feel the evidence, especially that of the last two medical gentlemen who have been examined, and who are strangers to both sides and only observers of the case, to be very strong, and sufficient to induce my learned brother and myself to stop the case." *The Queen v. Daniel M'Naughton*, 4 State Trials, N.S., 847, 924 (1843).

⁵⁶ *Id.* at 925.

⁵⁷ *Id.*: [T]he point I shall have to submit to you is whether on the whole of the evidence you have heard, you are satisfied that at the time the act was committed ... [the prisoner] had that competent use of his understanding as that he knew that he was doing, by the very act itself, a wicked and a wrong thing. If he was not sensible at the time he committed that act, that it was a violation of the law of God or of man, undoubtedly he was not responsible for that act or liable to any punishment whatever flowing from that act... [I]f on balancing the evidence in your minds you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent and liable to all the penalties the law imposes. If not... then you will probably not take upon yourselves to find the prisoner guilty. If that is your opinion, then you will acquit the prisoner.

Note that this instruction is not the famous M'Naughton test.

⁵⁸ *Id.* at 926.

⁵⁹ She wrote to Peel: The law may be perfect, but how is it that whenever a case for its application arises, it proves to be of no avail? We have seen the trials of Oxford and M'Naughton conducted by the ablest lawyers of the day... and they allow and advise the Jury to pronounce the verdict of Not Guilty on account of Insanity,—whilst everybody is morally convinced that both malefactors were perfectly conscious and aware of what they did!... Could not the legislature lay down that rule... which Chief Justice Mansfield did in the case of Bellingham [does defendant possess "a sufficient degree of understanding to distinguish good from evil, right from wrong, and whether murder was a crime not only against the law of God, but against the law of his country."]; and why could not the

all hotly attacked the judges and the results of M'Naughton's trial. Curative legislation was proposed, and both Houses debated the propriety of M'Naughton's disposition and whether it constituted a dangerous state of affairs.⁶⁰ In accordance with the legal practice of the day, the House of Lords could "take the opinion of the judges"⁶¹ on legal questions; this, in effect, meant that the judges could be called before the House of Lords to account for their actions. On June 19, 1843, the House of Lords called the judges before that body for the second time on the matter.⁶² After all, certain murders had gone unpunished. This time the fifteen common law judges were asked to respond to five questions.⁶³ Their answers constitute the famous *M'Naughton* Rules on the insanity defense.

Lord Chief Justice Tindal answered for all the judges, except for Mr. Justice Maule who gave a separate opinion. Since Tindal's reply has become the official statement of the "*M'Naughton* Rule," which is "the sole formula used by the courts of thirty states (and of Great Britain) to define insanity for the jury,"⁶⁴ and which, in conjunction with the misnamed "irresistible impulse" test, defines the criterion of criminal insanity in 18 other states and most federal jurisdictions,⁶⁵

judges be bound to interpret the law in this and no other sense in their charges to the Juries?

1 BENSON, *THE LETTERS OF QUEEN VICTORIA, 1837-1861*, at 587 (1907).

⁶⁰ For discussion of the newspaper, and other, attacks, see J. BIGGS, *THE GUILTY MIND* 102 (1955).

⁶¹ See *The Queen v. Daniel M'Naughton*, 4 State Trials, N.S., 847, 926 (1843).

⁶² *Id.*

⁶³ *Id.*: June 19, 1843.—The judges again attended the House of Lords, when the following questions were put to them without argument:—'1st.—What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? '2nd.—What are the proper questions to be submitted to the jury when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence? '3rd.—In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

'4th.—If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?

'5th.—Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?

⁶⁴ See GOLDSTEIN, at 45, and H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 68-81 (1954).

⁶⁵ The cases are collected in the appendix to Moore, *M'Naghten Is Dead—Or Is It?* 3 HOUSTON L. REV. 58 (1965).

I reproduce it here in full, supplying emphasis. Tindal said:⁶⁶

The first question proposed by your Lordships is this. 'What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury or of producing some supposed public benefit?'

In answer to which question, assuming that your Lordships' inquiries are confined to those persons who labour under such partial *delusions* only, and are not in other respects insane, we are of the opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, *if he knew, at the time of committing such crime, that he was acting contrary to the law, by which expression we understand your Lordships to mean the law of the land.*

Your Lordships are pleased to inquire of us, secondly: 'What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?' And, thirdly: 'In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?' And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, *that the jury ought to be told in all cases that every man is to be 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 labouring 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.* The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew *the differences between right and wrong*; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as *when put with reference to the party's knowledge of right and wrong in respect to the very act with*

⁶⁶ The Queen v. Daniel M'Naughton, 4 State Trials, N.S., 847, 930-32 (1843). (emphasis added).

which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been, to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your Lordships have proposed to us is this: 'If a person under an insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused?' To which question the answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question lastly proposed by your Lordships is: 'Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?' In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But, where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

The judges could not have believed that they were establishing a precedent when expressing their views. Their opinion was not rendered in relation to a specific case, reasoning to its issues and special circumstances; there was no argument on the subject, and the political considerations that colored the judge's actions were manifest.⁶⁷ At best, theirs was only an advisory opinion on the five questions, and "their answers are a hotchpotch of the law as laid down from the time of Bracton."⁶⁸ Yet, all cases involving the insanity defense heard in England today, and in 48 American states and most federal jurisdictions, turn, in large measure, on the principles set forth by the judges when they were called to account for themselves by the House of Lords.

One American state, New Hampshire, from the beginning, has rejected *M'Naughton*. This is probably attributable to the correspondence that took place between Dr. Isaac Ray and Judge Charles Doe.⁶⁹ In 1868, Judge Doe devised a jury charge on the insanity defense that he delivered to a jury in a case involving a defendant who had killed a man during a robbery. It was accepted by New Hamp-

⁶⁷ As Mr. Justice Maule said: I feel great difficulty in answering the questions put by your Lordships on this occasion:—First, because they do not appear to arise out of, and are not put with reference to, a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts not inconsistent with those assumed in the questions; this difficulty is the greater, from the practical experience both of the Bar and the Court being confined to questions arising out of the facts of particular cases: secondly, because I have heard no argument at your Lordships' Bar or elsewhere on the subject of these questions, the want of which I feel the more the greater is the number and extent of questions which might be raised in argument; and, thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in criminal trials. For these reasons I should have been glad if my learned brethren would have joined me in praying your Lordships to excuse us from answering these questions, but as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can, after the very short time which I have had to consider the questions, and under the difficulties I have mentioned, fearing that my answers may be as little satisfactory to others as they are to myself.

Id. at 927.

⁶⁸ J. BIGGS, *THE GUILTY MIND* 107 (1955). In a later edition of his book Dr. Isaac Ray commented adversely on M'Naughton's formulations. See I. RAY, *A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* 39 (4th ed. 1860). For discussion of the legal origins and attendant confusions in Tindal's answers, see S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 161-86 (1925).

⁶⁹ See Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration In The Jurisprudence Of Mental Disease*, 63 *YALE L.J.* 183 (1953), and Overholser, *Psychiatry's Contributions To Criminal Law And Procedure*, 12 *OKLA. L. REV.* 13, 16 (1959). For discussion of early insanity tests, see N. DAIN, *CONCEPTS OF INSANITY IN THE UNITED STATES, 1789-1865* (1964).

shire's appellate court.⁷⁰ In a later case⁷¹ the New Hampshire court unanimously reaffirmed Judge Doe's views, holding that when the insanity defense is in issue, "the real ultimate question to be determined seems to be, whether, at the time of the act, he had the mental capacity to entertain a criminal intent—whether, in point of fact, he did entertain such intent."⁷² The trial court judge had charged the jury that: "If the killing was the offspring or product of mental disease," the defendant should be acquitted.⁷³ A major difference between *M'Naughton* and the New Hampshire position, which laid the basis for the *Durham*⁷⁴ view, is that under New Hampshire's view "all symptoms and all tests of mental disease were purely matters of fact to be determined by the jury."⁷⁵ There is no legal rule defining the criteria of criminal insanity.⁷⁶ It was believed that further instructions on the issue would usurp the jury's authority.

Although unclear from the appellate opinion, New Hampshire's position might have been the basis of an instruction on the test of insanity given by a Washington trial court judge in 1906.⁷⁷ On appeal, counsel urged that the New Hampshire rule be allowed, but the Washington State Supreme Court announced: "We cannot subscribe to this test."⁷⁸ The Washington court reasoned that New Hampshire's rule "could have no possible application in this state" because under it "the testimony of nonexpert witnesses will not be received to show insanity"; whereas, in "this state the testimony of nonexpert witnesses

⁷⁰ *State v. Pike*, 49 N.H. 399 (1870). Chief Justice Perley instructed the New Hampshire jurors along the following lines:

If... [the jury] found that the defendant killed Brown in a manner that would be criminal and unlawful if the defendant were sane—the verdict should be "not guilty by reason of insanity" if the killing was the offspring or product of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor or transact business or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury.

Id. at 402. This basic viewpoint was first articulated by Judge Doe in 1866 in *Boardman v. Woodman*, 47 N.H. 120 (1866), but that case turned on a question of testamentary capacity, not criminal responsibility.

⁷¹ *State v. Jones*, 50 N.H. 369 (1871).

⁷² *Id.* at 382.

⁷³ *Id.* at 369.

⁷⁴ *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

⁷⁵ *State v. Pike*, 49 N.H. 399 (1870).

⁷⁶ See Reid, *Understanding The New Hampshire Doctrine Of Criminal Responsibility*, 69 YALE L.J. 367 (1960).

⁷⁷ *State v. Craig*, 52 Wash. 66, 100 P. 167 (1909).

⁷⁸ *Id.* at 70, 100 P. at 168-69. It has also been rejected in *Eckert v. State*, 114 Wis. 160, 89 N.W. 826 (1902) and in *People v. Hubert*, 119 Cal. 216, 51 P. 329 (1897).

is competent to show insanity."⁷⁹ Others have criticized New Hampshire's position on the ground that it, like *Durham*, lays down no legal rule of criminal responsibility and that one is necessary.⁸⁰

AN ANALYSIS OF *M'Naughton*

Given the widespread influence of *M'Naughton*, several of its features should be described and analyzed. The test has two differing branches, both stemming from the concept of knowledge. If an accused has defective reason, because of a disease of the mind, he is excused from criminal responsibility if his condition precluded him from *knowing* (1) "the nature and quality of the act he was doing," or from *knowing* (2) that "he was doing what was wrong." Thus, an accused is entitled to the defense if he can satisfy either of the above two conditions.

The objects of knowledge are different in the two divisions of *M'Naughton's* test. One branch of the test is satisfied by a description; the other requires an evaluation. In one branch what counts is knowledge of the act and its usual consequences. The question is whether an accused had sufficient ability to appreciate the nature and quality of his action. If an accused is able to give an accurate and coherent factual description of his act and its usual attendant consequences, placing them in context, then presumably he is in contact with reality and can appreciate the nature and quality of his act. As Professor Hall says, the requirement that one know the nature and quality of one's act "is the ordinary way of specifying what, in part at least, is meant by the psychiatrist's 'reality principle' [that is] it concerns knowledge of ordinary actions and their everyday consequences."⁸¹

⁷⁹ *Id.* at 71, 100 P. at 169. *Reaffirmed* in *State v. Collins*, 50 Wn. 2d 740, 314 P.2d 660 (1957). The instruction also carried a charge on the misnamed "irresistible impulse" rule, and Washington's court held by a weird bit of reasoning, that where such a charge was given in a state that followed *M'Naughton's* rule, it constituted reversible error, on the ground that where jurors are asked to answer more than *M'Naughton's* questions, "they are invited to enter the realm of speculation where even the opinion of alienists is met by like opinion."

⁸⁰ [T]he fact that the criterion of responsibility cannot be defined with scientific precision is not a sufficient reason for not defining it at all. . . . The advantage of a formula is that it serves to limit the arbitrary element and to promote uniformity, as well as to help the jury to decide between conflicting views. . . . To have no rule at all would be to leave the decision on which often a man's life depends to the uncertain variations of ethical standard and emotional reaction which may influence the minds of members of a jury.

Hancock, Macdonald & Radzinowicz, *Memorandum of Dissent*, in ROYAL COMM'N ON CAPITAL PUNISHMENT, REPORT, 285, 287 (1953).

The second branch of *M'Naughton* adds another dimension to the required object of an accused's knowledge. The second branch assumes that an accused knew the nature and quality of his act, and asks whether he had the capacity to appreciate that his act was wrong. Thus, in its second branch, the *M'Naughton* formula asks whether an accused is able to evaluate his action as being either right or wrong. This is plainly different from the first part of *M'Naughton* which calls upon the accused only to give a true, contextual description of his act and its usual consequences. The second part of *M'Naughton* is satisfied only by an evaluative statement, not by a contextually descriptive one.

Some courts have denied that a distinction exists between the two different branches of *M'Naughton*,⁸² and Weihofen has identified five courts that are of the opinion that the two different branches of *M'Naughton* are synonymous.⁸³ The reason given for disregarding the difference is "that if the accused did not know the nature and quality of his act, he would have been incapable of knowing it was wrong."⁸⁴ This reasoning assumes that an accused must know the nature and quality of his act before he can know whether his act was wrong. Thus, there is a necessary, logical connection between *M'Naughton's* two branches. I agree. The two conditions of *M'Naughton* do not stand on equal, independent logical grounds; one presupposes the other. For illustration, turn the conditions around and ask whether an accused can know whether his act is wrong if he has no knowledge of the act in question. This is a logical and factual impossibility.

This does not mean, however, that *M'Naughton* is satisfied by showing that the accused knew that he was wrong. For guilt to attach it must also be shown that the accused knew the nature and quality of his act. The prosecutor must establish both conditions—that the accused knew the nature and quality of his act *and* that he knew the act was wrong—before the accused can become a target for criminal sanction. An accused is entitled to the insanity defense if he can come under either of *M'Naughton's* two branches; he has two

⁸¹ J. HALL, *STUDIES IN JURISPRUDENCE AND CRIMINAL THEORY* 281 (1958).

⁸² "[K]nowledge of the wrongfulness of an act also embraces capacity to understand the nature and consequences of the same. . ." *Maas v. Terr.*, 10 Okla. 714, 63 P. 960 (1901), and "it is almost inconceivable that a man could be sane enough to appreciate and know the nature and quality of an act, and yet not know whether it was right or wrong to commit such an act." *Montgomery v. State*, 68 Tex. Crim. 78, 151 S.W. 813 (1912); *see* WEIHOFEN at 73.

⁸³ *Id.*

⁸⁴ GOLDSTEIN at 50.

exculpatory strings to his bow. Surely it is error, therefore, to treat the different branches synonymously and to give instructions relating to only one branch.

The Nebraska court uniquely interprets *M'Naughton* in the conjunctive. Recognizing differences in *M'Naughton's* two branches, the court requires an accused to satisfy both branches before qualifying for the insanity defense.⁸⁵ Such a conjunctive treatment of *M'Naughton* is reversible error in New York,⁸⁶ as well it should be. A conjunctive reading drastically narrows the rule's application, not allowing it to apply to certain obvious cases of insanity. A man might know the nature and quality of his act, but not know it is wrong. Conversely, a man might say that he knew his act was wrong, but he may not have appreciated its nature and quality when he did it. Under a conjunctive reading of *M'Naughton* he would fail to qualify for the insanity defense. For example, in one case defendant knew the nature and quality of his act when he chloroformed his 16-year-old son, a congenital imbecile, paralyzed and able only to mumble. But defendant believed his act to be "right" for he believed that his act was commanded by the "will of God."⁸⁷ In another case defendant knew the nature and quality of his act, but believed "that he had heard the voice of God calling upon him to kill the victim as a sacrifice and atonement."⁸⁸ Then, of course, there is *Hadfield's* case which did not turn on Hadfield's ability to distinguish right from wrong. The point is that *M'Naughton* is to be read in the disjunctive, not in the conjunctive.⁸⁹

In 1957 the Washington Supreme Court eliminated jury instructions on one of *M'Naughton's* two disjunctive parts. A trial court judge ruled out of the jury instructions all requested references to the phrase "the nature and quality of the act," and this was upheld by the supreme court which said that the only required instruction in Washington was that "a defendant, to establish a defense of mental irresponsibility, must prove that he did not have the mental capacity to distinguish between right and wrong with reference to the

⁸⁵ *Id.* at 75. *Kraus v. State*, 108 Neb. 331, 187 N.W. 895 (1922).

⁸⁶ *People v. Sherwood*, 271 N.Y. 427, 3 N.E.2d 581 (1936).

⁸⁷ *People v. Greenfield*, Bronx County Ct. (1939); see 14 N.Y.U.L.Q. 228 (1937).

⁸⁸ *People v. Schmidt*, 216 N.Y. 324, 110 N.E. 945 (1915).

⁸⁹ Wisconsin's court has held that an "important emphasis" is added to *M'Naughton's* test of insanity by the requirement that an accused know the nature and quality of his act because this standard highlights the distinction between an accused's "vaguely... [realizing] that particular conduct is forbidden" and "real insight into the conduct." *State v. Esser*, 16 Wis. 2d 567, 115 N.W.2d 505, 521 (1962).

act complained of."⁹⁰ The court held that in order to qualify as criminally insane in Washington there was no requirement that defendant prove that he did not have the mental capacity to know the nature and quality of his act, as he "might well have [to do] under the *M'Naughton* rule."⁹¹ Thus, the Washington court did not follow *M'Naughton*.

Furthermore, instead of reading *M'Naughton* accurately as setting up two disjunctive propositions, the Washington court evidently thought that the *M'Naughton* test (not applied by the court in *Collins*) was properly read in the conjunctive. The court wrongly believed that in order for an accused to qualify under *M'Naughton*, he would have to prove that he came under both divisions of the rule. This is the only reading of the opinion that accounts for the stated justification in *State v. Collins* that the "instructions given, in so far as they did not accurately state the *M'Naughton* rule [denying defendant instructions on knowledge of the nature and quality of his act], were favorable and not prejudicial to the defendant, in that they omitted one of the elements that the defendant could have been required to prove in order to establish his defense of mental irresponsibility."⁹²

The test the court substituted for the misinterpreted *M'Naughton* test allowed only the right-wrong exculpatory branch. But as pointed out above,⁹³ it does not make sense to ask if a man knew his act was wrong without first ascertaining if he knew the nature and quality of his act. Given the right-wrong test of insanity set forth in *State v. Collins*, one must conclude that, if strictly adhered to, it is logically and factually contradictory because it requires an accused to say whether he knew the act he did was either right or wrong, without allowing him to show that he did not appreciate his act. As a result the test does not address itself to the very act for which the person is being tried.

The test of criminal insanity in Washington is left in considerable

⁹⁰ *State v. Collins*, 50 Wn. 2d 740, 750, 314 P.2d 660, 666 (1957); the Washington court also approved this notion: "[H]is mind was diseased to such an extent that he did not have the ability to distinguish between right and wrong with respect to the act charged." See also *State v. White*, 60 Wn. 2d 551, 374 P.2d 942 (1962), cert. denied, 375 U.S. 883 (1963); *State v. Putzell*, 40 Wn. 2d 174, 242 P.2d 180 (1952); *State v. Rio*, 38 Wn. 2d 446, 230 P.2d 308, cert. denied, 432 U.S. 867 (1951); *State v. Henke*, 196 Wash. 185, 82 P.2d 544 (1938); *State v. Carpenter*, 166 Wash. 478, 7 P.2d 573 (1932); *State v. Long*, 163 Wash. 607, 1 P.2d 844 (1931).

⁹¹ *State v. Collins*, *supra* note 90, at 751, 314 P.2d at 666.

⁹² *Id.*

⁹³ See accompanying note 84, *supra*.

doubt. The Washington court in *State v. Collins* clearly indicated that *M'Naughton* was not the test of criminal insanity. In so doing it clearly misconceived the *M'Naughton* test. Because of this misconception it believed its own right-wrong test was more liberal than *M'Naughton*, when, in fact, it was more restrictive because it eliminated *M'Naughton's* "nature and quality" branch.⁹⁴ To add to the overall confusion resulting from *Collins*, five years later the Washington court said that "*M'Naughton* is, for good reason, the established rule in the State of Washington."⁹⁵ In support of this statement the court cited and simultaneously reaffirmed *Collins*. Is *M'Naughton* the test? If so, is it *M'Naughton* in the disjunctive or in the conjunctive? Or does the court still follow its own partial *M'Naughton* "right-wrong" test? The answers to these questions must await future adjudication.

The next point to consider concerns the meaning of the word "wrong" in the *M'Naughton* test. The test, in part, asks whether the accused knew the act was wrong. Courts have been asked to decide whether "wrong" means "legally" wrong or "morally" wrong. The English courts have held that the word relates to legal wrong.⁹⁶ Few American courts have considered this issue, but five who have confronted it have sided with the English courts.⁹⁷ The American Law Institute believes that the standard is "legally" wrong.⁹⁸ The Washington court, contrary to prevailing opinion, has held that the standard is "morally" wrong. In *State v. Davis*,⁹⁹ the supreme court approved a jury instruction requiring that an accused must be "unable to perceive the moral qualities of the act with which he is charged."¹⁰⁰

⁹⁴ It is important that this branch of *M'Naughton* be distinct and kept in jury instructions. It covers at least two important situations: (1) insane automatism, see, e.g., *Regina V. Charlson* [1955] 1 All E. R. 859, and *R. V. Kemp* [1956] 1 Q.B. 399, 40 Crim. App. 121, and (2) mistake or simple ignorance of fact. For discussion, see N. MORRIS & C. HOWARD, *STUDIES IN CRIMINAL LAW* 37-78 (1964). G. WILLIAMS, *CRIMINAL LAW* 477-90 (2d ed. 1961).

⁹⁵ *State v. White*, 60 Wn. 2d 551, 593, 374 P.2d 942, 967 (1962), cert. denied, 375 U.S. 883 (1963). That the Washington court is confused is clear. In *State v. Collins*, *supra* note 90 and text accompanying, the court clearly believed its test was different from that of *M'Naughton*, but in *State v. White*, *supra* at 586, 374 P.2d at 963, the court says: "The test is *M'Naughton*," citing *State v. Collins*! Earlier, the court said Washington's test was "based on the *M'Naughten* [sic] rule."

⁹⁶ *R. V. Windle*, [1952] 2 All Eng. Rep. 1, 2. See also G. WILLIAMS, *CRIMINAL LAW* 492 (2d ed. 1961). Suppose X kills Y knowing it is morally wrong, but is laboring under an insane delusion that his act is legally right. Would X have a defense of insanity?

⁹⁷ *People v. Nash*, 52 Cal. 2d 36, 338 P.2d 416 (1959); *State v. Foster*, 44 Hawaii 403, 354 P.2d 960 (1960); *State v. Andrews*, 187 Kan. 458, 357 P.2d 739 (1961); *McElroy v. State*, 146 Tenn. 442, 242 S.W. 883 (1922); *Harrison v. State*, 44 Tex. Crim. 164, 69 S.W. 500.

⁹⁸ See MODEL PENAL CODE § 4.01(1) (Prop. Off. Draft, 1962).

⁹⁹ 6 Wn. 2d 696, 108 P.2d 641 (1940).

¹⁰⁰ *Id.* at 708, 108 P.2d at 647. "The instruction placed no undue burden upon appellant and could not have confused the jury."

The *M'Naughton* opinion is unclear on this issue. In one place Lord Tindal says that an accused is punishable "if he knew at the time of committing such a crime that he was acting contrary to law; by which expression we . . . mean the law of the land."¹⁰¹ But later he says "if the accused was conscious that the act was one which he ought to do, and if that act was at the same time contrary to the law of the land, he is punishable." On the basis of the opinion itself it would seem that knowledge that the act was either legally wrong or morally wrong would preclude an accused from qualifying for the insanity defense under this branch of *M'Naughton*. Perhaps the courts which have restricted the meaning of "wrong," to either wrong in the legal sense or wrong in the moral sense have misinterpreted the original *M'Naughton* opinion.

As a practical matter the way in which a court interprets the word "wrong" may have little effect on the eventual outcome of a case. When the accused is asked if he knew that the act he did was wrong in the moral sense, the reference is probably to society's views on morality, not the defendant's subjective morals. Because the insanity defense is usually pleaded only when fundamental crimes are involved and because fundamental crimes are both legally and morally wrong (according to society's morals), the "legal" test and the "moral" test are almost identical in actual operation.¹⁰²

Two remaining phrases of the *M'Naughton* test must be discussed: "disease of the mind" and "know." Courts have not precisely defined the phrase "disease of the mind,"¹⁰³ but this locution presents

¹⁰¹ *The Queen v. Daniel M'Naughton*, 4 State Trials, N.S., 847, 930 (1843).

¹⁰² Professor Goldstein perceptively points out that the only reason for urging the moral interpretation of "wrong" is that "some writers see it as a way to broaden an otherwise narrow definition of 'know.' The apparent hope is to bring to the jury's attention the moral, and emotional, perspective of the defendant." GOLDSTEIN at 53. See also Cohen, *Criminal Responsibility and the Knowledge of Right and Wrong*, 14 MIAMI L. REV. 30, 49 (1959). But there is no assurance that the confusion created by this test—i.e., whose morals should be used?—will work in favor of the defendant. The jury is given the "morally wrong" instruction without comment as a general rule.

¹⁰³ See GOLDSTEIN at 47-49. Professor Goldstein points out that little judicial comment we have written in relation to cases in which defendant's mental condition was marginal, such as pleading insanity by intoxication, narcotics, etc. In Washington, mental derangement resulting from self-induced, excessive use of liquor or drugs, even amounting to a toxic psychosis, does not qualify as a disease of the mind satisfying Washington's insanity defense. See *Seattle v. Hill*, 72 Wash. Dec. 2d 778, 435 P.2d 692 (1968); *State v. Rio*, 38 Wn. 2d 446, 230 P.2d 308, cert. denied, 342 U.S. 867 (1951); *State v. Miller*, 177 Wash. 442, 32 P.2d 535 (1934); *State v. Hawkins*, 23 Wash. 289, 63 P. 258 (1900). This is consistent with other jurisdictions. Mental retardation or "defect" can qualify as a mental disease; however, the effect must be to deprive a defendant of *M'Naughton's* required "knowledge." *Bryant v. State*, 115 A.2d 502 (Md. 1955). But in Georgia it was not sufficient that defendant "had the mentality of a child nine or ten years old." *Reece*

many questions.¹⁰⁴ The phrase is not equivalent to medical classifications of mental diseases, whether one considers organic brain diseases, such as paresis or congenital defects, psycho-functional diseases such as the psychoses, psychoneuroses, psychopathy, or the less severe personality disorders.¹⁰⁵ It appears that the legal phrase takes its meaning from the rest of the *M'Naughton* rule, and is, therefore, severely limited by the meaning of the word "know," which is the most important concept. Noncognitive mental disorders are, therefore, not "diseases of the mind." Only few of the psychoses and the most severe forms of other mental disorders impair cognition, and thus come within the phrase "disease of the mind."¹⁰⁶ Thus, whatever be the disease that affects an accused's reason, to qualify as a "disease of the mind" under *M'Naughton*, it must affect an accused's reason so severely that he was deprived of knowledge of the nature and quality of his act, or that he did not know what he was doing was wrong.¹⁰⁷

The most important concept in *M'Naughton* is the word "know." This concept is critical because it circumscribes the entire test by singling out one aspect of a human being's total personality, the cognitive. Thus, the test is heavily intellectualistic, and from a psychological point of view, narrow because the cognitive becomes the single, important criterion of criminal responsibility.

Its narrowness is further compounded because the criterion of knowledge has been restrictively interpreted. Indeed, Utah's Supreme Court goes so far as to require that before a defendant can qualify under *M'Naughton* he must be suffering from a disease of the mind "to such an extent that he did not know the nature of the act; that is, did not know he had a revolver, that it may be loaded, or that, if

v. State, 212 Ga. 609, 94 S.E.2d 723 (1956). See also the writing of a psychiatrist: C. JEFFERY, CRIMINAL RESPONSIBILITY AND MENTAL DISEASE 193-226 (1967).

¹⁰⁴ For some of the problems see P. ROCHE, THE CRIMINAL MIND 15, 253 (1958); B. WOOTTEN, SOCIAL SCIENCE AND SOCIAL PATHOLOGY 205-25 (1959); Diamond, *From M'Naughton to Currens, and Beyond*, 50 CALIF. L. REV. 189, 192-93 (1962); Livermore & Meehl, *The Virtues of M'Naughton*, 51 MINN. L. REV. 789 (1967); Swartz, "Mental Disease," 111 U. PA. L. REV. 389, 390 (1963).

¹⁰⁵ For discussion, see WEIHOFEN at 10-49, 174-211, and 1 H. MANNHEIM, COMPARATIVE CRIMINOLOGY 242-82 (1965).

¹⁰⁶ The phrase is usually used clumsily to express a core meaning, "with regard to such conditions in which the sense of reality is crudely impaired, and inaccessible to the corrective influence of experience—for example, when people are confused or disoriented or suffer from hallucinations or delusions." Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 384 (1952). See also Kuh, *The Insanity Defense*, 110 U. PA. L. REV. 771 (1962); Weihofen, *The Definition of Mental Illness*, 21 OHIO ST. L.J. 1 (1960).

¹⁰⁷ See note 177 *infra*.

discharged, it may injure or kill.'"¹⁰⁸ The result of such a restrictive interpretation is that it holds responsible many defendants who are seriously disturbed, because it virtually precludes a successful assertion of the insanity defense. Since only few psychotics can actually meet a highly restrictive interpretation of "know," the related concept of "diseases of the mind" is also restricted to those diseases producing a total impairment of cognitive processes, *i.e.*, some of the psychoses.

Washington, too, indicates that it prefers a severe and restrictive interpretation of its insanity defense. In its last full consideration of the subject, the Washington Supreme Court held "that the established policy in this state is to strictly limit the application of that [insanity] defense."¹⁰⁹ Furthermore, the court held that "considerations of *stare decisis* reinforce this argument,"¹¹⁰ and, stunningly, that "the defense is available only to those persons who have lost contact with reality so completely that they are beyond any of the influences of the criminal law."¹¹¹ The severity of the court's interpretation gives credence to Zilboorg's wry observation that *M'Naughton's* standard can be met only by "totally deteriorated, drooling, hopeless psychotics of long standing, and congenital idiots."¹¹²

Psychiatrists,¹¹³ and others,¹¹⁴ object to narrow interpretations of

¹⁰⁸ *State v. Kirham*, 7 Utah 2d 108, 319 P.2d 859, 860 (1958). Cases similarly interpreting *M'Naughton's* knowledge requirement are collected in GOLDSTEIN at 235-36, n. 12.

¹⁰⁹ *State v. White*, 60 Wn. 2d 551, 590, 374 P.2d 942, 965 (1962), *cert. denied*, 375 U.S. 883 (1963).

¹¹⁰ *Id.*

¹¹¹ *Id.* *But cf.* *State v. Putzell*, 40 Wn. 2d 174, 242 P.2d 180 (1952). This requirement, citing *State v. Collins*, 50 Wn. 2d 740, 314 P.2d 660 (1957), seems to necessitate that defendant not know the nature and quality of his act ("lost contact with reality") which, of course, contradicts what the Washington court held in *State v. Collins*.

¹¹² G. ZILBOORG, *MIND, MEDICINE AND MAN* 273 (1943).

¹¹³ The major objection raised by psychiatrists is that the test fails to recognize that a mentally sick person might commit a crime because of morbid impulses or morbid reasoning, even though, in a sense, he might know it was wrong to do so. To illustrate this, two examples are generally given. One is the instance of an idiot who cuts off his sleeping brother's head just to see how annoyed the brother will be when he wakes up and can't find his head. The other example is that of the paranoiac who, believing that a bystander is calling him names, kills the bystander. It is argued that both these defendants would have to be found guilty under the *McNaughton* test. The idiot, it is presumed, knew that it was wrong to cut off heads... he must have been told, and therefore he knew that it was, at least, naughty. And the paranoiac knows that murder is not an appropriate retaliation for slander. Therefore both defendants knew their acts were wrong; hence, both are guilty. The point is made that a formula which leads to so obvious a miscarriage of justice is all wrong.

Davidson, *Criminal Responsibility: The Quest for a Formula*, in M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 61-62 (Hoch & Zubin eds. 1955).

the knowledge requirement. The psychiatric objections generally attack the verbal, or intellectualistic, interpretations of "know," saying that the law's interpretation of "know" does not take account of known facts about the human psychic apparatus. Psychiatrists hold that there are at least two types of knowledge, and that there is a "fundamental difference between verbal or purely intellectual knowledge and the mysterious other kind of knowledge [which] is familiar to every clinical psychiatrist; it is the difference between knowledge divorced from affect [emotional appreciation] and knowledge so fused with affect that it becomes a human reality,"¹¹⁵ and further, "that understanding is not a purely intellectual process and that the word 'know' as it is used in the phrasing of the criminal law dealing with insanity is now used by psychiatrists in a sense totally different [in the "affect" sense]. . . . How can we have one conception of knowledge when examining our patients and another as soon as we are sworn in at the witness stand?"¹¹⁶ A psychiatrist is advised that he will be "on much more solid ground . . . if he carries with him his strict clinical standard directly to the witness stand."¹¹⁷ Thus, the issue is joined, usually at the witness stand during cross-examination, between the psychiatrists' meaning of the concept of knowledge (including "affect," emotional appreciation) and a restrictive and intellectualistic interpretation (excluding "affect").¹¹⁸

Guttmacher and Weihofen cite a poll of American psychiatrists showing that 80% believed M'Naughton too narrow and unsatisfactory on this point, and they quote a survey showing that 90% of Canadian psychiatrists were dissatisfied with the rule there, M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 408 (1952).
¹¹⁴ *E.g.*, *Durham v. United States*, 214 F.2d 862, 872-74 (D.C. Cir. 1954); J. BIGGS, *THE GUILTY MIND* 132-33 (1955); H. WEIHOFEN, *THE URGE TO PUNISH* 11 (1957); Zilboorg, *A Step Toward Enlightened Justice*, 22 U. CHI. L. REV. 331 (1955).
¹¹⁵ Zilboorg, *Misconceptions of Legal Insanity*, 9 AM. J. ORTHOPSYCHIATRY 540, 552-53 (1939). Zilboorg does not blame the law, but holds that "the incongruity is caused by lack of clarity as to standards within the medical profession itself."
¹¹⁶ *Id.* at 553.

The extreme cases of such divorcement between purely intellectual or verbal perception and full realistic perception presents a clear-cut schizophrenic picture. But, not only the fully developed schizophrenic is afflicted with such a split between word-concept and fact. We know that compulsion neurotics, or obsessional neurotics, manifest the same clinical phenomenon, which in these cases is called isolation. . . . [T]he obsessional thought or the compulsive act is isolated, effectively from the rest of the personality and becomes non-integrated knowledge, or no knowledge at all.

Id. at 552.

¹¹⁷ *Id.* at 553.

¹¹⁸ The lack of agreement on meaning of key terms, the partisan quality of expert witnesses, plus vigorous examination and cross-examination upsets many psychiatrists so much that they (wrongly) refuse to enter the courtroom. "[M]ore than 10 per cent of psychiatrists refuse all courtroom employment and . . . another 20 per cent refuse employment as partisan experts . . . that still leaves 70 per cent of the nation's psychiatrists [but] the truth of the matter is that in this dissenting

Most courts that have considered the question of "knowledge" in *M'Naughton* interpret it more broadly than does Washington's court.¹¹⁹ California's Supreme Court has observed that "our trial courts place a commendably broad interpretation upon the *M'Naughton* 'knowledge' test."¹²⁰ The broader interpretation is followed in Canada, Scotland, and possibly, Australia.¹²¹

It is important that the word "know" be interpreted broadly, *i.e.*, to ask whether an accused had sufficient mental grasp of a total situation to appreciate the full consequences of his act. A broad interpretation of "know" allows for a full development of psychiatric testimony at trial. A decision on an accused's criminal responsibility should be based on as much factual information as possible. A narrow interpretation of the "knowledge" requirement, like Washington's, could be used to restrict the presentation of evidence and keep from the jury full psychiatric testimony depicting the true picture of an accused's mental condition.¹²² The principal function of a psychiatrist who testifies about an accused's state of mind is to inform the jury, in simple English, of the character and implications of the accused's mental disease. The psychiatrist can do this only if he is allowed some latitude, permitting him to explain directly to the jury, translating the terms of his own discipline and experience into layman's language. The psychiatrist should detail carefully the nature

third are to be found most of the leaders of American psychiatry." M. GUTTMACHER, *THE MIND OF THE MURDERER* 119-20 (1960). "By our system of partisan expert witnesses we have alienated and deprived ourselves of the services of the best; and accepted, and at the same time criticized and have been shocked by the performances of the worst." Niles, *Impartial Medical Testimony*, 45 ILL. BAR. J. 282, 283 (1957). *But see* J. HALLECK, *PSYCHIATRY AND THE DILEMMAS OF CRIME* 205-28 (1967). "A trial is not a scientific investigation; it is not a search for objective truth. The doctor who undertakes to go to court and testify as an expert witness must bear in mind that he is stepping squarely into the middle of a fight." M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 205 (1952). For a description toward movements toward impartial medical testimony in personal injury cases, see H. ZEISEL, H. KALVEN, JR. & B. BUCKHOLTZ, *DELAY IN THE COURT* 120-28 (1959).

¹¹⁹ GOLDSTEIN at 49-50: "In eleven states, the jury is told that an accused 'knows' only if he 'understands' enough to enable him to judge of 'the nature, character and consequence of the act charged against him,' or if he has the 'capacity to appreciate the character of and to comprehend the probable or possible consequences of his act.'"

¹²⁰ *People v. Wolff*, 40 Cal. Rptr. 271, 394 P.2d 959, 962 (1964).

¹²¹ GOLDSTEIN at 237, n.14.

¹²² *United States v. Freeman*, 357 F.2d 606, 619 (2d Cir. 1966); *Durham v. United States*, 214 F.2d 862, 870-71 (D.C. Cir. 1954); S. GLUECK, *LAW AND PSYCHIATRY* 61-68 (1962); Roche, *Criminal Responsibility* in P. HOCH & J. ZUBIN, *PSYCHIATRY AND THE LAW* 112 (1955); Carroll & Leopold, *The Current Influence of Psychiatric Concepts in Determining Criminal Responsibility in Pennsylvania*, 31 TEMP. L.Q. 254, 264, 280 (1958); Waedler, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 380-81 (1952).

of the accused's disorder, the medical history of the accused, the medical basis for the psychiatrist's diagnosis, and the probable consequences of the disease on the conduct of the accused.¹²³ A broad interpretation of the knowledge requirement is necessary to insure the possibility that this type of testimony is brought to the jury so the jury can be well informed.¹²⁴

To insure a broad interpretation and to achieve the above mentioned result, the word "know" ought be dispensed with and the word "appreciate" substituted. New York has done this.¹²⁵ This substitution of words will allow for full development of the relevant expert testimony, and will help the jurors understand and use psychiatric testimony; in part, it will preclude them from voting their probable preconceptions associated with a narrowly conceived, cognitive interpretation of "know." If necessary, and it may be, the judge should instruct the jury that the term "appreciate" refers to, and includes, emotional ("affect") as well as cognitive defects of human functioning.

M'Naughton AND A CONTROL TEST

Even if the word "appreciate" were substituted for "know," and were accompanied by an appropriate jury instruction, it is highly unlikely that the *M'Naughton* test would ever communicate adequately the conception that an accused should be acquitted by reason of insanity if he lacks the ability, from a disease of the mind, to conform his actions to the requirements of law. *M'Naughton's* test was devised in 1843 and drew on the prior law which, in turn, was formulated well before the advance of modern knowledge about human psychic apparatus. *M'Naughton* fails to take sufficient account of psychic realities and modern scientific knowledge. Psychiatry holds that a man is a complex, integrated personality;¹²⁶ that reason is only one element in a man's total psychic makeup; and that it is not

¹²³ Brief for Abram Chayes as amicus curiae at 26, *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954), reproduced in part, in J. HALL & S. GLUECK, *CASES ON CRIMINAL LAW AND ENFORCEMENT* 298 (2d ed. 1958).

¹²⁴ "Even under the right-wrong test, no evidence should be excluded which reasonably tends to show the mental condition of the defendant at the time of the offense." *State v. Carlson*, 5 Wis. 2d 595, 93 N.W.2d 354, 361 (1958). See also *State v. Shoffner*, 31 Wis. 2d 412, 143 N.W.2d 458, 463 (1966).

¹²⁵ N.Y. PEN. LAW § 30.05 (McKinney 1967). See also *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961).

¹²⁶ See F. ALEXANDER, *FUNDAMENTALS OF PSYCHOANALYSIS* (1st ed. 1948); AMERICAN HANDBOOK OF PSYCHIATRY (Arieti ed. 1959); O. ENGLISH & S. FINCH, *INTRODUCTION TO PSYCHIATRY* (1957); O. ENGLISH & G. PEARSON, *COMMON NEUROSES OF CHILDREN AND ADULTS* (1937); A. NOYES & L. KOLB, *MODERN CLINICAL PSYCHIATRY* (5th ed., 1959); L. SALZMAN & J. MASSERMAN, *MODERN CONCEPTS OF PSYCHOANALYSIS* (1962).

the sole determinant of conduct. Although man is an integrated unit, psychiatrists hold that his mental processes conveniently can be classed into three categories, according to the ways in which they manifest themselves. The classifications are (1) cognitive (intellectual), (2) volitional (ability to control one's actions), and (3) affective (emotional).¹²⁷ A broad interpretation of *M'Naughton*, substituting "appreciate" for "know," can take into account the first and third classes, cognitive-affective; but it cannot take account of the problems presented by the second class, the problems of volitional control. Thus, the real criticism of *M'Naughton* is that it ignores a fundamental category of psychic life. It emphasizes knowledge while ignoring self-control.¹²⁸ Although a man may appreciate what he is doing and may realize it is wrong, he may be unable to refrain from doing it.¹²⁹ Perhaps the most widely known examples of this type of behavior are kleptomania and pyromania.¹³⁰

Eighteen American states,¹³¹ the federal jurisdictions,¹³² thirteen European¹³³ and ten Latin-American countries¹³⁴ provide that lack

¹²⁷ See M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 410 (1952); Overholser, *The Role of Psychiatry in the Administration of Criminal Justice*, 93 J.A.M.A. 830 (1929).

¹²⁸ With the passage of years, their application [M'Naughton rules] has become increasingly difficult in the light of modern knowledge and understanding, and because of the variety of forms of mental alienation, sometimes transient, which can occur as negating volition. The law in making it essential to a finding of insanity that the mental condition of the accused should be such as not to understand the nature and quality of the act, or not to know that it was wrong, has imposed positive tests which are difficult to apply where the mind of the doer of the act did not function in control of the action... we cannot escape the difficulty that the M'Naughton Rules were never intended to apply to a case where the act was done without volition or consciousness of doing it.

Regina v. Cottle, [1958] N.Z.L.R. 999, 1009 (Ct. App.).

¹²⁹ Keedy reports that a group of psychiatrists were asked: "Are there cases where a person, suffering from mental derangement, knows that it is wrong to inflict bodily harm (killing, maiming, ravishing) upon another person, but owing to the mental derangement is incapable of controlling (resisting) the impulse to commit such bodily harm?" Of the 102 psychiatrists who replied, 93 answered "yes." Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956, 989 (1952).

¹³⁰ Of course, there are many others, e.g., epilepsy and manic-depressive psychoses. A paranoid may kill in the hope of freeing himself from his anxieties, and the compulsion neuroses lead their sufferers to do uncontrollable acts that they know are wrong. See Spierer, *The Psychology of Irresistible Impulse*, 33 J. CRIM. L.C. & P.S. 457 (1943); SULLIVAN, *CRIME AND INSANITY* 98, 110, 113-14 (1924). Psychiatrists recognize that persons suffering from certain diseases cannot control their actions. E.g., A. NOYES, *MODERN CLINICAL PSYCHIATRY* 88 (3d ed. 1948); Karpman, *Criminality, Insanity and the Law*, 39 J. CRIM. L.C. & P.S. 584 (1949); and 1949-1953 ROYAL COMM'N ON CAPITAL PUNISHMENT, REPORT 109-112 (1953).

¹³¹ GOLDSTEIN at 67, 241-42, n.1.

¹³² *Id.*

¹³³ Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956, 969-73 (1952).

¹³⁴ *Id.* at 974-76.

of volition under certain conditions precludes criminal responsibility. "Assuming defendant's knowledge of the nature and quality of his act and his knowledge that the act is wrong, 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," then, New Mexico's Supreme Court has declared, "he can not be found guilty."¹³⁵

Text writers have misnamed this test of insanity the "irresistible impulse" test. It is really a control test. Professor Goldstein demonstrates in reviewing alternative statutory expressions that there are so many differing formulations of the test "that there is no monolith called the 'irresistible impulse' test."¹³⁶ The central idea is loss of control. Of course there are formulations that use the words "irresistible impulse;" on the other hand, there are better formulations, like New Mexico's, resting directly on the notion of control.¹³⁷

Weighty objections cut against a narrowly formulated control test that uses the word "impulse" and connotes the idea of sudden and irresistible loss of control. Like an intellectualistic interpretation of *M'Naughton's* knowledge requirement, a "sudden impulse" interpretation of the control test can be used to restrict evidence and jury deliberations solely to its terms,¹³⁸ thereby keeping from the jury psychiatric testimony depicting the true nature of an accused's mental condition, as well as the insights of modern psychology.¹³⁹ The "impulse" connotation also fails to account for other cases where loss of volition takes place, but not suddenly.¹⁴⁰ To apply a control test only

¹³⁵ *State v. White*, 58 N.M. 324, 270 P.2d 727, 731 (1954).

¹³⁶ GOLDSTEIN at 69.

¹³⁷ Compare the New Mexico formulation with Alabama's formula "[I]f... the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*," *Parsons v. State*, 81 Ala. 577, 2 So. 854, 866-67 (1887), or with that of Massachusetts which uses the word "impulse," implying a suddenness of action. *Commonwealth v. Robers*, 48 Mass. 500, 502-03 (1844).

¹³⁸ In *Snider v. Smyth*, 187 F. Supp. 299, 302 (E.D. Va. 1960), *aff'd*, 292 F.2d 683 (4th Cir. 1961), the jury was told that if defendant had planned his act, he could not come within the irresistible impulse test, and to come within it, defendant's act had to be of the type that "comes upon a person rather hurriedly; it rises quickly; short of interference by a third party, it is irresistible." In *De Jarnette v. Commonwealth*, 75 Va. 867 (1881), discussed in *Thompson v. Commonwealth*, 193 Va. 704, 70 S.E.2d 284, 292 (1952), the court rested heavily on the notion of suddenness requiring that defendant's mental disease "break out in a sudden paroxysm of violence."

¹³⁹ GOLDSTEIN at 70-75 and J. HALL, *PSYCHIATRY AND CRIMINAL RESPONSIBILITY* 761, 777-78 (1956) claim that the presentation of evidence, in fact, is not greatly restricted, but the possibility still remains under the narrowly worded tests.

¹⁴⁰ *E.g.*, *People v. Sherwood*, 271 N.Y. 427, 3 N.E.2d 581 (1936).

to crimes which have been suddenly and impulsively committed, after a sharp internal conflict, neglects:¹⁴¹

many cases, such as those of melancholia . . . the sufferer from this disease experiences a change of mood which alters the whole of its existence. He may believe, for instance, that a future of such degradation and misery awaits both him and his family that death for all is a less dreadful alternative. Even the thought that the acts he contemplates are murder and suicide pales into insignificance in contrast with what he otherwise expects. The criminal act, in such circumstances, may be the reverse of impulsive. It may be coolly and carefully prepared; yet it is still the act of a madman. This is merely an illustration; similar states of mind are likely to lie behind the criminal act when murders are committed by persons suffering from schizophrenia or paranoid psychoses due to disease of the brain.

*State v. Reidell*¹⁴² is a well known instance of melancholia; there, defendant tried but failed to take his life after having killed his family, believing that all would be better off dead.¹⁴³

If one asks whether a control test should be part of the insanity defense, reason dictates an affirmative answer. Considered against the criterion of blameworthiness, surely, the answer is clear. No person can be considered a legitimate object of criminal or moral blame for his acts, if he lacks the ability to control himself. We do not hold that a man is rightfully blamed for his acts when he has no power over them. In such a situation, lacking volition, his "acts" are akin to a muscular spasm. We hold him blameless.

Considered against the social policy of general deterrence, which is believed to underlie our criminal law, the answer is equally clear. The notion of general deterrence suggests that one purpose of criminal law is to express formal condemnation of certain acts by calling them crimes, forbidding them, and sanctioning them in order to prevent others from performing the described criminal acts.¹⁴⁴ The theory is that a man, knowing that his proposed act constitutes a crime and knowing that if he engages in it he will be the subject of penal sanctions, is deterred from committing the act by his knowledge because

¹⁴¹ 1949-1953 ROYAL COMM'N ON CAPITAL PUNISHMENT, REPORT 110 (1953).

¹⁴² 9 Houst. 470, 14 A. 550 (Del. 1888).

¹⁴³ A most moving case is *People v. Sherwood*, 271 N.Y. 427, 3 N.E.2d 581 (1936).

¹⁴⁴ See generally VON HENTIG, *PUNISHMENT: ITS ORIGIN, PURPOSE AND PSYCHOLOGY* (1937); Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); Andenaes, *General Prevention—Illusion or Reality?* 43 J. CRIM. L.C. & P.S. 176 (1952); Redmount, *Some Basic Considerations Regarding Penal Policy*, 49 J. CRIM. L.C. & P.S. 426 (1959).

he fears punishment.¹⁴⁵ But there are certain people who are non-deterrable. The general deterrence theory recognizes that it is futile to condemn or threaten persons who are beyond the range of influence of threatened criminal sanction.

Considered against the criterion of blameworthiness or the social policy of general deterrences, it seems clear that any person who fails to possess ability sufficient to control his actions should be beyond the range of any threat or condemnation that the criminal law can make. Impaired volition should qualify a defendant for the insanity defense. In states that do not allow impaired volition to qualify under the insanity defense nonvolitional mentally-ill offenders are criminally convicted and punished, instead of treated. Such a situation is abhorrent in view of the professed justifications for the criminal law.

In 1947, the Washington Supreme Court construed different statutes as presenting a unitary irresistible impulse test, and rejected the test. It said "that this court has never recognized or approved the defense of irresistible impulse, nor do we now feel that we should accept the doctrine of irresistible impulse as a defense in a criminal action."¹⁴⁶ Fifteen years later, when it was asked to reconsider its position, the Washington court refused,¹⁴⁷ today Washington's insanity defense does not allow for impaired volition of a mentally-ill accused.

In its last refusal to adopt a control test, the Washington court based its position on three¹⁴⁸ considerations. First, "the classic criti-

¹⁴⁵ "The end of all penal laws is that they may *not* be applied." J. FICHTE, *THE SCIENCE OF RIGHTS* 345 (1889).

¹⁴⁶ *State v. Maish*, 29 Wn. 2d 52, 59, 185 P.2d 486, 490 (1947), criticized by Hoedemaker, *Irresistible Impulse as a Defense in Criminal Law*, 23 WASH. L. REV. 1 (1948).

¹⁴⁷ *State v. White*, 60 Wn. 2d 551, 590-92, 374 P.2d 942, 965-66 (1962), cert. denied, 375 U.S. 883, noted in 38 WASH. L. REV. 305 (1963).

¹⁴⁸ I do not deal with the court's obviously strained argument that in 1909, when Washington's legislature passed a statute abolishing the insanity defense, which statute later was held unconstitutional by the Washington Supreme Court, *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910), that the unconstitutional statute, today, expresses an "established policy in this state... to strictly limit the application of that [insanity] defense." *State v. White*, 60 Wn. 2d at 590, 374 P.2d at 965. Little can be added to the dissenting words of Mr. Justice Hunter, *id.* at 597-98, 374 P.2d at 970:

We have never before stated nor intimated that the 'right and wrong' test is a constitutional minimum, and I see no reason to conclude that our legislature has evidenced a desire that this state retain the 'right and wrong' test. The statutes concerning the defense of mental irresponsibility, under which we now operate, were passed in 1907. The legislature did not then inform this Court, nor has it since informed this Court, as to how we should define or view the concept of mens rea in implementing the defense of mental irresponsibility. The Strassburg case, *supra*, confirmed that mens rea cannot be eliminated as an element of crime. The delineation of that concept is a judicial function.

And, of course, so is the delineation of the test of insanity.

cism of 'irresistible impulse'—which applies also to any test which includes volition—is that such a test is extremely hard to apply with any hope of reasonable accuracy."¹⁴⁹ One wonders whether this objection is justifiable. For example, the Washington court expects juries to apply a formula requiring that an accused, to qualify for the insanity defense, be "unable to perceive the moral qualities of the act with which he is charged."¹⁵⁰ There are, of course, many other abstract formulas in Washington criminal law, *e.g.*, the reasonable man doctrine, and they are not "too hard" for juries to apply. The issue of "control" is of no greater difficulty for a jury than those of "intent," or "knowledge," or "negligence."

Secondly, the control test was rejected because "with regard to capacity to control one's behavior, it would appear that there is no more psychiatric certainty today than there was when this court decided *State v. Maish, supra*."¹⁵¹ Thus, the court cast its vote against psychiatry's credentials. Whether the Washington Supreme Court is competent to assess the modern scientific validity of psychiatry, I shall not discuss.¹⁵² However, if psychiatrists tend not to satisfy the court's criteria of certainty (which remain unidentified and unexplained) and if a control test is believed too hard for juries to apply, Washington's Supreme Court has contributed to this state of affairs. The court has created confusing trial conditions that make application of a formula difficult, dilute psychiatric testimony, and afford little guidance. For example, in *State v. Brooks*¹⁵³ the court established that in this state, nonexpert witnesses are fully qualified to give their opinions on the sanity or insanity of an accused, after

¹⁴⁹ *Id.* at 591, 374 P. 2d at 966.

¹⁵⁰ *Id.* at 579, 374 P. 2d at 959. See text discussion at notes 95-103 *supra*.

¹⁵¹ *State v. White*, 60 Wn. 2d at 592, 374 P. 2d at 966. This notion is not derived from *State v. Maish*, 29 Wn. 2d 52, 185 P.2d 486 (1947), but rather from a much earlier case, *State v. Craig*, 52 Wash. 66, 100 P. 167 (1909), where, at 71, it is stated that "when a jury of laymen are invited to go further than to answer the question, had the accused sufficient capacity at the time of committing the act to distinguish between right and wrong with reference to it, they are invited to enter the realm of speculation where even the opinion of the alienist is met by like opinion, and he can find no guide to clear his doubt or direct him toward a truthful verdict." Evidently, the Washington Supreme Court believes either that psychiatry has not progressed since 1909, which is false, or that it has not progressed sufficiently. If the latter is true, however, the court fails to tell us how much would be "sufficient" and under what criteria we might recognize it.

¹⁵² But, generally, consider the views of WEIHOFEN at 85, and S. GLUECK, LAW AND PSYCHIATRY 54, 57-58 (1962).

¹⁵³ 4 Wash. 328, 30 P. 147 (1892); accord, *State v. Schneider*, 158 Wash. 504, 291 P. 1093 (1930); *State v. Craig*, 52 Wash. 66, 100 P. 167 (1909). The court has extended this rule to civil cases; see *Halbach v. Luckenbach S.S. Co.*, 152 Wash. 492, 278 P. 178 (1929).

they have testified to the behavior of a defendant upon which they base their opinions. It is true that a trial court judge may exclude nonexpert witness opinions on an accused's insanity when he is convinced that the witness lacked sufficient personal knowledge to constitute a foundation for an opinion.¹⁵⁴ But by then the nonexpert witness has made his utterances before a jury. More objectionably, this rule opens the door to any and all kinds of testimony about an accused. Because nonexpert witness testimony is competent to show insanity,¹⁵⁵ fairness requires that a prosecutor be allowed to use the same type of evidence to prove sanity.¹⁵⁶ It can produce unclarity and confusion before a jury; psychiatric testimony can become entangled with lay testimony, and the ensuing confusion can make application of any rule of insanity difficult.¹⁵⁷

Finally, it appears that the Washington Supreme Court rejected a control test because it favors "a minimized insanity defense."¹⁵⁸ Evidently the Washington court believes that there are multitudes of potential defendants patiently waiting for it to approve a control test, who will then rush in when the barriers have been lowered.¹⁵⁹ This is, of course, false. Due to the stigma attached and the possibility of an indeterminate commitment if successful, few defendants assert the defense. This last point—indeterminate commitment—means that an acquittal by reason of insanity really is not an acquittal, in the usual sense of the term, because an accused does not go free, but to the criminally insane ward of the state penitentiary from which it is

¹⁵⁴ *State v. Wilkins*, 156 Wash. 456, 287 P. 23 (1930); *accord*, *State v. Miller*, 177 Wash. 442, 43 P.2d 535 (1934). For interesting views on lay testimony, see *Carter v. United States*, 252 F.2d 608, 618 (D.C. Cir. 1964); Pederson, *The Opinion Evidence Rule in Oregon*, 33 ORE. L. REV. 243 (1954).

¹⁵⁵ In *State v. Flanney*, 61 Wash. 482, 112 P. 630 (1911), it was held reversible error not to allow defendant to show that his wife was a member of a "Shaker Society" that taught and practiced illicit intercourse, causing defendant (husband) to suspect her of lewd conduct, thereby losing his "reason" when he shot her.

¹⁵⁶ "Where the defense is insanity, general or partial, the door is thrown wide open for the admission of evidence; every act of the party's life is relevant to the issue and admissible in evidence." *State v. Odell*, 38 Wn. 2d 4, 21, 227 P.2d 710, 719 (1951); *accord*, *State v. Collins*, 50 Wn. 2d 740, 314 P.2d 660 (1957); *State v. Miller*, 177 Wash. 442, 32 P.2d 535 (1934).

¹⁵⁷ For discussion, see *State v. Williams*, 34 Wn. 2d 367, 209 P.2d 331 (1949).

¹⁵⁸ *State v. White*, 60 Wn. 2d 551, 590-91, 374 P.2d 942, 965-66 (1962), *cert. denied*, 375 U.S. 883 (1963).

¹⁵⁹ For example, in a recent murder case, Don White was sentenced to death. On appeal, the Washington State Supreme Court affirmed the conviction and the United States Supreme Court declined to review it. At the age of twenty-two, Don White beat an old woman to death in a laundry room. He raped her, took her ring and watch (which were of little value), then spent more than an hour in the room, folding laundry, placing some of it under the head of the dying woman, and chatting with the unsuspecting people who came into the laundry. Later that day

difficult to obtain release.¹⁶⁰ In reaching its conclusion favoring a "minimized insanity defense" the court approvingly quoted an article by Professor Wechsler¹⁶¹ as setting forth the policy rationale behind "a minimized insanity defense." But, conveniently, the court ignored the fact that Professor Wechsler inveighed against *Durham's* rule,¹⁶² not a control test; that Professor Wechsler explicitly wrote that *M'Naughton* and a control test would come within a "minimized insanity defense;"¹⁶³ and that Professor Wechsler was the chief reporter for, and author of, the ALI's *Model Penal Code* which includes a control test in its insanity defense¹⁶⁴ and which had been argued to Wash-

he killed a longshoreman, whom, like the old woman, he had never seen before. He stabbed him with a knife, then wandered a little distance away to drink wine and watch the police come and go. At trial, expert witnesses on both sides testified to the accused's serious mental disorder. Consider his background. He had never lived with his mother, who was only thirteen at his birth. When he was four months old, a red cap at a railway depot hailed the woman who became his adoptive mother to ask if she wanted a baby. Despite his superior intelligence—his IQ was about 130—he was expelled from every school he attended. Nine times he was in state institutions, with a growing record of violence and delinquency. In 1951, a child psychiatrist said he was suffering from "a very malignant mental illness," that "institutionalization is absolutely necessary," and that "he will almost certainly wind up in prison or in a state mental hospital." It is apparent that, whatever the cause, the defendant was terribly sick, that his sickness was of long duration, and that it had been brought to the attention of the authorities time and time again. Yet, Don White could not qualify under Washington's "minimized insanity defense." *State v. White*, 60 Wn. 2d 551, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883 (1963). Commenting on Washington's insanity test, Judge Bazelon said "that a test of responsibility which allows Don White to be sentenced to death is no test at all." Bazelon, *The Concept Of Responsibility*, 53 GEO. L. J. 5, 13 (1964).

¹⁶⁰ Instructive is *State v. Tugas*, 37 Wn. 2d 236, 222 P.2d 817 (1950). The jury found defendant not guilty because of insanity at the time of the act and that, although his insanity did not continue, defendant was not safe to be at large because his insanity was likely to recur. Appellant was then "committed" to "the ward for the criminally insane at the state penitentiary." *Id.* at 240, 222 P.2d at 819. In this situation, defendant is not entitled to be released by the statutory procedure of jury trial (WASH. REV. CODE § 10.76.070 (1957)), to determine whether he is safe to be freed because his insanity is no longer liable to recur, but defendant's only remedy is habeas corpus, with all its limitations. *State v. Tugas*, 39 Wn. 2d 241, 234 P.2d 1082 (1951), *noted in* 27 WASH. L. REV. 156 (1956). *See also* *State ex rel. Thompson v. Snell*, 46 Wash. 327, 89 P. 931 (1907); Comment, *Hospitalization Of Mentally Ill Criminals In Pennsylvania And New Jersey*, 110 U. PA. L. REV. 78 (1961).

¹⁶¹ Wechsler, *The Criteria Of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1967).

¹⁶² *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954). Under *Durham* "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

¹⁶³ Professor Wechsler wrote: "On this analysis, the category of the irresponsible must be defined in extreme terms... The category must be so extreme that to the ordinary man, burdened by passion and beset by large temptations, the exculpation of the irresponsibles bespeaks no weakness in the law... This will be found to be the case in every instance where M'Naughton operates; with tight administration that distinguishes with care between the irresistible and unresisted impulse, it is the case under this test as well, though doubts about the possibility of such administration surely have their point." Wechsler, *The Criteria Of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 374 (1955). (Emphasis supplied).

¹⁶⁴ MODEL PENAL CODE § 401 (Prop. Off. Draft, 1962).

ington's court but rejected. The court's narrow "minimized insanity defense"¹⁶⁵ is not Professor Wechsler's.

It is true that a control test, available to an accused who appears normal before a jury and who obviously is not out of contact with reality, is more easily feigned than a test that is applicable only to an accused who is obviously deranged. But this consideration alone is not persuasive, particularly in Washington. First, any defendant who looks normal and acts in usually expected ways will have to overcome a jury's prejudice; a jury naturally will be unwilling to believe that a "normal" defendant had no self-control at the time of the act. Secondly, unless there is evidence of a long history of an accused's uncontrolled behavior, plus expert testimony explaining the origin and consequences of a disease that accounts for the accused's uncontrolled behavior, the defense will probably fail. Thirdly, in Washington the insanity defense is an affirmative defense, and the burden of proving insanity at the time of the act rests squarely on the defendant and never shifts.¹⁶⁶ An early landmark case, *State v. Clark*,¹⁶⁷ established that an accused must plead the insanity defense and prove it by a preponderance of the evidence; it is not enough for the jury to have a reasonable doubt as to his sanity.¹⁶⁸ Thus, in Washington at least, the possibility that defendants will succeed by feigning loss of control is slim indeed. The argument that they will do so successfully is not a persuasive reason for failing to adopt a control test as part of Washington's insanity defense.

As has been discussed above, the Washington Supreme Court may erroneously read *M'Naughton* in the conjunctive and may retain *M'Naughton's* right-wrong portion while deleting "the nature and quality" branch from its own insanity defense.¹⁶⁹ Ambiguously, the court interprets "wrong" to mean "morally wrong,"¹⁷⁰ rather than

¹⁶⁵ "Finally *M'Naughton* is preferable to the American Law Institute's test in that the *M'Naughton* rule better serves the basic purpose of the criminal law—to minimize crime in society." *State v. White*, 60 Wn. 2d 551, 592, 374 P.2d 942, 966 (1962), cert. denied, 375 U.S. 883 (1963).

¹⁶⁶ This has been true since the first case in territorial days, see *McAllister v. Territory of Washington*, 1 Wash. Terr. 360 (1872), and has not changed to this day, *State v. Collins*, 50 Wn. 2d 740, 314 P.2d 660 (1957).

¹⁶⁷ 34 Wash. 485, 76 P. 98 (1904). In 19 states, the federal courts and the Court of Appeals of the District of Columbia, the ultimate burden of proof is upon the state, not the defendant. See WEIHOFEN at 226-28.

¹⁶⁸ This was an important consideration in Wisconsin's adoption of the Model Penal Code test, *State v. Shoffner*, 31 Wis. 2d 412, 143 N.W.2d 458 (1966).

¹⁶⁹ See text, *supra* at notes 90-92.

¹⁷⁰ See text, *supra* at notes 94-95.

contrary to the criminal law.¹⁷¹ Finally, and unjustifiably, the court refuses to allow a control test as part of its insanity defense.¹⁷² The time has come for Washington's Supreme Court, or its Legislature, to look anew at Washington's insanity defense and to develop a new and better one.¹⁷³

¹⁷¹ See text, *supra* at notes 96-101.

¹⁷² See text, *supra* at notes 131-165; for additional confusing opinions on Washington's insanity test, see, *State v. Craig*, 52 Wash. 66, 100 P. 167 (1909), where the court rejected New Hampshire's rule and the misnamed "irresistible impulse" test. It inconsistently held that "... insanity being a question of fact, whenever it appeared from all the evidence bearing on the question that a person charged with crime did not have the mental power to choose between right and wrong with reference to the particular act charged, he was of unsound mind, and if such affection was the efficient cause of the act and if he would not have committed the act but for that affection, he should be acquitted; for one with such mind is *non compos mentis* and entitled to the protection of the law." In *State v. Schafer*, 156 Wash. 240, 286 P. 833 (1930), the court confused the right-wrong test ("while it seems to be fairly well established... that appellant was subnormal and was of the mental age of nine years, his ability to distinguish between right and wrong is the test of sanity or insanity in criminal law." *Id.* at 252) with a control test ("nevertheless it [the term 'mental irresponsibility'] implies nothing but what is defined in law as criminal insanity: that is, whether there was mental capacity and moral freedom to do or abstain from doing the particular act."); in *State v. Henke*, 196 Wash. 185, 82 P.2d 544 (1938), the court reaffirmed the above quote from *State v. Craig*. In *State v. Maish*, 29 Wn. 2d 52, 185 P.2d 486 (1947), the *Schafer* language of a control test was argued to the court, but was rejected. See criticism in Hoedemaker, *Irresistible Impulse As A Defense In Criminal Law*, 23 WASH. L. REV. 1 (1948). In *State v. Rio*, 38 Wn. 2d 446, 230 P.2d 308 (1951), *cert. denied*, 342 U.S. 867, the court held that a toxic psychosis, produced by excessive self-induced use of alcohol, that did not result in a permanent insanity, permanently disabling the accused from distinguishing between right and wrong, could not qualify under Washington's insanity test. This is, of course, contrary to the court's previous position that insanity need exist only at the time of the act, not permanently.

¹⁷³ *Seattle v. Hill*, 72 Wash. Dec. 2d 778, 435 P.2d 692 (1968). Addressing itself to Washington's insanity defense, the court said, "this state is committed to the rule that every sane person is responsible for his voluntary acts. *State v. Mays*, 65 Wn. 2d 58, 395 P.2d 758 (1964). If one is capable of distinguishing between right and wrong and knows the nature and moral qualities of his actions, he is deemed sane under the M'Naughten [sic] rule, a doctrine adhered to by this and the great majority of courts. *State v. White*, 60 Wn. 2d 551, 374 P.2d 942 (1962), *cert. denied*,... 375 U.S. 833..." *Id.* at 789, 435 P.2d at 700. From the first sentence in this quotation one reasonably could conclude that were a person found "sane" he would not be responsible for his involuntary acts, thereby believing that Washington followed some type of control test. See generally, C. MERCIER, CRIMINAL RESPONSIBILITY 20-56 (1926). But, *State v. Mays*, *supra*, rejected a proffered control test, reaffirming *State v. White*, *supra*, that also rejected the ALI's control test. And, in reality, Washington does not exculpate a person for loss of control, as demonstrated by the holding in *Seattle v. Hill*, *supra*, which determined that a confirmed alcoholic who had been convicted of drunkenness 98 times, sentenced to 17½ years in jail, and was found to be "a chronic addictive alcoholic," was a proper subject for criminal punishment, and not excusable for lack of volitional controls.

The second sentence in the above quotation demonstrates even more clearly the Washington Supreme Court's confusion on the meaning of *M'Naughton*. Evidently the court believes the *M'Naughton* test involves a conjunctive, not disjunctive, expression: Is a person "capable of distinguishing between right and wrong and knows the nature and moral qualities of his actions?" I confess I do not know what the court's intended meaning is, especially when one recalls that the Washington court has interpreted the first part of the above conjunction in the "morally wrong" sense. At best, one could say that the court really did not intend a conjunction, and wrote a redundant, single sentence. Even so, there remains the problem of

THE INSANITY TEST REFORMULATED

It is probably true that "the exact wording of the [insanity defense] and the actual name of the test are comparatively unimportant,"¹⁷⁴ but the crucially important consideration for any new insanity defense is that it contain three "necessary elements," namely, references to a defendant's cognition, his emotion, and his capacity to control his behavior. I offer a test modeled after that of the *Model Penal Code*,¹⁷⁵ *M'Naughton*, and *Currens*:¹⁷⁶

A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity either (a) to appreciate the factual nature, context and con-

squaring the meaning of the redundancy with that of the first sentence dealing with loss of control.

¹⁷⁴ *Dusky v. United States*, 295 F.2d 743, 759 (8th Cir. 1961), *cert. denied*, 368 U.S. 998 (1962). For similar views, see *Carter v. United States*, 325 F.2d 697, 707 (5th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964); *United States v. Cain*, 298 F.2d 934 (7th Cir. 1962).

¹⁷⁵ MODEL PENAL CODE § 4.01 (Prop. Off. Draft, 1962). The Code definition has been adopted or approved, in whole or in part, in several jurisdictions by judicial decision. *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967); *United States v. Freeman*, 357 F.2d 606, 622 (2d Cir. 1966); *Wion v. United States*, 325 F.2d 420, 430 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964); *Frigillana v. United States*, 307 F.2d 665, 670 n.8 (D.C. Cir. 1962) (favorable comment); *Feguer v. United States*, 302 F.2d 214, 244-45 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962); *Dusky v. United States*, 295 F.2d 743, 759 (8th Cir. 1961), *cert. denied*, 368 U.S. 998 (1962); *United States v. Currens*, 290 F.2d 751, 775 (3d Cir. 1961) (cognitive elements (*M'Naughton*) omitted); *Terry v. Commonwealth*, 371 S.W.2d 862, 864-65, (Ky. 1963); *Commonwealth v. McHoul*, — Mass.2d—, 226 N.E.2d 556 (1967); *State v. Shoffner*, 31 Wis. 2d 412, 143 N.W.2d 458 (1966) (by this decision the defendant in Wisconsin is given a choice between the *M'Naughton* and Model Penal Code tests but, if he chooses the Code test, he must assume the burden of proof). Elsewhere the Code definition has been adopted by statute (with modifications in three instances): ILL. ANN. STAT. ch. 38, § 6-2 (1961); MD. ANN. CODE art. 59, § 9(a) (1967 Supp.); MO. ANN. STAT. § 552.030 (omits "substantial capacity" qualification); N.Y. PEN. LAW § 30.05 (McKinney Supp. 1967) ("lacks substantial capacity to know or appreciate either: (a) The nature and consequence of such conduct; or (b) That such conduct was wrong"); ch. 196, § 95-501 [1967] Laws of Montana 6; VT. STAT. ANN. tit. 13, § 4801 (1959) (substitutes "adequate capacity" for "substantial capacity"). The Code definition has been proposed for adoption or is under consideration in a number of jurisdictions. It has been judicially rejected in three. *State v. Lucas*, 30 N.J. 37, 152 A.2d 50, 68-69 (1959); *State v. Poulson*, 14 Utah 2d 213, 381 P.2d 93, 94-95, *cert. denied*, *Poulson v. Utah*, 375 U.S. 898 (1963); *State v. White*, 60 Wn. 2d 551, 578-593, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883 (1963).

¹⁷⁶ In *United States v. Currens*, 290 F.2d 751 (1961), Judge Biggs refused to adopt the Model Penal Code's test on the grounds that it placed too much emphasis on cognition, and that jurors might so interpret it. Judge Biggs deleted references to cognition, and fashioned a new test: "The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated." *Id.* at 774. See Diamond, *From M'Naughton To Currens, and Beyond*, 50 CAL. L. REV. 189 (1962). But by deleting cognition Judge Biggs "seems to have denied to jurors a ground for finding insanity when the capacity for self-control is intact but the defendant did not 'appreciate the criminality of his conduct.'" GOLDSTEIN at 88.

sequences of his act, or (b) to appreciate the criminality of his conduct; or to conform his conduct to the requirements of the law which he is alleged to have violated.¹⁷⁷

I believe this insanity defense will provide the three necessary elements. In so doing it will allow for full and complete development of medical testimony. A psychiatrist could testify in detail to the origin, development and nature of an accused's disease; to the medical basis for his diagnosis; and to the probable consequences of the mental disease on the conduct of the accused. It will allow the law to take advantage of subsequent changes in medical science; the test will not be frozen in a particular period of medical history. The proposed test leaves the ultimate issue to the jury, where it belongs, but, unlike *Durham*,¹⁷⁸ it provides the jury with guidance. It will enable a judge

¹⁷⁷ This leaves the "mental disease" notion undefined; but here I follow Professor Goldstein: "it is now apparent that a precise definition of insanity is impossible, that the effort to eliminate functional definitions deprives the jury of an essential concreteness of statement and that it is entirely sensible to leave 'mental disease' undefined, at least so long as it is modified by a statement of minimal conditions for being held to account under a system of criminal law." GOLDSTEIN at 87. The basic reasons are that there is no disease, *qua* disease, that automatically exculpates its sufferers from criminal responsibility (*see* *Carter v. United States* 252 F.2d 608, 617 (D.C. Cir. 1957)); thus the concept of criminal insanity does not function to raise medical questions, but, rather, it raises questions of social policy, functioning to state the criteria under which official criminal condemnation shall not take place, identifying *why* that condemnation shall not take place, rather than upon *whom*. *See* Fingarette, *The Concept of Mental Disease In Criminal Law Insanity Tests*, 33 U. CHI. L. REV. 229 (1966). Interestingly, there is no agreed medical definition of the concept "mental disease." *See* Alexander, *Fundamental Concepts, Basic Principles and Assumptions of the Psychodynamic Position on Mental Disease*, in *INTEGRATING APPROACHES TO MENTAL DISEASE* 138 (Kruse ed. 1957); AM. PSYCHIATRIC ASS'N, *A PSYCHIATRIC GLOSSARY* 47 (2d ed. 1964); COMMITTEE ON NOMENCLATURE AND STATISTICS OF THE AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS* 10 (1952); M. FROHLICH, *CLASSIFICATION OF MENTAL DISORDERS*, in 3 *THE ENCYCLOPEDIA OF MENTAL HEALTH* 1032 (1963); Hakeem, *A Critique Of The Psychiatric Approach To Crime And Correction*, 23 *LAW & CONTEMP. PROB.* 650 (1958); Scott, *Research Definitions of Mental Health And Mental Illness*, 55 *PSYCHOLOGICAL BULL.* 29 (1958).

¹⁷⁸ I do not discuss *Durham v. U.S.*, 214 F.2d 862 (D.C. Cir. 1954), or its rule: "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874-75. It really does not establish a rule of criminal responsibility, and fails to point the jury to any criteria relevant to the purposes of the criminal law. For commentary see *Blocker v. United States*, 274 F.2d 572 (D.C. Cir. 1959); *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957); *Sauer v. United States*, 241 F.2d 650 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957); *United States v. Smith*, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954); *Symposium—Insanity And The Criminal Law*, 22 U. CHI. L. REV. 317 (1955); Maine, *see* *State v. Hathaway*, 161 Me. 255, 211 A.2d 558 (1965); Vermont, *see* VT. STAT. ANN. tit. 13 § 4801 (1959); and the Virgin Islands, *see* V.I. CODE ANN. tit. 14, § 14 (1957) have adopted the *Durham* rule, but 28 states have rejected it, *see*, *Blocker v. United States*, 288 F.2d 853, 866 n.22 (D.C. Cir. 1961). For accounts of developments and practices under the *Durham* rule see Arens, *The Durham Rule In Action*, 1 *LAW & SOC. REV.* 41 (1967); Clayton, *Six Years After Durham*, 44 J. AM. JUD. Soc'y 18 (1960); Krash, *The Durham Rule And Judicial Administration Of The Insanity Defense In The District of Columbia*, 70 *YALE L.J.* 905 (1961).

to instruct a jury in language that they can understand. The proposed rule exculpates only those who are both non-deterrable and unfit subjects for blame;¹⁷⁹ thus, the proposed test will serve the interests of justice, and the underlying purposes of the criminal law by identifying those who come within the test as persons in need of care and rehabilitation and those who come without it as fit subjects for punishment. Thus, the twin purposes of deterrence and retribution are served. Finally, because the proposed rule can be used and understood by jurors and because it continually will afford the medical profession full testimonial opportunities, the proposed insanity defense can serve as a bridge for the law between the facts of medical science and the purposes of the criminal law.

In most states, if an insanity defense is successful, the trial court (judge or jury) determines whether the mentally-ill defendant ultimately will be committed to a mental hospital, but in 12 states the defendant is mandatorily committed.¹⁸⁰ Washington follows the former practice and requires that if a jury should find an accused insane at the time of the act, by special verdict it must determine whether the accused's insanity still exists or whether it is so liable to recur that the accused is unsafe to be freed.¹⁸¹ If the jury finds that an accused's insanity persists or that he is unsafe to be returned to society, then "the court shall enter judgment in accordance therewith, and shall order the defendant committed as a criminally insane person . . .";¹⁸² if the jury's findings are otherwise and the accused is safe to be at large, then he is released.¹⁸³

It is important that jurors be instructed on the consequences of their finding of an acquittal by reason of insanity, but in only one jurisdiction, the District of Columbia, is such an instruction mandatory on the trial judge.¹⁸⁴ The jurors discuss this issue during delib-

¹⁷⁹ *But compare*, Silber, *Being and Doing: A Study of Status Responsibility and Voluntary Responsibility*, 35 U. CHI. L. REV. 47, 63-67, 68-89 (1967).

¹⁸⁰ A summary of the statutes is in *Lynch v. Overholser*, 369 U.S. 705, 724 (1962) (concurring opinion); *see also* Weihofen, *Institutional Treatment of Prisoner Acquitted By Reason of Insanity*, 38 TEX. L. REV. 849 (1960). Comment, *Compulsory Commitment Following Successful Insanity Defense*, 56 NW. U.L. REV. 409 (1961); The Model Penal Code opts for mandatory commitment, MODEL PENAL CODE, § 4.08, Comment (Prop. Off. Draft, 1962).

¹⁸¹ WASH. REV. CODE § 10.76.030 (1957).

¹⁸² WASH. REV. CODE § 10.76.040 (1957). Usually, he is confined in the maximum security section of a mental hospital; thus, it is very much like being in prison, *see* S. Rubin, *LAW OF CRIMINAL CORRECTION* 277-80, 517-19 (1963).

¹⁸³ *Id.*

¹⁸⁴ *Lyles v. United States*, 254 F.2d 725 (D.C. Cir.), *cert. denied*, 356 U.S. 961 (1957).

erations, and if they are not given accurate information on it by the trial judge, then they rely on information (probably less reliable) that has been supplied by other jurors.¹⁸⁵ Some state supreme courts recommend that such an instruction be given by the trial judge,¹⁸⁶ and others suggest it.¹⁸⁷

In Washington, the jury must find a special verdict on the current mental state of the defendant, but the jurors are not told what the consequences of their findings will be. No Washington case has been found expressly denying a Washington trial court the power to instruct on the issue. To the contrary, three justices¹⁸⁸ of Washington's Supreme Court have urged that:

Specifically, the defendant who pleads mental irresponsibility as a defense should be entitled to have the jury informed of the following: (1) Upon jury findings that he is not guilty by reason of mental irresponsibility and that such mental condition still exists or that because of the likelihood of relapse or recurrence he is unsafe to be at large, the court will order the defendant committed as a criminally insane person. (2) A person so committed shall not be discharged save upon the order of a court of competent jurisdiction made after a trial and judgment of discharge. (3) An order of discharge may be entered only after a trial before a jury in the court of the county that committed him, wherein it is found that he is a safe person to be at large.

This seems to be the better reasoned view, and it should become the established practice. It is recommended.

¹⁸⁵ I am of the opinion that, upon proper request, a defendant who pleads mental irresponsibility is entitled to have the jury informed, by way of instruction, as to the procedures in the State of Washington for the handling of those who are acquitted, but found by the jury unsafe to be at large in society. As the record in this case indicates, juries are acutely sensitive to the prospect of having dangerous persons at large and are tempted to "take the law into their own hands" in order to carry out what they may consider is their responsibility to protect society. In order to make the defense of mental irresponsibility a meaningful one, it is necessary to that end that juries be made aware of the social controls and machinery which the law provides for society's protection from a mentally irresponsible person who is unsafe to be at large.

State v. White, 60 Wn. 2d 551, 602, 374 P.2d 942, 972 (1962) (dissent).

¹⁸⁶ *E.g.*, State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458 (1966).

¹⁸⁷ *E.g.*, McClure v. State, 104 So. 2d 601 (Fla. 1958).

¹⁸⁸ Justices Hunter, Finley and Foster in State v. White, 60 Wn. 2d 551, 602, 374 P.2d 942, 972 (1962), relying on WASH. REV. CODE §§ 10.76.040, .060, .070 (1957). *But compare* State v. Tugas, 39 Wn. 2d 241, 234 P.2d 1082 (1951), and Note, 27 WASH. L. REV. 156 (1952). The objection to such an instruction is that it might serve to take a jury's attention off the insanity defense, and might produce compromise verdicts. *See* Pope v. United States, 298 F.2d 507 (5th Cir. 1962).