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CRIMINAL LAW - "TEMPORARY INSANITY" -ARGUMENTS AND PROPOSALS FOR ITS ELIMINATION AS A DEFENSE TO CRIMINAL PROSECUTION

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COMMENTS

CRIMINAL LAW — "TEMPORARY INSANITY" — ARGUMENTS AND PROPOSALS FOR ITS ELIMINATION AS A DEFENSE TO CRIMINAL PROSECUTION—In view of the apparently increasing number of cases which

have come before the courts in recent years in which the defense of "temporary insanity" has been made, an investigation into the status of that defense in the criminal law of today would seem desirable. The term "temporary insanity" is one of popular origin and finds no place in strict legal terminology. The defense of incapacity for the *mens rea,* legally speaking, is "insanity," not "temporary insanity." But because of the human desire for a *mot convenable,* we have come to apply the term "temporary insanity" to those defenses which are based upon the claim that the insanity begins "on the eve of the criminal act and ends when it is consummated."[1]

A recent case, *State of Connecticut v. Carol Paight,* Superior Court, Fairfield County, File No. 11405 (1950), will illustrate the subject of "temporary insanity" in a specific fact context.[2]

The facts to be gathered from the newspapers are these: Accused was a young woman twenty-one years old. On September 23, 1949, her father underwent an operation, and it was discovered that he had inoperable cancer. Accused was informed of this fact. Her subsequent action appears to have been influenced by an intense love of her father, and an abnormal dread of cancer. Upon hearing the report of the doctor, Miss Paight returned to her home, obtained her father's police revolver and drove to a wooded area where she fired one practice round "so I'd know what I was doing." She then returned to the hospital where she shot her father through the head. She then reported her deed to the nurses and soon was taken into custody by the police.

Upon her trial for second degree murder, the defense was that she was temporarily insane at the time she killed her father. Much evidence designed to show insanity at the time of the crime was introduced during the course of the trial. Nurses told of a glassy stare in her eyes after the crime; the family physician expressed the opinion that she was not sane; a psychiatrist gave similar testimony. On the other hand, a psychiatrist called by the State was of the opinion that Miss Paight was sane at the time of the killing. An issue of fact was evidently present, and the jury returned a verdict of not guilty by reason of insanity.

It is with this type of fact situation that this comment will be concerned.

First, a brief history of the law of insanity as a defense to crime will be set forth. Second, it will be shown that "temporary insanity" as used today has no place in the law of insanity as a defense to crime.

[1] Graves v. State, 45 N.J.L. 347 at 350, 46 Am. Rep. 778 (1883).

[2] This case is cited solely as a case in point, to serve as a fact basis for the discussion which follows, but not as a subject of criticism or condemnation.

Third, some possible remedies will be suggested for eliminating the present practice of using "temporary insanity" as a defense.

I

The modern concept of insanity which the law recognizes as a defense to crime was crystallized in 1843 in the famous M'Naghten Rules.[3] The opinion of the judges in that case laid down the following criteria: ". . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, *from a disease of the mind,*[4] as (1) not to know the nature and quality of the act he was doing; or (2) if he did know it, that he did not know he was doing what was wrong."[5] It is important to observe at this point that the wording of the rules suggests that the defect or mental condition must be apparent and of substantial duration. The M'Naghten Rules form the basis of the defense of insanity in this country as well as in England.[6] Upon this test, a few of the states have engrafted the "irresistible impulse" test, but that need not concern us at this point.[7]

As is obvious, there is ambiguity in the M'Naghten Rules. What is a "disease of the mind?" The importance of this determination is indicated by the wording of the rule: "If, *from a disease of the mind,* the defendant did not know. . . ." This phrase is the foundation upon which the remaining portion of the rule rests.

Through this ambiguity as to the nature of a disease of the mind the defense of "temporary insanity" slipped into our jurisprudence.

Much of the confusion concerning the use of "temporary insanity" stems from the idea that whatever factors bear upon the so-called *mens rea* of the accused must be submitted to the consideration of the jury. As a general proposition, the accused is entitled to have matters relative to his *mens rea* considered by the jury, but there are and always have been certain qualifications to this proposition. Both the old common law of England, and the wording of the M'Naghten Rules bring out certain situations where evidence, though perhaps bearing on the ac-

[3] Daniel M'Naghten's Case, 10 Cl. and Fin. 200, 8 Eng. Rep. 718 (1843).

[4] Italics supplied.

[5] Daniel M'Naghten's Case, 10 Cl. and Fin. 200 at 210, 8 Eng. Rep. 718 at 722 (1843); MEREDITH, INSANITY AS A CRIMINAL DEFENSE (1931).

[6] Bell v. State, 120 Ark. 530, 180 S.W. 186 (1915); Davis v. United States, 160 U.S. 469, 16 S.Ct. 353 (1895); Lowe v. State, 118 Wis. 641, 96 N.W. 417 (1903); State v. Kelley, 74 Vt. 278, 52 A. 434 (1902); Kraus v. State, 108 Neb. 331, 187 N.W. 895 (1922).

[7] See 14 AM. JUR. 793, §36, and 22 C.J.S. 126, §60 and cases there cited; Waite, "Irresistible Impulse and Criminal Liability," 23 MICH. L. REV. 443 (1925).

cused's *mens rea*, is excluded on policy considerations. These considerations of public policy will be dealt with more fully later.

II

Does the defense of "temporary insanity" have any legal basis in our criminal law? A few psychological concepts are relevant.[8] There are in psychology two main classifications of persons who (in the layman's words) are not normal. These categories are of psychotics and neurotics. This classification is met with more or less approval; some psychiatrists delineate sharply between them, while others say that the distinction is mostly traditional, and great difficulty is met when any dividing line is attempted. At any rate, it is fairly well agreed that neurosis is usually a much milder condition than psychosis, and neurosis is the early stage of psychosis.

Disposing first of psychosis, we can say that generally it a "long-termed" condition.[9] It would seem to be the type of insanity which was contemplated by the M'Naghten Rules. A psychotic condition is relatively easy to detect by a psychiatrist. Once the psychotic condition is established, what remains to be shown for legal defense is that, because of the psychotic condition, the accused committed the crime or did not know its commission was wrong. Here, again, the chances are relatively good that a psychiatrist can determine that the accused was under the influence of his psychosis when he committed the crime.

Within the neurosis[10] classification are included such conditions as traumatic neurosis,[11] acting-out tendencies,[12] and the hysterical personality.[13] It is with the latter that we need be mostly concerned. The hysterical personality is a relatively normal person, but he may enter

[8] Much of the technical psychological data which follows was obtained by the writer through interviews with three psychologists, Dr. Gerald Blum and Dr. Daniel R. Miller of the University of Michigan Psychological Bureau, and Dr. E. Lowell Kelly of the University of Michigan Psychology Department, and a psychiatrist, Dr. Ralph Morris Patterson of the University of Michigan Hospital. To them the writer is deeply indebted.

[9] DORLAND, THE AMERICAN ILLUSTRATED MEDICAL DICTIONARY (1944): Psychosis: "Formerly, a generic name for any mental disorder. Specifically, the deeper, more far-reaching and prolonged mental disorders. . . ."

[10] Id., Neurosis: ". . . A relatively minor disorder of the psychic constitution; in contrast with the psychosis, it is less incapacitating, and . . . the personality remains more or less intact. Sometimes called *psychoneurosis*."

[11] A neurosis which results from injury or shock. The shell-shocked war veteran is an example.

[12] Where, under stress, a person does things which he has subconsciously desired to do.

[13] This is the technical term.

what psychologists term a "fugue state"[14] wherein he may do certain acts and yet have no recollection of them afterward. Although the psychiatrist can readily detect the hysterical personality, and although he can tell with more or less accuracy, depending on the individual, that the individual may enter a "fugue state" at one time or another under certain conditions of strain, for him to say with accuracy that at a particular time an accused committed a certain crime and was in a "fugue state" is almost impossible. It cannot be emphasized too strongly that there are no precise tests which the psychiatrists can apply to reach *the* answer that will enable him to say with absolute certainty that this or that particular condition existed at any specified time.

Upon this basis of psychological information the legal aspects of the defense of "temporary" or "emotional"[15] insanity may be considered. The problem presented is this: is a person to be allowed to defend on the ground that he was temporarily or momentarily "dethroned" of his reason at the time he committed a crime, granting that psychiatrists agree that such a state of mind in the neurotic is *possible*? A review of several judicial pronouncements on the subject will serve at this point.

First, distinguishing mere anger from actual insanity, the Pennsylvania Supreme Court approved the following instruction:[16]

> "But the jury must not confound anger or wrath with actual insanity; because, however absurd or unreasonable a man may act when exceedingly angry, either with or without cause, if his reason is not actually dethroned it is no legal excuse for violation of law."[17]

And again, the courts have pointed out the necessity of this alleged momentary dethronement of the reason being associated with a disease of the mind:

> "But it must be remembered that one . . . will not be ex-

[14] DORLAND, THE AMERICAN ILLUSTRATED MEDICAL DICTIONARY (1944): Fugue: "A disturbance of consciousness in which the patient performs purposeful acts. After the state has passed, however, the patient has no conscious remembrance of his actions during this period."

[15] The two terms seem to be interchangeable: People v. Finley, 38 Mich. 482 (1878); State v. Moore, 42 N.M. 135, 76 P. (2d) 19 (1938); WOOD AND WAITE, CRIME AND ITS TREATMENT 374, note 13 (1941).

[16] Lynch v. Commonwealth, 77 Pa. 205 at 213 (1874).

[17] See also Copeland v. State, 41 Fla. 320, 26 S. 319 (1899); People v. Durfee, 62 Mich. 487 at 494 (1886); Fitzpatrick v. Commonwealth, 81 Ky. 357 (1883); Grant v. State, 250 Ala. 164, 33 S. (2d) 466 (1948); Sanders v. State, 94 Ind. 147 (1883).

cused from a crime . . . while his reason is temporarily dethroned not by disease, but by anger, jealousy or other passion. . . ."[18]

". . . insanity, to be a defense to crime, must be the result of a disease of the mind and of such a nature as to dethrone his reason; to destroy his reason to such an extent that he can not distinguish right from wrong. . . . The Law of Alabama does not recognize temporary or emotional insanity or insane jealousy."[19]

These quotations illustrate two of the limitations which the courts have placed upon the defense of temporary or emotional insanity. The claimed insanity must be distinguished from anger or passion, and it must be the result of a disease of the mind.[20] However, another group of cases goes even farther. They suggest that nothing less than a deep-seated, long-term mental disease (corresponding roughly to psychosis) will excuse one from crime:

"Emotional insanity without more does not constitute mental derangement as that term is used in [the statute]. Emotions are merely states of feeling common to all mankind. In regard to their effect when aroused they are the antithesis of unconsciousness and indicate an awareness of the inward state of mind as well as an alertness to outward facts. They generally accentuate the perceptions of the mind and hence tend to pave the way for the formation of a criminal intent. Emotional disturbances therefore readily become concomitants of the vast majority of crimes of violence."[21]

". . . [insanity] must be of a fixed or prolonged nature rather than momentary or fleeting; not temporary or effervescent in nature—sane one minute and insane another—more permanent than transient; more or less prolonged as distinguished from effervescent. . . ."[22]

Perhaps the strongest pronouncement in this regard comes from a 1949 Pennsylvania case:[23]

"Certainly neither social maladjustment, nor lack of self-control, nor impulsiveness, nor psychoneurosis, nor emotional in-

[18] Bell v. State, 120 Ark. 530 at 555, 180 S.W. 186 (1915). Arkansas reports show an exceptionally consistent line of well-reasoned cases upon the subject of emotional insanity: Smith v. State, 55 Ark. 259, 18 S.W. 237 (1891); Williams v. State, 50 Ark. 511, 9 S.W. 5 (1888). That sexual deviates cannot invoke the defense of "temporary insanity," see People v. Walter, 7 Cal. (2d) 438, 60 P. (2d) 990 (1936); Rozier v. State, 185 Ga. 317, 195 S.E. 172 (1938).

[19] Grant v. State, 250 Ala. 164 at 165, 33 S. (2d) 466 (1948).

[20] "The defense of insanity is one thing, and the defense of unconsciousness is another." People v. Martin, 87 Cal. App. (2d) 581 at 588, 197 P. (2d) 379 (1948).

[21] Territory of Hawaii v. Alcosiba, 36 Hawaii 231 at 240 (1942).

[22] Grant v. State, 250 Ala. 164 at 165, 33 S. (2d) 466 (1948).

[23] Commonwealth v. Neill, 362 Pa. 507 at 514, 67 A. (2d) 276 (1949).

stability, nor chronic malaria, nor all of such conditions combined, constitute insanity within the criminal-law conception of that term."

Thus, with this evidence that the supreme courts of our states and territories have cast out the defense of "temporary insanity" wherever possible,[24] it can hardly be said that "temporary insanity" has a place in our criminal law as a defense to crime. The opinions of these courts indicate also that as a matter of policy the defense should not have a place in our law at any court level. And yet the fact that there are many reported cases and many more unreported cases where the defense is used shows that *at the trial court level* it knows no bounds. Its abuse by the unscrupulous defendant seeking his last avenue of escape was aptly summed up by Judge Hemingway of the Arkansas Supreme Court when he said:[25]

"It would serve no useful purpose for us to comment upon the many and cruel outrages upon justice that have been perpetrated in the name of emotional insanity. The fact is within the observation of all, and its effects have prejudiced none more than the unfortunate members of society who are in fact bereft of reason."

The use of the defense "temporary insanity" is especially valuable where popular sentiment is with the accused. Where the jury would like an excuse to acquit the accused and at the same time retain their own self-respect, they will gladly rely on any sort of testimony as to the accused's alleged insanity. Such could well have been the situation in the case of *Connecticut v. Paight,* supra.

[24] The situation in New Jersey at the present time with respect to the validity of the defense of temporary insanity seems very uncertain. In Graves v. State, 45 N.J.L. 347 at 350, 46 Am. Rep. 778 (1883), we find the court holding: "The law regards insanity as a disease of the mind, implying fixedness and continuance of mental condition. It therefore rejects the doctrine of what is called emotional insanity, which begins on the eve of the criminal act and ends when it is consummated." Then in the 1943 case of State v. Lynch, 130 N.J.L. 253 at 257, 32 A. (2d) 183, the court flatly holds: "If, at the time of the shooting, the accused, by reason of temporary insanity, was incapable of distinguishing between right and wrong with respect to the act, he is not guilty of murder. Unless he was conscious that it was an act which he ought not to do, there was a lack of moral or criminal responsibility." This latter case would seem to overrule the case of Graves v. State. But confusion was added to the picture in the 1949 case of State v. Cordasco, 2 N.J. 189 at 198, 66 A. (2d) 27, when the court approved an instruction by the lower court to the effect that ". . . the law regards insanity as a disease of the mind implying fixedness and continuance of mental incapacity and that the test was not whether he was actually at the time in the mental state of appreciating the nature and quality of his act and of knowing that it was wrong but whether he had the capacity to do so." And at the same time, the court reaffirmed its position in the Lynch case. One justice dissented, recognizing the disagreement between the two positions taken in this case, in approving the inconsistent positions of the two former cases.

[25] Smith v. State, 55 Ark. 259 at 262, 18 S.W. 237 (1891).

An example of the misunderstanding of this defense and a demonstration of how the court has throttled preventative legislation appear in the case of *People v. Price*, a 1947 case in Recorder's Court, City of Detroit, Michigan.[26] Defendant, an elderly man, was accused of murdering his wife. Before trial, a hearing was held by the court to determine whether the defendant was sane for the purposes of standing trial. The doctors testified that there was no evidence of insanity or defect that would affect the defendant's criminal responsibility. Pursuant thereto the court entered the following order. "Now therefore it is ordered by the Court that the defendant, Sherman Price, be and he hereby is declared to be sane and is ordered to stand trial in his cause." On the trial of the case, defendant was acquitted on the grounds of insanity. The state then began proceedings under the Michigan statute[27] which calls for the examination and commitment to the Ionia State Hospital of persons acquitted of felony by reason of insanity. Before such proceedings got underway, defendant brought habeas corpus proceedings before a circuit judge, on the ground that it was res judicata that he was presently sane, for it had been judicially established at the previous sanity hearing that defendant was not now insane. The judge granted the writ and he was released from custody.

Now it should be noted that the order entered by the judge in the pre-trial sanity hearing was broader than necessary; it adjudged the defendant sane, where necessity required only that the defendant be adjudged sufficiently sane to understand the nature of the proceedings, and to aid counsel in his defense. This extra-legal pronouncement should in no way be res judicata as to the defendant's present sanity, for it exceeds the authority of the court and the purposes for which the hearing was held.

Following the result of the *Price* case to its logical conclusion, it would seem that no effect could ever be given to the Michigan commitment statute in this situation. Whenever the "temporary insanity" defense is pleaded, and a psychiatric commission's report filed with the court showed that the defendant was sane for purposes of trial, he could then never be committed under the statute if acquitted by reason of insanity. On the other hand, should the commission's report show insanity, the accused would not stand trial. Thus, it would appear that the purpose of the statute is thwarted, and the statute is to be deemed practically inoperative.

[26] Recorder's Court file number A-48486.
[27] Mich. Stat. Ann. §28.967 as amended by Public Acts 1947, No. 233.

On reading the newspaper accounts of the trial of Margaret Tack in Detroit in February 1938, the trial of Paul Wright in Los Angeles in February 1938, and the trial of Mrs. Francis Fitzpatrick in Detroit in November 1948, one questions the soundness of the defense of insanity as presented in these cases. In the *Fitzpatrick* case, the psychiatrist testifying for the defense said that he found the defendant neurotic during an examination several days after the shooting. "However, under cross-examination he granted that there was a difference between neurosis, or emotional upheaval, and psychosis, which is insanity under the law. 'She was capable of reaching such a deep emotional disturbance that she might possibly not know right from wrong,' he said."[28] For the prosecution, a member of the sanity commission gave his opinion that she suffered "no mental disease, condition or defect which would impair her criminal responsibility."[29] An acquittal on the ground of insanity followed.

It would seem that much depends upon the character of the trial judge and his willingness (or unwillingness) to adhere strictly to accepted legal principles. In this connection the writer interviewed several Michigan trial judges, asking each of them the following hypothetical question: "If the evidence in the case did not show that the defendant was suffering from a disease of the mind at the time he committed the act, or if it did not show that the act was a result of a disease of the mind, would you take the question of insanity away from the jury?" The responses ranged from "No, I would leave it up to the good sense of the jury to realize the lack of proof" to "Yes, I think I would in the proper case."[30] The diversity of the opinions of these judges shows the need for a general reconsideration of what is and should be that insanity which the law will recognize as a defense. Should the courts continue to allow persons to escape responsibility for their crimes committed in the heat of anger or passion on the feigned claim that they were temporarily insane? The very basis of our law of insanity as a defense to crime, the M'Naghten Rules, would seem to supply the answer to the question.[31] It would seem that only those cases where the disease of the mind was manifest and obvious were contemplated in the statement of the Rules. Professor Jerome Hall states that "The judges who formulated the M'Naghten Rules did not regard them as innovations; rather they were published as restatements of law long in vogue in England as

[28] DETROIT FREE PRESS, November 23, 1948, p. 2:6.
[29] DETROIT FREE PRESS, November 24, 1948, p. 15:1.
[30] Quoted in substance, not verbatim.
[31] See section I, p. 725 supra.

well as in this country."[32] If, then, the M'Naghten Rules were laid down for the purpose of "restating" the law of insanity in England in the year 1843, the case of *Rex v. Arnold* sheds some light on the type of insanity which the judges must have had in mind. In that case, which was decided over a hundred years before the M'Naghten Rules, Judge Tracy instructed the jury as follows:

> ". . . we must be very cautious; it is not every frantic and idle humour of man, that will exempt him from justice, and the punishment of the law. When a man is guilty of a great offence, it must be very plain and clear, before a man is allowed such an exemption; therefore it is not every kind of frantic humor or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast. . . ."[33]

The quotation is used here not for the purpose of advocating a return to the "wild beast" test, but merely to show the degree of insanity which the framers of the M'Naghten Rules thought should negative responsibility. Can it be said that the judges intended, in laying down the rule, that every person accused of crime who had no better defense should claim that he was "temporarily" insane? It would appear not. And this view seems to be supported by the quotations from the more recent opinions cited above. The defense has, with the possible exception of the practice in New Jersey as noted above,[34] been uniformly rejected when the question has been squarely presented before an appellate court.[35] The unfortunate thing in this respect is that under our dubious rule that the state may not appeal from an acquittal, the ruling of the trial court as to the matter of evidence, though erroneous, and prejudicial to the state, must stand.[36]

III

What can be done to remedy the abuses at the trial court level? It would appear that there are four possible remedies to the situation.

1. Perhaps of greatest importance would be a rule like that in Connecticut, whereby the state as well as the defendant may appeal a

[32] "Mental Disease and Criminal Responsibility," 45 COL. L. REV. 677 at 679 (1945).
[33] 16 How. St. Trials 695 at 763 (1724).
[34] See note 24.
[35] See WOOD AND WAITE, CRIME AND ITS TREATMENT 374, note 13 (1941).
[36] Ibid.

criminal case for prejudicial error committed at the trial stage.[37] This would give the appellate court the opportunity to reject the defense of "temporary insanity" whenever it is injected into the case.

2. Next, every effort should be made to make the *best* psychological testimony available to the jury. It is recognized by psychiatrists as well as the legal profession that in virtually every case the defendant, if he "shops around" enough, can secure a psychiatrist to testify that he was not sane at the time he committed a certain act.[38] It would be naive to shut our eyes to this fact. Nor should we rely too heavily upon witnesses called by the prosecution. There should be made available in every case where the defense of insanity is made, a panel of competent psychiatrists, appointed and called by the court itself, to give their opinions as to the mental condition of the accused.[39]

3. Very closely related to the preceding suggestion is the following: Should we not limit, either by statute or by judicial decision, the type of insanity which will constitute a defense to crime? Should not the defendant be required to prove by his testimony that he was suffering from a psychosis, not a mere neurosis, at the time he committed the crime in order to excuse him from punishability? This was virtually suggested in *Grant v. State*[40] when the court said, ". . . it must be of a fixed or prolonged nature rather than momentary or fleeting. . . ," and it was emphatically ruled in *Commonwealth v. Neill*,[41] where the court held that ". . . neither social maladjustment . . . nor psycho-neurosis [another term for neurosis] . . . constitute insanity within the criminal-law conception of that term."

It might be questioned, in view of the decision in *State v. Strasburg*,[42] whether such a limitation as here proposed would meet with constitutional objections. In that case, the Supreme Court of Washington held unconstitutional a statute which eliminated insanity completely as a defense to crime. Though the decision is severely criticized by Professor John R. Rood, in his article, "Statutory Abolition of the

[37] Conn. Gen. Rev. Stat. (1949) §8812.

[38] In this connection, the fact of whether or not the psychiatrist holds a diploma from the American Board of Neurology and Psychiatry should be considered in determining his competency. Such a diploma is issued only after the doctor passes a very rigid set of examinations; it is regarded as a certificate of very high proficiency in the field of psychiatry.

[39] In this connection, an excellent recent discussion by Professor Henry Weihofen on the subject of "Eliminating the Battle of Experts in Criminal Insanity Cases," 48 MICH. L. REV. 961 (1950) brings out further needed reforms in expert testimony on insanity.

[40] Grant v. State, 250 Ala. 164 at 165, 33 S. (2d) 446 (1948).

[41] Commonwealth v. Neill, 362 Pa. 507 at 514, 67 A. (2d) 276 (1949).

[42] 60 Wash. 106, 110 P. 1020 (1910).

Defense of Insanity in Criminal Cases,"[43] it can be completely distinguished from the proposal herein made to restrict the defense only to its legitimate, historical scope. In our present state of psychological science, it is virtually impossible to say with certainty in every case that the accused was or was not suffering from a mental disease *at the time he committed the crime.* It is a matter of deduction from known and inferred facts. But it would seem that as to the more serious mental conditions, the psychoses, the deductions could be made with greater accuracy than in those cases where the accused is neurotic. This is in accord with the apparent philosophy of the M'Naghten Rules, which require *clear* proof of disease of the mind. Therefore, a limitation of the defense of insanity to cases where the experts testified that the defendant was suffering from a psychosis does not come within the constitutional objection of the *Strasburg* case. It is merely a safeguard to see that the M'Naghten Rules, the basis of our defense of insanity, are adhered to.

Two objections to such a limitation have been pointed out by Dr. Ralph Morris Patterson.[44] One is that there is no clear dividing line between psychosis and neurosis, the former sometimes developing upon the latter. The other objection is that psychiatrists disagree among themselves as to what falls within the classification of psychosis. In other words, some psychiatrists would recognize a certain condition as psychotic, and some would say it was merely neurotic. But would it not be a step in the right direction, in view of the basis for the M'Naghten Rules, to limit the defense of insanity to cases where a psychiatrist will testify that the defendant was psychotic at the time he committed a particular act? It would make for more reliable psychiatric testimony. Admittedly, it would depart from the contemporary view held by many psychiatrists of today: that which denies the responsibility of any criminal—that which considers any crime a "pathological phenomenon."[45]

An interesting proposal is made in this connection by Dr. Patterson. He advocates that the judicial function of the courts should extend only to the determination of the facts, for example, did *A* unlawfully shoot *B*? If the jury decides that *A* did unlawfully shoot *B*, then without further action on the part of the court, *A* should be turned over to a board of psychiatrists, who would then determine what "punishment" or, more properly, what "treatment" should be given the defendant. The

[43] 9 MICH. L. REV. 126 (1911). Cf. "Due Process and Punishment," 20 MICH. L. REV. 614 at 645 (1922).

[44] Psychiatrist, University of Michigan Hospital.

[45] HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 527 (1947).

decision of the board might range anywhere from immediate release to society, for those not considered dangerous, to extended periods of incarceration in an institution where he would be given psychiatric aid with a view to rehabilitation. This view is commendable, but in the present state of both psychological and legal science, it is not pragmatic. And we must be pragmatic in dealing with the problem of "temporary insanity" in our law today. At best, this view of the psychiatrists must be a goal toward which both the students of psychology and law should work, with due regard to the constitutional difficulties which are inherent in the *Strasburg* case.

4. The trial judge should become more aware of his duty to the state as well as his duty to safeguard the rights of the defendant in a criminal action. This is especially true under our present rules whereby the state cannot appeal a criminal case. He should be given wide latitude, upon request of the prosecutor, to hear evidence pertaining to insanity, outside the presence of the jury, when there is substantial doubt as to whether the evidence is going to show what in law will constitute insanity. And he should not hesitate, in the proper case, to take the issue of insanity away from the jury, where there is no evidence of legal insanity presented. He should not leave it to the jury, on the naive belief that they can sift its true worth. If he leaves the question to the jury, and they *want* to acquit, they have an out—a legal out.

Let us imagine a specific case: *A* is charged with murdering *B*. *A* admits the shooting, but defends on the ground that he was insane at the time. A defense psychiatrist testifies that in his opinion, at the time *A* shot *B*, *A* did not have a consciousness of wrongdoing because of a disease of the mind. But the witness refuses or is unable to state whether or not *A* was suffering from a psychosis at the time he shot *B*. The prosecutor now moves the court to strike the evidence as immaterial. What should the trial judge do? It might be argued that such action on the part of the trial judge would be unconstitutional in that it would take away from the consideration of the jury one of the essential elements of the crime—*mens rea*. In answering such a contention, let us first put the matter into syllogistic form:

Major Premise: No one is punishable for his acts unless he has a *mens rea*.

Minor Premise: The defendant had no *mens rea*.

Conclusion: No punishability.

It is the minor premise upon which we should focus our attention. It does not come into being until the unconsciousness of wrongdoing

is proved. It is at this point that the court is able to exercise control, by determining what kind of evidence will be sufficient to demonstrate a lack of *mens rea.* As was said in *Rex v. Arnold,* supra,[46] ". . . it is not every frantic and idle humour of man, that will exempt him from justice. . . ." And the judges who formulated the M'Naghten Rules must have contemplated a degree of control on the part of the courts when they said, ". . . it must be *clearly* proved. . . ."

It is public policy which can and must dictate the quantum or type of proof necessary to constitute an issue of fact as to the accused's alleged lack of *mens rea.* This same public policy has been used in the past to shape the law with respect to the analogous problem of the "irresistible impulse" defense, and in several such cases it has been the real basis for the courts' decisions with respect to that defense. A brief examination of those cases will serve at this point to show the extent to which the courts might use public policy when confronted with a questionable defense of temporary insanity.

The courts of this country and England can be divided into three groups, based upon the extent to which they recognize the defense of "irresistible impulse."[47] In the first group are those jurisdictions which do not recognize that there is such a thing as irresistible impulse and consequently refuse to recognize it as a defense in a criminal action.[48] In the second group are those which recognize that there is or may be such a condition as irresistible impulse, but *on the grounds of public policy* refuse to recognize it as a defense to crime.[49] Third, there are those who recognize the existence of the condition and also make it available as a defense to the accused.[50] The second group, unlike the first and third, present problems similar to the "temporary insanity" defense. In rejecting the doctrine of irresistible impulse in a recent Ohio case, Judge Skeel aptly summed up the situation when he said:

> ". . . To extend the doctrine of immunity to cases where the actor knows that he is doing what is wrong but claims his inability to resist doing the act, even though such lack of resistance is

[46] 16 How. St. Trials 695 at 763 (1724).

[47] See Waite, "Irresistible Impulse and Criminal Liability," 23 MICH. L. REV. 443 (1925).

[48] State v. Carrigan, 93 N.J.L. 268, 108 A. 315 (1919); Cunningham v. State, 56 Miss. 269 (1879); State v. Scott, 41 Minn. 365, 43 N.W. 62 (1889); People v. Carpenter, 102 N.Y. 238, 6 N.E. 584 (1886).

[49] State v. Maish, 29 Wash. (2d) 52, 185 P. (2d) 486 (1947); State v. Alexander, 30 S.C. 74, 8 S.E. 440 (1888); State v. Harrison, 36 W.Va. 729, 15 S.E. 982 (1892).

[50] State v. Green, 78 Utah 580, 6 P. (2d) 177 (1931); Morgan v. State, 190 Ind. 411, 130 N.E. 528 (1920); State v. Varecha, 353 Ill. 52, 186 N.E. 607 (1933); Cline v. Commonwealth, 248 Ky. 609, 59 S.W. (2d) 577 (1933); Parsons v. State, 81 Ala. 577, 2 S. 854 (1886); Commonwealth v. Rogers, 48 Mass. 500 (1844).

> claimed to be the result of disease of the mind, is to project the judicial process into the realm of uncertainty and speculation."[51]

And yet, if in fact, as psychiatrists claim, there is such a thing as irresistible impulse, then there is no more reason to punish such an individual than in the case where it is established that he had no *mens rea* at the time he committed the crime. Conversely, why should we admit evidence as to a "temporary insanity" on the part of the accused, which of necessity is not of the highest accuracy, and at the same time refuse to listen to evidence as to whether the accused was suffering from an "irresistible impulse?" It was a consideration of public policy—a consideration of what will be of greatest benefit to the whole of society—which prompted Judge Skeel to reject irresistible impulse as a defense to crime.

The New York Court of Appeals also added a word of caution with respect to the doctrine of irresistible impulse which can be translated directly into the ability of the courts to dictate the quantum and type of proof necessary to constitute a defense to crime: "The vagueness and uncertainty of the inquiry [into irresistible impulse] which would be opened . . . may well cause courts to pause before assenting to it."[52]

Returning to our discussion of the minor premise of our syllogism, it is this same line of reasoning which would enable the courts to determine what *is* a lack of *mens rea* within the scope of that premise. The courts might well say that when the accused presents evidence of mental disease less than a condition of psychosis, public policy considerations dictate that it be rejected as a defense—rejected as evidence to show a lack of *mens rea.* Otherwise, the inquiry would, in the words of Judge Skeel, "project the judicial process into the realm of uncertainty and speculation." And certainly the "vagueness and uncertainty of the inquiry" about which the New York court complains would be at least equal, if not greater, than in the case of the irresistible impulse defense.

Keeping in mind the real intent and philosophy of the M'Naghten Rules discussed above, our defendant *A* has not introduced any evidence which *in law* constitutes insanity, and the evidence should be stricken from the record. Such action by the trial judge in taking the question of insanity away from the jury has been approved on several occasions,[53] and should not be considered as an unconstitutional infringement of the defendant's rights.

[51] State v. Cumberworth, 69 Ohio App. 239, 43 N.E. (2d) 510 at 512 (1942).

[52] Flanagan v. People, 52 N.Y. 467 at 470 (1873).

[53] Duthey v. State, 131 Wis. 178, 111 N.W. 222 (1907); State v. Melvin, 219 N.C. 538, 14 S.E. (2d) 528 (1941); Territory of Hawaii v. Alcosiba, 36 Hawaii 231 (1942).

It is apparent that the legal profession needs a greater understanding of what legally constitutes the defense of insanity in criminal proceedings of today. The philosophy of the M'Naghten Rules should be ever-present in the consideration of the defense, so that neither the bench nor the bar will lose sight of their duty to society as well as to the defendant. The defense of "temporary insanity" has entered our criminal law as an abuse of the defense of insanity, and it should be exposed at every opportunity. One of the first steps in this direction should be the allowance of an appeal by the state in criminal matters. Next, we should see that our courts and juries have available the best possible psychiatric testimony. In this respect, we should see that competent and disinterested psychiatrists examine the defendant and report their findings. To insure that their testimony will be reliable and accurate, the law should require testimony of psychosis before submitting the issue to the jury. And last, because of its importance under our present mode of procedure, the proceedings at the trial court level should be conducted very carefully, with consideration both to the rights of the defendant and those of the state. In this way, the rights of the defendant and of society will be adequately protected.

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