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Criminal Responsibility: Knowledge, Will and Choice

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CRIMINAL RESPONSIBILITY: KNOWLEDGE, WILL AND CHOICE

*by Professor Robert J. Willey**

ON MARCH 25, 1966, the court of common pleas of Cuyahoga County, Ohio handed down its opinion in the first degree murder trial of Mrs. Marianne Colby. The Court acknowledged that the *M'Naghten* formula was the recognized test for insanity, that it was a test of criminal responsibility rather than a medical test of insanity, that it has been followed in a classic fashion, that each doctor had compressed his final conclusion into the required *M'Naghten* strait jacket, and that the defense had proved by the greater weight of the evidence that the defendant was not guilty by reason of insanity.[1]

While the court admitted this was a just result, it continued by saying that it had a duty to speak out against the "right and wrong" test and continued reliance on criteria which more and more are challenged as being unsatisfactory. It averred that, "Unless and until some trial court under proper circumstances has the courage to point the way to a better method of submitting . . . the issue of the insanity . . . Ohio will continue to adhere to criteria which more and more are challenged as being false." The *M'Naghten* test is, said the court, "based on an entirely obsolete and misleading conception of the nature of insanity . . ."[2] The court continued with a recommendation that the American Law Institute (ALI) test as found in the Model Penal Code, Section 4.01, be adopted.[3]

On February 3, 1967, Judge Gray, in *State v. Keaton*,[4] approved a rather extensive insanity instruction. Defendant had

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[1] *State v. Colby*, 6 Ohio Misc. 19, 215 N.E.2d 65 (1966). *M'Naghten's case*, 10 Cl. and Fin. 200, 8 Eng. Rep. 718 (1843).

[2] *Id.* at 22, 215 N.E.2d at 67. The court was quoting the Report of the Royal Commission on Capital Punishment, 1949-53, Cmd. no. 8932 at page 80.

[3] Model Penal Code § 4.01 (proposed official draft, 1962). See, Tent. Draft No. 4, Comments § 4.01, 157-192 (1955).

[4] *State v. Keaton*, 9 O.App.2d 139, 223 N.E.2d 631 (1967).

requested that the *M'Naghten* test not be applied, but rather, that the ALI formulation be used. The court disclaimed need to answer this question, pointing out that, "Both the prosecution and defense went far beyond the confines of this rule in the presentation of their cases, as did the trial court in its charge to the jury." [5] As the charge given was more favorable to the defendant than the one asked for, his objection was found to be without merit. The court affirmed Ohio's allegiance to *M'Naghten,* argued it was bound to follow it, and claimed doing so.

The *Keaton* instruction first asked if the act was the product of defendant's diseased mind, continued with reference to the nature and quality of the act, whether it was wrong, and whether the defendant was a free agent in forming the requisite *mens rea* or diseased to such an extent that he lacked the mental ability to choose the right in relation to the act.[6] Judge Gray cited the *Dusky* case,[7] mentioned the ALI Model Penal Code formula, the *Currens* (*United States v. Currens,* 290 F. 2d 751 (1961)) test, the *M'Naghten* variations, and the irresistible impulse test, and ended his considerations with the suggestion that the charge given also encompassed the tests used in the various federal courts. It appears that the product terminology of *Durham v. United States,* U. S. App. D. C. 228, 214 F.2d 862 (1954), was also employed.

Both of these courts claimed to be following *M'Naghten,* though the Colby court decried its present use, and the *Keaton* court approved an instruction that included the requirements of any of the tests commonly discussed. It is obvious that these Judges, as well as many others, feel that *M'Naghten* is obsolete. It is also possible, considering our present state of knowledge, that a Due Process attack can be made on a continued traditional use of the test.[8] Considering these onslaughts on our use of *M'Naghten,* is it possible to modify our procedure and terminology within the confines of Ohio case law and arrive at an ade-

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[5] *Id.* at 148, 223 N.E.2d at 637.

[6] *Id.* at 149, 223 N.E.2d at 637.

[7] *Dusky v. United States,* 295 F.2d 743 (8th Cir. 1961) *cert. denied,* 368 U.S. 998 (1961).

[8] Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility,* 18 Stan. L. R. 322, 379 (1966). See *Fisher v. United States,* 328 U.S. 463, 476 (1946); *Leland v. Oregon,* 343 U.S. 790, 800 (1952). "The Science of psychiatry has made tremendous strides since the *M'Naghten* case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right-wrong test from their criminal law."

quate formulation and practice that will satisfy the bench, the bar, and the academics? The writer submits that it is.

In the *Colby* case the court referred to *M'Naghten* as the "right and wrong" test, and admittedly many judges do so restrict the test, both as concerns the admissibility of evidence of insanity, and in their subsequent instructions to the jury.[9] Judge Bazelon, in the *Durham* case,[10] outlined his understanding of the *M'Naghten* test. He noted that it dates back to the 13th or 14th century, was originally articulated as one's ability to distinguish between "good and evil" (i.e., if he "doth not know what he is doing no more than . . . a wild beast)," was refined by the 18th century with the use of "right and wrong" in place of good and evil and the disuse of the "wild beast" phrase, and was restated in its present form by the House of Lords in 1843.[11] It does emphasize knowledge in both phrases; whether the accused knows the nature and quality of his act, or whether he knew it was wrong. It is this singular emphasis on knowledge that has provoked most of the attack on the rule.[12] Even prior to 1843, reliance on knowledge of right and wrong was considered a fallacious test of criminal responsibility by the leading forensic psychiatrist of all time, Dr. Isaac Ray.[13] Dr. Ray's opinion of the validity of the knowledge test has been generally supported by modern day psychiatrists.[14] These critical opinions of the test have been generally accepted by students of the law too, as evidenced by the Report of the Royal Commission on Capital Punishment, where such a test was said to be based on an entirely

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[9] See Model Penal Code § 401 (Tent. Draft no. 4, comments at 156 and appendix A, at 161). One must admit that the leaders in the field, including those connected with the American Law Institute, refer to M'Naghten as the right-wrong test, and list Ohio as adhering to it.

[10] *Durham v. United States,* 214 F.2d 862 (C.A.D.C. 1954).

[11] Id. at 869. Judge Bazelon was not alone in understanding M'Naghten as the right-wrong test. He cites treatises and articles by nearly all the leaders in both the field of law and medicine. See his list of authorities as contained in footnote 13 page 869 through footnote 36 page 872.

[12] Id. at 871 n. 30; at 872 n. 31 and 32.

[13] Diamond, *Criminal Responsibility of the Mentally Ill,* 14 Stan. L. R. 10 (1961). Quoting from this article: "It is discouraging that the best of all books in the English language on forensic psychiatry was written over one hundred and twenty years ago. It is, of course, Dr. Isaac Ray's, *A Treatise on the Medical Jurisprudence of Insanity,* published five years before the M'Naghten trial."

[14] Zilboorg, *Legal Aspects of Psychiatry in One Hundred Years of American Psychiatry 1844-1944,* 507, 552 (1944); Roche, *The Criminal Mind* (1958), An Isaac Ray Award Book chosen by the American Psychiatric Association.

obsolete and misleading conception of the nature of insanity.[15] The attack need be properly understood.[16] The claim is made that it is inadequate in that it unscientifically extracts and emphasizes knowledge and intellect. It is said that cognition is no longer considered the most important factor in conduct and its disorders.[17] It is argued that emphasis on the knowledge factor is misleading and causes the jury to rely on what is "scientifically speaking, inadequate and most often, invalid and irrelevant testimony in determining criminal responsibility." [18]

The science of psychiatry now recognizes that man is an integrated personality. Jerome Hall says that ". . . the emotional, the cognitive, and the conative functions interpenetrate one another." He continues, ". . .(S)erious mental disease is a drastic impairment of all the principal aspects of the personality. In psychotic persons, there may be calculation of a high order; but it is unsupported by the empathy and sensitivity that in normal adults stimulates an identification with a prospective victim or a realistic imagining of the meaning and consequences of a serious attack on him. In short, a psychotic person does not actually understand the moral significance of his conduct." [19] While Hall continues with the thought that a test based on cognition is therefore adequate, since any faculty impairment affects all others, it could better be argued that a test of volition is demanded as well. If you accept the statement that psychotics may be capable of high order calculations, it is illogical to maintain that a test of cognition will separate the mentally ill from the otherwise calculating and intelligent person. As to this psychotic, it must be a test of volition that identifies him. The theory of integration of the personality fails to support Hall here.[20]

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[15] Royal Commission on Capital Punishment 1949-1953, Cmd. 8932 79 (1953).

[16] See Allen, *The Borderland of Criminal Justice* 105-122 (1964).

[17] Glueck, *Psychiatry and the Criminal Law,* 12 Mental Hygiene 575, 580 (1928).

[18] *Durham v. United States, supra* note 10, at 872 nn. 31 and 32; See, Allen, *The Borderland of Criminal Justice, supra* note 16.

[19] Hall, *General Principles of Criminal Law,* 494 (2 ed. 1960). He cites Zilboorg, *Misconceptions of Legal Insanity,* 9 Am. Jour. Orthopsychiat. 552-53 (1939).

[20] Hall claims a test based on knowledge is adequate, because an impairment of volition will also appear therein. However, *M'Naghten* requires only a minimal knowledge, and a nearly total lack of volition may be present in one with this minimal level of knowledge. Also, the knowledge test is often based on one's ability to verbalize, and this ability may not be materially affected by a defective will.

Another thrust of the attack is that *M'Naghten* is based on cognition, and testimony and consideration of the impairment of other faculties is not allowed in evidence and hence not considered by the jury. Our scientific friends suggest that all facts should be made accessible to the jury. I think we must agree that all relevant facts need be accepted and considered, and that many courts use *M'Naghten* as a testimonial strait jacket.[21]

In view of the near universal agreement among those involved in law and psychiatry, as to the above stated *M'Naghten* faults, it would seem that we must consider an extension or revision of our test of criminal responsibility. If we know of mental faculties not properly tested by *M'Naghten,* if they are relevant, then with this as with any other newly developed area of knowledge, we must expand our tests so as to allow adequate jury consideration, and articulate our tests so that the jury will be properly instructed as to how these facts affect the basic issue of criminal responsibility. In some jurisdictions the irresistible impulse test has been added to *M'Naghten. Durham* was developed as a complete substitute in the District of Columbia; and since *Durham,* the *Currens* test has been advanced, The American Law Institute test has been gaining acceptance, and modern variations of *M'Naghten* have been used. Most of the courts agree on the basic requirements of any new test, that the charge must embrace and require positive findings as to the three necessary elements of responsibility.[22] These are listed as defendant's cognition, his volition, and his capacity to control his behavior. These tests will be considered in turn to determine if they aid the process and principle of the criminal law.

As *M'Naghten* is a test solely and directly based on cognition, the irresistible impulse[23] test was offered as a test of volition. Certainly will, free will, is as important to criminality as the concept of the intellect. Cardozo put it nicely, in a comment on New York's *M'Naghten* Statute,

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[21] See the dissenting opinion by Judge Van Voorhis in *People v. Horton,* 308 N.Y. 1, 20-21, 123 N.E.2d 609, 619 (1954). A portion of his opinion is reproduced in the Proposed New York Penal Law (introduced as a study bill, Senate Int. 3918, assembly Int. 5376 at the 1964 Legislative Session) appendix B, page B-6. The Study Committee recommended legislation to solve this testimonial strait-jacket problem. In the *Keaton* case complete freedom was given the psychiatrist.

[22] *Dusky v. United States,* 295 F.2d 743 (8th Cir. 1961).

[23] Hall, *op. cit. supra* note 19, at 486 (2d ed. 1960); Eliasberg, *Irresistable or "Irresisted" Impulse?,* 9 Clev.-Mar. L. R. 447 (1960).

> "Everyone concedes that the present definition of insanity has little relation to the truth of mental life. There are times, of course, when a killing has occurred without knowledge by the killer of the nature of the act. A classic instance is the case of Mary Lamb, the Sister of Charles Lamb, who killed her mother in delirium. There are times when there is no knowledge that the act is wrong, as when a mother offers up her child as a sacrifice to God. But after all, these are rare instances of the workings of a mind deranged. They exclude many instances of the commission of an act under the compulsion of disease, the countless instances, for example, of crimes by paranoiacs under the impulse of a fixed idea. . . . If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method is neither good morals nor good science nor good law. . . ." [24]

Irresistible impulse was offered as an adjunct to *M'Naghten,* to call the jury's attention to the idea that there are people who know and understand what they are doing but are so diseased in their volitional function as to be unable to cease and desist from their act. In *Parsons*[25] the court pointed out that criminal responsibility requires consideration of two elements: "(1) Capacity of intellectual discrimination; and (2) freedom of will." Justice Somerville quoted Wharton[26] as follows, "If there be either incapacity to distinguish between right and wrong as to the particular act, or delusion as to the act, or inability to refrain from doing the act, there is no responsibility." He quoted Bishop[27] too: "There cannot be, and there is not, in any locality, or age, a law punishing men for what they cannot avoid." If, then, a mental disease can destroy the power of the victim to choose, his power of volition, can such a person be criminally responsible? The court thought not, and addressed itself directly to the issue of the existence of such a disease. The court argued it could not dogmatically deny the existence of such a disease, that its existence was a matter of fact, and that the truth of testimony averring the existence of such a disease in a particular case is a matter for the determination of the jury.[28]

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[24] Cardozo, *Law and Literature* 106-108, as quoted in the Proposed New York Penal Laws, Appendix B, page B-2.

[25] *Parsons v. State,* 81 Ala. 577, 2 So. 854 (1887).

[26] 1 Whart. *Criminal Law* § 33 (9th Ed. 1884).

[27] 1 Bishop *Criminal Law* § 383b (7th Ed. 1882).

[28] *Parsons v. State, supra* n. 25. Justice Summerville, on page 860, pointed

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Weihofen[29] claims that the test has been adopted in seventeen states, but be that as it may, the test forces the jury to choose between an irresistible impulse and one that could have been resisted but was not; and gives them no help with this crucial question. Hall claims the concept of irresistible impulse has been largely discredited,[30] and that it amounts to an abolition of the relevant rules of law too.[31] Judge Bazelon argues that the concept is valid, but that the term "irresistible impulse" is misleading in itself in that it does not recognize illnesses characterized by brooding and reflection and hence relegates these to the "right-wrong" test.[32] Mueller considers it an "unobnoxious attempt to improve upon M'Naghten," and suggests that such mental qualities are really ingredients of rational action, and consequently a part of the first clause of *M'Naghten*.[33] To say the least, its existence and partial acceptance does emphasize the feeling among a substantial minority that *M'Naghten* must be improved to place equal emphasis on volition, or rational act, as

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out that *M'Naghten* forces the court to instruct the jury that there is no disease which affects one's power of self control: even though all medical writers, superintendents of insane hospitals and other experts have just testified that there is.

[29] Weihofen, *Insanity as a Defense in Criminal Law* 43-44 (1933). See Model Penal Code, *supra* n. 9 at 161.

[30] Hall, *General Principles of Criminal Law* 486-500. On pages 495-6 he points out that Guttmacher reports 60% of the American Psychiatric Ass'n denied its validity (1955), but that Guttmacher also claimed that 90% of the Group for the Advancement of Psychiatry (a group within the Ass'n) had affirmed its validity (1954). In addition to showing the split within the group or between the groups, and the apparent inconsistency between the reports, Hall also pointed out that the Royal Commission on Capital Punishment (1949-1953) had considered it not only discredited, but inadequate and unsatisfactory.

[31] Hall on page 496 compares the Royal Commission's addition to *M'Naghten* allowing exculpation if the accused was incapable of preventing himself from committing [the act], and the second half of the ALI formulation which exculpates if the accused was unable to conform his conduct to the requirements of law. He contends that these, and the irresistible impulse test, violate basic principle in that they ignore cognition. He argues that the integrative view of personality admits that mental disease affects both cognition and volition, but that an acceptable test must be based on just cognition. We can agree with Hall that criminal responsibility is based on *mens rea,* but must add that crime also requires an act. Volition is a part of act, and a test that considers it does *not* violate basic principle. If the test was restricted to just volition, we could agree with Hall.

[32] *Durham v. United States, supra* note 10 at 873. See Perkins, *Criminal Law* 762 (1957).

[33] Mueller, *M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity,* 50 Geo. L. J. 105 (1961), (hereinafter cited as Mueller).

well as cognition. In view of recognized problems connected with the use of the irresistible impulse test, it would seem that we should use some better formulation of the question as to how we can emphasize volition in a modern insanity test.

Durham represents the most extreme break with the past.[34] It disallows emphasis on any mental faculty;[35] rather it denies criminal responsibility if the unlawful act is the product of mental disease or mental defect. The court defined, or if you prefer did not define, mental disease or defect, and continued with an explanation of its test. Where some evidence of mental disease is offered, the trial court must provide criminal responsibility guides for the jury.[36] It should tell the jury that they must believe beyond a reasonable doubt that there was no disease, or they should find the actor guilty; or, even if they believe he was diseased, if they believe beyond a reasonable doubt that the act was not the product of the disease, they should find him guilty. They further emphasized their point by saying of the defendant, "He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act." [37] In *Carter* the court restated this position in an unmistakable way. It said that the defendant was entitled to an acquittal if he would not have committed the offense "but for" or "except for" the mental disorder.[38] Remembering that the prosecution has the burden of proving no disease or no causal connection, one can see the near impossibility of the task, especially when one con-

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[34] Judge Bazelon noted that his new test was "not unlike that followed by the New Hampshire court since 1870." See *State v. Pike,* 49 N.H. 399 (1870). See Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity,* 69 Yale L. J. 367, 389-391 (1960). He contends that New Hampshire's rule governs the scope of evidence to be received while *Durham* lays down a rule of law.

[35] Reid, *ibid.* He points out that *Durham* did rule, as a matter of law, that knowledge of right and wrong was a symptom of mental disease. He questions whether a court should build any item of a current medical theory into judicial fact. He, as did Judge Doe in *Pike,* would leave these questions to the jury.

[36] *Durham v. United States, supra* note 10 at 875.

[37] *Id.* at 875 n. 49.

[38] This was further explained in *Carter v. United States,* 252 F.2d 608, 617 (1957) where it was said that the defendant was entitled to a not guilty verdict if he would not have committed the offense "but for" or "except for" the mental disorder. *Carter* was further cited in *Campbell v. United States,* 307 F.2d 597, (D.C.C.A. 1962) where the "but for" test was extended so as to preclude a showing that the defendant could have controlled an impulse to rob. This rather clearly destroys effective rebuttal by the prosecution.

siders that there are to be no restrictions placed on the testimony of the psychiatric expert as to mental disease or mental defect.

Durham gave us a proper solution for our evidence problem. Bazelon specifically stated that the expert would not be restricted to arbitrarily selected symptoms, phases or manifestations[39] of mental disease, but that he would be allowed to inform the jury fully as to the mental condition of the accused. He also specified that other relevant evidence should go to the jury as for example, ". . . whether an accused, who suffered from a mental disease or defect did not know the difference between right and wrong, acted under the compulsion of an irresistible impulse, or had been deprived of or lost the power of his will." Though he listed these as symptoms of mental disease, quite clearly he delisted them as a test for it.[40]

Bazelon was right in condemning our usual restrictive practice in connection with court room treatment of the psychiatric expert witness. In a 1963 Interim Report of the Commission on Revision of the Penal Law and Criminal Code of New York, the complaint of the psychiatrist was noted and found substantial. The Commission agreed that if psychiatric expert testimony was desirable, the expert must be allowed to testify in terms that are meaningful to him. The Commission cited *People v. Horton*[41] as a typical example of unreasonably restrictive and objectionable legal practice. The committee recommended that the expert be allowed to testify as to his examination of the accused, his diagnosis, and his opinion as to the relationship between all this and the issue involved whether it be act, wrongfulness, or a required particular state of mind. It was also noted that he could be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.[42]

Durham was best described by Judge Burger in *Blocker v. United States.*[43] He admitted that the "disease-product" test had been considered "vague," "confusing," "ambiguous" and "mis-

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[39] *Durham v. United States, supra* note 10 at 876.

[40] See Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity,* 69 Yale L. J. 367 (1960).

[41] *People v. Horton,* 308 N. Y. 1 at 20-21, 123 N.E.2d 609, 619 (1954), dissent by Judge Van Voorhis.

[42] Proposed New York Penal Law, Appendix B, pages B-5 through B-9 (1964).

[43] 288 F.2d 853 (C.A.D.C. 1961).

leading." [44] He made the observation that *Durham* was a valid signal that the old tests were not broad enough to encompass our expanded knowledge of the human mind and personality. He also noted that this instruction, or any other instruction on criminal responsibility must be based on acceptable criminal law principle, and must explain to the jury what the "test" or "rule" of criminal responsibility actually is.[45]

He initiated his discussion of the *Durham* test by pointing out that the test did not give a judicial definition of mental disease, but allowed the expert witness to use the term as he desired. He noted that there was no agreement among psychiatrists as to a proper definition of the term. He cited an instance where a week-end change in psychiatric nomenclature had altered the effect of the legal rule of the District,[46] and that this non-judicial change had increased the scope of the rule vastly over what was originally contemplated by the court. He suggested that a proper rule must establish a standard which can be relied upon by both the judge and the jury, especially in such a critical area as that of criminal responsibility.

In his attack on the word "product" as used in the test, he noted that Durham assumed that a mental disease can produce a criminal act, but added that this alone should not always exculpate. We are accustomed in law to require a material degree of causation.[47] We should require a showing that the disease affected either the quality of the act or the quality of the *mens rea,* and did so in a substantially material way.

Judge Burger pointed out that the deficiencies in definition had allowed the expert to use these terms in any way he wished, and since he was a "skilled forensic performer," it is apparent that he was able literally "to tell the jury how to decide the

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[44] *Id.* at 857. He cites (footnote 5) Prof. Mueller, Prof. Wechsler, Judge L. Hand, and Prof. Guttmacher. See Comment, 22 U. Chi. L. Rev. 317-404 (1955).

[45] *Id.* at 858. Burger says *Durham* is right in that "it sought to open the jury's inquiry to include the expanding knowledge of the human mind and personality." He continues that as psychiatric theory is relatively uncertain, the jury needs an instruction as to just how to use it.

[46] *Id.* at 860. *In re Rosenfield,* 157 F. Supp. 18 (D.C.D.C. 1957) is the case in which the staff of St. Elizabeth's Hospital, over a weekend, changed the definition of mental disease and thereby, without any court action, included the sociopath or psychopath therein. He suggests that the disease-product test is at best a rubber yardstick.

[47] Product, as used in the test, is the causal link between disease and act. As used by the court, any link exculpates.

case." [48] He argued that the definitions of the words and explanations of the elements of the test are conclusions of law, and that the expert must not be allowed to express his conclusions in the same terms as the ultimate jury question. He was willing to balance this prohibition by giving the expert wide latitude in the type of testimony he could offer, but he did add the admonition that it should be translated so the judge and jury can understand it.[49]

He correctly concluded that the value of *Durham* was that it broadened the scope of the medical inquiry to any and all relevant points; that its weakness was that it deviated from the essential elements or questions of criminal responsibility.[50] He suggested that centuries of social relationship have developed a collective morality; that responsibility for contract, for testaments, for certain intentional torts, as well as for crime is premised in free will, or what we commonly talk of as capacity to control our behavior to conform to certain standards. Thus, the basic postulates of criminality are cognition and capacity to control, and any instruction to the jury must give these basic thoughts to them as the "yardstick" to be applied in the specific case. He pointed out, applicable to *M'Naghten* as well as *Durham,* that it is not desirable to have the psychiatrist testify in terms of right and wrong. He argues the psychiatrist has no special competence in this area, and that he also objects to the burden. He adds, and this is acceptable to the psychiatrist, that the expert is only competent to testify in terms of defendant's capacity and ability to control and regulate his behavior. We can agree that right and wrong are legal and social standards. They are an expression of the collective moral standard established to regulate the social order. Since this is a standard of the law, it is a question for the law.[51]

The New Hampshire test as set out in *State v. Pike*[52] is sim-

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[48] *Id.* at 863. Burger was concerned that the jury might abdicate to the expert. If the test is used as worded, whether the accused has a mental disease or defect is critical. Thus, the expert's label may alone be sufficient to sway the jury. He concluded therefore that a test of criminal responsibility should not be in terms of the psychiatrist's discipline.

[49] *Id.* at 864.

[50] *Id.* at 865. "The correct direction of *Durham* was to broaden the scope of medical inquiry, but the incorrect step was to try to do this in terms which ignore the elements of recognition of wrongdoing and capacity to control conduct."

[51] *Id.* at 868.

[52] *State v. Pike,* 49 N.H. 399, 6 Am. Rep. 533 (1870).

ilar to *Durham.* The *Pike* court stated that the test of mental disease is purely a matter of fact, and that if the act was the product of mental disease in the defendant, he was not guilty by reason of insanity. This test deliberately provides no guide for the jury. It clearly refers to mental disease as a fact, and openly leaves the whole issue to the jury, with the specific understanding that the judge is not to confuse the jury with his opinion as to what mental disease may be.[53] Without a definition of any of the terms, the New Hampshire rule like *Durham,* allows the jury, or the jury swayed by the expert, to establish its own definitions of the critical terms. Of course, these definitions may vary from jury to jury. Consistency, as well as justice, need have some guide.

The *Currens* case, with the opinion written by Judge Biggs in 1961,[54] emphasized that the psychiatrists must be able to present the entire picture of the defendant's personality to the jury. Judge Biggs also demanded that the jury be given a standard to enable it to translate this evidence into an answer to the ultimate question as to whether the defendant possessed the necessary guilty mind to commit the crime. He argued that the concept of *mens rea* is based on an assumption of free will, that if there is reasonable doubt as to whether a particular person possesses capacity to conform his conduct to society's standard, then there is reasonable doubt as to his having the necessary guilty mind.

The *Currens* court was dealing with a psychopath, and refused as a matter of law to rule that such a person was sane. They admitted that some psychiatrists define the term so broadly that it includes a person who has no symptoms of disease other than a pattern of recurrent criminal behavior.[55] They agreed that

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[53] See Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity,* 69 Yale L. J. 367 (1960).

[54] *United States v. Currens,* 290 F.2d 751, 757-8 (C.A. 3rd Cir. 1961). The defendant requested the following charge: "If, at the time of the commission of the offense for which the defendant stands accused, the defendant was not able to distinguish right from wrong, and if you, members of the jury, find such to be the case in the cause which you are now trying, you must find the defendant not guilty by reason of insanity or unsound mind." The trial judge accepted this as based on *M'Naghten,* denied a second one which was based on *Durham,* and added gratuitously an irresistible impulse instruction.

[55] *Id.* at 761-762. It has been admitted by some psychiatrists that the term "psychopathy" is a waste basket category. It is now true, as Judge Biggs points out, that the label is also applied to some who have a recognized serious mental disorder. These can be and are distinguished from those whose only symptom is recurrent criminal behavior. He cites Cleckley, *The Mask of Sanity* (1941), and White, *The Abnormal Personality* (1948).

such a person should be criminally liable. They recognized the fears, because of this confusion among the psychiatrists, that this type of ruling will open the door to acquittal of psychopaths; but they also pointed out that among this group there was a subgroup "characterized by a diffuse and chronic incapacity for persistent, ordered living," that this group can be affirmatively diagnosed, and that they represent a true clinical entity with a fairly serious disorder.[56] Since the term "psychopath" is applied to these people, the court thought it not proper through legal fiat to deprive such a large class of persons of the insanity defense by holding that a person described as a psychopath is always criminally responsible. "Testimony and argument," they said, should be used to determine "whether a particular defendant should be held to the standards of the criminal law."[57] This seems to be in line with modern thinking and well within the legal tradition.

Because of the above factual situation and the issue thereby presented, the court established a test aimed directly at choice and control. They held that the jury must be satisfied that the defendant had substantial capacity to conform his conduct to the requirements of the law. They made no mention of knowledge in the test.[58]

As *M'Naghten* is based on cognition, *Currens* emphasizes volition; and if a test of insanity based solely on cognition is inadequate, so is a test based on volition.[59] Biggs says the test of

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[56] They specifically accepted part (2) of the ALI test. See footnote 32 page 774.

[57] *Id.* at 762-763.

[58] *Id.* at 774 "[12] 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." Biggs said the test was drawn from the ALI formulation, but the phrase "to appreciate the criminality of his conduct" was deleted because it would overemphasize the cognitive. He claims that cognition is rarely significant. He notes that this ALI proposal is similar to that of the Royal Commission who in turn borrowed it from the British Medical Association. The text of this test is: "The jury must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind (or mental deficiency) (a) did not know the nature and quality of the act or (b) did not know it was wrong or (c) was incapable of preventing himself from committing it." He continues, "Parts '(a)' and '(b)' of the test suggested by the Royal Commission lead straight back into the *M'Naghten* Rules and in our judgment, for reasons already stated, should be eschewed."

[59] *Contra,* Hall, *op. cit. supra* note 19, at 496. But see Hall at 519-520, where he admits that volitional and affective aspects are already in M'Naghten, and rightly so.

knowledge of right and wrong is almost meaningless, that *M'Naghten* is a sham, that a determination of sanity which was based on the answer to a single question is a vast absurdity.[60] He suggests that one's mental condition is more complex than that. Certainly we can agree with him on this, but we realize that cognition is also essential to criminality, as much a part of one's mental condition as is choice, and just as essential to our test.

The American Law Institute (ALI) test is formulated as follows: Sec. 4.01

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.[61]

Dr. Philip Q. Roche, in his award winning lectures, characterizes the ALI test as "M'naghten dead but not buried." [62]

The test is one of criminal responsibility, and emphasizes substantial capacity to appreciate and substantial capacity to conform. "Substantial" is thought to be important in that it reduces the M'Naghten all-or-nothing burden. It can be argued that *M'Naghten* requires a total lack of capacity. Psychiatrists argue that reality shows a graded scale of impairment, and a test worded in terms of total impairment is contrary to reality and destroys the validity of their testimony.[63]

The legal profession has an obligation to express the test in an understandable and exact way. Any instruction based on or articulated in relation to an impossible standard is suspect. Complete or total impairment is an impossible and useless standard. Our task here is to use words that are understandable to the jury, are correctly based on sound principle, and are not contrary to fact.

ALI requires that the accused be exculpated where he does not have substantial capacity to appreciate, while *M'Naghten* re-

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[60] *United States v. Currens, supra* note 54 at 763-770.

[61] Model Penal Code § 4.01, Proposed Final Draft (1962). For commentary, see Tent. Draft No. 4, 156 (1955).

[62] Roche, *The Criminal Mind* 195 (1958).

[63] Model Penal Code § 4.01, Comment at 158 (Tent. Draft No. 4, 1955).

quires that he be exculpated only if he did not know. Designedly, "substantial" is used to convey the idea to both the judge and jury that he is to be found not guilty unless he has measurable knowledge. *M'Naghten* requires a finding of guilt if he has any knowledge at all. Too, ALI uses the word "appreciate" rather than *M'Naghten's* "know." It has often been said that many courts interpret "know" to include verbal skills only, while "appreciate" connotes some understanding in addition to the ability to verbalize. In view of the many attacks on "know," as used and understood by *M'Naghten* courts, it is arguable the use of synonyms or broader terms is not only desirable but required.

In the comments following Section 4.01 the ALI committee recognized that as *M'Naghten* is commonly used it is based on cognition alone, and that it is defective for this reason. They added that irresistible impulse had proven to be a misleading and ineffective formulation of a volitional test, but that a proper test need put volition in issue. For this reason they added the "capacity to conform" phrase. Interestingly enough, they pointed out that Stephens[64] had always argued that *M'Naghten's* "know" required more than the ability to verbalize, that it implied a "capacity to function" in light of knowledge.

Mueller argues that the ALI formulation overlooks rational human conduct, while *M'Naghten* does not.[65] Section 2.01 specifies that "a person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act . . ." [66] It continues that "a bodily movement that otherwise is not a product of the effort or determination of the actor . . ." is not a voluntary act.[67] It would seem if we argue that *M'Naghten's* knowledge of the nature of the act contains thoughts of rationality, we can certainly argue no less tenuously, that it is contained in ALI's phrase "appreciate the criminality of his conduct." If this does not suffice, specific reference to 2.01 should establish as understandable a standard as *M'Naghten.*

The ALI formulation adds a specific test of volition as well. It seems that this test of volition is not subject to the same infir-

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[64] *Id.* at 157. See Stephen, History of English Criminal Law, Vol. 2 pg. 171 (1833). Hall, *op. cit. supra* note 19, at 482.

[65] Mueller, *supra* note 33, at 118 (1961).

[66] Model Penal Code § 2.01 (1) (Proposed Final Draft, 1962).

[67] *Id.* at § 2.01 (2) (d).

mities as irresistible impulse.[68] Certainly, capacity to conform is the broad generalization available here, and includes both sudden or spontaneous disorders, as well as those founded on long periods of brooding and reflection.[69]

This test emphasizes the cognitive aspects of behavior with its "capacity to appreciate" phrase, and the volitional aspects with its "capacity to conform" phrase. We have heard arguments that since man's personality is integrated,[70] it is impossible to imagine a volitional disturbance that will not affect cognition too, and therefore, our traditional emphasis on cognition is adequate. If we are going to require a total impairment of the mind before we exculpate, then this position may be tenable, as most gross impairments of volition will affect cognition, and will be discernible with our purely intellectualistic test. It is believed, however, both in law and psychiatry, that reliance on a test of intellect alone will miss certain well defined groups of these mentally ill people who can meet our present test of intellect.[71] If this is true, then any minimally acceptable test must be broad enough to accept testimony describing this group, and broad enough to give the jury an understandable standard to apply whether the issue be cognition or volition. Since this testimony will be given in terms of capacity to control or conform and not in terms of intellectual capacity, the test will be misleading unless it emphasizes control functions. If the jury is given a traditional right-wrong *M'Naghten* instruction as the test of insanity,[72] and then told by the witnesses that the accused knew right from wrong, but that this is really not the symptom of his mental disease, confusion is certain to reign. The law must meet the evidence presented with an appropriate instruction. Since the whole of the criminal law is premised on an assumption of free will, choice, and capacity to conform, an instruction on this point seems perfectly in order.[73] If our instruction on criminal respon-

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[68] *Durham v. United States,* 214 F.2d 862 (C.A.D.C. 1954).

[69] Perkins, *Criminal Law* 762 (1957); See *State v. White,* 58 N.M. 324, 329, 270 P.2d 727, 730 (1954).

[70] Hall, *op. cit. supra* note 19, at 494.

[71] Model Penal Code § 4.01, Comments at 182 (appendix C) (Tent. Draft No. 4, 1955).

[72] *United States v. Currens, supra* note 54.

[73] Lawrence, *Sanity: The Psychiatrico-Legal Communicative Gap,* 27 Ohio St. L. J. 219 (1966); Louisell and Diamond, *Law and Psychiatry: D'entente, Entente, or Concomitance?* 50 Cornell L. Q. 217 (1965).

sibility controverts the creditability of the expert, or confuses the jury on this issue, an effort to reformulate should not be denied.

In any test of criminal responsibility, a major issue will always be the extent of the causal connection between the act and the disease. All will agree that in some sense any act is the product of, to use *Durham's* terminology, the personality of the defendant. Admittedly, causation is a question for the jury, but is one that should be guided by an instruction of the court. *Durham* provides no limitations for the jury on this point, leaving the jury free to require any degree of causality they desire.[74] An acceptable instruction must guide the jury as to this relationship between disease and criminal guilt. *M'Naghten* requires that the defendant "know" the nature of the act, and whether it was wrong. ALI requires that the defendant have substantial capacity to appreciate and conform his conduct. Both of these tests give the jury understandable standards to apply. *M'Naghten* requires that the disease destroy the defendant's ability to "know"; ALI requires that the disease reduce the abilities of the defendant to a point below a substantial capacity to appreciate or conform. ALI differs from the combined *M'Naghten*-irresistible impulse test in requiring a showing that the defendant lacks *substantial* capacity rather than that he lacked *any* knowledge. The ALI formulation may result in exculpation of more defendants in that it seemingly imposes a greater burden on the prosecution. One must realize however, that the alternative to criminal conviction and confinement is civil commitment and mental treatment in an appropriate institution. Certainly this treatment potential is considered desirable and greatly more acceptable to many. Since the ALI standard imposes no additional danger on society, acceptance of this standard should not be odious to any. Whether we should require a total impairment as *M'Naghten* does, or give the jury the more elastic "substantial capacity" standard might very well be the type of question that can be better answered after we have more practical experience with actual jury application.[75]

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[74] *Carter v. United States,* 102 U.S. App. D.C. 227, 236, 252 F.2d 608, 617 (1957).

[75] See Mueller, *supra* note 33, at 119, where the author suggests a test phrased in terms of a "well-nigh dissipated capacity," but adds that it must be supplemented by a test dealing with those with reduced capacities.

The second paragraph of the ALI formulation was designed for the special purpose of instructing the jury as to how they should handle the problem of the psychopath. Some psychiatrists have concluded that mental abnormality can be inferred from habitual anti-social behavior, and have then, in turn, explained the criminal behavior by referring to the mental abnormality.[76] The term has been used by some psychiatrists as a catch-all phrase. When the psychiatrists changed nomenclature in the District of Columbia and began to refer to psychopathy as a disease, the scope of *Durham* was extended greatly beyond any expectation.[77] Yet, some psychiatrists do use the term to designate a certain group who can be affirmatively diagnosed. Judge Biggs was presented with this problem in *Currens*. It seems he was quite correct in refusing to rule as a matter of law that such a label could never be used to describe a mentally ill person.[78] The issue, in all these cases, is whether the individual was mentally ill, and whether the mental illness was serious enough, in relation to the act, to absolve the actor of responsibility. Any test must be aimed at the substance of the issue, the impairment of cognition and volition. What label the psychiatrist put on our defendant or his illness may hold meaning for them, but it should not be allowed to divert the jury from its task of determining his criminal responsibility. Too, our test should emphasize the fact that the jury must make this final determination, that they cannot exculpate on a mere showing that some psychiatrists call our defendant diseased, but that they must relate all testimony of mental capacity to the issue of criminal responsibility.

The ALI formulation, *Currens*, and the modern *M'Naghten* statements represent efforts to accommodate modern thinking. It has always been a required criminal law principle that man must have will enough to do right and abjure wrong. Certainly, the very definition of act requires considerations of rationality and choice. No definition of either *mens rea* or actus *reus* is possible without considerations of both cognition and volition. *Mens rea* demands (1) "a recognition of wrongfulness," and (2) "the decision to act despite such recognition." Actus *reus* is defined as rational human conduct. "The ravings of a human vegetable, the spasms and the convulsions of an ill person, are not rational hu-

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[76] Allen, *The Borderline of Criminal Justice,* 120 (1964).

[77] *Blocker v. United States, supra* note 43.

[78] *United States v. Currens, supra* note 55.

man acts, and the criminal law deals only with rational human acts." [79] Hence, cognition, volition and capacity to exercise control are the necessary elements of criminality. As stated in *Dusky,* "If those 3 elements—knowledge, will and choice—are emphasized in the court's charge as essential constituents of the defendant's legal sanity, we suspect that the exact wording of the charge and the actual name of the test are comparatively unimportant and may well be little more than an indulgence in semantics. We think this approach to be sound because it preserves and builds upon those elements of *M'Naghten* and of Irresistible Impulse which are acceptable in these days and yet modernizes them in terms which a jury can grasp and apply." [80]

In addition to a proper jury instruction adequate latitude must be given to the psychiatrist to testify. No evidence as to the mental condition of the defendant should be excluded. Hall, a most ardent *M'Naghten* supporter, has affirmed this as being desirable.[81] In *Colby,* the court stated that the psychiatrists were allowed to testify fully as to their findings, but were asked to compress their final conclusion into the *M'Naghten* strait jacket.[82] In *Keaton,* the court noted that the defendant was permitted to ask any question of the psychiatrist he desired. It also noted that one psychiatrist refused to give his answer to the right-wrong question, saying he wanted to leave that matter to the jury.[83] Weihofen argues that the psychiatrist could and should answer this question without qualms. "Whether a person would be dangerous if allowed at liberty, whether a testator understood what he was doing when he made his will, whether a party to a contract understood the nature of the transaction. Whether the accused knew at the time that his act was wrong is, in theory, no more legal or less medical than these others." [84] We may not agree whether this question is necessary, though it would seem to be helpful to the jury. If our instruction or practice is so restrictive as to exclude relevant evidence, then one or both need be changed. As stated in *Freeman,* "When the law

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[79] Mueller, *supra* note 33, at 115.

[80] *Dusky v. United States,* 295 F.2d 743, 759 (8th Cir. 1961).

[81] Hall, *Psychiatry and Criminal Responsibility,* 65 Yale L. J. 761, 774 (1956).

[82] *State v. Colby,* 6 Ohio Misc. 19, 21, 215 N.E.2d 65, 66 (1966).

[83] *State v. Keaton,* 9 O.App.2d 139, 223 N.E.2d 631, 636 (1967).

[84] Weihofen, *The Definition of Mental Illness,* 21 Ohio St. L. J. 1, 14 (1960).

limits a testifying psychiatrist to stating his opinion whether the accused is capable of knowing right from wrong, the expert is thereby compelled to test guilt or innocence by a concept which bears little relationship to reality." [85] This shows the danger that has been a part of the traditional use of *M'Naghten.* Quite clearly both the *Colby* Court and the *Keaton* Court have accepted procedural reforms to obviate this defect. Quite clearly too, this is a problem apart from the test itself, but one which has been or must be solved along with the formulation of an acceptable test.

We can draw a few conclusions from the above analysis of the various tests. Any acceptable test must articulate standards of criminal responsibility for the jury. These standards must be based on the constituent elements of criminal responsibility, cognition and volition. Tests which give the jury no standard, such as *Pike* and *Durham,* represent an abdication of jural responsibility, and will result in a jury by jury disposition without any element of consistency. Any test that restricts itself to either cognition or volition is susceptible to attack. Thus, those courts that use *M'Naghten* as a right-wrong test, and emphasize cognition only are at variance with modern thought, both legal and medical. In like fashion a test such as *Currens* that emphasizes volition to the exclusion of cognition is deficient. It appears we can agree on what should be in a standard test; and that standard requires consideration of cognition, volition, and capacity to control. Both the ALI formulation, and a proper or modern *M'Naghten* satisfy this requirement. The ALI formulation requires that a person have substantial capacity (1) to appreciate the criminality of his conduct, and (2) conform his conduct to the requirements of the law. This is direct and understandable emphasis on knowledge and will. *M'Naghten* emphasizes (1) knowledge of the nature of the act, and (2) knowledge of right and wrong. Give substance to the first arm of *M'Naghten;* define act as Stephens, Bishop, Hall, Mueller, Perkins, or any other criminal law expert does, to include rational behavior based on choice; and emphasize this arm as the right-wrong arm has been stressed in the past, and *M'Naghten* becomes as acceptable as ALI. Possibly, to escape the charge that knowledge is stressed too much, the "know" of *M'Naghten* should be changed to "know,

[85] *United States v. Freeman,* 357 F.2d 606, 619 (1966). See the dissenting opinion of Judge Van Voorhis in *People v. Horton, supra* note 21.

appreciate and understand." [86] Our task is to communicate to the jury, and the charge need be complete enough to give them an adequate definition of act, including the requirement that it be the result of conscious choice. It might be necessary to fully explain that "know" requires more than a mechanical ability to verbalize. Here, understanding and choice are requisite, for the concept of *mens rea* demands both.

We still have a choice between *M'Naghten* and ALI, for *M'Naghten* is worded in terms of a total loss of capacity, while the ALI test talks in terms of substantial capacity. A choice between these levels of capacity is one of policy. One would suspect that the less stringent ALI formulation will exculpate more offenders than *M'Naghten.* In any event, determining where we draw this arbitrary line is not demanded here, since both tests are acceptable within criminal law principles.

In Ohio, we claim to follow *M'Naghten,* and proper articulation and fair emphasis is the present task. At a minimum, we must reform our test so that we emphasize the proper elements of criminal responsibility.

Our test dates back to *Clark v. State of Ohio,*[87] an 1843 murder case. Judge Birchard emphasized the elements in the following way. He first stated that "purposely," as used in the statute defining the crime "implies an act of the will; an intention; a design to do the act. It presupposes the free agency of the actor." Secondly, he emphasized deliberation and premeditation by mentioning that they require "action of the mind." He further explained, "The crime of murder in the first degree can, therefore, only be perpetrated by a free agent, capable of acting or of abstaining from action—free to embrace the right and to reject the wrong." He concluded, "The question may be safely stated to you thus: Was the accused a free agent in forming the purpose to kill Cyrus Sells? Was he, at the time the act was committed, capable of judging whether that act was right or wrong? And did he know at the time that it was an offense against the laws of God and Man?"

Ten years later Corwin, J., in *Farrer v. State,*[88] was faced with an objection to a usual restrictive right-wrong instruction, and answered it this way: "The power of self-control—'free

[86] Hall, *op. cit. supra* note 19, at 482.
[87] *Clark v. State of Ohio,* 62 Ohio 495 (1843).
[88] *Farrer v. State,* 2 Ohio St. 54 (1853).

agency'—is said to be quite as essential to criminal accountability as the power to distinguish between right and wrong. And I have no doubt that every correct definition of sanity, either expressly or by necessary construction, must suppose freedom of will, to avoid a wrong, no less than the power to distinguish between the wrong and the right. And in this very case, I can see many reasons why it would have been proper to say this much to the jury in so many or in similar words." He continued by suggesting that a sensible jury would assume this to be the case, that the definition given by the court would not preclude jury consideration of the "power of self-control or free agency."

We have modern evidence that some juries follow inadequate instructions, and we need a modern rule to guard against this possibility.[89]

Around the turn of the century, in *Kalb* and *Tyler,* the court affirmed that a test of sanity that considered both cognition and volition, and used a test that put both in issue. The court described a sane person as "one who has sufficient knowledge, power and judgment to distinguish right from wrong; or having such mental power, has sufficient will power to refrain from doing the wrong when the alternative is presented to him."[90] The substance of this test was continued in *Cook* (1932), *Frohner* (1948), and in *Ross* (1952).[91] In the last case, the court specifically found that there was adequate affirmative proof of purpose, deliberation and premeditation; and noted that the psychiatrist had testified fully. The trial court had not submitted the issue of insanity to the jury, feeling that not enough evidence had been offered to require it; and the Supreme Court affirmed, and restated the law of Ohio in terms of *M'Naghten.* In both *Frohner* and *Ross* the court was faced with defendants who took plenty of time to plan and execute their crimes, and who manifested no significant traces of insanity.

In the 1963 *Stewart* case, the court of appeals, Judge Doyle speaking, defined sanity in these terms: "A person accused of crime who knows and recognizes the difference between right

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[89] Mueller, *Criminal Law and Administration,* 58 Annual Survey of American Law 111, 113 (1958).

[90] *State v. Kalb,* 7 Ohio N.P. 547, 5 Ohio Dec. 738 (C.P., 1894); *State v. Tyler,* 7 Ohio N.P. 443, 5 Ohio Dec. 588 (C.P., 1898).

[91] *Cook v. Western & S. L. Ins. Co.,* 30 Ohio N.P.N.S. 247 (C.P., 1932); *State v. Frohner,* 150 Ohio St. 53, 80 N.E.2d 868 (1948); *State v. Ross,* 92 Ohio App. 29, 108 N.E.2d 77 (1952).

and wrong in respect of the crime with which he is charged, and has ability to choose the right and abjure the wrong, is legally sane." [92] This was affirmed to be the correct rule by the Supreme Court in an opinion by Judge Jones.[93] Judge Doyle had also given an instruction on the nature and quality of the act and deliberation too, which involves capacity and freedom of choice. Certainly, this case allows consideration of all the relevant questions involved in criminal responsibility. Whether it articulates them in a way that is pleasing to the profession is arguable. The real issue is whether they were communicated to the jury.

Stewart was cited in the *Keaton* case as being Ohio's rule on insanity. It is apparent that Ohio law, from 1843 to and including *Stewart,* embraces considerations of cognition, volition and capacity to control. In as many cases as you can find these questions put in issue, the answer has been uniform. *Colby* cites *Clark v. State* as the origin of our right-wrong test. Judge Birchard in *Clark* said that an act can "only be perpetrated by a free agent, capable of acting or abstaining from action, free to embrace the right and to reject the wrong." He strongly articulated this thought in his instruction, and did not limit the question to "right and wrong." Both the *Colby* and the *Keaton* Courts allowed the psychiatrists to testify freely, but the *Colby* court objected to the *M'Naghten* strait jacket. As Weihofen argues, the accused's concept of right-wrong is a portion of the issue, and seems an acceptable question for the expert witness; and, if the question is properly asked, need not require of them an ethical or moral judgment.[94] One must admit, if the right-wrong dichotomy is used as an evidentiary rule to exclude testimony as to other mental abnormalities, then it is used to exclude relevant

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[92] *State v. Stewart,* 120 Ohio App. 199, 210-211, 201 N.E.2d 793, 801.

[93] *State v. Stewart,* 176 Ohio St. 156, 198 N.E.2d 439 (1964). Judge Jones stated "One is presumed to intend the natural, reasonable and probable consequences of his voluntary acts. . . . Appellant is thus presumed to have intended the natural, reasonable, and probable consequences of repeatedly striking his victim about the head with a hammer and strangling her with his hands, and later, with a rope."

It could be argued that Judge Jones presumed too much here, that he presumed the defendant committed a "voluntary act." If this is true, this case can not be rationalized with criminal law principle or prior Ohio cases. He said, in another portion of his opinion, that there was sufficient evidence of intention, deliberation and premeditation to support the verdict, and that such evidence could be found in the testimony of the appellant, as well as in that of the various experts who testified.

[94] Weihofen, *supra* note 84, at 1, 14.

testimony and must be eliminated. It was not so used in *Colby* or *Keaton,* and cannot legitimately be so used in Ohio. Certainly, the right-wrong question will not always be solely relevant, and as the *Keaton* case demonstrates, the psychiatrist should not always be required to answer it.

The *Colby* Court was correct in pointing out that ALI talks in terms of substantial incapacity, while *M'Naghten's* standard is total incapacity. Where this line should be drawn is still a problem, but authority can be cited for the proposition that the *M'Naghten* line serves the basic purposes of the criminal law in a better way than ALI.[95] Many argue that we should make *M'Naghten* more expressive by using an expanded phrase such as "appreciate and understand" where we now use "know." Our task is to communicate our standard to the jury. One doubts if a lay jury thinks in terms of an absolute standard when considering a problem (such as insanity) on which the experts have just testified in terms of gradations.

In conclusion, we have over one hundred years of experience with our *M'Naghten* rule. Our case law contemplates allowing the psychiatric expert to testify fully as to his "observations and conclusions concerning the mental condition of the defendant." [96] Our cases contain example after example where courts have considered cognition, volition, and capacity to control. They point out that Ohio's *M'Naghten* is not a restricted "right and wrong" test.[97] Some cases in this chain use synonyms for the word "know" to reduce the burden from an absolute one, such as *Kalb's*[98] use of the phrase "sufficient knowledge, power and judgment to distinguish right from wrong"; and *Strong's* verbiage, whether he had "so far lost the power to choose." [99] It would appear that our *M'Naghten* test contains all that is of value in the American Law Institute formulation and the various modern formulations commonly used throughout the world. All that remains is for us to apply it in a sophisticated way.

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95 *State v. White,* 60 Wash. 2d 551, 374 P.2d 942 (1962).

96 *State v. Colby, supra* note 1.

97 *Farrer v. State, supra* note 88.

98 *State v. Kalb, supra* note 90.

99 *State v. Strong,* 12 Ohio Dec. 698 (C.P., 1902).