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INSANITY AS A DEFENSE IN THE NORTH CAROLINA CRIMINAL LAW

DILLARD S. GARDNER*

From the manias and depressions of King Saul, the grass eating degeneracy of Nebuchadnezzar, and the homicidal delusions of the Trojan War hero, Ajax, down to the mentally warped killers and sex criminals in the morning newspaper, man has tried to think sanely about insanity, to apply reason to the understanding of the irrational. Here is a fairly typical excerpt from a local newspaper: "Brinkley was first arrested and charged with burglary when he was caught in a room in Alexander Dormitory. He remained in Wake County jail without privilege of bond until his first mental examination in which a Duke University neuro-psychiatrist declared him insane. . . . The second examination conducted [by the Veterans' Hospital, Richmond, Virginia] into the veteran's facility [*sic*] declared him sane and competent to defend himself in court."† Such cases present medical problems. They are also legal problems. Most of all, they are social problems. We are here concerned, primarily, with the legal problem.

Insanity: A Legal Term

It may surprise some to know that "insanity" is a legal, not a medical, term.¹ It has been criticized as a "heritage" in our language which no longer serves a useful purpose.² Such titles as *Mental Disorder and the Criminal Law* (Glueck) and *Criminal Responsibility* (Mercier) indicate an attempt to escape from a term which has become deeply imbedded in our daily speech. "Insanity" is used in law and in everyday speech to indicate the individual lack of social and legal responsibility for conduct; it is not intended as a precise descriptive or diagnostic symbol for use in psychiatric discussion.³ In dealing with the "insane,"

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† *Raleigh Times*, Jan. 9, 1951, p. 12.

¹ Karpman, *Criminality, Insanity and Law*, 39 J. CRIM. L. & CRIMINOLOGY 584-585 (1949). See SMOOT, *LAW OF INSANITY* (1929) c. 3. No medical authorities are cited and the discussion is based almost exclusively on legal materials.

² In WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 12 (1933), the author declares, "It would undoubtedly be best to eliminate the use of the word 'insanity' altogether, and instead, to use words like 'mental disorder' when referring to the medical concept of mental ill health *per se*, and other terms, clearly legal in their implication, to describe the concepts which we have referred to as 'irresponsibility . . . ' and 'present insanity. . . .'"

³ GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 12 (1925), discusses the history of the word, pointing out how it was brought into law from medicine or

the courts must think primarily of society, secondarily of the individual, although there should be an awareness of the scientific findings concerning the particular mental disorder. The psychiatrist has a different problem; in approaching the patient as a psychotic needing individualized treatment and care, he does not have to concern himself with the legal theories and concepts of responsibility. In its legal aspects the problem of responsibility touches one of the most baffling puzzles which has challenged men's minds through the ages, for it rests upon the ideas of freedom of will, volition, and human personality. "The law of insanity" is the joint field of law and medicine, but in this joint undertaking, law is the senior partner and the primary, if not the final, responsibility rests with law, not medicine.

Functions of Law and of Medicine

It is always important, where the question of sanity is under adjudication, to keep clearly in mind the proper division of function between law and medicine, between court and doctor. The proper function of the medical witness is to *describe* the mental condition of the person under consideration, and to point out wherein and to what extent the particular mentality is subnormal with reference to an adequate or reasonably adequate adjustment to his environment.⁴ At this point, the

some other field at an early date, was pre-empted by law, then was disowned by medicine to the extent that it is no longer treated as a medical term. The looseness with which the term is used is indicated by MALOY, *MEDICAL DICTIONARY FOR LAWYERS* (2d ed. 1951), where many synonyms of broad, general meaning are given. See also OVERHOLSER & RICHMOND, *HANDBOOK OF PSYCHIATRY* 9, 164 (1947); WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 11 (1933).

⁴"The most fruitful source of error and confusion in this field of law is traceable to the requirement that the expert say categorically whether or not the hypothetical person (whom everybody knows to be the defendant on trial) did or did not know right from wrong. This question is purely within the province of the *jury*, who must answer it as they must any other matter of questionable fact; all the expert should be asked to do, and all his training qualifies him to do, is to pass judgment, not upon the ethicolegal question of right and wrong, but upon the *medical question* of whether or not the defendant was mentally unsound, a question that his peculiar training and experience, and his study of the individual offender's case, entitles him to answer. Once he has given the facts as he finds them, as to *mental unsoundness* (i.e. his opinion as to sanity or insanity and the type and degree of the latter), the *second* question, that of *irresponsibility*, is one that the jury must decide, with the aid of such legal devices as tests applied to the fact of insanity." GLUECK, *op. cit. supra* note 3, at 309. Dr. Zilboorg states this view even more strongly from the viewpoint of the medical witness: "To force a psychiatrist to talk in terms of the ability to distinguish between right and wrong and of legal responsibility is—let us admit it openly and frankly—to force him to violate the Hippocratic Oath, even to violate the oath he takes as a witness to tell the truth and nothing but the truth, to force him to perjure himself for the sake of justice. For what is it, if not perjury, if a clinician speaks of right and wrong, and criminal responsibility, and the nature and quality of the criminal act committed, when he, the psychiatrist, really knows absolutely nothing about such things, when they are presented to him in terms of a hypothetical question, based on legal assumptions and hypothetical psychiatry. He may think he knows something about these things, but this, his assumed knowledge, would then be his not by virtue of his being a clinical psychiatrist, or

judge (or the judge and jury) takes over the determination. Weighing what the medical testimony has developed, the judge (or judge and jury) measures the mental adequacy of the subject against the legal test for sanity and decides whether or not the intelligence, judgment, and general mental attainments of the individual are sufficiently high to demand that he be held to the requirements of thought and conduct required of normal men generally. The question for the doctor is the medical question of *mental unsoundness*, its character and extent; once that has been presented, the judge (or judge and jury) decides whether the particular mental unsoundness is sufficiently severe to result in *legal irresponsibility*. The doctor's province is that of medical fact; the inference from those facts, under the appropriate legal tests, is the function of the jury and constitutes the determination of the question of legal responsibility. The doctor says the person is mentally unsound; the jury goes further and says that mental unsoundness is of such a degree that he is freed from legal responsibility for his acts. The point at which the *factual* problem of the doctor becomes the *adjudicating* problem of the jury is the point of stress in society's system for handling the criminally insane.

Criticism of the Medical Function

Judges, lawyers, and, to a large extent, laymen tend to discount medical and psychiatric opinion. Often, as in the newspaper reference above, medical men arrive at directly opposite conclusions, and the lay witness treats them as canceling each other, largely disregarding both. Then, too, normal egotism makes nearly everyone feel that he can "tell when somebody is crazy" as well as any expert, the feeling that psychiatry is "an elaborate statement of what everybody knows in language that nobody can understand." Furthermore, involved psychiatric theory with its highly technical language is so foreign to the experience of the common man that he is inclined to look upon the psychiatrist as a glorified medicine man rather than a medical scientist. Too, there is sometimes the tendency on the part of experts generally (and psychiatrists are no exceptions) to deliver their opinions with the defiant dogmatism of revealed fact, thus arousing the natural resentment bestowed upon those who assume to speak as absolute and final authorities. Coupled with this is the usual reluctance or inability of the psychiatrist to be persuasive, to announce his findings convincingly in understandable terms for the uninitiated, with the result that the man-of-the-street tends

a psychiatric expert, but only by virtue of his assuming the role of an amateur lawyer." *The Reciprocal Responsibilities of Law and Psychiatry*, 54 CASE AND COMMENT 8, 14 (Nov.-Dec. 1949). See also note 6 *infra*.

to disregard the psychiatrist and to fall back upon his own "common sense" judgment of the sanity or insanity of the individual.^{4a}

Criticism of the Legal Function

There is a substantial body of opinion, particularly from medical men, criticizing the law's disposition of the insane. From the psychiatrist's point of view, there is a feeling on his part that, as a trained and experienced specialist in a very abstruse subject, his findings and conclusions should be accepted without question. He knows that time will not permit him to conduct for the court a course in abnormal psychology and advanced psychiatry which will permit laymen to follow, in detail, his findings and conclusions; with pardonable professional pride, he sees no reason for such necessity, thus overlooking the fact that most laymen have become accustomed to the acceptance of the findings of general practitioners but few have ever had dealings with psychiatrists or know much of the mystery of the human mind. Against this background, astute cross-examiners, by the simple process of withdrawing or adding symptoms in their questions, usually find it relatively easy to discredit, in part at least, the conclusions of the psychiatrist.

Too, the psychiatrist is justifiably critical of legal language and concepts, regarding them as incorporating obsolete and often discredited medical theories relating to the mind. For example, the notion that intelligence may be separated from the volitional and emotional life of an individual appears absurd and fantastic to most scientists, but appears to be taken for granted in legal theory. This is but symptomatic of the wide gulf separating psychiatric and legal theory. Most psychiatrists, as trained medical men, regard society's (law's) entire procedure in diagnosing, treating and detaining the insane as thoroughly unscientific, crude and inadequate.⁵ Added to all this, at times the judge and the lawyers in their technical application of the rules of evidence appear to the psychiatrist to be in a conspiracy to prevent him from telling the jury that he has found the person under consideration to be irresponsibly insane.⁶

^{4a} The selection, and payment, of experts by the parties—with resulting bias and conflict—has been sharply condemned. See Note, 36 HARV. L. REV. 333 (1923); White, *Expert Testimony in Criminal Proceedings Involving the Question of the Mental State of the Defendant*, 11 J. CRIM. L. & CRIMINOLOGY 499 (1921); GLUECK, *op. cit. supra* note 3, at 34. Its result in practice is to discredit thoroughly the conflicting experts. Note, 9 MICH. L. REV. 603 (1911).

⁵ Many, if not most, criminal psychopathologists regard all criminals as "mentally sick" and fit subjects of treatment rather than of incarceration. Dr. Benjamin Karpman, of St. Elizabeth's Hospital, Washington, D. C., has often vigorously and ably presented this view. See Karpman, *supra* note 1, at 584 and Karpman, *An Attempt at a Re-evaluation of Some Concepts of Law and Psychiatry*, 38 J. CRIM. L. & CRIMINOLOGY 206 (1947), the latter insisting upon an extensive re-appraisal of the right-from-wrong theory as the basis of criminal punishment.

⁶ The proper scope of the medical expert's testimony is this: He may tell the symptoms of the particular mental disorder of diagnosis, which of them apply to

Doctors are often critical of the hypothetical question, but it is the only device available which will present to the jury *after the event but before the facts are adjudicated* the doctor's opinion of defendant's mental condition at the time of the event. By giving his opinion based on different sets of evidentiary facts, once the jury has found one of those sets of facts to be true, the doctor's opinion aids it in adjudicating the ultimate fact, i.e., whether defendant was *legally responsible* (not whether he was mentally disordered).⁷ The use of partisan and biased experts, privately employed to testify for one side, tends to discredit expert testimony. Much could be done to improve this condition if the trial judge would (after consultation with the lawyers to secure agreement if possible) appoint experts to be called by the court and paid by the parties jointly (or by the county of trial).⁸ The present right-from-wrong test of insanity is too narrow for scientific accuracy. We now punish all who know right from wrong, when we should punish only those who, knowing right from wrong, voluntarily do the wrong, having the power to choose the right. Many insane people, some institutionalized, know right from wrong, but lack the volition and control to reflect it in conduct. A broadening of the present test would give a more fair, humane and scientifically accurate test, and can be accomplished without legislation.⁹

the person under consideration as well as their weight in diagnosis, and the combination of symptoms and circumstances which would amount to proof of the mental disorder. Schultz, *The Role of Medical Science in the Administration of Criminal Justice*, 23 J. CRIM. L. & CRIMINOLOGY 736, 742 (1933). Generally, the expert is not permitted to state that the subject is insane or that he does not know right from wrong, as this is the question at issue and is for the jury to decide. ROGERS, *EXPERT TESTIMONY* 439 (3d ed. 1941). However, in North Carolina, experts have been allowed more latitude; for example, a doctor has been permitted to testify that a defendant was incapable of distinguishing between right and wrong. *State v. Vernon*, 208 N. C. 340, 342, 180 S. E. 590, 591 (1935). See "Evidence of Mental Incapacity," *infra*.

⁷ Briggs, *Medico-Legal Insanity and the Hypothetical Question*, 14 J. CRIM. L. & CRIMINOLOGY 62 (1923); White, *Expert Testimony in Criminal Proceedings Involving the Question of the Mental State of the Defendant*, 11 J. CRIM. L. & CRIMINOLOGY 499 (1921); GLUECK, *op. cit. supra* note 3, at 29-36; Lind, *Cross Examination of Alienists*, 13 J. CRIM. L. & CRIMINOLOGY 228 (1922). THE UNIFORM EXPERT TESTIMONY ACT would vastly improve this condition.

⁸ White, *supra* note 7; Notes, 36 HARV. L. REV. 333 (1923), 9 MICH. L. REV. 603 (1911). The fullest use of the suggestion made as to pay and appointment of experts would perhaps require enabling legislation in North Carolina, but the implied and inherent powers of the court would permit much of this to be accomplished without new statutes. For a discussion of the excellent Mass. Brigg's Law in eliminating partisan experts, see Weihofen, *Eliminating the Battle of the Experts in Criminal Insanity*, 48 MICH. L. REV. 961 (1950).

⁹ See note 7 *supra*; BULKNELL & TUKES, *PSYCHOLOGICAL MEDICINE* 269 (3d ed. 1874); Meagher, *Crime and Insanity: The Legal Opposed to the Medical View, and the Most Commonly Asserted Pleas*, 14 J. CRIM. L. & CRIMINOLOGY 46 (1923); Note, 72 U. OF PA. L. REV. 167 (1924) (citing both legal and medical authorities); Dr. W. T. Williamson, representing the Oregon State Medical Association, *The Insanity Defense*, 1 ORE. L. REV. 100 (1922). The criticism expressed is well presented by Somerville, J., in *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887), a state-

Insanity: Historical Introduction

The concept of insanity has changed through the ages. It was first regarded as a pact with the devil, a sin, and as a sin it soon came to be regarded as a crime.¹⁰ Much later it was treated as a defense to crime.¹¹ Today, it is considered not only a defense to, but also a cause of, crime.¹² Insanity for ages was the joint province of priests, philosophers, and doctors. Gradually, medicine absorbed the subject and contributed its concepts to the law. Today, as we have already noted, insanity is largely the joint problem of law and medicine.

In the early fourteenth century, English law first began to recognize the mitigating effect of insanity.¹³ In the sixteenth century rules were developed for determining legal insanity.¹⁴ By the eighteenth century the basis for the modern rules had been laid.¹⁵ In 1843 *M'Naghten's Case*¹⁶ was decided; the rule in that English case—the test of legal insanity is the capacity to distinguish between right and wrong—is the fundamental expression of the law of insanity as a defense to crime in both England and America today.¹⁷ Twelve years after *M'Naghten's Case*, the Supreme Court of North Carolina, faced for the first time with the necessity for adopting a test of criminal insanity, accepted the

ment which Dean Henry W. Ballentine, in the next article cited, characterized as "probably the best exposition of the subject in the books." Dean Ballentine himself ably criticizes the present rule in *Criminal Responsibility of the Insane and Feeble-minded*, 9 J. CRIM. L. & CRIMINOLOGY 485 (1919), where he establishes this thesis: "Crime does not exist unless the actor can be regarded as morally responsible for his act." Chief Justice Stacy came quite close to the same view in *State v. Harris*, 223 N. C. 697, 704, 28 S. E. 2d 232, 238 (1943), where he says that if the defendant did not know he was doing what was wrong "the law does not hold him accountable for his acts, for *guilt arises from volition*, and not from a diseased mind." [Italics added.] For an excellent recent discussion, see Aschaffenburg, *Psychiatry and the Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 2 (1941).

¹⁰ Hart, *PSYCHOLOGY OF INSANITY* 2-4 (3d ed. 1929); MAUDSLEY, *RESPONSIBILITY IN MENTAL DISEASE* (1874); JACOBY, *THE UNSOUND MIND AND THE LAW* (1918).

¹¹ It was recognized as an excuse for crime during the reign of Edward I (1272-1307) and during the reign of Edward III (1326-1327). 3 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 371 (3d ed. rewritten 1923).

¹² HOAG & WILLIAMS, *CRIME, ABNORMAL MINDS AND THE LAW* 19 (1923).

¹³ 3 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 371 (3d ed. rewritten 1923).

¹⁴ GLUECK, *op. cit. supra* note 3, at 131; WHARTON & STILLE, *MEDICAL JURISPRUDENCE* 513-517 (3d ed. 1873).

¹⁵ HAWKINS, *PLEAS OF THE CROWN* Book 1, p. 2 (8th ed. 1824).

¹⁶ 10 Clark and Fin. 200 (1843).

¹⁷ 22 C. J. S. 124 (1940). "Ever since the *McNaghten* formula was adopted, attempts have been made to change it. But all courts of last resort have come back to the rule. This is not due to any mystic reverence for 19th Century law. It is due to the fact that after all the oratory has evaporated, one stark fact remains. Unless a man is held answerable for doing what he knows he should not do, there will be no enforceable sanction against criminal behavior. Even very psychotic patients can be influenced by fears, hopes and promises. . . . And it is not unreasonable to hold even a lunatic accountable for doing something that he really knows is wrong. They do it every day in mental hospitals." Davidson, *The Psychiatrist's Role in the Administration of Criminal Justice*, 4 RUTGERS L. REV. 578, 587 (1950).

right-from-wrong test of *M'Naghten's Case*.¹⁸ This test is still applied in North Carolina.¹⁹

Meaning of Right-from-Wrong Test

What does our court mean by the "capacity to distinguish between right and wrong"? Does it mean moral or legal wrong? Does it mean wrong in a general, abstract sense or with reference to the specific act and offense charged? The test is sometimes said to be the capacity to "understand the nature and consequences of the act." Do the words "nature" and "consequences" refer to the moral, the social, the physical, the individual, or the legal "consequences"?

In the first case in this State, mentioned above, the trial judge told the jury that the test was whether the defendant was "sufficiently rational to distinguish right from wrong, and to know that what he was doing was in violation of the laws of God and man"; and, the supreme court, after saying that he "lays down the doctrine more strongly" than the old textbooks, approved the charge. It would probably be approved today. Certainly, since this case, the court has again and again said that if the individual, at the time of the offense, knew the nature and consequences of his act and was conscious that he was doing wrong, he was sane; if not, he was insane.²⁰ The charge must be *at least* this favorable to the defendant; it may be as much *more* favorable to the defendant as the trial judge cares to make it, since the State cannot appeal from an acquittal. This means—as able trial lawyers have long recognized—that if the judge charges more favorably for the defendant than the law requires (as, for example, if he tells the jury that "temporary, emotional insanity" or "irresistible impulse" are defenses to crime), the jury will often acquit a defendant who would have been convicted before a more severe and more accurate judge. The practical result is that the trial judge has a wide latitude in giving to the jury a more *lenient* test of insanity than the right-from-wrong test, but he will be reversed on appeal if he gives a test which the supreme court considers more *harsh* than the standard test.

It will be noted that the portion of the test referring to defendant's

¹⁸ State v. Sewell, 48 N. C. 245 (1855), emphasized the understanding of "moral" right as the basis of responsibility. Earlier, in State v. John, 30 N. C. 330 (1848), a homicide involving drunkenness, raised the problem, but did not suggest a comprehensive test of insanity. State v. Brandon, 53 N. C. 463 (1861), is actually our first case clearly stating the *M'Naghten* rule, although the classic formulation of the North Carolina rule begins with State v. Haywood, 61 N. C. 376 (1867).

¹⁹ State v. Harris, 223 N. C. 697, 28 S. E. 2d 232 (1943); State v. Mathews, 226 N. C. 639, 39 S. E. 2d 819 (1946); State v. Swink, 229 N. C. 123, 47 S. E. 2d 852 (1948).

²⁰ For an extended charge on the subject reflecting an Irish stew of many cases, see State v. Bracy, 215 N. C. 248, 18 S. E. 2d 891 (1939).

consciousness of "doing wrong" has a strong moral tone. In one case the test used was distinguishing "good and evil,"²¹ and in another it was said that he must be "under a visitation of God" so as not to be able to "distinguish between good and evil."²² But for later adjudications to the contrary, we would assume from these intimations that the "wrong" to be tested is "wrong" in a general and abstract sense. The test does not involve the understanding of abstract wrong, but only the "wrong" of the particular and specific act.²³

Having settled that it is the "wrong" of the particular act which is to be considered, we still have the question whether it is *moral* or *legal* wrong that is the test. There are loose expressions in the cases²⁴ which might support the view that "legal" wrong is involved, but our court, in sustaining a charge that the test is whether he knew "what he was doing was in violation of the laws of God and man," declared that the test refers to "moral right and wrong."²⁵

The words "nature," "quality" and "consequences" with relation to the act have not been amplified in the cases, but are treated as merely another form of stating the right-from-wrong rule, and do not intend to add further elements to the test. Sometimes the test is said to be "the capacity to distinguish right from wrong with respect to the specific act," at other times it is given as "the capacity to know the nature and quality of the act," but, perhaps even more often, both of these tests are given alternatively as but two ways of stating the same test; certainly, the two forms of stating the test have been treated as legally synonymous.²⁶

²¹ State v. English, 164 N. C. 497, 80 S. E. 72 (1913).

²² State v. Haywood, 61 N. C. 376 (1867).

²³ State v. Hairston, 222 N. C. 455, 23 S. E. 2d 885 (1943). This decision must be taken as modifying and correcting the view of State v. Cooper, 170 N. C. 719, 87 S. E. 50 (1915), where the test given was the capacity to distinguish between right and wrong *either generally* or with reference to the particular crime. The *Hairston Case* follows the view of *M'Naghten's Case*—that the "wrong" referred to is the "wrong" of the act charged, not "wrong" generally or in the abstract. WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 28 (1933).

²⁴ In State v. Haywood, 61 N. C. 376 (1867), it was said that the test was whether the prisoner comprehended the "criminal character" of his act. In a recent case a charge was approved which said that if the prisoner understood the "criminal character" of the act and knew it to be "unlawful," he was legally sane. State v. Bracy, 215 N. C. 248, 1 S. E. 2d 891 (1939). See State v. Hammonds, 216 N. C. 67, 3 S. E. 2d 439 (1939).

²⁵ State v. Sewell, 48 N. C. 245 (1855), is our first case following *M'Naghten's* rule. The opinion does not cite *M'Naghten's Case*, although the trial judge appears to have followed it. Cardozo, J., also took this view, in one of the few cases extensively discussing the question—*People v. Schmidt*, 216 N. Y. 324, 110 N. E. 945 (1915). *M'Naghten's Case* also took the view that "moral," not "legal," wrong was the test, as it is there pointed out that actual knowledge of the law is no test, the law being "administered on the principle that everyone must be taken conclusively to know it." To the same effect, see WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 28, 40 (1933).

²⁶ State v. Haywood, 61 N. C. 376 (1867); State v. Cooper, 170 N. C. 719, 87

Bearing in mind that it is (a) the moral, not the legal, wrong with reference to (b) the particular act charged as a crime, which must be understood by the defendant, the legal test for insanity may be stated as follows: *Did the defendant, at the time of the alleged offense, know the nature and quality of his act and the natural consequences of it, and knowing this, have the capacity to distinguish between what was morally right and morally wrong with respect to that particular act?*²⁷ This is the basic test.

The "Test" in Specific Conditions

Having considered the basic test for insanity, we can now turn to its application to particular mental conditions. Here we have such conditions as drunkenness, dipsomania, delirium tremens, drug addiction, emotional insanity, low mentality, and the like. The temporary and long-time effects of alcohol on mentality are so frequently encountered that the application of the test in alcoholic conditions will now be considered. In many, if not most, homicides involving intoxication, the investigating officers might immediately secure blood-tests for alcoholic content from participants and thus take a great many of these cases out of the realm of general speculation as to responsibility (more than .2 of 1% alcohol in the blood definitely affects the mind); however, there are legal and practical difficulties preventing this to date and such scientific information is rarely available to the courts.²⁸

Alcoholic Conditions

The horn-book generalization—"drunkenness is no excuse for

S. E. 50 (1915); *State v. Journegan*, 185 N. C. 700, 117 S. E. 27 (1923); *State v. Hairston*, 222 N. C. 455, 23 S. E. 2d 885 (1943); *State v. Harris*, 223 N. C. 697, 28 S. E. 2d 232 (1943); *State v. Swink*, 229 N. C. 123, 47 S. E. 2d 852 (1948).

²⁷ This statement of the rule, though somewhat more detailed, substantially follows the recent cases, such as *State v. Harris*, 223 N. C. 697, 28 S. E. 2d 232 (1943), where a number of the authorities are reviewed. "Nature" is here used to refer to the physical facts; as, for example, that he had a gun in his hand, that the gun was loaded, that he had his finger on the trigger, etc. "Quality" is used to denote the moral aspects of the act; as, for example, that human life has dignity and is protected by society, that wounding or killing a human being is morally wrong, etc. "Natural consequences" is used to couple the physical facts and the moral aspects in terms of significance and meaning; as, for example, that firing the gun at the deceased would wound or kill him, an act which is morally wrong and for which he will be held to be morally accountable. Trial judges wishing to amplify the traditional test to include, with greater fairness and scientific accuracy, factors long advocated by critics such as Judge Somerville (see note 9), may, after giving the test above, add the following: "Or did the defendant, even though you find that mental disease has weakened his power to choose between right and wrong, still possess sufficient will, as a free agent, to avoid the act in question?" This would extend the traditional test of the "reasoning" insanities to include the "volitional" insanities such as insane compulsions, obsessions, phobias, etc. which may paralyze or destroy the will power.

²⁸ See Inbau, *Scientific Tests in Evidence*, SYMPOSIUM ON MEDICOLEGAL PROBLEMS 226 (1948); INBAU, SELF-INCRIMINATION 72 (1950); FORRESTER, CHEMICAL TESTS FOR ALCOHOL IN TRAFFIC LAW ENFORCEMENT (1950).

crime"²⁰—is basically correct, but like most over-simplifications is none too accurate. Certainly, this generalization is true where the specific intention to commit the crime is formed first and the intoxicants are taken to "fortify" the criminal for the commission of the crime.³⁰ It is also true, in part, with respect to crimes requiring *no specific, criminal intent*, such as second-degree murder or manslaughter³¹ or rape³² (which do not require, in a legal sense, premeditation or deliberation) or most of the lesser crimes. This class includes nearly all criminal cases; the rule as to these may accurately be called the general rule in criminal cases. In such cases drunkenness *is* a defense, but since the state does not have to prove a specific intent, it is an affirmative defense and the burden is upon the defendant to satisfy the jury that he was so intoxicated that he did not know what he was doing and was so unconscious of doing wrong that he was incapable of forming even the general criminal intent.³³ In such cases there is no specific mental element which is a part of the definition of the crime and which the state, accordingly, has the burden of proving; it follows that the defendant must go forward with proof satisfying the jury that he did not know what he was doing or that it was wrong (otherwise the jury may assume from the act itself that he was sane). In other words, the general presumption of sanity make the defendant responsible for his criminal acts, unless the jury is satisfied that he was irresponsible.³⁴

However, in one class of cases drunkenness *may* be an "excuse" or "defense" in a somewhat different sense. In charges of murder in the first degree,³⁵ or burglary,³⁶ or probably felonious breaking and entering,³⁷ all of which require a specific, criminal intent as a part of the

²⁰ State v. Sewell, 48 N. C. 245 (1855); State v. Keith, 83 N. C. 626 (1880); State v. Alston, 210 N. C. 258, 186 S. E. 354 (1936).

³⁰ State v. McManus, 217 N. C. 445, 8 S. E. 2d 251 (1940); State v. Kale, 124 N. C. 816, 32 S. E. 892 (1899).

³¹ State v. Alston, 210 N. C. 258, 186 S. E. 354 (1936).

³² State v. Hairston, 222 N. C. 455, 23 S. E. 2d 885 (1943); State v. Swink, 229 N. C. 123, 47 S. E. 2d 852 (1948).

³³ *Ibid.*; State v. Adams, 214 N. C. 501, 199 S. E. 716 (1938).

³⁴ State v. Cloninger, 149 N. C. 567, 63 S. E. 154 (1908); State v. Cureton, 218 N. C. 491, 11 S. E. 2d 469 (1940).

³⁵ State v. Murphy, 157 N. C. 614, 72 S. E. 1075 (1911); State v. Ross, 193 N. C. 25, 136 S. E. 193 (1927); State v. Alston, 210 N. C. 258, 186 S. E. 354 (1936); State v. Edwards, 211 N. C. 555, 191 S. E. 1 (1937).

³⁶ State v. Allen, 186 N. C. 302, 119 S. E. 504 (1923).

³⁷ State v. Spear, 164 N. C. 452, 79 S. E. 869 (1913); State v. Feyd, 213 N. C. 617, 197 S. E. 171 (1938); State v. Friddle, 223 N. C. 258, 25 S. E. 2d 751 (1943).

The most recent pronouncement on the subject is State v. Marsh, 234 N. C. 101, 66 S. E. 2d 684 (1951), one of the last opinions written by Stacy, C. J., and adopted by the court after his death, involving charges of robbery with firearms and murder. The judge told the jury, ". . . while the defendant has no burden so far as establishing a lack of premeditation and deliberation—the State has the burden of showing that beyond all reasonable doubt before it can obtain a verdict of guilty of murder in the first degree—at the same time if the defendant has satisfied you that he did not have the mental capacity because of his drunkenness to

definition of the crime, the state must prove this intent as one of the elements of the crime.^{37a} In such cases where drunkenness has made the formation of such an intent impossible, the state fails to prove an essential part of the crime and the defendant is acquitted. In these cases the state must show, beyond a reasonable doubt, that the defendant had the necessary specific intent. In first degree murder, for example, proof of drunkenness may negate deliberation and thus reduce the crime from first degree murder to some lower degree of homicide.³⁸ In these specific intent cases, as plainly indicated by the opinions in the cases cited, it *should* be held for error if the judge requires the defendant

deliberate and premeditate, he could not be guilty of murder in the first degree." This was approved; *State v. Ross*, 193 N. C. 21, 136 S. E. 193 (1927); *State v. Swink*, 229 N. C. 123, 47 S. E. 2d 852 (1948); and *State v. Harris*, 223 N. C. 697, 28 S. E. 2d 232 (1943), were cited as in accord. This still leaves the rule in doubt, as the burden was first placed on the state, then the defendant was required to "satisfy" the jury. The *Ross* case placed the burden on the state as did the *Harris* case, but the latter indicated that the presumption of sanity was such as to require the defendant to "satisfy" the jury of his insanity; the *Swink* case involved a rape charge, which requires no specific intent, and does not bear directly on the problem. The *Harris* case makes it clear that the real problem is whether the presumption of sanity instantly disappears when evidence of insanity is offered. This is unsettled.

^{37a} As Chief Justice Stacy quoted, with approval, from a Tennessee case in *State v. Allen*, 186 N. C. 302, 309, 119 S. E. 504, 507 (1923): "To regard the fact of intoxication as meriting consideration in such a case [where a specific intent is part of the crime] is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines and punishes has, in point of fact, been committed." This view had already been fully discussed and approved in *State v. Murphy*, 157 N. C. 614, 72 S. E. 1075 (1911), where Hoke, J., wrote that the view that "voluntary drunkenness is no legal excuse for crime" does not "prevail where, in addition to the overt act, it is required that a definite, specific intent be established as an essential feature of the crime. In CLARK'S CRIM. LAW 72 (3d ed. 1915), this limitation is succinctly stated: "Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence." This was quoted with approval in *State v. Ross*, 193 N. C. 25, 27, 136 S. E. 193, 194 (1927); and was again approved in *State v. Alston*, 210 N. C. 258, 261, 186 S. E. 354, 356 (1936), where it was stated as "well settled," and numerous North Carolina cases were cited to support the statement. For authorities indicating that this view is now "unsettled," see discussion in text under "Burden of Proof," *infra*. For a discussion of the medical and legal problem, see Weihofen and Overholser, *Mental Disorder Affecting the Degree of Crime*, 56 YALE L. J. 959 (1947).

³⁸ *State v. Murphy*, 157 N. C. 614, 72 S. E. 1075 (1911); *State v. Alston*, 210 N. C. 258, 186 S. E. 354 (1936); *State v. Edwards*, 211 N. C. 555, 191 S. E. 1 (1937); *State v. Absher*, 226 N. C. 656, 40 S. E. 2d 26 (1946). These cases, after the statute establishing degrees of murder, hold clearly that proof of drunkenness may "lower the grade of the crime" from first degree murder. Accordingly, they modify and correct the contrary view in older cases; as, for example, *State v. Kale*, 124 N. C. 816, 32 S. E. 892 (1899), where it is said in passing that drunkenness will neither repel the malice implied from the use of a deadly weapon (which still seems not to have been challenged) nor "lower the grade of the crime" (which was changed, but *may* once more be the law). An example of the recent tendency to return to the old rule, in spite of the murder statute, is *State v. Cureton*, 218 N. C. 491, 11 S. E. 2d 469 (1940), a first degree murder case in which drunkenness was treated as an affirmative defense and it was held that there was not evidence enough to overcome the presumption of sanity. The practical effect of this view is to raise a "presumption of specific intent," which would free the state of the burden of proving specific intent.

to satisfy the jury that he was so drunk that he was irresponsible, since the state has the burden of showing beyond a reasonable doubt that he was sufficiently responsible to form the specific intent. Unfortunately for the clarity of the law, there is another line of cases inconsistent with this position. This problem is discussed later under "Burden of Proof." To return to the particular matter under consideration—drunkenness as a defense—the North Carolina Supreme Court has recognized that, in these specific intent cases, the right-from-wrong test serves a special and limited purpose and should be applied in an appropriate way; for example, in determining the effect of drunkenness on deliberation the test is whether the defendant was "unable to think out beforehand what he intended to do and to weigh it and understand the nature and consequences of his act."³⁹

Nearly a hundred years ago, *delirium tremens*, a violent form of temporary mental disturbance brought on by excessive and prolonged use of alcohol,⁴⁰ was considered as a defense to crime.⁴¹ The *delirium* had passed at the time of murder, but it was there declared that when drunkenness "is carried so far as to cause delirium tremens, any act perpetrated under the delirium is excused, though the disease is but temporary; and when continued so far as to dethrone reason altogether, the presumption of law is removed; because the disease is then permanent: the law looks only to the state of mind, and not to the cause producing it."^{41a} In a later dipsomania murder this was approved.⁴² "Dipsomania" is an uncontrollable craving for alcoholic liquors,⁴³ and is described by our court as an "insatiable thirst, intensified by long indulgence" which is not recognized as a defense to crime.⁴⁴ In what appears to be the first case in our reports dealing with responsibility in criminal law (murder of one slave by a drunken slave), the court flatly refused to consider voluntary drunkenness as a defense, but suggested that, possibly, where there was legal provocation, it might be admitted to rebut malice; although this case was five years after *M'Naghten's Case*, the opinion did not indicate any awareness of that

³⁹ *State v. Cureton*, 218 N. C. 491, 11 S. E. 2d 469 (1940). Substantially the same test was approved in *State v. Hammonds*, 216 N. C. 67, 3 S. E. 439 (1939), where Judge Burney had charged fully on the state's duty to show specific intent and deliberation in first degree murder cases, saying "Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence," and if the defendant was "so drunk that he is utterly unable to form or entertain this essential purpose, he should not be convicted . . . of murder in the first degree."

⁴⁰ MALOY, *MEDICAL DICTIONARY FOR LAWYERS* 171 (2d ed. 1951).

⁴¹ *State v. Sewell*, 48 N. C. 245 (1855).

^{41a} *Id.* at 249.

⁴² *State v. Potts*, 100 N. C. 457, 6 S. E. 657 (1887).

⁴³ MALOY, *MEDICAL DICTIONARY FOR LAWYERS* 182 (2d ed. 1951).

⁴⁴ *State v. Potts*, 100 N. C. 457, 465, 6 S. E. 657 660 (1887).

case and generally implied an extremely limited recognition of insanity as a defense to crime.⁴⁵

"Alcoholism" is the condition produced by excessive or prolonged use of alcoholic liquors; in its acute form it may be mere drunkenness, but in its chronic form due to long-continued excess, it produces permanent damage to the individual.⁴⁶ There is a popular tendency to disregard mere drunkenness in fixing guilt for crimes, but chronic alcoholism actually produces organic changes and deteriorations in the individual and necessarily affects the mental condition. This distinction, fortunately, has been recognized by the courts.⁴⁷ Evidence that the alcohol definitely affected the defendant at the time of the offense, and that the deliberation had not previously taken place while sober, must be quite clear; otherwise, the court will hold that there was not sufficient evidence to go to the jury on the question of lack of sanity.⁴⁸ Chronic alcoholism, especially when connected with other factors affecting the mind, has been recognized as a defense to crime. In one case, an advanced syphilitic and alcoholic, requested an instruction that if long-continued use of alcohol or disease, or both, deprived him of his sanity at the time of the offense, he would not be guilty; the court *held* that he was entitled to this instruction.⁴⁹ In another case, a former morphine addict had been drinking before the offense; the trial judge instructed that if long use of liquor or drugs, or both, had destroyed his sanity, he would not be guilty, and the court approved the charge.⁵⁰ In the last case the court merely declared there was "No error" adverse to the defendant; appellate procedure provides no method for determining errors of the judge *favoring* the defendant.

In dealing with drunkenness and crime, the temptation, on the part of some (a few medical men and psychiatrists, for example), to regard the condition unqualifiedly as a disease must be checked. An uncriti-

⁴⁵ *State v. John*, 30 N. C. 330 (1848). Twelve years after *M'Naghten's Case*, the opinion in a later case on the question showed no familiarity with the *M'Naghten* rule. *State v. Sewell*, 48 N. C. 245 (1855). Nearly twenty years after *M'Naghten*, that case was still not cited, although this 1862 opinion presented the first clean-cut statement of the right-from-wrong test in our reports. *State v. Brandon*, 53 N. C. 463 (1861). Finally, nearly a quarter of a century after *M'Naghten*, Judge George Green's charge to the jury, an excellent synthesis of the *M'Naghten* rule, was commended by Pearson, C. J., in *State v. Haywood*, 61 N. C. 376 (1867), as a model to the other trial judges. That charge is still the accepted pattern in North Carolina.

⁴⁶ MALOY, *MEDICAL DICTIONARY FOR LAWYERS* 26 (2d ed. 1951).

⁴⁷ *State v. Potts*, 100 N. C. 457, 6 S. E. 657 (1887); *State v. Sewell*, 48 N. C. 245 (1855). See cases cited in notes 48-50, *infra*.

⁴⁸ *State v. English*, 164 N. C. 498, 80 S. E. 72 (1913); *State v. Shelton*, 164 N. C. 513, 79 S. E. 883 (1913).

⁴⁹ *State v. Lee*, 196 N. C. 714, 146 S. E. 858 (1929).

⁵⁰ *State v. English*, 164 N. C. 498, 80 S. E. 72 (1913). In *State v. Rippy*, 104 N. C. 752, 10 S. E. 259 (1889), the judge failed to charge on the effect of an overdose of morphine as affecting responsibility; this was held to be error.

cal and indiscriminate application of this conception could all but destroy the basic and fundamental doctrine of legal responsibility. "For forensic purposes, alcoholism is not a sickness but a bad habit," although, "of course it may strip the offense of some element, such as wilfulness, premeditation or deliberation, and thus reduce the degree of the crime."^{50a}

Conditions Not Constituting a Defense

Like most legal definitions, the statement of the right-from-wrong test is as important for what it does not say as for what it says. It excludes many mental conditions from consideration as a defense. One of the fullest of the early statements of the rule was made by Justice Manly: "The law does not recognize any moral power compelling one to do what he knows is wrong. 'To know the right and still the wrong pursue' proceeds from a perverse will brought about by the seductions of the evil one, but which nevertheless, with the aids that lie within our reach, as we are taught to believe, may be resisted and overcome, otherwise it would not seem to be consistent with the principles of justice to punish any malefactor. There are many appetites and passions which by long indulgence acquire a mastery over men more or less strong. Some persons indeed deem themselves incapable of exerting strength of will sufficient to arrest their rule, speak of them as irresistible, and impotently continue under their dominion; but the law is far from excusing criminal acts committed under the impulse of such passions. . . . If the prisoner knew that what he did was wrong, the law presumes that he had the power to *resist* it, against all supernatural agencies, and holds him amenable to punishment."⁵¹ This rule clearly assumes: (1) That man has complete freedom-of-will, (2) that intelligence dominates and controls both emotion and will, (3) that no appetite or passion, however great, is too strong for the individual to control. With one or more of these assumptions, many scientific men are inclined to disagree, but our entire structure of criminal law administration is raised upon them. In fact, it is difficult to see how an orderly society could be maintained without these or similar assumptions as to individual responsibility.

^{50a} Davidson, *The Psychiatric Role in the Administration of Criminal Justice*, 4 RUTGERS L. REV. 578 (1950). For a medical man, Dr. Davidson's understanding, and appreciation, of the legal function is profound, exceptional and refreshing. In North Carolina "he who knows the right and still the wrong pursues is amenable to the criminal law."—Stacy, C. J., in *State v. Harris*, 223 N. C. 697, 704, 28 S. E. 2d 232, 238 (1943), approving a quotation given earlier by Manly, J., in *State v. Brandon*, 53 N. C. 463, 467 (1861). Our law recognizes the distinction between voluntary drunkenness, which is no excuse, and dethronement of reason, which is an excuse. *State v. Hammonds*, 216 N. C. 67, 3 S. E. 2d 439 (1939). It also recognizes the distinction between temporary drunkenness, which may not be an excuse, and chronic alcoholism producing irresponsibility, which is a defense to murder. *State v. Lee*, 196 N. C. 714, 146, S. E. 858 (1929).

⁵¹ *State v. Brandon*, 53 N. C. 463, 467-8 (1861).

There have been many vague, descriptive terms used in our cases with reference to mental conditions which do not constitute a defense to crime. Their meanings are not always precise, but they are helpful in suggesting the general, outside limits of the legal definition of insanity. It has been said that "moral or emotional" insanity is no defense to murder.⁵² This, apparently, means merely that defects of intelligence only determine insanity, and that no defects of the moral or emotional life can affect legal responsibility. The same case declared that "uncontrollable impulse" is no defense to crime; this idea, in the more generally used expression "irresistible impulse," is an extension of the right-from-wrong test and has been recognized as a defense in some states.⁵³ "A temporary lapse of moral perception" is no defense to crime, but might be used to show want of deliberation;⁵⁴ a plea of "temporary insanity" has actually been used in this state to reduce murder to second degree.⁵⁵ Neither a "weak mind"⁵⁶ nor a "low mentality"⁵⁷ are defenses to crime unless there is an inability to distinguish right from wrong. However, if there is a lack of capacity to distinguish right from wrong on only one subject (sometimes called monomania) and the offense charged relates to that subject, this is a valid defense to crime.⁵⁸

Evidence of Mental Incapacity

Anyone who has known a defendant, and formed an opinion of his mental condition, may testify to his mental capacity, even though the witness is not an expert.⁵⁹ If the witness is accepted by the trial judge as a medical or psychiatric expert,⁶⁰ even though he has no personal knowledge of defendant, he may give his opinion based upon the evidentiary observations of others as reflected in hypothetical questions.⁶¹

⁵² *State v. Terry*, 173 N. C. 761, 92 S. E. 154 (1917). See *State v. Green*, 152 N. C. 835, 68 S. E. 16 (1910), in which the husband claimed a "brainstorm" caused him to kill his wife's paramour, and the jury reduced the offense to second degree murder.

⁵³ The term "irresistible impulse" is more commonly used. The states recognizing this defense are listed, with case citations, in GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 267-273 (1925).

⁵⁴ *State v. Farrell*, 223 N. C. 804, 28 S. E. 2d 560 (1944). See *State v. Green*, 152 N. C. 835, 68 S. E. 16 (1910).

⁵⁵ *State v. Green*, 152 N. C. 835, 68 S. E. 16 (1910).

⁵⁶ *State v. Spivey*, 132 N. C. 989, 43 S. E. 475 (1903).

⁵⁷ *State v. Jenkins*, 208 N. C. 740, 182 S. E. 324 (1935); *State v. Bracy*, 215 N. C. 248, 1 S. E. 2d 891 (1939).

⁵⁸ *State v. Hairston*, 222 N. C. 455, 23 S. E. 2d 885 (1943).

⁵⁹ *State v. Keaton*, 205 N. C. 607, 172 S. E. 179 (1934); *State v. Witherspoon*, 210 N. C. 647, 188 S. E. 111 (1936).

⁶⁰ *State v. Coombs*, 200 N. C. 671, 158 S. E. 252 (1931); *State v. Smith*, 223 N. C. 457, 27 S. E. 2d 114 (1943); *State v. Peterson*, 225 N. C. 540, 35 S. E. 2d 645 (1945).

⁶¹ *State v. Dilliard*, 223 N. C. 446, 27 S. E. 2d 85 (1943). For a more detailed discussion, see STANSBURY, *NORTH CAROLINA EVIDENCE* 268-273 (1946) and 2

These are the two basic rules governing evidence of mental capacity.

Customarily, the non-expert testifies to whether the defendant was "insane" or "knew right from wrong."⁶² In addition to those lay witnesses who knew defendant *before* the offense, a sheriff⁶³ or a superintendent of an asylum,⁶⁴ who had defendant in custody *after* the offense, may testify to his mental condition. Of course, the defendant himself may testify; for example, that certain injuries had affected his mind.⁶⁵ A non-expert may testify that defendant knew it was "wrong to shoot a man down"⁶⁶ and has even been permitted to say that defendant was mentally sound and capable of premeditation;⁶⁷ but he may not give an opinion of defendant's mental capacity to commit the particular crime charged, as this is the specific question to be decided and an opinion upon it would invade the province of the jury.⁶⁸ Further, a non-expert

WIGMORE, EVIDENCE §672 (3d ed. 1940). For criticisms of the hypothetical question from the medical point of view, see White, *Expert Testimony in Criminal Proceedings Involving the Question of the Mental State of the Defendant*, 11 J. CRIM. L. & CRIMINOLOGY 499 (1921), and Briggs, *Medico-Legal Insanity and the Hypothetical Question*, 14 J. CRIM. L. & CRIMINOLOGY 62 (1923). For medical criticism of the right-from-wrong test itself, see Meagher, *Crime and Insanity: The Legal as Opposed to the Medical View, and the Most Commonly Asserted Pleas*, 14 J. OF CRIM. L. AND CRIMINOLOGY 46 (1923), and Note, 72 U. OF PA. L. REV. 167 (1924), citing both medical and legal authorities. See note 6 *supra*.

⁶² State v. Stefanoff, 206 N. C. 443, 174 S. E. 411 (1934); State v. Keaton, 205 N. C. 607, 172 S. E. 179 (1934); State v. Jones, 203 N. C. 374, 166 S. E. 163 (1932); State v. Cooper, 170 N. C. 719, 87 S. E. 50 (1915); State v. Coley, 114 N. C. 879, 19 S. E. 705 (1894).

⁶³ State v. Cooper, 170 N. C. 719, 87 S. E. 50 (1915).

⁶⁴ State v. Pritchett, 106 N. C. 667, 11 S. E. 357 (1890).

⁶⁵ State v. Nall, 211 N. C. 61, 188 S. E. 637 (1936).

⁶⁶ State v. Banner, 149 N. C. 519, 63 S. E. 84 (1908).

⁶⁷ Such testimony was permitted in State v. Horne, 209 N. C. 725, 184 S. E. 470 (1936), although the witness is not directly quoted in the opinion. As we would expect, an opposite opinion has also been allowed; in State v. Nall, 211 N. C. 61, 188 S. E. 637 (1936), the witness was permitted to express the opinion that defendant "was not mentally competent, but was irresponsible." If the rule relating to the "invasion of the province of the jury," discussed under note 68 *infra*, is sound, these two cases are of doubtful soundness unless strictly interpreted and narrowly applied. *Contra* the view of these cases, see State v. Hauser, 202 N. C. 738, 164 S. E. 114 (1932), and note 68 *infra*.

⁶⁸ This is the view of State v. Hauser, 202 N. C. 738, 164 S. E. 114 (1932), which held it error to allow a non-expert to testify that defendant had "sufficient mental capacity to plan a murder and then carry it into execution," and of State v. Journegan, 185 N. C. 700, 117 S. E. 27 (1923), in which the court sustained exclusion of testimony that defendant had "sufficient mental capacity to operate a still and to know it was wrong." Many other supporting local authorities are collected in STANSBURY, NORTH CAROLINA EVIDENCE §126 (1946), where this rule is subjected to sharp criticism and where it is pointed out that it has been attacked by the late Justice Hoke (Marshall v. Telephone Co., 181 N. C. 292, 106 S. E. 818 (1921)) and by Justice Devin (Patrick v. Treadwell, 222 N. C. 1, 21 S. E. 2d 818 (1942)), by former U. N. C. Law Dean Charles T. McCormick (Book Review, 37 ILL. L. REV. 462 (1943)), by Harvard Professor Edmund Morgan (Book Review, 29 VA. L. REV. 970 (1943)), by the late Dean Wigmore (EVIDENCE §1920 (3d ed. 1940)), and in a note in 16 N. C. L. REV. 180 (1938). The reader is entitled to know my view. Those who are familiar with my article, *The Camera Goes to Court*, 24 N. C. L. REV. 233 (1946) know that I am an advocate of admitting all reliable evi-

may not be questioned concerning the defendant's "general reputation" for sanity, as this is not a subject properly proved by reputation evidence.⁶⁹

"Hereditary insanity" has also been mentioned in the cases; to be competent evidence it must be: (1) Notorious, (2) of the same species of insanity as defendant's, and (3) not temporary. Of course, this type of evidence must meet the usual rules of relevancy.^{69a}

Pleading Insanity

Insanity may be pertinent in either of two aspects: (1) Insanity at the time of the offense (this is the general problem which we have been discussing) and (2) insanity at the time of trial. The first deals with legal responsibility for the act itself and, consequently, is a problem of guilt or innocence; the latter relates to the capacity of the defendant to conduct his defense and, accordingly, is a preliminary problem relating to postponement of trial of the question of guilt or innocence. Since the latter is simpler, less important and less recurrent, it will be discussed first.

In the first place, "present insanity" must be specially pleaded; if it is not pleaded, the judge need not pass upon it nor submit it to the jury.⁷⁰ When such a plea is entered, the court has said that the proper procedure is to try this preliminary question before a jury and dispose of it in advance of the jury trial of the case on its merits.⁷¹ This still commends itself as the more orderly and less confusing method of disposing of the matter. However, in one case, after the trial on the merits had been begun, the plea was amended to suggest "present insanity" and the trial judge submitted both issues to the jury; the court decided that the defendant waived the objection and since it was not shown that the defendant was prejudiced by such handling, there was no error

dence which will help the jury reach the true facts. Accordingly, I think the "invasion of the jury" rule should be abandoned. Jurors, in their daily lives, evaluate and act upon opinion, expert and non-expert, constantly. Why should they not follow, as jurors, the same guides they have found dependable in their personal affairs? Jurors pass on the weight and credibility of conflicting evidence of fact; are they not equally qualified to evaluate conflicting opinions?

⁶⁹ State v. Coley, 114 N. C. 879, 19 S. E. 705 (1894).

^{69a} State v. Christmas, 51 N. C. 471 (1859); State v. Cunningham, 72 N. C. 469 (1875). Naturally, such evidence cannot be presented until there is proof of defendant's own insanity. Similarly, where there has been no proof that defendant was drinking, evidence that he was "wild" when drinking, was not admissible. State v. Alexander, 179 N. C. 759, 103 S. E. 383 (1920). For like reason, when insanity is a defense, it cannot be shown that deceased was a "dangerous and violent man," nor that he had been armed and lying in wait for defendant. State v. Banner, 149 N. C. 519, 63 S. E. 84 (1908). Nor can it be shown that the infidelity of the wife, reported to defendant, was true. State v. Green, 152 N. C. 835, 68 S. E. 16 (1910).

⁷⁰ State v. Spivey, 132 N. C. 989, 43 S. E. 475 (1903).

⁷¹ State v. Haywood, 94 N. C. 847 (1886).

in the trial.⁷² In a recent case, the opinion implies that when present insanity is pleaded the trial judge should halt the trial of the offense and try this issue first, but in that case the judge submitted both "present insanity" and "insanity at the time of the offense" to the jury at the same time, and no error was found.⁷³ Accordingly, the present state of the law is that the proper procedure is to try the question of present insanity first, but if the trial judge submits both issues to the same jury at the same time, the North Carolina Supreme Court will not disturb the result.

The general plea of "not guilty" is broad enough to cover an admission of the act but denial of guilt on the ground of insanity.⁷⁴ A formal plea, apparently, is sometimes made,⁷⁵ and when so made the effect is to admit the act but deny responsibility for it.⁷⁶ The safer practice is to offer the formal plea of "not guilty on the ground of insanity"; in one case there was evidence that the defendant was "crazy" after a blow on his head, but the court declared that there was "no evidence that the defendant was not capable" and the judge was not required to charge the jury on insanity.⁷⁷

Degree of Proof

Where the burden is upon the state to show sanity in making out the offense, the proof must be "beyond a reasonable doubt";⁷⁸ normally, the burden is upon the defendant and his is a lesser burden—"to the satisfaction of the jury."⁷⁹ In one of the cases the trial judge correctly charged that defendant must prove insanity "to the satisfaction of the jury," but at one place, by a *lapsus linguae*, suggested that insanity must be "clearly proven"; the court did not think the jury was confused by this.⁸⁰ In a later case, the judge required that insanity be "clearly proved," without correcting this; the court promptly held it to be error.⁸¹

Presumption and Burden of Proof

The average, normal individual knows what he is doing and is held responsible for his acts. This psychological norm has been recognized

⁷² State v. Sandlin, 156 N. C. 624, 72 S. E. 203 (1911).

⁷³ State v. Sullivan, 229 N. C. 251, 49 S. E. 2d 458 (1948).

⁷⁴ State v. Potts, 100 N. C. 457, 6 S. E. 657 (1887).

⁷⁵ State v. Melvin, 219 N. C. 538, 14 S. E. 2d 538 (1941).

⁷⁶ State v. Bowser, 214 N. C. 249, 199 S. E. 31 (1938).

⁷⁷ State v. Miller, 219 N. C. 514, 14 S. E. 2d 522 (1941).

⁷⁸ See text *infra*, "Presumptions and Burden of Proof."

⁷⁹ State v. Cash, 219 N. C. 818, 15 S. E. 2d 277 (1941); State v. Cureton, 218 N. C. 491, 11 S. E. 2d 469 (1940); State v. Payne, 86 N. C. 609 (1882); State v. Willis, 63 N. C. 26 (1868).

⁸⁰ State v. Manning, 221 N. C. 70, 18 S. E. 2d 821 (1942).

⁸¹ State v. Swink, 229 N. C. 123, 47 S. E. 2d 852 (1948). In State v. Payne, 86 N. C. 609 (1882), the court held "preponderance of the evidence" wrong but, as it is a lighter burden of proof than "satisfaction of the jury," such a charge is not prejudicial and will not be reversed.

by the courts and has given rise to the presumption that every man is sane and possesses sufficient reason to be responsible; if he asserts the contrary, the burden is upon him to show it.⁸² In such cases, the state may rely (1) on this presumption of sanity, or (2) on testimony of witnesses, or (3) on both.⁸³ There is one class of cases, as we noted earlier,⁸⁴ which may constitute an exception to this general rule: Where the definition of the crime includes a specific mental element, the state, in proving this crime, must prove the mental element beyond a reasonable doubt.⁸⁵ It would seem to be elementary logic that where a particular mental element is an essential *part* of the crime and the state has the burden of proving the *whole* crime, beyond a reasonable doubt, it has not succeeded until it has proved the required mental element. The many cases which hold that evidence of drunkenness is admissible "in mitigation" of deliberation in first degree murder cases are authority for this position, since they recognize that such evidence by the defendant is an effort to weaken or "mitigate" the case which the state has the burden of proving. However, the rules which are applicable in the non-specific intent cases (where intent is presumed from the act itself) apparently, at times, have influenced the result in specific intent cases (where the state has the burden of proving intent).⁸⁶ The cases before the enactment of the statute dividing murder into degrees did not make

⁸² *State v. Cloninger*, 149 N. C. 567, 63 S. E. 154 (1908); *State v. Cureton*, 218 N. C. 491, 11 S. E. 2d 469 (1940). Neither is malice rebutted by proof of drunkenness. *State v. Potts*, 100 N. C. 451, 6 S. E. 657 (1887).

⁸³ *State v. Harris*, 223 N. C. 697, 28 S. E. 2d 232 (1943).

⁸⁴ See text *supra* "Alcoholic Conditions."

⁸⁵ In addition to the cases cited under the heading "Alcoholic Conditions," see specifically the following: *State v. Hairston*, 222 N. C. 455, 23 S. E. 2d 885 (1943), a rape case which correctly places the burden on defendant, but specifically recognizes that the rule is different in first degree murder. Justice Barnhill in his dissent in *State v. Creech*, 229 N. C. 662, 51 S. E. 2d 348 (1949), collects a large number of our cases to the effect that evidence of drunkenness is in mitigation of deliberation, which the state has the burden of proving, a view vigorously stated by Hoke, J., in *State v. Murphy*, 157 N. C. 614, 72 S. E. 1075 (1911), and approved in *State v. English*, 164 N. C. 497, 80 S. E. 72 (1913); *State v. Allen*, 186 N. C. 302, 119 S. E. 504 (1923); *State v. Ross*, 193 N. C. 25, 136 S. E. 193 (1927).

⁸⁶ For example, compare the language in *State v. Creech*, 229 N. C. 662, 51 S. E. 2d 348 (1949), *State v. Bracy*, 215 N. C. 248, 1 S. E. 2d 891 (1939), and *State v. Potts*, 100 N. C. 457, 6 S. E. 657 (1887), with the rule of Justice Hoke in *State v. Murphy*, 157 N. C. 614, 72 S. E. 1075 (1911), and the later cases following it, cited in note 85 *supra*. The language in *State v. Cureton*, 218 N. C. 491, 11 S. E. 2d 469 (1940), too, could be troublesome, but the result is completely consistent with such cases as *State v. Shelton*, 164 N. C. 513, 79 S. E. 883 (1913), where it was held that there was no substantial evidence of lack of mental capacity requiring its submission to the jury. This question of submission, of course, can arise under either the *Murphy* rule or the *Creech* rule, though, perhaps, less evidence would be considered necessary to "raise a reasonable doubt" than would be required to "satisfy the jury." Actually, *State v. Potts*, 100 N. C. 451, 6 S. E. 657 (1887), as well as *State v. Brittain*, 89 N. C. 481 (1883) and *State v. Payne*, 86 N. C. 699 (1882), is merely authority for the position that before our statute created first degree murder as a separate offense with a specific intent, the burden of proving legal incapacity rested on the defendant.

any distinction as to the burden, but after the statutory change the burden of proving deliberation was placed squarely on the state.⁸⁷ After the statute, the burden continued to be on the defendant in *second* degree murder cases (as in all other non-specific intent cases),⁸⁸ but not in *first* degree murder where the state must prove deliberation.⁸⁹ Unfortunately, some cases *after* the statute, relying on the old cases, continued the old rule without modification even in first degree murder cases.⁹⁰ Thus, we have two lines of authority as to where the burden of proving the mental element rests in first degree murder cases. There is little wonder that a recent case brought sharply in focus the conflict between the two rules, the majority view sustaining the unmodified rule and placing the burden of showing the lack of deliberation on the defendant.⁹¹ Thus, the present rule in all criminal cases may be stated in the words of Clark, C. J., ". . . the burden of proving insanity in a criminal case is on the defendant who sets it up."⁹²

As we have noted, this burden placed on the defendant to prove insanity is based upon the presumption that everyone is sane. Accordingly, in cases where insanity is a defense, the jury is told that the defendant is presumed to be innocent and the state must prove him guilty, but that he is also presumed to be sane and legally responsible for his acts, if he does not prove the contrary. To what extent, if any, this counter-presumption of sanity confuses the jury, or weakens the effect of the traditional presumption of innocence, we have no means of knowing.

⁸⁷ After the statute dividing murder into degrees, the first murder case involving the mental element was *State v. McDaniel*, 115 N. C. 807, 20 S. E. 622 (1894); it was there said that it was "too well settled to require discussion" that if the evidence "raises a reasonable doubt as to whether defendant formed a deliberate, premeditated design to kill" he cannot be convicted of murder in the first degree. *WHARTON, HOMICIDE*, was cited to support this position. See *WHARTON, HOMICIDE* 811-814 (3d ed. 1907); 2 *WARREN, HOMICIDE* 201-204 (Perm. ed. 1938), citing a number of North Carolina cases, such as *State v. Bishop*, 131 N. C. 733, 42 S. E. 839 (1902); *State v. Foster*, 172 N. C. 960, 90 S. E. 785 (1916), *State v. Roberson*, 150 N. C. 837, 64 S. E. 182 (1909). *State v. Ross*, 193 N. C. 25, 136 S. E. 193 (1927), a first degree murder case, and *State v. Allen*, 186 N. C. 302, 119 S. E. 504 (1923), a first degree burglary case, followed with approval the *McDaniel* and *Murphy* view.

⁸⁸ *State v. English*, 164 N. C. 498, 80 S. E. 72 (1913).

⁸⁹ See note 87 *supra*.

⁹⁰ *State v. Terry*, 173 N. C. 761, 92 S. E. 154 (1917); *State v. Jones*, 191 N. C. 753, 133 S. E. 81 (1926); *State v. Bracy*, 215 N. C. 248, 1 S. E. 2d 891 (1939); *State v. Cureton*, 218 N. C. 491, 11 S. E. 2d 469 (1940). *State v. Jones supra*, also held that proof by defendant of previous insanity plus the presumption that insanity continues constitutes a *prima facie* case of insanity, but does not relieve the defendant of the burden of satisfying the jury.

⁹¹ *State v. Creech*, 229 N. C. 662, 51 S. E. 2d 348 (1949).

⁹² *State v. Hancock*, 151 N. C. 699, 701, 66 S. E. 137, 138 (1909). This was an embezzlement case in which the trial judge had placed the burden on the state to show mental capacity, but Clark, C. J., went to some pains to correct this view. Thus, embezzlement is treated as a non-specific intent crime.

If this survey of the substantive and procedural law of insanity as a defense has revealed both ambiguities and shortcomings in the present law, we need not conclude that this jurisdiction is backward in this field. On the contrary, a rather extended examination of the authorities suggests that the state of the law here is fairly typical. The need for sympathetic understanding and co-operation between the legal and medical professions is not confined to North Carolina, nor is it limited to this particular subject. This tendency of law and medicine to clash is unfortunate but understandable. Each profession has its history, traditions, usages, language, techniques, concepts and viewpoints. The lawyer and doctor each moves with pride and confidence within the pattern of his own professional *mores*. Few men in either of the professions are so well grounded in both law and medicine (even if they had the time and inclination) as to be able to act as interpreters and co-ordinators of the contributions of both professions for the common good.⁹³ This is one of the penalties inflicted upon a society dedicated to an ever-increasing specialization in its quest for knowledge. Our knowledge grows vertically without spreading horizontally. As the circumference of man's knowledge increases, the area of contact with the vast space of ignorance also increases. There is a humility of knowledge. The more we *know*, the more we know that we do not know. The growing knowledge of the specialist draws him ever farther away from other specialists—and the common man. Man's learning has grown too vast for this age to hope to produce a Benjamin Franklin⁹⁴ or a Leonardo da Vinci,⁹⁵ but it is imperative that specialties such as law and medicine, both dealing with the complex and social animal called man and having many points of contact, produce courageous figures who will undertake

⁹³ So great has specialization become that medical men, as a matter of course, refer mental questions to neuropsychiatrists, and many lawyers frankly confess that they know little or nothing of the law of insanity. ". . . in general, our lawyers may graduate from law school and attain membership at the bar . . . and become members of the bench, without being required to understand sufficiently the difference between a mentally ill person and a sane person in a civil or criminal case." Costerella, *Mental Illness and the Law*, 3 LAWYER AND LAW NOTES 2 (Fall, 1949). One of the minor, but very real, difficulties is that lawyers and doctors have trouble escaping from their vocabularies. Both professions need to take to heart the wisdom of Lord Thring in commenting upon Walter Bagehot, "I always think that a man is master of his art in proportion as he can dispense with its jargon."

⁹⁴ The range of Franklin's thought is indicated by his extensive writings; a busy career in diplomacy; the experiments with lightning; the invention of bifocal spectacles; his pioneering in such fields as police organization, fire protection, insurance, public libraries, and higher education—and an amazing variety of other accomplishments not so well known.

⁹⁵ Leonardo da Vinci, whose fame could have rested either on his sculpture or his painting, was known to his contemporaries largely for his engineering and architecture. His inventions were numerous; his studies of physiology and anatomy were extensive and significant; and, to the end, he was a "most profound investigator into all the known branches of science of his age."

to advance the cross-pollination and cross-fertilization of these related specialties. Unless we soon enter upon the "Age of the Synthesizers," our learning appears doomed to become narrower and narrower as it becomes deeper and deeper. The isolated and disparate bodies of learning must be brought closer together for the benefit of all, lest the common man be imprisoned in a vale of ignorance by the host of lofty crags of specialized learning encircling him. Our factual stockpile is growing without a proportionate gain in general understanding. Learned men build up footnotes, but the common man does not acquire wisdom. This modest survey, in one small sector of the learning of the two professions, grew out of an awareness of these problems of specialization and is an effort to draw law and medicine closer together in one of the many typical fields where the public good would benefit from a greater unity of thought and effort.*

The Special Committee on Crime and Psychiatry of the North Carolina Bar Association for 1951 was composed of Robert E. Lee, Wake Forest; Frank C. Patton, Morganton; Clyde E. Gooch, Salisbury; Norman Shepard, Smithfield; Basil L. Whitener, Gastonia; and Dillard S. Gardner, Chairman, Raleigh. The Committee reported to the Sedgelyield meeting, June 14-16, 1951. The following recommendations (based in part upon the foregoing article) were made, Mr. Whitener dissenting from the first, third and fourth recommendations:

First. The presently accepted legal test of insanity—the capacity to distinguish right from wrong—is an adequate test of mental disease affecting the reasoning faculties, but it should be extended to include diseases which destroy will-power and volition and the capacity to control one's conduct. Many hospitalized insane can distinguish right from wrong, but what renders them socially irresponsible is their lack of power to control their conduct along rational lines. What the criminal law should punish is not insane reasoning, but insane conduct, the *doing* of the wrong by one having the power to *do* the right. A charge embodying such an extension of the present test is given in the above article. As this test is more favorable to the defendant than the present right-from-wrong test, it may be given to juries without enabling legislation, but the compulsory use of the test would require legislation. Such legislation is recommended.

* After completing this paper, there came to my desk the May '51 issue of *Texas Law Review*, which at p. 611 contains "Science, Experts and the Courts" by Charles T. McCormick, formerly Dean of the Law Schools of the University of Texas and of the University of North Carolina, and certainly one of the ablest critics of the law of evidence in the United States. I happily note his agreement with many of the conclusions I have ventured here; particularly realistic are his appraisals of the shortcomings of the right-from-wrong test and of the hypothetical question, both of which my former teacher would eliminate in favor of more modern and more scientific techniques.

Second. The partisan character of conflicting experts, when insanity is at issue, has done much to discredit expert testimony and to deprive juries of sound psychiatric advice and aid; this could be improved by the court-appointment of experts (as is done now when receivers are named) or by the judge (at the time of the plea) ordering the defendant to a state hospital for a period of observation and a report from the superintendent at the time of the trial (the superintendent to be subject to examination and cross-examination). Trial judges, perhaps, have inherent power "in the interest of justice" to name experts to be called by the court or to order defendants to state hospitals for observation, but to set at rest any doubts on this point, enabling legislation to this effect is recommended.

Third. In all crimes which are defined to include a specific mental element (as, for example, "deliberation" in first degree murder), when there is evidence that the defendant was insane or under the influence of alcohol or narcotics, the burden of proving the existence of the necessary mental element shall be upon the State. This was previously the law (and may still be the law), but there are cases which cast doubt upon this former right of the defendant. Legislation which would eliminate this doubt is recommended. Such legislation would not disturb the present rule in ordinary criminal cases, where criminal intent is presumed from the act itself and the burden is upon the defendant to prove, to the satisfaction of the jury, that he lacked the mental capacity to commit the crime.

Fourth. In all cases, where lack of the mental element is a defense, all witnesses, expert and non-expert, who have observed defendant, may describe his mental condition and give an opinion concerning his mental condition, including an opinion as to his capacity to commit the particular crime charged. This is the rule at present, except that there is case authority which prohibits an opinion as to the capacity to commit the particular crime on the ground that such opinion invades the province of the jury, and there is also case authority which permits such opinions. A clarifying act would eliminate the present confusion, leaving the jury to pass upon witnesses' opinions and to give to them such credit and weight as the jury think they deserve. Such an act is recommended.

The report was referred to the new Committee for further study. Mr. Kingsland Van Winkle, of Asheville, is the Chairman of the new Committee which is continuing the study of this subject. This Committee's Report to the North Carolina Bar Association will be due in the summer of 1952.