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The Winning National Moot Court Brief

Patrick W. Healey
University of Nebraska College of Law

James M. Knapp
University of Nebraska College of Law

Jerrold L. Strasheim
University of Nebraska College of Law

The Winning National Moot Court Brief

Editor's Note: The Nebraska Law Review is proud to reproduce here the winning brief of the Seventh Annual National Moot Court Competition submitted by a three-member team representing the University of Nebraska College of Law. To retain that value which may be gained from the brief as a style guide for other collegiate teams in moot court competitions and for the practicing lawyer, the brief is published as it appeared in the final round of competition, rather than in the newly-adopted format and typographical style of the Nebraska Law Review. More important, the substance of the brief deals with a perplexing problem of the criminal law—the defense of insanity. The brief is of course a document advocating one side of the issue. The following brief summary of the legal issue raised is included to place the brief in its proper context.

The classic Anglo-American teaching on the test for insanity as a defense in a criminal case has for generations been embodied in *McNaughten's Case*,[1] decided by the House of Lords in 1843. *McNaughten* lays it down that a defendant may only be acquitted for insanity where "at the time of the committing of the act, [he] was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or . . . that he did not know he was doing what was wrong."[2] Few judicial pronouncements have found such general acceptance into our law. The *McNaughten* or "right and wrong" formula is today the exclusive basis for determining criminal insanity both in England and Canada and in approximately thirty American jurisdictions. A sizeable minority of the states, however, have held that the "right and wrong" test is not adequate for all cases but that a crime may also be excused for insanity where defendant's mental faculties were so impaired by disease that he lacked the power of conscious volition and inhibition and so was unable to resist an impulse to commit the act. This is the so-called "irresistible impulse" supplement to *McNaughten*. But the breadth of the supplement is not great, even theoretically. The *McNaughten* formula,

[1] 10 Clark and Fin. 200 (1843).

[2] Id., at 210.

in other words, remains as the basic test for criminal insanity even in "irresistible impulse" jurisdictions.

This overwhelming judicial adherence to *McNaughten* is particularly striking on account of the many and bitter attacks levelled against the formula, both with and without its gloss. The considerations put forth as requiring its burial will not be reviewed here. Suffice it to say that until 1954 the New Hampshire Supreme Court was the only tribunal willing to give them credence in the form of a decision, and this as long ago as 1869.[3] New Hampshire's rule since 1869 has simply been that an accused is not criminally responsible if his unlawful act was the offspring of mental disease or mental defect. But New Hampshire stood alone for 85 years, until joined by the District of Columbia as a result of the Court of Appeals' decision in *Durham v. United States*[4] which has since become one of the most widely discussed and controversial cases of our time. *Durham* expressly adopts the New Hampshire rule, finding that *McNaughten*—even when extended by the doctrine of "irresistible impulse," as had previously been done[5]—falls considerably short of the mark. Ironically, this was the same Court which, only nine years previously, had found no error in the trial court's refusal to instruct that defendant's mental disorder (short of criminal insanity) should be considered as showing a possible lack of the deliberation and premeditation necessary to constitute first degree murder.[6]

Unquestionably, *Durham* is the most significant development in the law of criminal insanity since *McNaughten*. This is not, however, merely because of its break with the past, except only indirectly, or even in the added importance it gives to the role of the psychiatrist and of the lawyer who seeks to manipulate and persuade him. The psychiatrist, after all, is the only one qualified to give content to the concept of mental disease influencing action. The mere change of wording in the instruction to the jury will probably mean little; that Monte Durham's retrial under the new

[3] State v. Pike, 49 N.H. 399 (1869). See also, State v. Jones, 50 N.H. 369 (1871).

[4] 214 F.2d 862 (App. D.C., 1954).

[5] Smith v. United States, 36 F.2d 548 (App. D.C., 1929).

[6] Fisher v. United States, 149 F.2d 28 (App. D.C., 1945), *aff'd on other grounds*, 328 U.S. 463 (1946). Compare Stewart v. United States, 214 F.2d 879, 883 (App. D.C., 1954). *Fisher* has uniformly been condemned in the law reviews. See, e.g., Weihofen and Overholser, Mental Disorder Affecting the Degree of a Crime, 56 Yale L.J. 959 (1947).

test resulted in a conviction should surprise no one.[7] The principal significance of the case seems rather to lie in the intense interest it has engendered in the problem of the marginally insane criminal and in the problem of criminal responsibility in general. The law journals published since *Durham* have contained more searching discussion of such problems than ever before. Attention has likewise heavily been directed upon the treatment afforded those acquitted by reason of insanity. For example, the question whether or not conviction and prison may not sometimes be preferable to such treatment has squarely been raised.[8]

The brief which follows is also part of the discussion kindled by *Durham*. The hypothetical case prepared by the National Moot Court authorities was obviously drafted in the light of Monte Durham and for the purpose of casting more light on whether such a man should be punished as a criminal or be sent to a mental hospital. The brief is indeed excellent, an eloquent plea for the latter course. Not everyone, to be sure, will agree with the conclusions reached. That is unimportant though it would be otherwise if everyone did. The point is that the brief is an example of student work at its best on problems vitally affecting the administration of the criminal law.

[7] See Durham v. United States, 237 F.2d 760 (App. D.C., 1956). The conviction was again reversed, however, because of trial court error in telling the jury that Durham had been found competent to stand trial and for conveying the impression that he would soon be released as cured from the mental hospital if he was found not guilty. On the eve of the scheduled third trial Durham pleaded guilty, thereby admitting that he was not legally insane at the time of the commission of the offense. See United States v. Fielding, 148 F. Supp. 46, 49 (D.D.C. 1957).

[8] E.g., De Grazia, The Distinction of Being Mad, 22 Univ. Chi. L. Rev. 339 (1955).

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 13.

CARL YOUNG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT.

BRIEF FOR THE PETITIONER.

PATRICK W. HEALEY,
JAMES M. KNAPP,
JERROLD L. STRASHEIM,
Attorneys for Petitioner,

UNIVERSITY OF NEBRASKA COLLEGE OF LAW,
Lincoln, Nebraska.

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Opinion Below.

The opinion of the United States Court of Appeals for the Thirteenth Circuit (R. 9-15) has not been officially reported.

Questions Presented.

1. Whether it was error to refuse to instruct the jury that the petitioner may not be convicted for an act which was the product of mental disease.

2. Whether it was error to refuse to instruct the jury that evidence of mental unsoundness may be considered in determining whether the petitioner was capable of the deliberation and premeditation necessary for a conviction of murder in the first degree.

Statement.

For many years the petitioner, Carl Young, suffered from severe mental disturbance. In 1945 he received a medical discharge from the service, based on psychiatric examination revealing a "profound personality disorder which rendered him unfit for military service" (R. 11). In 1953 after an arrest for assault and battery, he was committed by court order for psychiatric examination. His condition was diagnosed as "psychosis with psychopathic personality" (R. 11). Released after treatment for twelve months, he was still subject to violent rages and moods of deep despondency (R. 11). In December of 1955 his wife took their two children from their home and went to live with her family in another state (R. 9). During January, both by letter and by phone, he frequently requested her to return the children. She rejected these demands (R. 9-10). He phoned again on February 3 and February 5, demanding custody of the children; when she refused he threatened her life (R. 10). She reported the threats to the local United States Attorney, who filed a complaint charging violation of 18 U. S. C., Sec. 875 (c) (threat of bodily harm by interstate communication), and a warrant was issued for Young's arrest (R. 10).

Two F. B. I. agents, Richard Fosdick and Michael Hammer, were assigned to locate and arrest him. Finding him at home, they told him that he was under arrest (R. 10). During questioning concerning difficulties with his wife and the threatening phone calls, Young was cooperative. However when the questioning turned to the children, he became visibly agitated. Agent Hammer asked, "Do you think you'll get your children back by threatening your wife?" (R. 10). The question had a trigger-like effect on Young.

He leaped at Fosdick and snatched the agent's pistol from the holster, which was exposed since Fosdick had removed his coat (R. 10-11). Pointing the gun at Fosdick, Young said, "I'm going to get my kids. Don't try and stop me." Told to put the gun down, Young told Fosdick, "If you move, I'll kill you." Fosdick stepped forward, and was mortally wounded by two shots from the pistol (R. 11).

Brought to trial for the first degree murder of a government agent engaged in official duties (18 U. S. C. Secs. 1111, 1114) (R. 9), Young's defense was that his mental condition was such as to relieve him of criminal responsibility, or at least to render him incapable of the premeditation and deliberation which are elements of first degree murder. Accordingly, the trial court was requested to instruct the jury, (1) that if the accused's act was the product of his mental disease, he is not criminally responsible (R. 13); and (2) that the jury might consider evidence of mental disturbance, even though not amounting to insanity, on the issue of whether premeditation and deliberation existed, so as to constitute first degree murder (R. 14-15). Both requests were denied (R. 13-15) and the denials properly excepted to (R. 5).

Young was found guilty of first degree murder and sentenced to death (R. 1). The Court of Appeals for the Thirteenth Circuit affirmed (R. 16).

Summary of Argument.

Petitioner's first contention is that he is not guilty of the crime for which he was convicted for the reason that at the time of the killing of the Federal agent, as for a long time previously, he had been suffering from severe mental disorder, and his act was the product of that dis-

order. Petitioner was, however, precluded from effectively utilizing this defense at the trial because the District Court instructed the jury that petitioner was punishable if at the time of the act he knew "right from wrong," knew the "nature and quality" of what he was doing, and was not impelled by "irresistible impulse." The Court refused a request of petitioner's counsel to instruct that punishment could not be imposed for an act which was the product of mental disease.

The charge the Court gave was erroneous, since the particular factors the trial court selected as determinative of responsibility are merely possible symptoms of mental disease, which "do not necessarily, or even typically, accompany even the most serious mental disorder" *Durham* v. *United States,* 214 F. 2d 862, 876 (D. C. Cir. 1954). Since these symptoms have no essential relation to the extent of mental disturbance, the result of punishing one who lacks such symptoms but is nevertheless grossly insane is to punish the victim of disease for his affliction.

Petitioner further contends that even if he is to be held "legally sane," and hence responsible for the killing, his conviction of *first degree* murder cannot stand. Evidence that the petitioner was suffering from mental disorder which rendered him incapable of a deliberate and premeditated killing was introduced at the trial. Such evidence is relevant, for one who was incapable of premeditating and deliberating necessarily did not do so. The trial court erroneously refused to instruct the jury specifically that they might consider accused's mental disorder in determining the degree of crime committed. A specific instruction to this effect is necessary, for otherwise the jury is likely to confuse the defense that the murder was not in the first degree with the defense that the accused

was not responsible for any crime, and not attach any significance to evidence of mental disorder in respect to the former defense.

The refusal of the District Court to instruct the jury as requested by the petitioner prejudiced his substantial rights, and the conviction must accordingly be set aside.

ARGUMENT.

POINT I.

It was error to refuse to instruct the jury that the petitioner may not be convicted for an act which was the product of mental disease.

The question in this case is whether the petitioner, Carl Young, should be executed as a criminal or committed and treated as an insane person. There is no doubt that his act caused the death of a Federal agent; or that at the time of that act he knew right from wrong, knew the "nature and quality" of what he was doing, and was not impelled by irresistible impulse. The jury so found. But these factors alone, petitioner maintains, are not sufficient to make his act criminal.

Petitioner's defense at the trial was that at the time of the killing he was insane, and that his act was the offspring of his mental disease and hence not criminally punishable. In accordance with that theory, the petitioner requested an instruction that he would not be responsible if he was "suffering from mental disease and . . . this act was the product of his mental condition" (R. 13). The court refused this instruction, and instead charged that the petitioner was sane and punishable unless he "was laboring

under a defect of reason from disease of the mind such that he did not know the nature and quality of his act or did not know the difference between right and wrong so as to know that his act was wrong" (R. 13), or "was suffering from a diseased condition of the mind which so far destroyed his will, the governing parts of his mind, that his actions were not subject to the will, but beyond its control" (R. 14).

The instructions given by the trial court, rendering petitioner's theory of defense completely meaningless, were errors requiring reversal of his conviction.

A. The right and wrong test abstracts a single possible symptom of mental disorder, which has no essential relation to the degree of mental disturbance, and makes that symptom conclusive of responsibility.

The first portion of the court's instruction on the defense of insanity, referring to knowledge of the "nature and quality" of the act and knowledge that it is wrong, is derived from the 1843 *Opinion of the Judges in M'Naghten's Case,* 10 Clark and Fin. 200, 8 Eng. Rep. 718 (H. L. 1843). That test states that the accused, in all cases, is to be pronounced responsible if he was aware at the time of the act of its nature and quality, and that it was wrong, regardless of the extent of his mental disturbance in other respects. Petitioner contends that this test is obsolete in the light of modern medical knowledge, and is inadequate as a norm of criminal responsibility.

If insanity at the time of the act is to be accepted as a ground for excusing the madman from criminal responsibility, it is necessary to formulate a test describing the circumstances in which madness will furnish a defense. A test with this function should have some relation to the degree to which the mind of the accused is impaired by

disease. Science has made it clear that lack of cognitive awareness of right and wrong, and of the "nature and quality" of the act, are only possible symptoms of mental disease, and are not even typically associated with some of the more severe forms of mental disorder. Therefore, lack of such knowledge is an inadequate test of responsibility.

The absence of relation between the degree of mental disturbance and the symptoms selected as determinative by the M'Naghten rules has been pointed out by the English Royal Commission on Capital Punishment, 1949-53. After an exhaustive survey of all aspects of the question, that body concluded that the right-wrong test was:

> ". . . based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, and yet commit it as the result of the mental disease." Royal Commission Report 80.

Lack of knowledge of right and wrong is, in fact, so little indicative of serious mental disease that most inhabitants of an insane asylum possess such knowledge. Dr. Isaac Ray, the foremost American forensic psychiatrist of his day, is quoted by the New Hampshire Court as follows:

> "To persons practically acquainted with the insane mind, it is well known that in every hospital for the insane are patients capable of distinguishing between right and wrong, knowing well enough how to appreciate the nature and legal consequences of their acts, acknowledging the sanctions of religion,

> and never acting from irresistible impulse, but deliberately and shrewdly." *State* v. *Jones,* 50 N. H. 369, 395 (1871).

How does it happen that a test with the function of stating when insanity will excuse the actor has so little relation to whether or not he is insane, and if so, to the extent of his insanity? The answer lies in the fact that the right-wrong test was conceived in a period of ignorance of the real nature of mental disorder, and based on erroneous notions as to the functioning of the human mind. Underlying its formulation was an assumption, based on medical views then accepted, that the human mind is composed of distinct faculties, each performing its function independently of the others. Recurring again and again throughout the M'Naghten opinion is a limitation of the rule to those "who labor under such partial delusions only, and are not in other respects insane." The assumption that such a mental state exists is based on medical misconceptions of the day, and is completely unreal in the light of modern knowledge. The indebtedness to now exploded medical theories is described in Guttmacher and Weihofen, *Psychiatry and the Law* 418 (1952):

> "The judge's assumption that a person might suffer from delusions and yet be otherwise unaffected mentally was based on medical misconceptions of the time, the now exploded theories of monomania and phrenology. Monomania was . . . essentially a state of mind characterized by the predominance of one insane idea, while the rest of the mind was normal."

Modern psychiatric knowledge makes it plain that the human mind and personality is an integrated whole, and that no "faculty" of the mind can operate independently of the remainder of the self. A delusion is not an isolated

fragment of mental life, unrelated to other aspects of the personality. It is, rather, the form in which underlying mental disorder manifests itself; the shape in which underlying conflicts and aggressions masquerade in particular instances of mental disorder.

The judiciary has not remained unaware of the unreal nature of the assumption of compartmentalized faculties underlying the M'Naghten rules. Speaking for three dissenting judges of the 3rd Circuit, sitting *en banc* in *United States ex rel. Smith* v. *Baldi,* 192 F. 2d 540, 567 (3rd Cir. 1951), Judge Biggs pointed out, in advocating a test similar to that proposed by petitioner in this case:

> "M'Naghten's Case . . . assumes the existence of a logic-tight compartment in which the delusion holds sway leaving the balance of the mind intact . . . the criminal retains enough logic in the tight compartment so that from this sanctuary of reason he may inform himself as to what the other part of his mind, the insane part, has compelled or permitted his body to do. If the sane portion of the accused's mind knows that what the insane part compels or permits his body to do is wrong, the body must suffer for it by way of electrocution or hanging, obliterating both the good and the bad portions, as well as the residence of both."

Armed, then, with such a conception of a mind fully reasonable surrounding a single self-contained insane delusion, the judges in M'Naghten's Case could well tell the lunatic that he must, at his peril, apply rationally the knowledge of right which the "sane portion" of his mind perceives. As Dr. Isaac Ray succinctly stated, the right and wrong test is very reasonable, "if insane men would but listen to reason." Ray, *Medical Jurisprudence* 49 (5th Ed. 1871).

Since the right-wrong test makes relevant only certain possible symptoms which constitute only a small aspect of mental disease, the jury is never informed accurately whether the accused is in fact insane, or if so, of the nature of the disorder with which he is afflicted. The psychiatrist, from whom a great deal of information on this question could be learned, is unduly restricted in his testimony. Once the expert witness has been probed regarding the questions—meaningless to him—of right and wrong, any attempt at amplification or explanation is likely to be choked off, either as irrelevant, or because the question has already been answered. Examples of this restraint upon communication of the psychiatrist's knowledge of the accused's mental condition appear in a number of cases. At the trial in *Durham* v. *United States,* 214 F. 2d 862, 868 (D. C. Cir. 1954):

> ". . . when defense counsel sought elaboration from Dr. Gilbert on his answers relating to the 'right and wrong' test, the court cut short the questioning with the admonition that 'you have answered the question, Doctor.' "

Another flagrant example of the frustration of psychiatric testimony appears in the transcript of the trial in *Fisher* v. *United States,* appealed to this court on another question in 328 U. S. 463 (1946). Quoted in Biggs, *The Guilty Mind* 139-142 (1955), the transcript reads in part:

> Q. Is it your opinion, then, that this defendant Fisher could not distinguish between the right and wrong of the act which he did? A. In part, yes. As I told you before, I don't think you can answer these questions categorically, "yes" or "no" to a question, unless you want further amplification. But to answer "yes" or "no" to your question, clear cut, I don't think you could do it.
>
> * * * * * *

Q. What is a schizoid person with regard to insanity or sanity? A. He has moments in which his behavior is definitely——

Q. Please, Doctor, is he a sane person or an insane person? A. Well, he is both.

Q. Which was Fisher when he killed Miss Reardon? Was he a sane person or an insane person? A. I imagine he had all the elements of an insane person.

Q. What is your opinion, as a psychiatrist, whether Fisher was a sane person or an insane person when he killed Miss Reardon? A. I think, from the best I can say, he was probably—definitely showed signs of what I call impulsive or uncontrollable urge. To that extent he might be considered as probably a borderline between an uncontrollable urge, and, at the same time, probably evidence of a psychosis.

Q. I am not speaking of what he was evidence of. I am speaking of what he was subject to. Was he an insane individual when he killed Miss Reardon or was he a sane individual when he killed her, in your opinion? A. Well, I don't think he was sane.

Q. Will you please answer the question, Doctor? A. Your question involves a yes and no because of the way it is framed, but it doesn't give me any latitude to answer on my part. You put them out so that I can't say anything but what you want me to say."

The same confinement of the psychiatric witness is evident in the testimony of Dr. Stowe in the case at bar. Attempting to amplify the fact that knowledge of right and wrong has no real relation to mental disease, he was interrupted by the prosecutor, who said:

> "Your answer then is that you cannot form an opinion as to whether the defendant knew that the act was wrong?" (R. 12).

Thus, it is clear that, as a norm of criminal responsibility, the right-wrong rules are totally inadequate. That test has no real relation to the extent of impairment of the mind, but at best refers to one of many possible symptoms of mental disorder. The result of this is to punish the afflicted, even though the affliction has brought on the crime—in short, to punish for disease. No one has yet satisfactorily replied to the penetrating observation of Judge Ladd in *State* v. *Jones,* 50 N. H. 369, 394 (1871):

> "No argument is needed to show that to hold that a man may be punished for what is the offspring of disease would be to hold that he may be punished for disease. Any rule which makes that possible cannot be law."

B. The inadequacies of the right and wrong test as a norm for criminal responsibility are not remedied by the doctrine of irresistible impulse.

To compensate for the defects of the M'Naghten rules, many courts (as did the District Court in the trial of this case) have added thereto the doctrine of irresistible impulse. First given expression in an 1834 Ohio case, *State* v. *Thompson,* Wright's Ohio Rep. 617, 622, where the jury was told that in addition to knowledge of right and wrong, the defendant must have "had power to forbear or to do the act" to be held responsible, the charge of "irresistible impulse" has usually been construed as adding to the cognitive knowledge required by the right-wrong test, a requirement of unimpaired volition or "will".

However, an examination of the rationale and application of the irresistible impulse doctrine reveals that it completely fails to obviate the inadequacies of the M'Naghten rules. The addition of the irresistible impulse doctrine to the right-wrong test must, of necessity, be based on a

realization that the right-wrong test is not a valid formula for the determination of criminal responsibility. Most of the jurisdictions which have adopted the irresistible impulse doctrine base this repudiation upon recognition that the attempt in the M'Naghten case to diagnose the mental state of an individual through the use of only one of the many factors which make up human personality is in direct conflict with scientific knowledge. In *Parsons* v. *State,* 81 Ala. 577, 2 So. 854, 860 (1886), a case often termed a "classic" exposition of the irresistible impulse doctrine, the court concurred that mental disorder ". . . is never established by any single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case." In *Bradley* v. *State,* 31 Ind. 492, 506-7 (1869), the court stressed:

> "It [the M'Naghten test] assumes either that the mind possesses but one faculty, the cognitive, or power to apprehend by the understanding, or that this faculty alone is liable to disease which may relieve the sufferer from responsibility. Neither hypothesis is true."

Recognition of the basic defects of the M'Naghten rules by these jurisdictions is laudable, but the attempt to remedy those defects by the mere addition of the volitional aspect through a charge of irresistible impulse is futile. In effect, any court charging the M'Naghten rules and the doctrine of irresistible impulse in conjunction is saying: "We know that the mental condition of an individual depends on many, many factors. Thus, we refuse to recognize that a single factor, cognition, is determinative of that condition. So, we will add one more of the many factors, volition, and ignore the rest."

The failure of the irresistible impulse test to consider the extreme importance of the emotional, or affective, influ-

ence on mental stability forms the basis for this criticism. Dr. David Abrahamsen, one of the country's most distinguished psychiatrists, in his report to the Forty-Third Annual Meeting of the American Psychopathological Association in 1953, stated:

> "There must be no doubt that emotional illness may interfere with the action of the person to such an extent that in many cases he cannot be considered responsible for his actions."

Paradoxically, many of the courts which continue to employ *only* the M'Naghten standard recognize the validity of this criticism in rejecting the irresistible impulse theory. In the English case of *Rex* v. *True,* 16 Crim. App. Rep. 164, 167 (1922), the court pointed out that men's minds are not divided into separate compartments and, if a man's will power was destroyed by a mental disturbance, it might well be that the disease would so affect his mental powers as to destroy his power of knowing his act was wrong. The same foundation for rejecting the irresistible impulse test is expressed in the leading American case of *State* v. *Harrison,* 36 W. Va. 729, 15 S. E. 982 (1892). One of the most prolific pro-M'Naghten writers, Professor Hall, in his recent article on M'Naghten in 42 *American Bar Association Journal,* 917, 985 (1956), posits his entire argument on similar grounds. The inconsistency in such a position is inescapable. "We choose one factor, the cognitive," they say "to determine the mental status of an accused. We strongly reject the addition of any other factors in our decision, as that addition fails to recognize that the personality of an individual is composed of a great many, interdependent factors." It is obvious that any refutation of irresistible impulse on these grounds would necessarily represent adequate rebuttal of the right-wrong test.

The basic defect in the irresistible impulse test is identical to that of the M'Naghten rules. The attempt of both to crystallize current medical theories into legal tests of responsibility has proved inadequate in all respects. Consequently, the case reports are replete with graphic illustrations of the conviction, imprisonment, and execution of people who are undeniably insane, yet completely outside the orbit of either test.

A prime example of this is reflected in the case of *People* v. *Willard*, 150 Cal. 543, 89 Pac. 124 (1907). Frank Willard, an alcoholic paranoid who was convinced that he had been appointed by President Theodore Roosevelt and the Governor of California to arrest evildoers, had twice been committed by a judge of the Superior Court to the State Hospital for the Insane, each time being discharged. Soon after Willard's second release, the sheriff of the county, having heard that Willard was acting in a peculiar manner, brought him to the courthouse where two physicians were summoned as medical examiners and reported to the judge that Willard was insane and "homicidal and dangerous." The judge declared Willard insane and ordered him recommitted to the State Hospital for care and treatment. While the judge was signing the order, Willard started to leave the courtroom. When the sheriff tried to intercept him, Willard drew a pistol and shot and killed the sheriff. The Supreme Court of California, using the M'Naghten formula, upheld his conviction of first degree murder. The circumstances negatived any question of "irresistible impulse", and Willard, formally adjudged insane only a few minutes before the act, was executed as sane.

Other cases of persons with severe mental disorder whose acts are obviously the product of that disorder, yet

who still know right from wrong and are unaffected by irresistible impulse, appear in the authorities. Obviously made responsible by instructions such as those given by the trial court would be the person afflicted by a depressive condition accompanied by religious delusions urging him to kill his children in order to spare them the theological consequences of sin (Kinberg, *Forensic Psychiatry Without Metaphysics,* 40 J. Crim. Law and Criminology 555, 569 (1950)), and the lunatic who supposes himself to be commanded by God to perform his act, or who believes himself to be God. *McElroy* v. *State,* 146 Tenn. 442, 242 S. W. 883 (1922). Undoubtedly made responsible would be the madman who commits the crime *for the purpose* of bringing punishment upon himself, for by the nature of the case he knows the act is punishable. *Hadfield's Case,* 27 How. St. Tr. 1282 (1800).

C. The product of mental disease test remedies the basic defects of the M'Naghten-irresistible impulse rules and provides an effective norm of criminal responsibility.

The test embodied in the instruction requested by the petitioner is the same as the one which was adopted by the New Hampshire courts eighty-six years ago. *State* v. *Pike,* 49 N. H. 399 (1870). It is also the same as the one adopted by the Court of Appeals for the District of Columbia in the landmark decision of *Durham* v. *United States,* 214 F. 2d 862 (D. C. Cir. 1954). The test "is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Durham* v. *United States, supra,* p. 874. This test, usually referred to as the Durham test, effectively implements the policy of the law that the insane are to be exculpated from responsibility.

Of paramount importance is the fact that the Durham test predicates non-responsibility on the nature of the *disease* itself, and its effects on the defendant's act. It does not, as do the right and wrong-irresistible impulse rules, attempt to codify medical theories into law. Because it does not, it avoids the imposition of punishment for disease. The M'Naghten-irresistible impulse test assumes that it is possible to describe insanity in terms of a few particular symptoms, crystallize that description into a rule of law, and by applying that rule achieve a just separation of the responsible from the non-responsible. It is this assumption that the Durham rule rejects, holding that psychiatric knowledge has conclusively established it to be false. As Judge Bazelon pointed out in the Durham case, 214 F. 2d 862, 872 (D. C. Cir. 1954):

> "The fundamental objection to the right-wrong test, however, is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation, but that it is made to rest on any particular symptom. In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role, not merely one for which they have no special competence."

It is indeed an impossible task to attempt to crystallize in a legal rule all the symptoms that characterize insanity. Professor John Whitehorn of the Johns Hopkins Medical School expressed the medical view:

> "The medical profession would be baffled if asked to write into the legal code universally valid criteria for the diagnosis of the many types of psychotic illness which may seriously disturb a person's responsibility, and even if this were attempted, the diagnostic criteria would have to be rewritten from time to time, with the progress of psychiatric knowl-

> edge." Quoted in Guttmacher and Weihofen, *Psychiatry and the Law* 419-420 (1952).

Thus, any theory of responsibility which crystallizes existing medical theories must necessarily become obsolete with the passage of time and the advance of knowledge. *There is but one way to avoid this defect*—the criteria of responsibility must be the clinical entity, disease, and not what current knowledge considers evidence of it. Then, as scientific progress reveals more accurate means of determining the presence and nature of mental disease, the information may be effectively utilized. Such a test becomes self adjusting.

The Durham test will also assist the expert witness in his task of communicating to the jury the actual nature of the disorder which afflicts the accused, because the disease itself and its relation to defendant's acts become the criteria of his responsibility. Thus, as the court pointed out in *Durham* v. *United States,* 214 F. 2d 862, 875 (D. C. Cir. 1954):

> ". . . the jury is not required to depend on arbitrarily selected 'symptoms, phases, and manifestations' of the disease as criteria for determining the ultimate questions of fact. . . . Testimony as to such 'symptoms, phases and manifestations,' along with other relevant evidence, will go to the jury. . . ."

A substantial trend of recent authority supports the principle of the test proposed by the petitioner. The English Royal Commission on Capital Punishment 1949-1953, after complete investigation of the subject, rejected both the M'Naghten rules and the irresistible impulse test and focused the question of responsibility on the disease itself, recommending that it be left to the jury "to determine

whether at the time of the act the accused was suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible." Royal Commission Report 275-6. The Committee on Psychiatry and Law of the Group for the Advancement on Psychiatry recommended, after extensive study, that criminal responsibility be precluded in cases where the accused was suffering from a committable mental disease, "and in consequence thereof, he committed the act." Report No. 26 of Committee on Psychiatry and Law 7-8 (1954). In 1951 Chief Judge Biggs, speaking for three dissenting judges of the Third Circuit sitting *en banc* in *United States ex rel. Smith* v. *Baldi,* 192 F. 2d 540, 568 (3d Cir. 1951), concluded:

> "We can see no reason why the legal test of irresponsibility for the commission of a crime should not be based upon the principle that if the mental illness of the accused is the proximate, or a contributory cause of the crime, then the accused may not be found guilty of murder."

These authorities, as well as the observations of "medico-legal writers in large number" prompted the monumental decision in *Durham* v. *U. S.,* 214 F. 2d 862, 870 (D. C. Cir. 1954), which has already had far-reaching effect in giving new impetus to the reconsideration of the obsolete tests. The Minnesota Supreme Court has very recently adopted the "product of mental disease" test in determining whether an insane wife killer should be barred from sharing in her property, even though the court was bound to the right-wrong test by statute in criminal cases. *Anderson* v. *Grasberg,* 78 N. W. 2d 450 (Minn. 1956). The court squarely recognized the inadequacies of the M'Naghten rules:

"The fact that [defendant] committed the act knowing it was wrong with full realization of its consequences should not be considered in a vacuum apart from the disease which produced the act. We feel that the better rule to be applied to the case before us is that the slayer will not be barred from taking the property where his unlawful act was the product of mental disease. In light of the present-day knowledge of the nature of mental diseases, it is not realistic to apply the arbitrary right-and-wrong test to the facts in this case."

POINT II.

It was error to refuse to instruct the jury that the petitioner's mental condition might be considered in determining whether the homicide had been committed with the premeditation and deliberation necessary to constitute first degree murder.

A second defense of petitioner is that he did not commit murder in the first degree, since he was incapable of a deliberate and premeditated killing as required by 35 Stat. 1143 (1909), 18 U. S. C. sec. 1111, providing:

"§1111 Murder

"(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing . . . is murder in the first degree.

"Any other murder is murder in the second degree.

"(b) Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punish-

> ment,' in which event he shall be sentenced to imprisonment for life;
>
> "Whoever is guilty of murder in the second degree shall be imprisoned for any term of years or for life."

The District Court gave a charge on premeditation and deliberation which made no reference to the petitioner's mental condition, saying in substance that premeditation is the "formation of a specific intent to kill"; that deliberation is "consideration and reflection upon the preconceived design to kill" and involves "turning it over in the mind" and "giving it second thought"; that while "the formation of the design to kill may be instantaneous," deliberation requires the lapse of an appreciable but no fixed time between the formation of the design to kill and the fatal act; and that the "fact of deliberation" governs rather than "the length of time it may have continued" (R. 15).

As evidence had been introduced that "the defendant's mental condition was such that he was incapable of premeditation or the formation of an intent to commit a crime" (R. 14), the court was requested to give an instruction based on the doctrine of partial responsibility—that the jury might consider evidence of mental disorder of the accused, even though short of total insanity, to determine whether he was capable of premeditation and deliberation so as to be guilty of murder in the first degree (R. 14-15). The request was denied, and the refusal affirmed upon appeal. The petitioner here contends that this request represents the law, and that failure to give it in this case prejudiced his substantial rights.

A. To sustain a conviction for first degree murder premeditation and deliberation may not be implied but must be established in fact.

The crimes of first and second degree murder are separate and distinct, the difference lying in the mental state requisite to each. To find Carl Young guilty of first degree murder, it must be determined that he premeditated and deliberated. Deliberation and premeditation are essential elements of the crime; if they are not established, the crime is not shown.

These mental elements may not be implied but must be established as facts. The rule was stated in *Sabens* v. *U. S.*, 40 App. D. C. 440, 443 (D. C. Cir. 1913):

> ". . . a deliberate intent to take life is declared to be an essential element of murder in the first degree, and this of course must be shown as a fact. While implied malice at common law was sufficient to make an offense murder, under our statute which requires proof of actual malice, implied malice constitutes murder in the second degree."

Thus the requirement for first degree murder is that the particular accused actually premeditated and deliberated.

B. Evidence that the accused was mentally disordered is relevant in determining whether the accused in fact premeditated and deliberated.

Since it is actual premeditation and deliberation that is required, evidence of mental disorder should be considered. It is clear that one who could not premeditate and deliberate did not in fact do so. As the Indiana Court stated in *Aszman* v. *State*, 123 Ind. 347, 352, 24 N. E. 123, 125 (1889):

> ". . . it would be legal as well as logical incongruity to hold that the crime of murder in the first

> degree could only be committed after deliberate thought or premeditated malice, and yet that it might be committed by one who was without mental capacity to think deliberately or to determine rationally."

In the single case in which the defense of partial responsibility was urged upon this Court, no decision was rendered on its merits. In *Fisher* v. *United States,* 328 U. S. 463 (1946), a case arising out of the District of Columbia, refusal of the trial court to instruct according to the doctrine was assigned as error. This Court refused to overturn the decision of the lower court, but did not base its refusal on the ground that the instruction was unsound. Rather, it was held that acceptance or rejection of such a defense was a matter of local concern with which the Supreme Court could not rightfully interfere. The Court stated, p. 476:

> "We express no opinion upon whether the theory for which petitioner contends should or should not be made the law of the District of Columbia. Such a radical departure from common law concepts is more properly a subject for the exercise of legislative power or at least for the discretion of the courts of the District. *The administration of criminal law in matters not affected by constitutional limitations or a general federal law is a matter peculiarly of local concern."* (Emphasis added.)

The Court of Military Appeals, accepting the principle herein urged, observed that the *Fisher* case rested on local law. *U. S.* v. *Kunak,* U. S. C. M. A. 346, 17 C. M. R. 346 (1954).

Incapacity, where it results from voluntary intoxication, is relevant for the jury to consider in its finding whether a killing is deliberate and premediated. The leading case is *Hopt* v. *People,* 104 U. S. 651 (1881). In revers-

ing the Supreme Court of the Territory of Utah, which had refused to instruct that intoxication should be considered by the jury in determining the accused's mental state, this Court stated, p. 634:

> "But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question of whether the accused is in such condition of mind, by reason of drunkenness *or otherwise,* as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury." (Emphasis added.)

Properly analyzed, the *Hopt* case establishes the proposition that incapacity resulting from any cause is relevant to whether deliberate premeditation existed. The broad language used does not confine the rule to instances of intoxication. What is stated is that deliberate premeditation may be negated by reason of "drunkenness or otherwise."

Nor can the reasoning of the case be limited to instances of intoxication. The pivotal point in its rationale is that the accused was incapacitated, not that he was intoxicated. What is significant is the state of mind of the accused, not the means whereby it was produced. Accordingly, the principle extends to all situations, including mental disorder, whereby a defendant is incapable of entertaining the required state of mind. The Wisconsin Supreme Court, citing the *Hopt* case, stated:

> "The learned trial court erred in ruling that no abnormal mental condition was material on the general issue of not guilty, other than that produced and existing at the time of the alleged homicide by the use of intoxicating liquor . . . *the important circumstance was the disordered intellect, and not the*

> *means by which it was produced.*" (Emphasis added). *Hempton* v. *State,* 111 Wis. 127, 135; 86 N. W. 596, 598 (1901).

It is proper that such a view be adopted. Should the voluntary drunkard receive better treatment at the hands of the law than the mentally disordered who have no control over their conditions? The dictates of conscience call for an emphatic negative reply, such as was given by a New Jersey judge:

> "The law is not the creation of such barbarous and insensible animal nature as to extend a more lenient rule to the case of a drunkard, whose mental facilities are disturbed by his own will and conduct, than to the case of a poor demented creature afflicted by the hand of God." Kalisch, J., concurring in *State* v. *Noel,* 102 N. J. L. 659, 694; 133 Atl. 274, 285 (1926).

Moreover, partial responsibility comports with modern psychiatric knowledge. There are many variations of mental states between the person of superb mental health and the madman, which fact has been recognized by this Court. In *Fisher* v. *United States,* 382 U. S. 463, 475 (1946), it was said that "No one doubts that there are more classifications of mentality than the sane and the insane." And Mr. Justice Murphy, dissenting, p. 492, observed, "the existence . . . of partial insanity, is a scientifically established fact" and argued that "common sense and logic recoil" at a rule ignoring this.

C. Implicit in the legislative division of murder into degrees is a policy to apply the death penalty only to that class of murderers likely to be influenced by its threat. Rejection of partial responsibility is inconsistent with this aim.

The degree device adopted by Congress to define crime is actually a means for prescribing varying measures of punishments for crimes having the same common denominators, but differing as to the absence or presence of aggravating circumstances. At common law all murders resulted in capital punishment. The division of the crime into two groups by Congress is an acknowledgment that not all cases of murder should entail the capital penalty. In effect, therefore, the creation of first degree murder is an extraction from the general category of murder of certain cases to which it was thought proper to apply capital punishment.

The purpose of this extraction was stated in *Bullock* v. *United States,* 122 F. 2d 213, 214 (D. C. Cir. 1941):

> "Statutes which distinguish deliberate and premediated murder from other murder, reflect a belief that one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse; or that the prospect of the death penalty is more likely to deter men from deliberate than impulsive murder."

Thus, implicit in the employment of the degree device is the belief that not all murders should be capitally punished, and that the most severe of sanctions is to be imposed only where it is likely to prevent homicide.

To disallow the instruction desired on mental disorder here is inconsistent with this policy. By its very nature capital punishment can only prevent homicide (1) by deterring, and (2) by incapacitating, the established crimi-

nal from further activities. The death penalty being the inhumane sanction that it is, it is reasonable that it was intended to be imposed only when both preventive means are operative. But deterence will effectively prevent crime only when it operates on the rational faculties of the would-be criminal. A person is deterred by the threat of punishment. The impact of the threat is that it gives the would-be criminal a motive for not committing the crime to weigh against the motives in its favor. If for some reason the threat is not perceived, or if perceived, there be no opportunity to properly evaluate it, it is utterly deficient as a deterrent, for the deterrent effect of capital punishment will be felt only by those who have the time and capacity to think and reason, and who do think and reason. Thus it would seem more logical to impute to Congress an intent to effectively utilize the high deterrent effect of capital punishment, than to hold that Congress desired to impose so severe a sanction where its deterrent effect is never realized.

A similar conclusion has been reached by the Law Revision Commission of New York after reviewing the homicide laws of that state. In stating that capital punishment was not intended to be inflicted where its deterrent effect was neutralized, the Commission concluded that as regards premeditation and deliberation:

> ". . . in requiring the actual state of mind of the offender and all the influences contributing to the actual mental condition to be considered, the Court of Appeals was merely giving effect to the logical implications of a policy that was expressed in the statutes. . . ." Report of the Law Revision Commission for 1937, page 574.

Likewise, Frankfurter, J., dissenting in *Fisher* v. *United States,* 328 U. S. 483 (1946) said:

> "The crime of murder was divided into two classes . . . in recognition of the fact that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation. It is this consideration that has led most of the states to divide common law murder into two crimes, and Congress followed this legislation."

If, then, the class of individuals which the first degree murder definition seeks to encompass are those who as a result of reasoned selection choose homicide as the means of achieving their end, whatever that may be, it is manifest that evidence of mental disorder, which shows the absence of reasoned selection of homicide, is relevant to the issue of the degree of crime. If the accused's mental state was such as not to perceive the threat of punishment and weigh it so as to make a reasoned selection of homicide, he is not guilty of the most severe type of murder. Such are the logical implications of the policy expressed in the statute.

D. The refusal of the requested instruction on partial responsibility prejudiced the substantial rights of the petitioner.

The error in not instructing the jury that mental disorder might be relevant to the degree of crime committed was prejudicial. The rule is stated in *Kotteakos* v. *United States,* 328 U. S. 750, 765 (1946):

> ". . . if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed, it is impossible to conclude substantial rights were not affected."

Accordingly, it must appear affirmatively from the record that the jury, in the absence of the instruction was not confused between the use of evidence of mental disorder

to excuse a crime, and its use to show that the specific crime of first degree murder had not been committed.

Nothing of the sort appears here. The direction given the jury was that only if the accused satisfied the requirements of the M'Naghten rules or of the irresistible impulse test could he be found not "guilty by reason of insanity" or "not responsible." Guilty of what? Is it not likely that the jury thought in terms of guilt of, and responsibility for, first degree murder, the crime the accused was charged with? Is it not likely that the charge on premeditation and deliberation was considered a separate matter with which the evidence of mental disorder was not concerned? There must be an affirmative showing that the jury was not so disposed, and the record does not establish this.

In *United States* v. *Kunak,* 5 U. S. C. M. A. 346, 17 C. M. R. 346, (1954) the court held the absence of an instruction on partial responsibility prejudicial error stating that the "minimal requirements for the issue of premeditation" were not met. The same holding appears in *State* v. *Anselmo,* 46 Utah 137, 148 Pac. 1071 (1915).

This Court has also recognized that an instruction on partial responsibility may mean the difference between life and death to the accused. In *Fisher* v. *U. S.,* 328 U. S. 463, 470 (1946) it was observed that ". . . the jury might not have reached the result it did if the theory of partial responsibility . . . had been submitted" to the jury.

Accordingly, since it is impossible to tell what the verdict would have been had the case been left to the jury with a proper instruction, the conviction cannot stand. *Kwaku* v. *Rex,* (1946) A. C. 83.

Conclusion.

The conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

PATRICK W. HEALEY,
JAMES M. KNAPP,
JERROLD L. STRASHEIM,
Attorneys for Petitioner.