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## M’Naghten: Right or Wrong for Florida in the 1980s? It Flunks the Test

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## **Abstract**

The members of the jury listened solemnly as the judge instructed them on the law.” The defendant was charged with murder in the first degree.

**KEYWORDS:** florida, flunks, test

## *M'Naghten*: Right or Wrong for Florida in the 1980s? It Flunks the Test

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The members of the jury listened solemnly as the judge instructed them on the law.<sup>1</sup> The defendant was charged with murder in the first degree. There was ample evidence indicating that the defendant had, indeed, committed the crime. In fact, he did not deny doing it. The defense relied exclusively upon insanity to support the pleading of not guilty. "Due to his mental condition," the defense attorney argued, "he did not have the ability to form an *intent*." Psychiatrists testifying for the defense stated that, due to his mental impairment, the defendant could not control his actions. The prosecution, through its medical experts, countered that the defendant *knew* his actions were wrong.

With this testimony in mind, the jury would wrestle with the ultimate decision of the sanity of the accused. In deciding the extent of the defendant's criminal responsibility, the jury would apply the law as instructed by the judge.

The judge continued his charge:

A person is sane and responsible for his crime if he has a sufficient mental capacity when the crime is committed to understand what he is doing and to understand that his act is wrong. If at the time of the alleged crime a defendant was by reason of mental infirmity, disease or defect, unable to understand the nature and quality of his act or its consequences, or, if he did understand it, was incapable of distinguishing that which is right from wrong, he was legally insane and should be found not guilty by reason of insanity.<sup>2</sup>

Thus, the jury faced the dilemma of deciding whether the defendant was mentally infirm to a degree which rendered him unable to recognize the wrongfulness of his act. If the jury should find that the accused was infirm, but still knew the difference between right and

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1. This is merely hypothetical and is not intended to represent any actual case.

2. *Florida Standard Jury Instructions in Criminal Cases*, approved in *In re Standard Jury Instructions in Criminal Cases*, 327 So. 2d 6 (Fla. 1976).

wrong, they would have no choice but to convict.

This colloquy is intended to illustrate the diverse and difficult choice thrust upon the unwary juror deciding the insanity question in *M'Naghten*<sup>3</sup> jurisdictions. The difficulty results from the rigidity of the *M'Naghten* test, which confines juror alternatives. It permits a finding of insanity *only* if the accused did not know (or understand) that his act was wrong. The test is directed toward the accused's ability to form the required mental intent (*mens rea*). Mental intent must be demonstrated if the accused is to be held responsible for his act. This test effectively cloaks the fact finder with judicial "blindness": it precludes jurors from considering any evidence showing the defendant labored under a mental disease or defect which, while not rendering him incapable of distinguishing right from wrong, affected his ability to rationally control his behavior. This all-or-nothing approach, sometimes referred to as the "*mad or bad*" doctrine,<sup>4</sup> ignores the existence of the grey area between sanity and insanity. According to the *M'Naghten* criteria, mentally ill persons failing to meet the rigid standards of the "right-wrong" test would be determined criminally responsible despite their infirmities.<sup>5</sup>

Florida still clings to the *M'Naghten* test<sup>6</sup> in deciding on the sanity of its criminals. The rationale for continued adherence to a test deemed unacceptable<sup>7</sup> by so many medical and legal scholars, is that the court is not convinced the rule is not the best available for measuring an accused's mental condition.<sup>8</sup> Thus, despite its intrinsic infirmities and

3. 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843) wherein the court stated:

[T]o establish a defense on the ground of insanity, it must be clearly proved that at the time of the commission of the act, the party accused was labouring under such a defect of reason, from disease of the mind as to not know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.

4. Note, *Insanity-Guilty But Mentally Ill-Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. OF PRAC. AND PROC. 351 (1979).

5. Arnella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977).

6. See, e.g., *Wheeler v. State*, 344 So. 2d 244 (Fla. 1977), cert. denied, 440 U.S. 924 (1979).

7. See notes 58-68 *infra*.

8. *Piccotte v. State*, 116 So. 2d 626 (Fla. 1959), appeal dismissed 364 U.S. 293

backhanded support, the *M'Naghten* test still reigns supreme in the State of Florida.

This note advocates the abrogation of this rule, which, in the opinion of this writer, has failed to weather the passage of time, and which was based on faulty premises, outmoded even at the time of the rule's inception. This note will review the history of the *M'Naghten* rule and its application in Florida. Additionally it will consider the reasoning which necessitates abrogation. Of course, one cannot merely advocate abrogation of one doctrine without supporting implementation of a successor. Therefore, an examination of the potential alternatives which have supplemented or replaced *M'Naghten* in other jurisdictions will follow this analysis.

## I. *M'Naghten*-The Best Test Available or History's Mistake?

### *Pre-M'Naghten Tests*

The *M'Naghten* test has origins dating back to the Eirenarch era of 1582 wherein William Lombard of Lincoln's Inn declared that "[i]f a mad man or a natural fool, or a lunatic in the time of his lunacy, or a child who apparently has no knowledge of good nor evil do kill a man, this is no felonious act . . . for they cannot be said to have any understanding will."<sup>9</sup> Even in this period, the law recognized that one could not be culpable if he could not, due to mental infirmities, form the intent to commit the crime. This attempt at civility evolved into the "wild beast" test, which provided for exculpation if the defendant "be wholly deprived of his understanding and memory," to such an extent that he "doth not *know* what he is doing no more than . . . a wild beast."<sup>10</sup> A later rule developed, formulated by the humane Sir Matthew Hale, which based criminal responsibility on whether the accused at least had the understanding of a normal child of fourteen.<sup>11</sup>

Prior to *M'Naghten*, no clear formulation had emerged as a uniformly accepted test of criminal responsibility. Prior cases had been decided according to the "right-wrong" dichotomy, a school of thought

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(1960); *Van Eaton v. State*, 205 So. 2d 298 (Fla. 1967).

9. Moore, Jr., *M'Naghten is Dead - Or Is It?* 3 Hous. L. REV. 58, 62 (1965).

10. *Rex v. Arnold*, 16 How. St. Tr. 685, 764 (1724).

11. 1 Hale P.C. as cited in Annot., 44 A.L.R. 584 (1926).

strongly influenced by beliefs in witchcraft, phrenology, and monomania.<sup>12</sup> Monomania, which was predicated upon the assumption that one idea could dominate the other cognitive aspects of the mind, was a basic precept upon which the “right-wrong” test was premised. Thus, it was reasoned, if a person had an insane delusion, it would totally control that person.

At that point in time, however, the accuracy of these concepts was already being questioned. Many of the legal and medical scholars recognized the intrinsic shortcomings created by such a simplistic test. *M’Naghten’s* case offered those scholars the opportunity to reject the “right-wrong” test and adopt a more modern approach.

Yet in perhaps the cruelest irony in the history of the common law, the *M’Naghten* court was forced to adopt these ideas (which it recognized as being outdated) due to intense political pressure applied by the Queen. Because no clear test had previously been promulgated, the court’s reluctant endorsement of the “right-wrong” test crystallized the fallacious concepts into the virtual vacuum of legal precedent.<sup>13</sup> Thus the test was outdated as it was being adopted.

### *M’Naghten’s Case*<sup>14</sup>

Daniel M’Naghten has become infamous as one of history’s most unproficient lunatics. A victim to some degree of mental impairment, he suffered from delusions of persecution.<sup>15</sup> He thought he was being pursued, unjustly accused of crime, and in danger of being murdered.<sup>16</sup>

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12. *United States v. Freeman*, 357 F.2d 606, 616 (2d Cir. 1966), particularly nn. 23 & 24. *See also* BIGGS, *THE GUILTY MIND* 61 (1955).

13. *Id.*

14. 8 Eng. Rep. 718. The name “M’Naghten” is sometimes incorrectly spelled as “M’Naughton”. When this error was committed by *The London Times*, Justice Frankfurter wrote to the editors correcting them. The *Times* replied that its spelling was based on the spelling “signed by the man himself” in signing a letter. The Justice replied, in typical Frankfurtian humor, “To what extent is a lunatic’s spelling of his own name to be deemed an authority?” *OF LAW AND LIFE AND OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1956-1963* 1-4 (Kurland ed. 1964). *See also* 357 F.2d at 608.

15. *See* Ellison & Haas, *A Recent Judicial Interpretation of the M’Naghten Rule*, 4 *BRIT. JOUR. OF DELINQUENCY* 129 (1953).

16. This diagnosis was reached by GUTTMACHER & WEIHOFEN, *PSYCHIATRY*

As a result of these delusions, in which Robert Peel, the English Prime Minister was the chief culprit, M'Naghten was driven to murder. To carry out his plan, M'Naghten stalked the Prime Minister and waited for him outside his carriage. However, in his effort to kill the Prime Minister, M'Naghten instead shot and killed Peel's secretary, Drummond, who happened to be riding in the carriage of the Prime Minister that day.

The obvious defense was insanity. Unbeknownst to those involved, the methods used and result reached by the *M'Naghten* court would influence similar defendants for over a hundred years. This trial became the setting for an attempt to utilize new psychological studies which, it was felt, would aid in creating a realistic formula for determining criminal responsibility. M'Naghten's defense counsel relied heavily on a recent psychological work which contained new approaches to the subject of criminal responsibility in general, and in particular, criticized the "right-wrong" test.<sup>17</sup> This work impressed Lord Chief Justice Tindal with its logical insight into the workings of the human mind, as well as its theories on behavior. This convinced him of M'Naghten's incompetency to such an extent that he practically directed a verdict for the accused.<sup>18</sup>

As a consequence of the finding of "not guilty by reason of insanity," the Queen, who was quite angry with the verdict, summoned the court before the House of Lords to clarify the law in such cases. Her motivation stemmed from a rash of assassination attempts on the Royal Family, including three aimed at the Queen herself. Faced with an atmosphere of intense pressure,<sup>19</sup> Lord Chief Justice Tindal spoke for the court. In responding to queries submitted by the House of Lords, Tindal reaffirmed the "right-wrong" test<sup>20</sup> *despite* the fact that

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AND THE LAW 403 (1952).

17. The famous work relied upon was I. RAY, *MEDICAL JURISPRUDENCE OF INSANITY* (1838).

18. 357 F.2d at 617. *See* BIGGS, *supra* note 12, at 102.

19. *Id.* citing to S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 162-63 (1925).

20. The Lord Chief Justice stated:

We have to submit our opinion to be that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary

he felt it outmoded. In so doing, he turned his back on the work of Dr. Ray<sup>21</sup> which had impressed him so greatly at the trial. As a result, the strides science had made in attempting to more adequately understand the mind were virtually nullified, and the legal test for insanity in criminal cases continued to focus on the accused's knowledge of right from wrong. Thus, this brave attempt to forge a more significant and accurate legal test was frustrated. In time, this test was adopted in every state<sup>22</sup> except New Hampshire,<sup>23</sup> whose supreme court was also impressed with the work of Dr. Ray.

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be proven to their satisfaction; and that to establish a defense on the ground of insanity it must be clearly proved that, at the time of the committing of the act, the party accused 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, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate, when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

8 Eng. Rep. at 722. See Annot., 44 A.L.R. 584-85 (1926) for a general discussion.

21. See note 17 *supra*.

22. The United States Supreme Court recognized the test in *Davis v. United States*, 165 U.S. 373 (1897).

23. *State v. Pike*, 6 A.R. 533, 49 N.H. 399 (1870). See also *State v. Jones*, 50 N.H. 369 (1871), wherein the court stated that the defendant was not guilty by reason of insanity if his crime "was the offspring of product of mental disease . . ." *Id.* at 398.



But the die had been cast. Despite its receding acceptability in the scientific community, the "right-wrong" test, now synonymous with *M'Naghten*, was chisled into the stone of the common law. Thus sanity was, and is, being decided according to psychological understanding *circa* 16th century!

### *M'Naghten - Florida's Test*

The *M'Naghten* test was expressly adopted in Florida in 1902.<sup>24</sup> Despite periodic attacks<sup>25</sup> the courts have continued to lend vitality to the doctrine as "the best available rule for determining the question of the legal accountability of the accused for his criminal act . . . ."<sup>26</sup>

This adherence has not been evidenced by a wholehearted commitment, however. For example, in 1973, when the court was again asked to review *M'Naghten's* viability, the test received a backhanded affirmation because of a "lack of a better alternative."<sup>27</sup>

While virtually unchanged since its inception, the *M'Naghten* test was altered by the inclusion of the terms "disease or defect"<sup>28</sup> in defining the types of infirmities which would, if affecting the person's ability to differentiate right from wrong, deny criminal responsibility. In light of the current criticisms of the test's rationality, this judicial attempt to resuscitate the doctrine seems belated and misses the mark. Despite several strong challenges, the test remains intact.<sup>29</sup> The first of these occurred in *Reid v. Florida Real Estate Commission*.<sup>30</sup> The Second

24. *Davis v. State*, 44 Fla. 32, 32 So. 822 (Fla. 1902).

25. See notes 58-68 *infra*.

26. *Campbell v. State*, 227 So. 2d 873, 877 (Fla. 1969), *cert. dismissed*, 400 U.S. 801 (1970). *But see* *Anderson v. State*, 276 So. 2d 17 (Fla. 1973) (Ervin, J., dissenting). Justice Ervin, who had previously concurred in *Campbell*, proposed abandoning *M'Naghten* in favor of the MODEL PENAL CODE test.

27. 276 So. 2d at 18.

28. See *Wheeler v. State*, 344 So. 2d 244, 246 (Fla. 1977) *cert. denied*, 440 U.S. 924 (1979). The terms "disease or defect" were part of the MODEL PENAL CODE § 4.01(1) (Final Draft 1966).

29. See *Van Eaton v. State*, 205 So. 2d 298 (Fla. 1967); *Wheeler v. State*, 344 So. 2d 244 (Fla. 1977); *Campbell v. State*, 227 So. 2d 873 (Fla. 1977); *Anderson v. State*, 276 So. 2d 17 (Fla. 1973).

30. 188 So. 2d 846 (Fla. 2d Dist. Ct. App. 1966). This opinion was later expressly disapproved of. 205 So. 2d 298 (1967).

District Court of Appeal stated:

A person otherwise sane and competent may nevertheless be under a lawful mental disability so as to be incapable of formulating a rational intent to do *a particular act at a particular time*. Thus legal 'insanity' which incapacitates from civil responsibility and exonerates from crime is a mental deficiency with reference to the *particular act* in question, although it may not be a *general* incapacity.

[A] person is entitled to acquittal on the ground of mental incapacity if at the time of the commission of the act he either did not know the difference between right and wrong or *he was unable to refrain from doing wrong* . . . . Thus if it is established from the evidence that as the result of some mental defect or disease a person was unable to refrain from doing wrong . . . he could not be held criminally responsible notwithstanding he did not deny . . . that he knew the difference between right and wrong.<sup>31</sup>

This was a radical stand in view of the historical rigidity with which the state supreme court had clung to *M'Naghten*. The court not only utilized the irresistible impulse rationale,<sup>32</sup> but also allowed that the incapacity need only be partial. This nonconformance may be partially explained by the sympathy evoking fact situation. Kathleen Reid, a 49 year old real estate broker, was arrested and convicted of shoplifting after lifting a three dollar steak from a supermarket. Apparently, the woman was suffering from mental infirmities created by the onset of menopause. As a result of her conviction, the Florida Real Estate Commission had revoked her broker's license. The appellate court reversed the conviction concluding that she lacked the capacity to form the requisite legal intent and her license should not, therefore, be suspended.

Although this decision contained elements which modified the *M'Naghten* test in a positive manner, and could have opened the door for a more modern approach to the conundrum, the Florida Supreme Court nevertheless disapproved unanimously.<sup>33</sup>

Most of the United States Circuit Courts of Appeal have dis-

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31. *Id.* at 854 (emphasis supplied)(footnotes omitted).

32. See notes 69-72 *infra*.

33. 205 So. 2d 298.

carded *M'Naghten*<sup>34</sup> with the Fifth Circuit joining the fold in *Blake v. United States* decided in 1969.<sup>35</sup> In *Blake*, the court attempted to find a definition of insanity "more nearly attuned to present day concepts of psychiatry."<sup>36</sup> There the defendant had been charged with bank robbery<sup>37</sup> and relied on the defense of insanity. The lower court had charged the jury according to the standard definition of insanity.<sup>38</sup> However, the appellate court felt the *M'Naghten* test was outmoded and sought to replace it with the "substantial capacity" language of the American Law Institute's Model Penal Code (M.P.C.) Test.<sup>39</sup>

After carefully considering the alternatives, the court adopted the M.P.C. test because, "[m]odifying the lack of mental capacity by the adjective 'substantial', still leaves the matter for the jury under the evidence, lay and expert, to determine mental defect *vel non* and its relationship to the conduct in question. A substantial lack of capacity is a more nearly adequate standard."<sup>40</sup>

As a result of this decision, a defendant who commits a federal offense will be judged according to the more liberal insanity test. The divergent results thus created exemplify the ludicrous inconsistency precipitated by utilizing such different tests.<sup>41</sup>

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34. Those circuits which have replaced *M'Naghten* with a modified or complete version of § 4.01 of the MODEL PENAL CODE are: *United States v. Brawner*, 471 F.2d 969, 979 (D.C. Cir. 1972); *United States v. Freeman*, 357 F.2d 606, 624 (2d Cir. 1966); *United States v. Currens*, 290 F.2d 751, 774 (3d Cir. 1961); *United States v. Chandler*, 393 F.2d 920, 926 (4th Cir. 1968); *Blake v. United States*, 407 F.2d 908, 915 (5th Cir. 1969); *United States v. Smith*, 404 F.2d 720, 727 (6th Cir. 1969); *United States v. Shapiro*, 383 F.2d 680, 685-88 (7th Cir. 1967); *United States v. Frazier*, 458 F.2d 911, 917 (8th Cir. 1972); *Wade v. United States*, 426 F.2d 64, 65 (9th Cir. 1970); *Wion v. United States*, 325 F.2d 420, 430 (10th Cir. 1963).

35. 407 F.2d 908.

36. *Id.* at 909.

37. This was a violation of 18 U.S.C. § 2113 (1964).

38. This standard definition was based upon dictum in *Davis v. United States*, 165 U.S. 373 (1897), and was adopted by the Fifth Circuit in *Howard v. United States*, 232 F.2d 274, 275 (5th Cir. 1956)(en banc).

39. See notes 79-84 *infra*.

40. 407 F.2d at 915. Also, the court adopted the alternative term "wrongfulness" to be used instead of "criminality."

41. Section 4.01 of the MODEL PENAL CODE could be adopted by either the courts or by the legislature. See, e.g., ILL. ANN. STAT. ch. 38, § 6-2 (Smith-Hurd 1962).

The next frontal attack on *M'Naghten* occurred in 1973 as a closely divided Florida Supreme Court again affirmed the doctrine. The case of *Anderson v. State*,<sup>42</sup> was not factually unlike any other challenge which had arisen in the past. In this instance, however, three members of the seven member panel dissented, finding the current test outmoded as applied.<sup>43</sup> Relying heavily on the logic asserted in *United States v. Freeman*,<sup>44</sup> the dissenters attempted to vitiate the test and proposed the adoption of the M.P.C. test.<sup>45</sup> The opinions of Justices Ervin and Boyd indicated strong discomfort with *M'Naghten*. Justice Ervin felt that:

In this age of increasing psychiatric sophistication, it is naive to believe a determination as to a person's sanity can be made solely on the basis of his ability to distinguish right from wrong. A jury should be given a defendant's entire mental record if he raises the issue of his sanity . . . . In addition, the jury should be charged in a manner which would allow it to find a defendant not guilty by reason of insanity not only when he does not know what he is doing is wrong but also when he cannot control his actions because of a mental disease. I believe the time has come to discard *M'Naghten* . . . .<sup>46</sup>

Similarly, Justice Boyd concluded: “[s]urely with all the modern advances in court procedures and the abandonment of antiquated approaches to justice the time has come to adopt a better standard than the *M'Naghten* rule . . . .”<sup>47</sup> Interestingly enough, despite Justice Boyd's strong dissent, when the question was again raised in *Wheeler v. State*,<sup>48</sup> he concurred with the majority leaving Justices Adkins and England (two additions since the *Anderson* decision) as the only dissenters. In *Wheeler* the court retained *M'Naghten* but supplemented it with the “disease or defect” language from the M.P.C.<sup>49</sup>

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42. 276 So. 2d 17.

43. *Id.* at 19 (Ervin, J. dissenting).

44. 357 F.2d 606.

45. See MODEL PENAL CODE § 4.01 (final draft 1966) at note 80 *infra*.

46. 276 So. 2d at 23.

47. *Id.* at 24.

48. 344 So. 2d 244.

49. See note 28 *supra*.

In 1973, *M'Naghten* was challenged on constitutional grounds. The appellant in *Walker v. State*<sup>50</sup> urged that the *M'Naghten* test was arbitrary, unreasonable and denied an accused his substantive due process rights. The court dismissed this argument in cursory fashion. Thus another attempt at abrogating the test had fallen short of the mark.

In 1977 the Florida legislature attempted to make the insanity issue clearer for the jury by creating the bifurcated trial system.<sup>51</sup> The bifurcated trial system had been tried in several states<sup>52</sup> in an effort to provide greater safeguards for the defendant. The system provided that the issue of guilt-innocence be tried prior to the issue of insanity, in a completely separate hearing, thereby avoiding the potential prejudice

50. 284 So. 2d 448 (Fla. 3d Dist. Ct. App. 1973).

51. FLA. STAT. § § 921.131 [918.017] (1977). Section one of this statute reads: Separate proceedings on issue of insanity.

(1) When in a criminal case it shall be the intention of the defendant to plead not guilty and to rely on the defense of insanity, no evidence of insanity shall be admitted until it is determined through trial or by plea whether the defendant is guilty or innocent of committing or attempting to commit the alleged criminal act. Advance notice of intention to rely upon the defense of insanity shall be given by the defendant as provided by rule. Upon a finding that the defendant is guilty of the commission or attempted commission of the criminal act, a trial shall be promptly held, either by the same trial jury, if applicable, or by a new jury, in the discretion of the court, solely on the question of whether the defendant was sane at the time the criminal act was committed or attempted. The defendant shall have the option, with approval of the court, of waiving the jury trial on the issue of insanity and allowing the determination of sanity to be made by the judge. Evidence may be presented as to any matter that the court deems relevant to the issue of sanity regardless of its admissibility under the exclusionary rules of evidence, except as prohibited by the Constitutions of the United States or State of Florida; provided, however, that the defendant is given the opportunity to rebut any such evidence. If the jury or the judge shall determine that the defendant was guilty of committing or attempting to commit the criminal act and was sane at the time, then the court shall proceed as provided by law. If it is determined that the defendant was guilty of committing or attempting to commit the criminal act but was insane at the time, the court shall adjudicate the defendant not guilty by reason of insanity.

52. At one time, Arizona, California, Colorado, Louisiana, Texas, Wisconsin and Wyoming all used the bifurcated trial system. *See, e.g.*, COLO. REV. STAT. § 16-8-104 (1973).

which could result from the introduction of the wide range of evidence relevant to an insanity defense.<sup>53</sup>

Despite its noble intent, the Florida Supreme Court struck down the statute concluding that it violated a defendant's due process rights.<sup>54</sup> The court pointed out that under the statute

[s]anity is, in effect presumed, giving rise to an irrebuttable presumption of the existence of the requisite intent. Thus, the state is relieved of its burden of proving each element beyond a reasonable doubt because the defendant is precluded from offering evidence to negate the presumption of intent . . . . [Prohibiting] the introduction of any or all evidence bearing on proof of insanity at the trial of guilt or innocence . . . deprive[s] a defendant of the opportunity of rebutting intent, premeditation, and malice, because an insane person could have none.<sup>55</sup>

Thus another attempt at altering the insanity defense had failed.

Those relying on the defense of insanity did receive token judicial relief in *State v. Roberts*,<sup>56</sup> where the *Lyles* rule<sup>57</sup> was adopted. The rule states that when an accused relies on the insanity defense, the jury must be told of the consequences following a finding of "not guilty by reason of insanity"; i.e. confinement and supervision in a mental hospital. Thus the court helped inform jurors, previously unaware, of the consequences attaching to their verdict.

Although this additional step does make the *M'Naghten* test somewhat more palatable, it nonetheless fails to mollify the test's harsh results. In the final analysis, Florida retains a test to determine an accused's ability to form a cognitive *mens rea* - a determination which is not medically, scientifically or legally proficient in the current era of modern psychiatry.

53. See Comment, *Due Process and Bifurcated Trials: A Double-Edged Sword*, 66 NW. U.L. REV. 327 (1971).

54. *Boyd v. Green*, 355 So. 2d 789 (Fla. 1978). See *State v. Shaw*, 106 Ariz. 103, 471 P.2d 715 (1970), and *Sanchez v. State*, 567 P.2d 270 (Wyo. 1977), wherein both courts invalidated the bifurcated trial system on similar grounds.

55. 355 So. 2d at 793-94 (citations omitted).

56. 335 So. 2d 285.

57. *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957).

## The Critics Attack

The most fundamental criticism of the *M'Naghten* test is the narrow scope of behavior it addresses: the cognitive, rather than volitional, aspects of an accused's personality are the sole factors considered in determining sanity.<sup>58</sup> Thus, sanity is gauged according to whether the accused knows the difference between right and wrong while the degree of his awareness and the ability to control his behavior are rendered immaterial. "This is an anathema to modern psychiatry."<sup>59</sup> It creates a situation in which the jury may acquit, and thereby hospitalize, only those who are unable to distinguish between right and wrong. Those who suffer from mental infirmities and are unable to *control* their behavior must be found guilty.

The net result is a disservice to society. Mentally deficient people, not insane according to *M'Naghten*, are incarcerated rather than treated in hospitals and return to the mainstream of society untreated. In recognizing this principle, it was stated that:

Because M'Naghten unrealistically considered mentally ill only those who are unable to distinguish right from wrong, many defendants with severe mental defects receive guilty rather than not guilty by reason of insanity verdicts. This does nothing to accomplish the two goals of criminal punishment, the maximum rehabilitation of criminals, and the protection of society, against crime . . . . [Thus mentally] ill defendants are found guilty . . . and placed in prisons without psychiatric facilities; mental rehabilitation is impossible. When they have finished serving their sentences, they are released to society uncured and ready to unwittingly commit another crime.<sup>60</sup>

This potential for recidivism is a problem inherent in the treatment afforded those failing the test, and can only be corrected by a more

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58. See, e.g., Note, *Criminal Law The A.L.I. Model Penal Code Insanity Test* 44 TUL. L. REV. 192 (1969), Note, *The Legal Standard for Determining Criminal Insanity: A Need for Reform*, 20 DRAKE L. REV. 353 (1971), Platt, *Choosing a Test for Criminal Insanity*, 5 WILLAMETTE L.J. 553 (1969); 276 So. 2d at 22.

59. 276 So. 2d at 22.

60. *Id.* at 22-23, citing Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STANFORD L. REV. 59 (1961). See, e.g., BIGGS, *supra* note 14, at 24.

liberal application of standards in determining criminal responsibility.

A secondary defect which further debilitates the effectiveness of *M'Naghten* results from the unnecessarily great demarcation of expert psychiatric testimony.<sup>61</sup> As a result,

[w]hen the law limits a testifying psychiatrist to stating his opinion whether the accused is capable of knowing right from wrong, the expert is thereby compelled to test guilt or innocence by a concept which bears little relationship to reality. He is required, thus to consider one aspect of the mind as a 'logic tight compartment in which the delusion holds sway leaving the balance of the mind intact . . . .'<sup>62</sup>

Psychiatrists who must couch their responses in the "right-wrong" context when testifying, find themselves in a frustrating, if not professionally onerous situation. The test is too confining for a science as infinite as psychiatry. This sentiment was illustrated by Dr. Lawrence Kolb who stated that "answers supplied by a psychiatrist in regard to questions of rightness or wrongness of an act or 'knowing' its nature constitute a professional perjury."<sup>63</sup> The "right-wrong" dichotomy does not adequately lend itself to the complicated diagnosis which the craft demands.

This leads to another deleterious effect *M'Naghten* has on the efficiency of psychiatric testimony, that being inhibition in communicating knowledge concerning the accused's disease or defect. Too often this results in the psychiatrist talking about mental illness and the attorney talking in terms of "right and wrong."<sup>64</sup> This can only serve to further confuse the jury, making its task of ultimately deciding on the defendant's sanity that much tougher.

The unpopularity of the test became evident when a group of psychiatrists was polled.<sup>65</sup> Seventy-nine percent believed the *M'Naghten*

61. United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).

62. *Id.* at 619 citing GLUECK, *supra* note 19, at 169-70.

63. Remarks, Annual Judicial Conference, *Insanity as a Defense*, 37 F.R.D. 365, 387 (2d Cir. 1964).

64. United States v. Currens, 290 F.2d 751, 766 (3d Cir. 1961). See Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325 (1955).

65. The poll was conducted through a questionnaire on medical problems sent to members of the American Psychiatric Association. In view of the unscientific nature of



test to be unsatisfactory.<sup>66</sup> In a similar questionnaire, eighty-seven per cent felt the test did not present a realistic and adequate statement of the medical facts.<sup>67</sup> Dissatisfaction of that magnitude clearly indicates that many in the field of psychiatry would concur in the test's abrogation and would not find such a movement vituperative.

Perhaps the most pernicious result of limiting expert testimony to the confines of the rigid "right-wrong" formula is not that "psychiatrists will feel constricted in artificially structuring their testimony but rather that the ultimate deciders — the judge or the jury — will be deprived of information vital to their final judgment."<sup>68</sup> It can only result in a disservice for all concerned if jurors continue to render verdicts based on inadequate expert testimony. In this respect, an uneducated jury surely is an ignorant jury. In view of the state of the science, inadequate education of the jury is both unfortunate and unnecessary.

Whether Florida will recognize these criticisms and relinquish adherence to *M'Naghten* remains to be seen. In light of the strong attacks of test opponents, the question will no doubt be raised again. As alternatives to *M'Naghten* withstand the test of time, or if some new test evolves which evokes support, proponents will urge its adoption here. The crux of this dilemma centers not on whether *M'Naghten* should be replaced, but on what should take its place.

### The Alternatives

One alternative, penned by the respected Chief Justice of the Massachusetts Supreme Court, gained judicial impetus soon after *M'Naghten* was decided. In what came to be known as the irresistible impulse doctrine, an entirely new element, intended as a supplement to the *M'Naghten* instruction, was added to the test. Chief Justice Shaw stated:

If then it is proven to the satisfaction of the jury, that the mind of

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the survey, the author recognizes the inherent inadequacies of the poll. It is cited, however, not to stress any exact formulation of opinion, but to show the basic contempt with which many psychiatrists view the *M'Naghten* test.

66. Appendix B to § 4.01 of the MODEL PENAL CODE (final draft 1966).

67. 276 So. 2d at 22.

68. 357 F.2d at 620.

the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree that for the time being it overwhelmed the reason, conscience and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse; if so, then the act was not the act of a voluntary agent, *but the involuntary act of the body*, without the concurrence of a mind directing it.<sup>69</sup>

The “irresistible impulse” focus shifts away from a pure “right-wrong” dichotomy, exculpating the defendant who acted from an internal impulse resulting from an actual existing disease of the mind, which he could neither resist nor control. It was not intended to encompass irresistible impulse produced *entirely* by emotion, although the two were often mistakenly intermingled. If it could be shown (despite an accused’s knowledge that his act was wrong) he was acting on an internal impulse caused by a diseased mind, and that he was unable to control this impulse, grounds for acquittal were established. Despite its acceptance in many states as a supplement to *M’Naghten*, this test also received criticism as some courts questioned the viability of the doctrine.<sup>70</sup>

Many courts view the test, which attempted to ameliorate the harmful results of *M’Naghten*, as inherently inadequate. An additional criticism of “irresistible impulse” enunciated a doubt that the concepts upon which the test were based even existed.<sup>71</sup> The term implies that a crime impulsively committed was necessarily the result of an uncontrollable urge. Thus, “the ‘irresistible impulse’ test is unduly restrictive because it excludes the numerous instances of crimes committed after excessive brooding and melancholy by one who is unable to resist psychic compulsion or to make any real attempt to control his conduct.”<sup>72</sup> This leads to inconsistent verdicts where the manner in which the crime was perpetrated becomes more important than the accused’s state of mind.

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69. *Commonwealth v. Rogers*, 7 Metc. 500, 502 (1844), as cited in WEINREB, *CRIMINAL LAW: CASES, COMMENTS, QUESTIONS* 393 (2d ed. 1975) (emphasis added).

70. *State v. Maish*, 29 Wash. 2d 52, 185 P.2d 486 (1947); *State v. Witt*, 342 So. 2d 497 (Fla. 1977); 357 F.2d 606. See also Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761 (1956).

71. 357 F.2d 606.

72. *Id.* at 620-21. See also Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1955).

Shrewd defense counsel were able to confuse juries and thus vitiate any improvement this test had over *M'Naghten*.

In finding "irresistible impulse" unsatisfactory, one court concluded that the test was "little more than a gloss on *M'Naghten*, rather than a fundamentally new approach to the problem of criminal responsibility."<sup>73</sup> This view forced some courts finding *M'Naghten* too rigid, to look elsewhere.

In 1954, Judge Bazelon opined in *Durham v. United States*<sup>74</sup> that a defendant was not criminally responsible "if his unlawful act was the product of mental disease or defect." This concept not only removed the limitations which had previously burdened expert testimony, but encouraged the psychiatrist to fully report all relevant information concerning the accused's sanity.

The *Durham* test completely replaced *M'Naghten* in those jurisdictions which adopted it. Because it deemphasized the cognitive element, looking instead to the accused's volitional makeup on a subjective basis, its advantages over *M'Naghten* were clearly apparent. However, despite its great improvement over the *M'Naghten* test, *Durham* too had deficiencies rendering it unacceptable. There was recognition of an intrinsic nexus problem, which required proving that the offense committed was a product of mental disease or defect. Moreover, the lack of tangible guidelines to aid the fact-finder was an even greater fundamental flaw. This resulted in the battle of the psychiatrists which had the effect of "usurp[ing] the jury's function."<sup>75</sup> Thus, the *Durham* test fell into disfavor, being rejected by all but two states.<sup>76</sup> Even Bazelon's court eventually rejected the concept.<sup>77</sup>

During the year preceding the pronouncement in *Durham*,<sup>78</sup> a group of medical and legal scholars began to meet in an attempt to create a more accurate and workable definition of criminal responsibil-

73. 357 F.2d at 621.

74. 214 F.2d 862, 874 (D.C. Cir. 1954).

75. 357 F.2d at 621. *But see* Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1961)(Burger, J., concurring).

76. *See* ME. REV. STAT. ANN. tit. 15, § 102 (1980); State v. Pike, 6 A.R. 533, 49 N.H. 399 (1870).

77. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

78. 214 F.2d 862 (D.C. Cir. 1954).

ity.<sup>79</sup> After nine years of research, drafting and revising, the American Law Institute adopted Section 4.01 of the Model Penal Code in 1962.

This new test held an accused not responsible for criminal conduct which, due to a mental disease or defect renders him *substantially* incapable of appreciating the criminality of his conduct or conforming with the requirements of the law.<sup>80</sup> The improvement over *M'Naghten* appears obvious. By using the word "substantial" the test recognizes the difficulty implicit in demanding incapacity be *total* in order to find the accused criminally responsible.

The choice of the word "appreciate" rather than "know" was critical in that "mere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior, can have little significance."<sup>81</sup> By modifying "criminality" in this manner, ALI authors recognized the grey area dividing the two terms with respect to the human mind.

Another area of improvement over its predecessors was the lesser degree of importance the ALI standard placed on expert testimony. Although psychiatric testimony is admissible whenever relevant, it does not pretend to encroach upon the purview of the jury. Thus the pratfall of *Durham* was avoided by ALI's careful elimination of rigid classifications.

The ALI formulation "accounts for a defendant's entire mental condition, including both cognitive and volitional capacities, and

79. This group was headed by Professors Herbert Weshcler of Columbia University who served as the chief reporter, and Louis B. Schwartz of the University of Pennsylvania.

80. MODEL PENAL CODE § 4.01 (final draft 1966):

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) The terms 'mental disease or defect' do not include an abnormality manifested by repeated criminal or otherwise antisocial conduct.

The drafters created a possible alternative by allowing the adopting jurisdictions to replace the word "criminality" with "wrongfulness". *See, e.g.*, 357 F.2d 606, 622 n.52, wherein the court stated that "[w]e have adopted the word 'wrongfulness' . . . because we wish to include the case where the perpetrator appreciates that his conduct is criminal, but because of a delusion, believes it to be morally justified." *Id.*

81. 357 F.2d at 623.

properly recognizes that partial impairment may preclude criminal responsibility."<sup>82</sup> The recognition that a partial impairment could affect an accused's volitional capacities was a vast improvement over *M'Naghten's* total incapacity edict.

Additionally, the test is couched in simple language enabling medical experts to more clearly communicate their clinical observations to the jury.<sup>83</sup> Because of this, the jury is able to reach its own conclusion as to the accused's criminal responsibility, rather than accept the expert's opinion as determinative.<sup>84</sup> Thus an additional weakness of *Durham* is avoided.

The Model Penal Code test is not, however, without critics. One objection is that its "substantial impairment" requirement is vague and therefore "susceptible to purely personal interpretation by jurors."<sup>85</sup> Judge Bazelon claims that the use of the word "result" would lead to conclusory expert opinions in the same manner which resulted from the product language of the *Durham* test.<sup>86</sup>

Despite these criticisms, the test continues to flourish. Accepted in the vast majority of the federal jurisdictions,<sup>87</sup> it is increasingly being used to replace *M'Naghten* in those jurisdictions which had maintained the older test.

### Conclusion

There is little doubt that the *M'Naghten* test fails to adequately consider all of those elements comprising the decision making process. Focusing entirely on cognition, while ignoring volitional aspects of behavior, seems primitive in light of the current state of psychiatric science. Because of the test's rigid limitations, defendants who are not adjudicated insane are confined in penal institutions rather than hospi-

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82. Comment, *M'Naghten Rule Abandoned in Favor of "Justly Responsible" Test for Criminal Responsibility*, 14 SUFFOLK L. REV. 617, 624 (1980) (footnotes omitted).

83. *Id.* at 625.

84. *Id.*

85. *Id.* at 625. See *Wade v. United States*, 426 F.2d 64, 77-78 (9th Cir. 1970) (Trask, J., dissenting).

86. *United States v. Brawner*, 471 F.2d 969, 1027 (D.C. Cir. 1972) (Bazelon, C.J., concurring and dissenting).

87. See note 34 *supra*.

tals. This results in untreated mentally ill people returning to society, providing no inhibition of recidivism.

Although the Model Penal Code test is not without drawbacks, it appears to have a more solid foundation in current medical diagnostic ability than any other test currently used. To say that it more nearly reflects the state of modern psychiatry than *M'Naghten* is an understatement.

Because the Model Penal Code test promotes a more liberal approach in the determination of insanity, it assures that mentally infirm defendants will receive necessary medical treatment, and juries will be able to make more accurate and educated decisions. This serves the needs of society to a far greater extent than does maintenance of the current test in Florida, which, despite minor alterations, is still a woefully inadequate index of criminal responsibility.

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