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Criminal Law—Insanity—The Wisconsin "Experiment" With the ALI Test

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cific exception rule. This rule dispenses with the need for exceptions where the error charged is "basic and fundamental." However, there are no adequate guidelines to determine what errors are "basic and fundamental," which leaves room for uncertainty in the majority rule's application. Thus, the specific exception rule is not readily acceptable. The minority view, maintaining that general exceptions are sufficient, is ably stated by Justice Musmanno's dissent in the instant case. The argument for this position is that a litigant should not be penalized for his attorney's failure to specifically except.[40] The minority holding is unacceptable because it discourages counsel from delineating his reasons for objecting; this makes it difficult for the trial judge to analyze the precise error alleged and if necessary, correct his charge. On balancing the above considerations, the specific exception rule seems preferable. If coupled with uniform jury instructions, an initial charge prior to the introduction of evidence and/or a clarification of the instances where a general exception will suffice, the specific exception rule can be endorsed without reservation.

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CRIMINAL LAW—INSANITY—THE WISCONSIN "EXPERIMENT" WITH THE ALI TEST

Defendant, after entering a plea of not guilty by reason of insanity, was tried and convicted of arson, burglary and armed robbery in the Circuit Court of Milwaukee County. The defense offered several alternative tests for criminal responsibility as instructions to the jury; that of the American Law Institute,[1] the test advocated by the British Royal Commission on Capital Punishment,[2] the *Durham* test[3] and the *Currens* test.[4] The proposed instructions also included an instruction which would inform the jury that if the insanity plea was successful the defendant would be mandatorily hospitalized[5] until an appropriate mental

40. Instant case at 11, 220 A.2d at 637.

1. Model Penal Code § 4.01 (hereinafter refered to as ALI test); Elements in the instruction: "lack of substantial capacity to appreciate criminality of conduct or lack of substantial capacity to conform conduct to the requirements of the law"; State v. Shoffner, 143 N.W.2d at 460 (1966) (hereinafter cited instant case).

2. Royal Commission on Capital Punishment, 1949-53 Report, para. 333, at 116 (Cmnd. No. 8932). Elements in the instruction: "whether accused was suffering from disease of the mind to such a degree that he ought not to be held responsible," instant case at 460.

3. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); Elements in the instruction: "whether the act is the product of mental illness"; instant case at 460.

4. United States v. Currens, 290 F.2d 751 (3d Cir. 1961); Elements in the instruction: "lack of substantial capacity to conform conduct to the requirements of the law"; instant case at 460.

5. Wis. Stat. Ann. § 957.11(3) (1958) which reads in part: "If found not guilty because insane, or not guilty because feeble minded, the defendant shall be committed to the central state hospital or to an institution designated by the Department of Public Welfare, there to be detained, until discharged in accordance with the law." *Cf.* People v. Lally, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966).

examination determined that he could be released. All of these requested instructions were denied by the trial court which then instructed the jury on the basis of the *M'Naghten* test.[6] On appeal to the Supreme Court of Wisconsin, *held*, reversed, four justices concurring in part, three justices dissenting in part. A defendant, after presenting evidence that as a result of mental disease or defect he lacked substantial capacity to conform his conduct to the requirements of the law, may exercise an option to have the jury instructed on the basis of the American Law Institute test of insanity in place of the *M'Naghten* test.[7] However, he must first agree to waive the statutory provisions placing the burden of proof on the state[8] and assume that burden himself. The instruction informing the jury of the status of the defendant after a successful plea of not guilty by reason of insanity is approved.[9] *State v. Shoffner*, 31 Wis. 2d 412, 143 N.W.2d 458 (1966).

The defense of insanity, although not unknown in England prior to the nineteenth century,[10] reached a stage of modern development with the *M'Naghten* rule in 1843.[11] That test is based primarily on two concepts: the ability of the defendant to distinguish right from wrong, and the defendant's knowledge of the nature and quality of his act.[12] Although criticized since its inception,[13] the

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6. 10 Clark & Fin. 200. 8 Eng. Rep. 718 (1843). See State v. Esser, 16 Wis. 2d 567, 599, 115 N.W.2d 505, 522 (abnormal condition of the mind that renders a defendant incapable of understanding the nature and quality of his act or incapable of distinguishing right from wrong).

7. Model Penal Code § 4.01. Mental Disease or Defect Excluding Responsibility:
(1) A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.
(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

8. Wis. Stat. Ann. § 957.11(1) (1958), which provides: "And if the jury finds that the defendant was insane or feeble minded or that there is a reasonable doubt of his sanity or mental responsibility at the time of the commission of the alleged crime, they shall find the defendant not guilty because insane or feeble minded."

9. The court also discussed several other grounds of appeal; alleged error in admitting defendant's statements into evidence, error on voir dire, failure to prove venue, and failure to prove arson. The court also held that the exclusionary rule of Miranda v. Arizona, 384 U.S. 436 (1966) would apply to the retrial of the instant case despite the fact that the first trial took place more than a year before *Miranda* was decided and despite the United State Supreme Court's decision holding that *Miranda* applies only to cases in which the trial began after June 13, 1966; Johnson v. New Jersey, 384 U.S. 719 (1966).

10. See Biggs, The Guilty Mind 82-111 (1955); see also Note, 4 Buffalo L. Rev. 318, 319 (1954) (a brief review of the various tests used prior to the M'Naghten formulation).

11. Daniel M'Naghten, in an attempt to assassinate Sir Robert Peel, killed Peel's secretary Drummond instead. He was later found not guilty on the ground of insanity. As a result of the public furor that followed the verdict the House of Lords requested the opinion of the judiciary on the law governing such cases. The resulting opinion is popularly refered to as the M'Naghten test. 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843).

12. *Id.* at 210. Essentially the test declared that there will be no criminal responsibility if the accused was laboring under such a defect of reason, from a 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 what he was doing was wrong.

13. See 2 Stephen, History of the Criminal Law of England 154-75 (1883) (an early analysis and criticism of M'Naghten).

test received near universal acceptance in England and the United States.[14] In some instances American courts expanded *M'Naghten* by adding the "irresistable impulse test" which excuses the defendant when, although he knew the wrongfulness of his act, he was incapable of controlling the impulse to commit it.[15] Until recently the lone exception to this general acceptance of *M'Naghten* was New Hampshire, where a much broader formula was given to the jury: whether the defendant had the mental capacity to entertain a criminal intent and whether, in fact, he did entertain such an intent.[16] Thus *M'Naghten* remained, without serious challenge, the principal test for criminal responsibility until 1954, when the Court of Appeals for the District of Columbia, in the case of *Durham v. United States*,[17] formulated a test, similar to that of New Hampshire, declaring that there is no criminal responsibility if the defendant's unlawful act was the product of a mental disease or defect.[18] Wisconsin twice rejected the *Durham* test,[19] the second rejection occurring approximately at the same time *Durham* was being radically modified by the District of Columbia court.[20] That court modified *Durham* stating that the test referred only to abnormal conditions of the mind which substantially affect mental or emotional processes and substantially impair behavior control.

Recently other federal courts, while not following *Durham*, have changed *M'Naghten*. In *United States v. Currens*[21] the Third Circuit Court of Appeals approved a new formula which declares, in essence, that no criminal responsibility will be found if the defendant, as a result of a mental disease or defect, lacks substantial capacity to conform his conduct to the requirement of the law.[22] The court rejected that part of the American Law Institute definition containing the "knowledge" element of the defense[23] and emphasized that part of the test dealing with capacity to control conduct,[24] characterizing the former as "mere surplusage."[25] The Eighth Circuit Court of Appeals, in 1961, declared that it would not find reversible error in any trial court's instruction to the jury if it "embraces and requires positive findings as to three necessary elements, namely

14. Weihofen, Mental Disorder or a Criminal Defense [hereinafter cited as Weihofen] 51 (1954).

15. *Id.* at 81.

16. State v. Jones, 50 N.H. 369, 382 (1871); State v. Pike, 49 N.H. 399 (1869).

17. 214 F.2d 862 (D.C. Cir. 1954).

18. *Id.* at 875; see also Note, 26 Temp. L.Q. 152 (1952) (fairly typical criticism of M'Naghten).

19. State v. Esser, 16 Wis. 2d 567, 115 N.W.2d 505 (1962); Kwosek v. State, 8 Wis. 2d 640, 100 N.W.2d 339 (1960) (Wisconsin reaffirming M'Naghten Rule).

20. McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962).

21. 290 F.2d 751 (3d Cir. 1961).

22. *Id.* at 774.

23. ALI test, *supra* note 7 (substantial capacity to appreciate the criminality of his conduct).

24. *Ibid.* (substantial capacity to conform his conduct to the requirements of the law).

25. United States v. Currens, 290 F.2d 751, 774 (3d Cir. 1961). See Mueller, *M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity*, 50 Geo. L.J. 105 (1961) (general criticism of M'Naghten); *but see* 9 U.C.L.A.L. Rev. 516 (1962) (contending that the cognitive element is contained in the *Currens* standard).

the defendant's cognition, his volition and his capacity to control his behavior.[26] The Tenth Circuit[27] and the Second Circuit[28] have adopted the ALI test. In *United States v. Freeman* the Second Circuit criticized *M'Naghten* as "grossly unrealistic" in its single track emphasis of the cognitive element of responsibility.[29] Adopting the ALI test the court commented: "The Model Penal Code formulation views the mind as a unified entity and recognizes that mental disease or defect may impair its functioning in numerous ways."[30] The court also noted changes or deletions from the ALI test made by other courts in other circuits and rejected them in favor of the full official wording of the test.[31] Other federal circuit courts have declared that they are unable to change *M'Naghten* until action by Congress or the Supreme Court.[32] This attitude is shared by the Supreme Court of California[33] which believes that it must wait for the state legislature to change the test, although courts in Michigan[34] and Ohio[35] have expressed their willingness to consider a possible change. In other states, statutory changes have been effected; the ALI test is now accepted in Illinois[36] and Vermont[37]; in Maine the *Durham* rule has been approved[38]; and in New York the *M'Naghten* test has been slightly modified.[39] In Wisconsin dissatisfaction with the "right-wrong" test led to its deletion from the code in 1953 but no new standard was promulgated in its place by the legislature.[40] Thus the Wisconsin courts were left to enunciate the standard for the insanity defense and in the case of *State v. Esser* chose to continue with a formulation of *M'Naghten*.[41]

Three elements, other than the actual test for criminal responsibility, can

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26. Dusky v. United States, 295 F.2d 743, 759 (8th Cir. 1961).
27. Wion v. United States, 325 F.2d 420 (10th Cir. 1963) (The court characterizes the ALI test as M'Naghten plus "irresistable impluse" in more modern language.). *Id.* at 427.
28. United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).
29. *Id.* at 618.
30. *Id.* at 622.
31. *Id.* at 624.
32. Sauer v. United States, 241 F.2d 640, 643 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957); *accord*, Howard v. United States, 232 F.2d 274, 275 (5th Cir. 1956).
33. People v. Nicolaus, — Cal. App. 2d —, 409 P.2d 193, 48 Cal. Rptr. 353 (1966).
34. People v. Krugman, 377 Mich. 559, 141 N.W.2d 33 (1966).
35. State v. Colby, 6 Ohio Misc. 19, 215 N.E.2d 65 (1966).
36. Ill. Ann. Stat. ch. 38, § 6-2 (Smith-Hurd 1961) (wording of the ALI test adopted).
37. Vt. Stat. Ann. tit. 13, § 4801 (1958) (Vermont's variation of wording ALI test substantially the same as the original.).
38. Me. Rev. Stat. Ann. tit. 15, § 102 (1964) (Maine bases its test on the "product of mental illness" formula.).
39. N.Y. Pen. Law § 1120 (1965). The New York rule now reads:
A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to *know* or *appreciate* either:
(a) The nature and consequences of such conduct; or
(b) That such conduct was wrong.
See also Note, 40 St. John's L. Rev. 75 (1965). "By the addition of the words 'substantial capacity to know or appreciate,' it would seem that the new statute broadens the requirement of mere 'knowledge' imposed by the M'Naghten Rule." *Id.* at 81. See also Legislation, 30 Albany L. Rev. 140 (1966).
40. Platz, *The Criminal Code*, 1956 Wisconsin L. Rev. 350, 367-68 (1956).
41. State v. Esser, 16 Wis. 2d 567, 115 N.W.2d 505 (1962).

have a substantial effect on the defense of insanity: first, there is the allocation of the burden of proof; second, there is the clarity and precision with which the instructions are given by the trial court to the jury; and third, there is the possibility of prejudice against the plea of insanity which can have a profound effect on every element of the defense, including the aforementioned. The jurisdictions are split as to the allocation of the burden of proof: in the federal courts[42] and in about half the states[43] the burden is on the prosecution to prove the defendant's sanity beyond a reasonable doubt, as it is in Wisconsin,[44] or by a preponderance of the evidence.[45] States which place the burden of proof on the defendant often characterize the plea as an affirmative defense[46] and an "exception" to the principle[47] that it is the duty of the state to establish all elements of the alleged offense.[48] Making the plea of insanity an "exception" in the allocation of the burden of proof may indicate judicial bias against the plea. Second, the element of communication of the trial court's instructions has been neglected in the insanity area, as well as in other fields: "Thus the issue has never been how to communicate instructions; it has been what should the instruction mean: where should the boundaries of responsibility be fixed."[49] Recent jury studies indicate that there is a low rate of comprehension by the jury of the instructions given by the trial court[50] and that trial courts are failing to communicate the standard for criminal responsibility to the jury.[51] Third, there is the element of prejudice against the plea of insanity and its effect on the defense. Juror prejudice against the insanity defense may, in some instances, be the result of fear that the defendant will be set free should his plea be successful. In the District of Columbia the jury is told that the defendant must be hospitalized after a successful insanity plea.[52] In some states the jury, after finding the defendant insane at the time of the offense, must then decide his present sanity and the desirability of commitment.[53] In either situation

42. Davis v. United States, 160 U.S. 469 (1895).
43. Weihofen 212.
44. Wis. Stat. Ann. § 957.11(1) (1958).
45. 38 N.D.L. Rev. 340, 350 (1962).
46. Weihofen 220.
47. So regarded by, *e.g.*, Glueck, Law and Psychiatry 118 (1962).
48. See, *e.g.*, Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1961). "His sanity at the time of the offense becomes an element of the crime." *Id.* at 854. *Cf.* People v. Lally, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966).
49. James, *Jurors Assessment of Criminal Responsibility*, 7 Soc. Prob. 58, 59 (1959) [hereinafter cited James].
50. Arens, Granfield & Susman, *Jurors, Jury Charges and Insanity*, 14 Catholic U.L. Rev. 1, 25 (1965) [hereinafter cited Arens].
51. *Id.* at 26.
52. Taylor v. United States, 322 F.2d 398 (D.C. Cir. 1955); Lyles v. United States, 254 F.2d 725, 728 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958) (The court declares that jurors have a common understanding as to the meaning of the verdicts of guilty and not guilty but not of the verdict not guilty by reason of insanity, so the jury should be told of defendant's mandatory commitment.). *Contra*, Pope v. United States, 298 F.2d 507 (5th Cir. 1962).
53. Tex. Code Crim. Proc. Ann. art. 46.02 § 2(d-1) (1965) (supplementary finding of present sanity or insanity required); *but see* Weihofen 365 (jury generally not informed of defendant's future status even if there is a mandatory commitment statute).

the possibility of juror prejudice against the insanity plea, because of fear that the defendant will be set free to menace society, is eliminated.[54] In addition to this possibility, juror prejudice may affect other elements of the defense. For example, it is evident that jurors tend to distrust psychiatric testimony in favor of the defendant[55] and this feeling would make it difficult for the defendant to create even a reasonable doubt as to his sanity.[56] Finally, jurors seem to interpret any test of criminal responsibility to meet their own preconceived notions of the insanity defense.[57] Although this may be the result of ignorance, due to the failure of the court to communicate the standard, it would seem to be at least partly due to juror bias.[58]

In considering the defense of insanity, Justice Fairchild, writing for the "majority"[59] in the instant case, first emphasized that "the basic question facing society" is whether, at the time of the offense, the accused was so substantially affected by mental illness that society can not hold him responsible for his crime.[60] The court goes on to point out that although every alternative test for criminal responsibility, including that formulated in *State v. Esser*,[61] can be subject to some criticism, the court had not been shown that the *Esser* definition, coupled with the placing of the burden of proof on the state, had resulted in any injustice.[62] However, Justice Wilkie in his concurring opinion, remarked that the reason the court has not been shown the unfairness of the *Esser* rule is that in none of the records in the criminal cases involving insanity, brought before the court since *Esser*, was there any effort to modify the rule and "accordingly, there would have been nothing in any record which in any way could present

54. Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 Yale L.J. 905, 939 (1961) (The instruction is cited as "one of the most important elements in the field since *Durham* itself.").

55. James 66. "[As one juror said:] 'I don't think there is a person sitting in this room that if they were tried by a psychiatrist, with their background of education and their approach that they couldn't find some kind of quirk in all of us.' . . . In the same vein another juror commented: 'As far as psychiatric testimony, I would say that a psychiatrist could pick up any dozen people and make up some sort of an examination, the type that they give you; and they'll find something wrong with you. . . .'" *Id.* at 66.

56. Arens 23. "What was said of the law of insanity must now be said of the burden of proof in the charges: comprehension was dramatically low." *Ibid.*

57. *Id.* at 26. "[H]ighlighting the difficulty manifest by the public in conceptualizing mental illness [is the fact that]. The popular conception has thus been couched in terms of bizarre behavior manifestations, suggestive of the Wild Beast Test . . . ." *Ibid.* See Arens 66. "The second point is that Durham jurors have no difficulty *in construing the instructions to suit their beliefs* concerning the centrality of cognition." (Emphasis added.) *Ibid.*

58. James 68.

59. The court is actually split into two groups. Justices Gordon, Beilfuss and Heffernan favor the continued use of the *Esser* definition of criminal responsibility, with the burden of proof on the state. Justices Hollows, Wilkie and Chief Justice Currie would introduce the ALI test and continue to place the burden of proof on the state. Justice Fairchild while agreeing with the former that the *Esser* definition is all that a defendant is entitled to as a matter of right, wishes to extend an "option" to the defendant to be tried under the ALI test if he assumes the burden of proof. Justices Hollows, Wilkie and Chief Justice Currie concur with Justice Fairchild, and thus the majority of the court approves the granting of the option. Instant case at 463-64.

60. Instant case at 461.

61. 16 Wis. 2d 567, 115 N.W.2d 505 (1962).

62. Instant case at 461.

the fairness of the *Esser* rule as against any other."[63] Justice Fairchild then noted with interest the recent changes in other jurisdictions, regarding the insanity test applied,[64] and deplored the fact that the record before them lacked comprehensive psychiatric testimony in terms of these other possible definitions of insanity so as to be a convincing demonstration that the *Esser* definition had failed.[65] However, the court continued, because of the complexity of the field involved, it wished to attempt an "experiment" and extend to a defendant an option to assume the burden of proof and be tried under the ALI test.[66] Justice Fairchild would not elaborate on what he hoped this "experiment" might achieve. The court then explained that, although Wisconsin placed the burden of proof on the state,[67] it could see "no good reason" why the defendant may not waive the benefit of the rule and assume the burden.[68] In dealing with the instruction informing the jury of the mandatory hospitalization of defendant should he be found not guilty by reason of insanity, the court noted that this was inconsistent with the general rule that the jury should not be told of the effect of their verdict.[69] However, because of the possibility that jurors might be biased against the insanity plea if they think the defendant will be set free, it was felt that there was sufficient reason for an exception to be made,[70] and therefore the court, all justices concurring, approved the instruction.

It is difficult to see what the court in the instant case hopes to achieve with its "experiment" in granting the defendant an option to assume the burden of proof and be tried under the ALI test. The court did not elaborate on this point in its decision, although there are several possible objectives that should be considered: there is the possibility that the court wishes to see what juror reaction will be to the more liberal ALI test. This view is supported when one looks to the reasoning in the *Esser* decision where the court declared, "we are not inclined to deem it just to acquit him because he succeeds merely in raising a reasonable doubt of his capacity to control his acts."[71] Here the court seems to be making two assumptions that recent jury studies show to be dubious: first they assume that it is *not* difficult to raise a reasonable doubt of sanity in the minds of the jury and second they assume that the volitional control element will be given the same weight and consideration as the cognitive element by the jury.[72] In addition to this, there would still remain the question of how the court intends to measure the reaction of the jury. The court may look to the number of defendants opting the ALI test and/or how many defendants are found not guilty under that test. However, no valid conclusion can be drawn from

63. *Id.* at 473.
64. *Ibid.*
65. *Id.* at 463.
66. *Id.* at 464.
67. Wis. Stat. Ann. § 957.11(1) (1958).
68. Instant case at 465.
69. *Ibid.*
70. *Id.* at 465-66.
71. State v. Esser, 16 Wis. 2d 567, 589, 115 N.W.2d 505, 517 (1962).
72. James 68.

these statistics. Defendants may refuse the option because they believe that the assumption of the burden of proof is too high a price to pay. The court may look to the ratio of defendants found not guilty under the ALI test as compared with the number of defendants found not guilty under the *Esser* test, but the court will still be unable to draw any valid conclusion from these statistics since it cannot say, in any individual case, that the result would have been different under another test for criminal responsibility.

The court may also be looking for a reaction by the trial judges of Wisconsin since they would be "the group most cognizant of instances, if any, where persons whose conduct had been substantially affected by mental illness have been convicted."[73] It is difficult to see what form this reaction will take. The trial judges do not have the option to give or withold the ALI test. The trial judges will not be able to give an opinion on the reaction of the jury since they have no better or other way of knowing if the jury's reaction would have been changed, had a different test been applied, than does the court in the instant case. It is further to be noted that the court, in the instant case and in *Esser*, was reluctant to change the test for criminal responsibility because it felt that if the defendant could prove that he was unable to control his conduct such a showing would "generate in the minds of the jury a reasonable doubt of his capacity to distinguish the nature and quality of his acts or to distinguish right from wrong."[74] Thus the defendant would supposedly have the benefit of the ALI test while still theoretically operating under *M'Naghten*. This inference is neither necessary nor likely. Such insight is not common among lay jurors nor do they attempt to broaden the scope of definitions given them. On the contrary, their interpretation is generally a restrictive one, in that they often seem to apply the test for criminal responsibility by giving a limited and precise definition for the terms of the test.[75]

In the instant case the court tries to solve some of the problems it faces in the "complex" field of insanity and criminal responsibility by "experimenting" with new tests and formulations, evidencing a great concern with linguistic niceties that would appear to be lost on the jury. Such experimentation is unnecessary and unwise. The ALI test is simple, precise and thorough. It would serve as a fair and accurate test of criminal responsibility even if the burden of proof remained on the state. However, if the ALI test is adopted the court will still be faced with two problems: juror prejudice[76] and the difficulty of communicating the standard for criminal responsibility to the jury. The court has partially dealt with the problem of juror prejudice in its adoption of the instruction informing the jury of the defendant's mandatory hospitilization following a successful insanity plea. Though this decision represents a definite advance

73. Instant case at 461.
74. *Id.* at 463.
75. James 67.
76. *Id.* at 66. ("The following comment illustrates juror prejudice against the insanity plea: 'I think we all agree that insanity has been abused a lot.'")

there are still manifestations of juror prejudice to be dealt with which need study and "experimentation." It has been suggested that training for jury service would help meet the problem of juror prejudice but even this suggestion would only be meaningful as part of a comprehensive effort by the courts.[77] The element of communication also needs the consideration of the courts; for example an "experiment" with written instructions might prove fruitful.[78] In would seem that there are possibilities for more productive experiments in the field of criminal responsibility than that found in the instant case.

JAMES M. VAN DE WATER

CRIMINAL LAW—PUNISHMENT—IMPRISONMENT OF INDIGENT FOR NON-PAYMENT OF A FINE UNCONSTITUTIONAL IF EXTENDED BEYOND MAXIMUM STATUTORY SENTENCE

Subsequent to a plea of guilty to the misdemeanor of assault in the third degree, defendant Saffore was given the maximum sentence allowed by law:[1] a five hundred dollar fine in addition to imprisonment for one year. Non-payment of the fine was to result in one day imprisonment for each dollar remaining unpaid upon completion of the one year of incarceration.[2] It is undisputed that the sentencing court was cognizant of the defendant's inability to pay the fine: because of his indigency the trial court, the Appellate Division, and the Court of Appeals granted the defendant's motion to have counsel assigned to him. The effect of the complete sentence was to incarcerate Saffore for at least eight months (assuming time off for good behavior)[3] plus an additional five hundred days, for a crime for which the legislature had imposed a maximum one year term of imprisonment. The Appellate Division of the Supreme Court affirmed the trial court's decision[4] and an appeal was taken by permission. The Court of Appeals *held*, when payment of a fine is "impossible" and known by the court to be "impossible," imprisonment to work out the fine, if it results in total imprisonment of more than one year for a misdemeanor, is unauthorized by the Code of Criminal Procedure and violates the defendant's right to equal protection of the law and the constitutional ban

77. Arens 27.
78. *Ibid.*

1. N.Y. Pen. Law § 245 provides, "Assault in the third degree is punishable by imprisonment for not more than one year, or by a fine of not more than five hundred dollars, or both."
2. N.Y. Code Crim. Proc. §§ 484, 718 provide "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which cannot exceed one day for every one dollar of the fine."
3. See N.Y. Correc. Law § 230.
4. People v. Saffore, 25 A.D.2d 496, 267 N.Y.S.2d 314 (4th Dep't 1966).