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# Criminal Law--Insanity and Criminal Responsibility--The Status of the M'Naughten Plus Irresistible Impulse Test

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or standard to guide the court. The court might evaluate the current attitude of the general public toward permitting the work on Sunday, but in any event there is no choice but to arbitrarily decide on this specific work. The decision of such a case renders the statute no less vague; it clarifies the statute in only one isolated situation. The countless numbers of other persons feeling a need to work or operate their business on Sunday remain without a guide.

As pointed out by the court in the principal case, when there are "conflicting emotions" about a law, "such conflicts are better brought to the floor of the legislature."<sup>40</sup> This is true but it relates to the purpose of the statute, not the form. The constitutionality of the purpose of the Sunday closing statute is conceded. It must, however, meet the test of all criminal statutes; "the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction."<sup>41</sup> The Kentucky Sunday closing statute does not meet this test. "Works of necessity" is not "clearly stated," makes no attempt to "define" anything and may "reasonably admit" to more than "one construction."

Until a statute is enacted in clear and definite terms, the people of the state should not be governed by a law that is unconstitutionally vague. To allow this confers "upon the courts powers both arbitrary, legislative in character and ex post facto in effect."<sup>42</sup> Since there are only nine specific exceptions in the present Kentucky Sunday closing statute, the majority of situations would be covered by the "works of necessity" clause. Voiding this clause would in effect void the entire statute.

*Mark E. Gormley*

**CRIMINAL LAW—INSANITY AND CRIMINAL RESPONSIBILITY—THE STATUS OF THE M'NAUGHTEN PLUS IRRESISTIBLE IMPULSE TEST.**—The defendant was convicted of murder and sentenced to death on evidence that he shot and killed his son. The defense was not guilty by reason of insanity. Instructions were given incorporating the M'Naughten (right-wrong) plus irresistible impulse test as a means of determining the criminal responsibility of the accused. The court reviewed the entire record of the case although no bill of exceptions was filed. *Held:* Reversed. The court incorporated the Model Penal Code test

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<sup>40</sup> *Arlan's Department Store of Louisville v. Commonwealth*, 369 S.W.2d 9, 13 (Ky. 1963).

<sup>41</sup> 34 App. D.C. 592 (1910).

<sup>42</sup> *Arlan's Dept. Store of Louisville v. Commonwealth*, 369 S.W.2d 9, 13 (Ky. 1963).

as follows: "Before the defendant can be excused on the ground of insanity, the jury must believe from the evidence that at the time of committing the offense in question, the defendant as a result of mental defect or disease did not have substantial capacity to conform his conduct to the requirements of the law." *Terry v. Commonwealth*, 371 S.W.2d 862 (Ky. 1963).

The M'Naughten plus irresistible impulse test was, and remains, the best test for legal insanity and its use should be continued. It is followed by a large majority of jurisdictions in the United States<sup>1</sup> and was derived from an advisory opinion following a middle-nineteenth century decision of an English court.<sup>2</sup> The basic criteria of the test are whether the defendant, at the time of the killing, was without sufficient reason to know what he was doing, or had not sufficient reason to know right from wrong.<sup>3</sup> The test has been subjected to vigorous criticism, particularly by medical experts, who contend that it poses a moral query which is not within their province<sup>4</sup> and that the test leaves the psychiatrist talking about mental illness and the attorney speaking in terms of morality.<sup>5</sup> Justices Frankfurter,<sup>6</sup> Douglas,<sup>7</sup> and the late Justice Cardozo<sup>8</sup> have criticized the test. It has been said that M'Naughten has led its hardy existence because, "like the fictional presumption that every man knows the law, it is socially useful."<sup>9</sup>

The two basic theories of the states which advocate the continued use of M'Naughten are: (1) it furnishes the most useful and logical criteria available,<sup>10</sup> and (2) even though it should not be the ultimate, it presents the best criteria available for determining criminal responsibility.<sup>11</sup> The irresistible impulse test<sup>12</sup> is a supplement to M'Naughten

<sup>1</sup> Annot., 45 A.L.R.2d 1452 (1956).

<sup>2</sup> M'Naughten's Case, 10 Clark and Fin. 200, 8 Eng. Rep. 718 (1843).

<sup>3</sup> *Ibid.* See also *Abbott v. Commonwealth*, 107 Ky. 624, 55 S.W. 196 (1900).

<sup>4</sup> Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A.J. 527 (1962).

<sup>5</sup> Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry, *Criminal Responsibility and Psychiatric Expert Testimony*, Rep. No. 26 (1954).

<sup>6</sup> Royal Commission on Capital Punishment, p. 102, para. 290, H. M. Stationary Office (1953).

<sup>7</sup> Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 Iowa L. Rev. 485 (1956).

<sup>8</sup> Cardozo, *What Medicine Can Do for Law*, Law and Literature and Other Essays and Addresses by Benjamin N. Cardozo, Harcourt, Brace, N.Y. (1931).

<sup>9</sup> Davidson, *The Psychiatrist's Role in the Administration of Criminal Justice*, 4 Rutgers L. Rev. 578 (1960).

<sup>10</sup> Mueller, *M'Naughten Remains Irreplaceable: Recent Events in the Law of Incapacity*, 50 Geo. L.J. 105 (1961-62).

<sup>11</sup> Cavanaugh, *Problems of a Psychiatrist in Operating Under the M'Naughten, Durham and Model Penal Code Rules*, 45 Marq. L. Rev. 478 (1961-62). See Minty, *Insanity and Diminished Responsibility as Defences on Criminal Charges*, 29 Medico-Legal J. 141 (1961).

<sup>12</sup> Annot., 45 A.L.R.2d 1453 (1956).

which will acquit the accused if, at the time of the killing, as a result of mental unsoundness he had not the sufficient will power to govern his actions by reason of some *insane impulse* which he could not resist or control.<sup>13</sup> This addition to M'Naughten at most helps preserve the principle of freedom of the will.<sup>14</sup>

The Model Penal Code test,<sup>15</sup> as incorporated in the new Kentucky rule, was applied in the federal case of *United States v. Currens*.<sup>16</sup> The test has been severally criticized because it seemingly substitutes irresistible impulse alone for the M'Naughten rule, thus allowing every defendant with the opportunity to admit that his understanding was normal, and also to contend that he was so unable to control himself that he was driven to kill.<sup>17</sup> It is also acknowledged that it is merely a rewording of M'Naughten plus irresistible impulse in more sophisticated language and therefore will yield the same result.<sup>18</sup> This test is criticized by medical experts on the same grounds as M'Naughten and was, in fact, rejected by the three psychiatric consultants on the committee formulating it.<sup>19</sup> The majority in the principal case admitted that the test was merely being put in a different form, not for the benefit of the jury, but for the benefit of medical witnesses, to enable them to lend more assistance to the court and jury in determining the defendant's mental state.<sup>20</sup>

A third test, rejected in *Terry* as unsound,<sup>21</sup> uses the criterion of whether the unlawful act was "the product of a mental disease or defect," and is commonly known as the Durham test.<sup>22</sup> It is the favorite of medical experts because it enables them to communicate to the jury using the terms of their trade, and to give a picture of the whole man.<sup>23</sup> Legal experts severely criticize *Durham* because it fails to provide a sufficient standard which tests legal insanity. Under this rule, if expert witnesses differ, the jury must credit the testimony of one while disregarding that of the other.<sup>24</sup>

<sup>13</sup> 3 Stanley's Instructions § 901 (2d ed. 1957).

<sup>14</sup> Cavanaugh, *supra* note 11.

<sup>15</sup> ALI Model Penal Code, Tentative Draft No. 4, p. 159-60 (1962).

<sup>16</sup> 290 F.2d 862 (D.C. Cir. 1961).

<sup>17</sup> Hall, *Mental Disease and Criminal Responsibility—M'Naughten versus Durham and the American Law Institute's Tentative Draft*, 33 Ind. L.J. 212, 222 (1957-58).

<sup>18</sup> Gleuch, *Law and Psychiatry—Cold War or Extente Cordiale?* (1962).

<sup>19</sup> Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A.J. 527, 530 (1962).

<sup>20</sup> *Terry v. Commonwealth*, 371 S.W.2d 862 (Ky. 1963).

<sup>21</sup> *Ibid.*

<sup>22</sup> *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

<sup>23</sup> Overholser, *supra* note 19, at 529.

<sup>24</sup> Sobeloff, *Insanity and the Criminal Law: From M'Naughten to Durham and Beyond*, 41 A.B.A.J. 793, 795 (1955).

In the principal case, the dissenting opinion, favoring the retention of the M'Naughten plus irresistible impulse test, said: "Rules of law of long standing should not be cast aside lightly but only upon a sound and meritorious basis. Such rules are not flapjacks and should not be tossed about as such."<sup>25</sup> This decision came less than thirty days after the court upheld the test which it had followed for sixty-two years.<sup>26</sup> Joseph Weintraub, Chief Justice of the New Jersey Supreme Court, said in a recent article that as a practicing attorney, he fought for the removal of the M'Naughten test and then as a judge, he realized that the struggle between M'Naughten and its competitors is over an irrelevancy<sup>27</sup> and refused to overturn the older rule.<sup>28</sup>

This is not to say that M'Naughten and irresistible impulse are the perfect solution. Given the fact that a defendant commits a crime, he is at least slightly abnormal.<sup>28</sup> The primary purpose in this field then, is to insure against repetition of criminal acts for the protection of society. Obviously, some rule should be formulated which will aid both legal and medical experts in their determination of criminal responsibility. But until some better means to reach the desired end are found, a rule which has proved durable and practical for many years should not be rejected.

*John Dixon, Jr.*

CONSTITUTIONAL LAW—DUE PROCESS OF THE FOURTEENTH AMENDMENT—RIGHT TO COUNSEL IN NON-CAPITAL STATE FELONY PROSECUTIONS.—The petitioner, Gideon, convicted of a non-capital felony offense in a Florida state court after entering a plea of not guilty, filed a habeas corpus petition in the Florida Supreme Court. His petition alleged that the trial court's denial of his request for court appointed counsel abridged his constitutional rights as he was without funds with which to retain counsel. The Florida Supreme Court, without opinion, denied him relief.<sup>1</sup> The United States Supreme Court granted certiorari with leave to proceed in forma pauperis.<sup>2</sup> *Held*: Reversed. A

<sup>25</sup> Terry v. Commonwealth, *supra* note 20, at 866.

<sup>26</sup> Newsome v. Commonwealth, 366 S.W.2d 174 (Ky. 1962).

<sup>27</sup> Weintraub, *Criminal Responsibility: Psychiatry Alone Cannot Determine It*, 49 A.B.A.J. 1075 (1963).

<sup>28</sup> State v. Lucas, 30 N.J. 37, 82, 152 A.2d 50, 74 (1959).

<sup>29</sup> The article is based on this premise—Goldstein and Katz, *Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 Yale L.J. 225 (1960-61).

<sup>1</sup> Gideon v. Cochran, 135 So. 2d 746 (Fla. 1961).

<sup>2</sup> Gideon v. Cochran, 370 U.S. 908 (1962). The Court appointed counsel to represent Gideon on appeal and requested that the briefs discuss the question: "Should this Court's holding in *Betts v. Brady*, 316 U.S. 455 . . . be reconsidered?"