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THE NINTH CIRCUIT ABANDONS M'NAGHTEN

Ever since that fateful day in 1843 when Daniel M'Naghten fired his errant shot at Sir Robert Peel, the common law courts have struggled with the problem of insanity as a defense to criminal prosecutions.¹ Today, more than a century later, it sometimes seems that scant progress has been made toward a successful reconciliation between current psychological knowledge and the administration of criminal justice.²

Insanity in Criminal Prosecutions

As handed down by the House of Lords, the rule of *M'Naghten's Case*³ came to be universally recognized in this country as the proper standard by which to measure an individual's mental capacity to commit crime.⁴ A defendant who had committed the proscribed act would not be held to answer if it could be established that he lacked what has come to be called cognitive capacity—if, that is to say, it could be proven either that he did not know what he was doing, or if he did know, that as a result of some delusion he did not know that what he was doing was wrong. Soon thereafter, as the plea of insanity came more and more into use—and as the shortcomings of *M'Naghten* became more and more apparent—some jurisdictions formulated the irresistible impulse test to supplement *M'Naghten*. Even though he was not exculpated by application of the *M'Naghten* rule, a defendant could still escape punishment if he could show that at the time of the commission of the act he was unable to control his conduct. The *M'Naghten* rule, with or without the irresistible impulse modification, served the country well into the twentieth century. But the advent of modern psychology brought with it a torrent of criticism of the right-wrong test. As the science of psychology became more refined, *M'Naghten* came to lose many of its adherents.⁵ Like many legal

1. For a discussion of mental disease in the criminal law before *M'Naghten*, see R. PERKINS, *CRIMINAL LAW* 852-58 (2d ed. 1969).

2. This topic has been the subject of endless commentary. For a comprehensive symposium of various points of view, see *Insanity and the Criminal Law—a Critique of Durham v. United States*, 22 U. CHI. L. REV. 317 (1955).

3. 8 Eng. Rep. 718 (H.L. 1843).

4. "[T]o 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 labouring 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." *Id.* at 722.

5. See, e.g., S. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925); A.

problems, however, the recognition of the shortcomings of the rule did not necessarily sound its death knell, at least not until an acceptable substitute could be found. The *M'Naghten* rule therefore remains very much alive as the search for such a substitute continues.

A landmark departure from the right-wrong test was taken by the Court of Appeals for the District of Columbia in 1953 in *Durham v. United States*.⁶ Under the *Durham* rule, a defendant is not criminally responsible for unlawful conduct that was the "product" of mental disease or defect. Due to the causation problems it creates for the trier of fact, however, this "product" rule met with the approval of few outside the medical profession. The *Durham* test is used by only two other jurisdictions.⁷ Shortly after *Durham*, in 1955, the American Law Institute (ALI), in its tentative draft for the Model Penal Code, proposed what is commonly known as the "substantial capacity" test.⁸ Under this test, a person is responsible for criminal conduct unless as a result of some mental defect he lacked "substantial capacity" to appreciate the wrongfulness of his act, or to conform his conduct to the requirements of the law. The *Durham* and the ALI formulations are by no means the only feasible replacements for *M'Naghten*; but they have attracted the greatest attention—if not support—and all decisions discussing an alternative to *M'Naghten* must inevitably deal with them.

The Ninth Circuit Abandons *M'Naghten*

The search for a more suitable definition of exculpatory insanity⁹

GOLDSTEIN, *THE INSANITY DEFENSE* 67-79 (1967); Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59 (1961).

6. 214 F.2d 862 (D.C. Cir. 1954). "The rule . . . is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874-75. This rule was further clarified in *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962), which defined "mental disease or defect" as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." *Id.* at 851.

7. The *Durham* rule is essentially the test that has existed since 1870 in New Hampshire. *State v. Pike*, 49 N.H. 399 (1870). Maine has adopted *Durham* by statute. 15 ME. REV. STAT. ANN. ch. 5, § 102 (1964).

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

"(2) As used in this Article, the terms, 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." MODEL PENAL CODE § 4.01 (Final Draft, 1962). In the tentative draft first presented to the American Law Institute in May 1955 the language was identical to that quoted above except for the addition of the phrase "As used in this Article" and the addition of the substitute word "wrongfulness" after the term "criminality" in the final draft.

9. The proposed substitutes for *M'Naghten* are legion, but an evaluation of their

led the Court of Appeals for the Ninth Circuit to its decision in *Wade v. United States*.¹⁰ *Wade* was an *en banc* decision in which the court, by a narrow seven-to-six margin, abandoned its long-standing version of the *M'Naghten* rule¹¹ in favor of the ALI "substantial capacity" formulation.¹²

In an extremely well-documented opinion, Judge Ely, writing for the majority, clearly implied that the Ninth Circuit had long been anxious to reappraise *M'Naghten*;¹³ contrary to the view it expressed 13 years earlier, the court no longer felt foreclosed from making the reappraisal.¹⁴ The majority in *Wade* made much of the fact that with the exception of the First Circuit, no other federal appellate court retains *M'Naghten* in its traditional form¹⁵ (six of the circuits have replaced *M'Naghten* in only the last 4 years). The recent trend toward discard-

relative merits is outside the scope of this note. For such an evaluation, see Diamond, *From M'Naghten to Currens, and Beyond*, 50 CALIF. L. REV. 189 (1962); Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1955). For an argument that *M'Naghten* should be retained, see Mueller, *M'Naghten Remains Irreplaceable: Recent Events In the Law of Incapacity*, 50 GEO. L.J. 105 (1961).

10. 426 F.2d 64 (9th Cir. 1970).

11. The Ninth Circuit version of *M'Naghten* can be found in *Maxwell v. United States*, 368 F.2d 735 (9th Cir. 1966), stated as follows: "Insane," as here used, means such a perverted and deranged condition of a person's mental and moral faculties as to render him either incapable of knowing the nature of the act he is committing; or where he is conscious of the nature of the act he is committing and able to distinguish between right and wrong, and knows the act is wrong, yet his will, by which I mean the governing power of his mind, has been so completely destroyed that his actions are not subject to it, but are beyond his control." *Id.* at 741 n.7.

12. At his trial for bank robbery, *Wade* had requested an instruction in terms of the ALI formulation; this was refused and the instruction patterned after *Maxwell* was given instead. 426 F.2d at 65.

13. See *Ramer v. United States*, 390 F.2d 564 (9th Cir. 1968), where the majority in a 5-4 decision held that the issue of *M'Naghten's* validity had not been properly raised. Judge Ely refers to this case as the last instance in which the Ninth Circuit considered the validity of *M'Naghten*. 426 F.2d at 65.

14. "At one time, it was suggested that reexamination of the *M'Naghten* rules was foreclosed by decisions of the Supreme Court. . . . Nevertheless, after our *Sauer* decision [*Sauer v. United States*, 241 F.2d 640 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957)], one circuit after another has rejected the *M'Naghten* rules and has persuasively demonstrated that the Supreme Court has never set a fixed standard of criminal responsibility." 426 F.2d at 67.

15. The District of Columbia Circuit has *Durham*. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). The Second Circuit has adopted the American Law Institute proposal. *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966). The Third Circuit has adopted what is essentially the ALI formulation minus the requirement that the defendant appreciate the criminality of his act. *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961). The Fourth through the Seventh Circuits have adopted the ALI definition. *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968); *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969); *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968); *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967). The

ing *M'Naghten* was doubtless a primary factor in the *Wade* court's decision.¹⁶ Judge Ely wasted few words on *M'Naghten*. He simply termed its shortcomings apparent¹⁷ and cited a plethora of cases criticizing the rule. He then undertook a lengthy evaluation of the alternative insanity definitions,¹⁸ and concluded that "substantial capacity" was the best available.¹⁹

Although it accepted the ALI formulation, the Ninth Circuit followed the Sixth Circuit's treatment of the Model Penal Code section 4.01 definition of insanity and rejected the second paragraph thereof.²⁰ That is to say, the court refused to exclude from its definition of insanity all "abnormality manifested only by repeated criminal activity." To follow the Model Penal Code in this regard, the court thought, could result in the imprisonment without treatment of individuals having great potential for recidivism, and would make the entire definition "confusing and ambiguous to jurors."²¹

Eighth Circuit has severely limited *M'Naghten*. *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967). The Tenth Circuit has modernized *M'Naghten* and equated it to the ALI formulation. *Wion v. United States*, 325 F.2d 420 (10th Cir.), *cert. denied*, 377 U.S. 946 (1964).

16. "We have concluded that we should no longer stand virtually alone. . . ." 426 F.2d at 65.

17. "The *M'Naghten* rules fruitlessly attempt to relieve from punishment only those mentally diseased persons who have no cognitive capacity—those who are unable to know the nature and quality of their acts or that the acts were wrong. This formulation does not comport with modern medical knowledge that an individual is a mentally complex being with varying degrees of awareness." *Id.* at 66.

18. Judge Ely reviewed *Durham*, *Currens*, and the ALI definition. *Id.* at 68-70. In his dissent, Judge Trask reviewed the definition offered by Judge (now Chief Justice) Burger in a concurring opinion in *Blocker v. United States*, 288 F.2d 853, 857 (D.C. Cir. 1961). 426 F.2d at 76. In *Blocker*, Chief Justice Burger proposed the following: "The defendant is not to be found guilty as charged unless it is established beyond a reasonable doubt that when he committed the act, *first*, that he understood and appreciated that the act was a violation of law, and *second*, that he had the capacity to exercise his will and to choose not to do it. If, because of some abnormal mental condition, either of these elements is lacking, he cannot be found guilty. To hold him guilty the jury must find, beyond a reasonable doubt, both that he understood and appreciated the act charged was a violation of law and that he possessed the capacity or competence to choose to do it or refrain from doing it." 288 F.2d at 871.

19. The court stated by way of dictum that the "substantial capacity" criterion would be afforded limited retroactivity, and would apply only to cases that had not become final before the date of decision. 426 F.2d at 73-74.

20. *Id.* at 71-73. See note 8 *supra*.

21. The *Wade* court surprisingly failed to discuss the effects of this deletion. It was concerned that the inclusion of this second paragraph would result in imprisonment of these defendants without proper psychiatric treatment and would return them to society with a high probability of recidivism. But it showed little concern for the alternative, *i.e.*, that by deleting this second paragraph the resultant more liberal definition would allow these same criminals with a history of repeated criminal conduct to be acquitted by reason of insanity and to be freed without treatment. *See id.* at 72-73.

In an equally lengthy dissent,²² Judge Trask, joined by five other dissenters, chided the majority for abandoning an old friend and for jumping onto the bandwagon with the other courts of appeals. In the dissenters' view, the *M'Naghten* rule, as applied in the Ninth Circuit,²³ withstood the traditional criticism of a simple right-wrong test. In the Ninth Circuit, Judge Trask maintained, all relevant psychiatric evidence—the “entire action pattern of a man”—was admissible under the formulation of *M'Naghten* which included an irresistible impulse test modernized by the phrase “uncontrollable act.”

Although the dissenters did not appear to favor *M'Naghten* over many of the possible alternatives, they particularly disliked the use of the word “substantial” in the ALI formulation.²⁴ Apprehensions concerning the liberality of the Model Penal Code's definition led Judge Trask to a discussion of a most serious problem within the federal criminal system. Believing that broad interpretation of the word “substantial” in the ALI definition will inevitably lead to more acquittals on the ground of insanity, Judge Trask concluded that before the ALI definition is adopted, there should be some procedure for the commitment of defendants acquitted by reason of insanity in federal prosecutions.²⁵

Not surprisingly, the majority in *Wade* took an opposite view. In a cursory treatment of the subject, Judge Ely recognized the lack of federal post-acquittal commitment procedures, but nevertheless concluded:

The paramount and controlling factor is that we cannot abdicate our judicial responsibility by prolonging an antiquated common law rule of criminal responsibility merely because legislation on collateral matters is still pending.²⁶

Is a Federal Post-Acquittal Procedure Constitutional?

What role the presence or absence of a federal post-acquittal commitment procedure should play in the determination of insanity criteria is a subject for much more extensive study.²⁷ In this brief Note,

22. Judges Barnes, Chambers, and Kilkenny each wrote separate dissents.

23. See note 11 *supra*.

24. Should *M'Naghten* be abandoned, the dissenters would replace it with the formulation recommended by the British Royal Commission on Capital Punishment. 426 F.2d at 76.

25. The minority criticizes the majority for adopting the ALI definition of insanity, without giving enough weight to that group's further recommendation in section 4.08 of the Model Penal Code of a commitment procedure. See 426 F.2d at 75-84 (Trask, J. dissenting).

26. 426 F.2d at 73.

27. That the absence of a post-acquittal procedure has in the past deterred the federal courts from liberalizing *M'Naghten* is beyond doubt. For example, the Ninth

the discussion will be confined to the actual possibility of such a procedure—the establishment of which was advocated by the entire Court of Appeals for the Ninth Circuit.

While they found little else to agree upon, the two sides in *Wade* both seem to agree upon the necessity of an effective method for dealing with acquitted defendants, who by their own admission were, at one point in time at least, mentally incompetent. But despite this unanimity of opinion, the eventual establishment of such a procedure is far from certain, as its absence from present federal statutes indicates.

Resort to the insanity defense by any significant proportion of federal defendants is a relatively new phenomenon.²⁸ Until relatively recent times, the insanity issue was raised primarily in state proceedings. This was because most of the crimes in which insanity ordinarily plays a part are prosecuted under the police power of the individual states.²⁹ Extensive experience with the problem has led the states to develop, again under the authority of their police powers, rather elaborate procedures for dealing with mental incompetents not subject to criminal liability.³⁰

As a result of the enormous growth of federal regulation of individual conduct within the last 30 years, the defense of insanity has been raised more and more frequently in the federal courts. Recognizing this trend, Congress in 1949 enacted measures designed to cope with the insane before and during the criminal process, justifying its action on the constitutional ground that such legislation was necessary and proper for the efficient functioning of the federal courts.³¹ Conspicuously absent from the 1949 legislation, and conspicuously absent ever since, was a procedure for dealing with mentally incompetent defendants after the criminal process had been completed—that is, after an acquittal on the ground of insanity. It has, consequently, devolved upon the

Circuit itself has said: "Many observers implicitly assume in their criticism of present law that if the accused is set free on the criminal side that he will be confined on the civil. Unfortunately, that is not the case. If it were, this court might be much more disposed to alter its current views. The choice today in this jurisdiction is not between confinement and commitment, but rather between confinement and freedom." *Sauer v. United States*, 241 F.2d 640, 650 (9th Cir. 1967).

28. See *Dession, The Mentally Ill Offender in Federal Criminal Law and Administration*, 53 *YALE L.J.* 684 (1944).

29. *Id.* at 684.

30. Note, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration*, 68 *YALE L.J.* 293, 306-07 (1958). Tennessee is the only state without such a procedure. *Id.* at 306.

31. Act of Sept. 7, 1949, ch. 535, 63 Stat. 686 (codified at 18 U.S.C. §§ 4244-48 (1964)). These measures were declared constitutional by the Supreme Court under the necessary and proper clause. *Greenwood v. United States*, 350 U.S. 366, 375-76 (1956).

states to assume jurisdiction "on the courthouse steps," as it were, over these defendants for the purpose of affording them psychological rehabilitation.

The widespread (although by no means certain) state practice of accepting the responsibility for dealing with defendants acquitted of federal crimes on the ground of insanity no doubt accounts to some extent for the lack of federal legislation on the matter. But until recently, by far the greatest obstacle to such federal legislation was its assumed constitutional infirmity. On what constitutional basis could federal authorities commit an insane defendant after he has been acquitted and the federal prosecution has by definition come to an end? Underlying the absence of congressional legislation on this subject has been the widely-held belief that only in the police power can such authority be found—a power specifically reserved to the states.³²

Recently two bills have been introduced in Congress that would have provided for federal post-acquittal commitment procedures.³³ Although both bills expired in committee, they were based on tenable constitutional foundations and could possibly have withstood constitutional challenge.³⁴ The late Senator Robert F. Kennedy introduced a bill providing for commitment of an acquitted federal defendant if it could be shown that he endangered "the safety of the officers, property, or other interests of the United States."³⁵ This proposal, while standing on fairly solid constitutional ground by requiring a federal interest to be involved, left a large gap in situations in which the defendant would be considered dangerous only to himself or to the population in general. Such a gap, into which most cases can be expected to fall, could only be filled by a very broad and very tenuous definition of federal interest, and even then such a definition would be difficult to apply in particular cases.

The former Senator Joseph Tydings introduced a very similar proposal, under which commitment procedures would be available for any defendant who met the single requirement of being dangerous to himself or others.³⁶ When the reasoning behind the Tydings legislation is examined, it becomes clear that it is the sounder proposal of the two. Tydings argued, contrary to widespread opinion, that the neces-

32. *E.g.*, *Higgins v. United States*, 205 F.2d 650, 653 (9th Cir. 1953); *Edwards v. Steele*, 112 F. Supp. 382, 383 (W.D. Mo. 1952).

33. S. 3689 & S. 3753, 89th Cong., 2d Sess. (1966).

34. *See Note, Federal Commitment of Defendants Found Not Guilty By Reason of Insanity—Proposed Legislation*, 52 IOWA L. REV. 930 (1967); Tydings, *A Federal Verdict of Not Guilty by Reason of Insanity and a Subsequent Commitment Procedure*, 27 MD. L. REV. 131 (1967).

35. S. 3689, 89th Cong., 2d Sess. § (b) (1966).

36. S. 3753, 89th Cong., 2d Sess. § (d) (1966).

sary and proper clause could constitutionally support commitment at this "end" stage of the judicial process. Speaking of the differentiation between federal and non-federal interest in the Kennedy bill, Tydings said:

If such a differentiation is necessary to insure the constitutionality of a Federal commitment, I would endorse it, for almost any commitment procedure would be better than the present void in Federal law. However, I do not believe that it is clear that such a differentiation is necessary in order to insure constitutionality. The person found dangerous after acquittal because of insanity came to public attention through the alleged commission of what would be, but for the element of mental irresponsibility, a Federal crime. The Federal interest should be strong enough in that individual to allow Federal control of the person until his release will not endanger society. Moreover, a Federal problem, a person who allegedly committed a violation of Federal law, should not be foisted upon the States for solution.³⁷

Neither the Kennedy nor the Tydings bill, both introduced in 1966, was enacted into law. But since 1966, six federal appellate courts have liberalized their insanity definitions by dropping *M'Naghten*.³⁸ It is a safe assumption that such action, which quite naturally raises concerns like those expressed by Judge Trask, coupled with the federal bench's continual requests for congressional action³⁹ in this area, will result in some sort of federal commitment procedure closely approximating either the Kennedy or the Tydings proposal.

Either a broad procedure that would reach almost all defendants acquitted of a federal crime by reason of insanity, or a narrower procedure that requires the recognition of a federal interest is needed. Not only do the reasons expressed by Judge Trask require some such enactment, but also the lack of such a procedure may postpone a careful examination of the question of the scientifically proper definition of criminal insanity by the federal courts.

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37. 112 CONG. REC. 20,293 (1966) (remarks of Senator Tydings).

38. See note 15 *supra*.

39. See, e.g., *Wade v. United States*, 426 F.2d 64, 73 (9th Cir. 1970); *United States v. Chandler*, 393 F.2d 920, 928 (4th Cir. 1968); *United States v. Freeman*, 357 F.2d 606, 625 (2d Cir. 1966).

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