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A desirable solution of the problem might be obtained by means of several slight statutory modifications, *viz.*:

(1) The statutes providing for testamentary disposition of one's body to certain institutions for the rehabilitation of the maimed¹⁸ could be reworded so as to give a present right of disposition for similar purposes to the surviving spouse or next of kin, in the absence of such testamentary disposition.

(2) The statutes providing for the distribution of cadavers to medical schools¹⁹ could be modified so as to include a specific grant of such bodies to medical schools for the additional purpose of obtaining material to be used in the treatment of the living.

(3) The autopsy statutes²⁰ could be reworded to authorize the delivery to public institutions for the rehabilitation of the maimed of all parts and other material removed, upon completion of the examination, with the written consent of the person entitled to possession of the body, if known.

It is submitted that the enactment of such amendments would serve not only to enhance the development of medical science in the field of transplantation in North Carolina, but would also serve to clarify in some measure the uncertainty in the law of this state with regard to the rights of others in the bodies of deceased persons.

ROYAL G. SHANNONHOUSE, III.

Criminal Law—Insanity as a Defense—New Test for Determining

In the important case of *Durham v. United States* defendant had been discharged from the United States Navy in 1945 at the age of seventeen, after a psychiatric examination showed that he was mentally unfit for Naval service because of a personality disorder.¹ During the succeeding eight years he attempted suicide, was convicted of stealing cars and passing bad checks, and was committed three different times to mental hospitals. Two months after his third release from a mental hospital, he was caught breaking into a house. Again he was committed to a mental hospital. Finally, in February of 1953, he was brought to trial in the United States District Court in the District of Columbia

in other sections of the country. From whom would the performing agency obtain the consent where the deceased was survived by several children by two marriages when neither wife survived him? Since consent to retention is, in effect, a donation, the statutes providing for consent to the performance of an autopsy do not provide the answers to these questions.

¹⁸ N. C. GEN. STAT. §§ 90-216.1 *et seq.* (Supp. 1953).

¹⁹ N. C. GEN. STAT. §§ 90-211 *et seq.* (1950).

²⁰ N. C. GEN. STAT. § 15-7 (1953); N. C. GEN. STAT. §§ 90-217 *et seq.* (1950); N. C. GEN. STAT. § 152-7 (6) (1952). See also N. C. GEN. STAT. § 90-216.1 (Supp. 1953).

¹ *Durham v. United States*, 214 F. 2d 862 (D. C. Cir. 1954).

charged with housebreaking. The only defense raised was that of insanity at the time the crime was committed.

During the trial, an expert witness testified at least four different times that defendant was of unsound mind at the time the crime was committed.² Yet the trial court, without a jury, convicted accused of housebreaking. The basis for the conviction was very simple: the expert witness would not testify to the fact that defendant did not "know" "the difference between right and wrong in connection with governing his own actions."³

The test applied by the district court was that set out in the celebrated *M'Naghten* case,⁴ a test which has been adopted by a majority of the states⁵ and the Supreme Court of the United States.⁶ Many states and the District of Columbia (until the *Durham* case) have added to the right and wrong test, the irresistible impulse test.⁷ Yet this defendant, an acknowledged mental case, received no benefit from either of these rules in the district court. The court of appeals, however, reversed the district court, set out a new test by which mental responsibility is to be determined, and sent the case back for a new trial. And the court of appeals abandoned completely the old right and wrong test which has so long held sway over the defense of insanity in the criminal law.

Briefly, the circumstances under which the right and wrong rule was promulgated one hundred and twelve years ago by an English court

² *Id.* at 866.

³ *Id.* at 868.

⁴ 8 Eng. Rep. 718 (1843).

⁵ *Leland v. Oregon*, 343 U. S. 790 (1952); *State v. Eisenstein*, 72 Ariz. 320, 235 P. 2d 1011 (1951); *People v. Field*, 108 Cal. App. 2d 496, 238 P. 2d 1052 (1951); *Hall v. State*, 78 Fla. 420, 83 So. 513 (1919); *Griffin v. State*, 208 Ga. 746, 69 S.E. 2d 192 (1952); *State v. Powell*, 71 Idaho 145, 227 P. 2d 582 (1951); *State v. Beckwith*, 242 Ia. 228, 46 N. W. 2d 20 (1951); *Fisher v. Fraser*, 171 Kan. 472, 233 P. 2d 1066 (1951); *State v. Johnston*, 207 La. 161, 20 So. 2d 741 (1945); *State v. Knight*, 95 Me. 467, 50 Atl. 276 (1901); *Taylor v. State*, 187 Md. 306, 49 A. 2d 787 (1946); *State v. Simenson*, 195 Minn. 258, 262 N. W. 638 (1935); *McGann v. State*, 175 Miss. 320, 167 So. 53 (1938); *State v. Barton*, 361 Mo. 780, 236 S. W. 2d 596 (1951); *Fisher v. State*, 154 Neb. 166, 47 N. W. 2d 349 (1951); *State v. 27* (1949); *People v. Irwin*, 166 Misc. 751, 4 N. Y. S. 2d 548 (Ct. Gen. Sess. Skaug, 63 Nev. 59, 161 P. 2d 708 (1945); *State v. Cordasco*, 2 N. J. 189, 66 A. 2d 27 (1949); *People v. Irwin*, 166 Misc. 751, 4 N. Y. S. 2d 548 (Ct. Gen. Sess. 1938); *State v. Shackelford*, 232 N. C. 299, 59 S. E. 2d 825 (1951); *State v. Barry*, 11 N. D. 428, 92 N. W. 809 (1903); *Kobyluk v. State*, 94 Okla. Crim. Rep. 73, 231 P. 2d 388 (1951); *State v. Layton*, 174 Ore. 217, 148 P. 2d 522 (1944); *Comm. v. Neill*, 362 Pa. 507, 67 A. 2d 276 (1949); *State v. Gardner*, 219 S. C. 97, 64 S. E. 2d 130 (1951); *State v. Lechman*, 2 S. D. 171, 49 N. W. 3 (1891); *Gibbs v. State*, 192 Tenn. 529, 241 S.W. 2d 556 (1951); *McGee v. State*, 155 Tex. Crim. 639, 238 S. W. 2d 707 (1951); *State v. Putzell*, 40 Wash. 2d 174, 242 P. 2d 180 (1952); *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982 (1892); *Simecek v. State*, 243 Wis. 439, 10 N. W. 2d 161 (1943); GUTTMACHER AND WEIHOFEN, *PSYCHIATRY AND THE LAW* 403 (New York: W. W. Norton and Company, Inc., 1952); WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 68, 129-173 (Buffalo: Dennis and Co., Inc., 1954).

⁶ *Davis v. United States*, 160 U. S. 469, 488 (1895).

⁷ WEIHOFEN, *op. cit. supra* note 5, at 129-173; Keedy, *Irresistible Impulse As a Defense in the Criminal Law*, 100 U. OF PA. L. REV. 956 (1952).

were these: M'Naghten, a paranoiac under delusions of persecution, shot and killed the secretary to Sir Robert Peel in an attempt to kill Peel. M'Naghten was found not guilty because of insanity. The case aroused a great deal of public interest and debate, prompting the House of Lords to ask the fifteen highest judges of England to state the law governing such cases. These judges stated that in order to establish the defense of insanity, it must be "proved to the satisfaction of the jury" that:

"at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."⁸

At the time this case was decided, Francis Gall's theory of phrenology was the accepted view in medicine.⁹ The fifteen English judges evidently were influenced by Gall's theory¹⁰ for they spoke of a person suffering from delusions "and not in other respects insane."¹¹ Thus it would appear that the judges had the idea that if the particular section of the brain governing reason and logic were not unbalanced, the person was sane and capable of committing a criminal act. It made no difference that the person was totally insane in other sections of the brain.

The irresistible impulse rule needs little explanation, for it is exactly what the name implies. The person compelled to commit a criminal act by an impulse produced by a mental disease which is beyond his power to control, may be excused from criminal responsibility.¹² The Supreme Court of the United States stated the irresistible impulse rule in conjunction with the M'Naghten rule as follows:

"The term 'insanity' as used in this defence means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and

⁸ M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

⁹ Gall declared that the brain was divided into twenty-seven different sections or organs, each section controlling a particular trait of the person. The dominant trait of a person depended on which section was the largest, and the size of each section could be ascertained by studying the shape of the skull. GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 170 (Boston: Little, Brown, and Company, 1925); GUTTMACHER AND WEIHOFEN, *PSYCHIATRY AND THE LAW* 418 (New York: W. W. Norton and Company, Inc., 1952); WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 3-4 (Buffalo: Dennis and Co., Inc., 1954).

¹⁰ "It seems not at all improbable that the learned judges . . . had a sentimental weakness for phrenology." GLUECK, *op. cit. supra* note 9, at 170. "It is this discarded fanciful brain-child of an eccentric Viennese physician of a hundred and thirty years ago that underlies the cornerstone of our law governing the criminal responsibility of the mentally sound." WEIHOFEN, *op. cit. supra* note 9, at 4.

¹¹ M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

¹² U. S. *ex rel.* Wing v. Pennsylvania, 90 F. Supp. 208 (W. D. Penn. 1950).

wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control."¹³

By applying the irresistible impulse rule with the M'Naghten rule, the scope of insanity sufficient to excuse a criminal act is increased.

North Carolina follows the majority of American jurisdictions in applying the M'Naghten rule.¹⁴ In *State v. Haywood*, the following charge to the jury was called to the attention of trial court judges as being a proper one to use:

"That if the prisoner, at the time he committed the homicide, was in a state to comprehend his relations to other persons, the nature of the act and its criminal character, or, in other words, if he was conscious of doing wrong at the time he committed the homicide, he is responsible. But if on the contrary, the prisoner was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, he is not guilty of any offense against the law; for guilt arises from the mind and wicked will."¹⁵

Today, eighty-eight years later, this same charge or one very similar, is still used.¹⁶

The person compelled to commit a crime by an "irresistible impulse" is denied the defense of insanity in North Carolina,¹⁷ for the reason stated by Justice Bailey in *State v. Brandon*,

"The law does not recognize any moral power compelling one to do what he knows is wrong. . . . 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 impuse of such passions. . . . If the prisoner

¹³ *Davis v. United States*, 165 U. S. 373, 378 (1897).

¹⁴ *State v. Shackelford*, 232 N. C. 299, 59 S. E. 2d 825 (1950); *State v. Haywood*, 61 N. C. 376 (1867); *State v. Brandon*, 53 N. C. 463 (1862); Gardner, *Insanity As a Defense in the North Carolina Criminal Law*, 30 N. C. L. REV. 4, 10 (1952).

¹⁵ *State v. Haywood*, *supra* note 14, at 377.

¹⁶ *State v. Grayson*, 239 N. C. 453, 80 S. E. 2d 387 (1954); *State v. Shackelford*, 232 N. C. 299, 59 S. E. 2d 825 (1950); *State v. Creech*, 229 N. C. 662, 51 S. E. 2d 348 (1949).

¹⁷ *State v. Shackelford*, *supra* note 16; Gardner, *supra* note 14, at 18.

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."¹⁸

It seems that the court has given little credence to the idea that "passions" and "supernatural agencies" could overcome the power of reason to know right from wrong. In *State v. Potts*, Chief Justice Smith, writing the majority opinion, said,

"We have not allowed, as exempting from the consequences of crime, what is called moral insanity;^[19] that is, an alleged uncontrollable impulse to commit an act, with the mental faculties in full force, to comprehend its criminality and wrong."²⁰

A fair interpretation of this language would indicate that the court has not been persuaded that the emotional "section" of the brain could influence the reasoning "section" of the brain; otherwise how could the person have his "mental faculties in full force, to comprehend its criminality and wrong"?

It was stated in *State v. Bracy* that:

"Whatever may be his mental weakness, if a person has knowledge and consciousness that the act he is doing is wrong and will deserve punishment whatever may be his mental weakness, he is in the eye of the law of sound mind and memory, and subject to punishment."²¹

It seems a bit inconsistent to recognize a person's mental weakness in one sentence, yet declare him to be of sound mind in the next sentence.

Therefore, a proper conclusion would seem to be that the court not only follows the rule of *M'Naghten's* case, but in denying the irresistible impulse test, follows the medical rationale on which the reasoning of the *M'Naghten* case is based. The North Carolina Supreme Court recognizes that intelligence and reasoning can be overcome only by a "visitation of God"²² and the defense of insanity is not available unless reason has been overcome.²³

¹⁸ *State v. Brandon*, 53 N. C. 463, 467-468 (1862).

¹⁹ "Moral insanity" as used here means an irresistible impulse. See *State v. Terry*, 173 N. C. 761, 765, 92 S. E. 154, 156 (1917).

²⁰ *State v. Potts*, 100 N. C. 457, 465, 6 S. E. 657, 660 (1887).

²¹ *State v. Bracy*, 215 N. C. 249, 256, 1 S. E. 2d 891, 896 (1939).

²² The court does not attempt to define of what a "visitation of God" consists. Still this phrase is repeated in many of the older cases. See *State v. Journegan*, 185 N. C. 700, 117 S. E. 27 (1923); *State v. English*, 164 N. C. 498, 80 S. E. 72 (1913); *State v. Spivey*, 132 N. C. 989, 43 S. E. 475 (1903).

²³ *State v. Grayson*, 239 N. C. 453, 80 S. E. 2d 387 (1954) (defendant was an illiterate man 26 years old. He had congenital syphilis which resulted in chronic infection of the brain and meninges. From 1944 until 1949, except for a period of two months, he was confined in two mental hospitals. In July of 1949 he was

It is submitted that the medical theory on which the *M'Naghten* case was based is outdated, and thus the law of the case is outdated.²⁴ Francis Gall's "section" theory of the brain has been discredited. Modern medicine has shown that the brain functions as a unit.²⁵ A disorder to any one part of the brain is a disorder to the whole.²⁶ An emotional disorder can overcome the power of reason in the strongest of persons.²⁷ Thus the person emotionally deranged may be driven to commit a crime which he knows to be wrong.²⁸ Tested by the traditional application of the right and wrong standard, this person is guilty of a crime even though it was not an act of his free will.²⁹

In recent years, the right and wrong rule has been the subject of much criticism.³⁰ The North Carolina Supreme Court as early as 1935

released to his mother who was to place him in another mental hospital. Tests showed his mental age to be four years, eleven months, and he had the intelligence quotient of an imbecile. The court reversed a conviction of murder on the ground that there was an error in the instructions, and awarded a new trial.; *State v. Shackelford*, 232 N. C. 299, 59 S. E. 2d 825 (1950) (defendant had a long record of maladjustment in his home life, had been tried for petty larceny, drunkenness, immoral conduct, and reckless driving, and served time for killing a man while in service. An expert witness testified that the defendant had a psychopathic personality. Still the defendant was convicted of rape and sentenced to die.); *State v. Potts*, 100 N. C. 457, 6 S. E. 657 (1887) (dipsomaniac convicted of murder).

²⁴ It should be noted that some experts feel that it is not the law of the *M'Naghten* Case that is outdated, but it is the interpretation of the law that is outdated. "[A] person who is prevented by mental disease from controlling his own conduct cannot be said, in the true sense of the words, to 'know the nature of his acts' and . . . he is therefore not criminally responsible under the existing law as formulated in the *M'Naghten* Rules." *Royal Commission on Capital Punishment 1949-1953 Report* (Cmd. 8932) 80 (1953).

²⁵ "What is needed in the law . . . is a proper conception of the unified personality. Disease of the mind is disease of a unity. . . ." GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 265-266 (Boston: Little, Brown, and Company, 1925); Notes, 40 CORNELL L. Q. 135 (1954); 102 U. OF PA. L. REV. 224 (1954).

²⁶ "The intellect, the emotions, and the will are not disparate functions operating in separate compartments of the brain, but are wholly interdependent, each reacting on the other. A disorder manifesting itself in one sphere of mental activity is still a disorder of the mind as a whole, and not merely of the one compartment." WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 10 (Buffalo: Dennis and Co., Inc., 1954).

²⁷ GLUECK, *op. cit. supra* note 21, at 312; "On the basis of undeniable and overwhelming clinical evidence, it has been proven that human behavior is basically emotionally conditioned and that intellectual activities are emotionally determined." Karpman, *Concepts of Law and Psychiatry*, 38 J. OF CRIM. L. AND CRIMINOLOGY 206, 212 (1948).

²⁸ DAVIDSON, *FORENSIC PSYCHIATRY* 13 (New York: The Ronald Press Company, 1952); GLUECK, *op. cit. supra* note 21 at 312; MERCIER, *CRIMINAL RESPONSIBILITY* 157 (New York: Physicians and Surgeons Book Co., 1926); Keedy, *Irresistible Impulse As a Defense in the Criminal Law*, 100 U. OF PA. L. REV. 956, 957 (1952); Weihofen and Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 YALE L. J. 959, 975 (1947).

²⁹ *State v. Shackelford*, 232 N. C. 299, 59 S. E. 2d 825 (1950); *State v. Potts*, 100 N. C. 457, 6 S. E. 657 (1887).

³⁰ In a recent poll, the question of the adequacy of the *M'Naghten* rule was submitted to a large group of psychiatrists in the United States. Eighty per cent stated that the rule was unsatisfactory. In a similar poll among Canadian psychiatrists, ninety per cent expressed dissatisfaction. GUTTMACHER AND WEIHOFEN, *PSYCHIATRY AND THE LAW* 408 (New York: W. W. Norton and Company, Inc.,

recognized the fact that the rule was under attack, but refused to make any change.³¹ In 1951, the Special Committee on Crime and Psychiatry of the North Carolina Bar Association recommended that the legal test of insanity "should be extended to include diseases which destroy will power and volition and the capacity to control one's conduct."³²

The *Durham* case is undoubtedly a result of this criticism for it overruled the previous tests applied in the District of Columbia.³³ The court of appeals, in reversing the district court by a unanimous decision discarded the old right and wrong rule, saying:

"We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances."³⁴

The new test to be applied by the district court on retrial is simple in its statement:

"An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."³⁵

The mental-cause rule of the *Durham* case is not new in the United States. Eighty-five years ago, in *State v. Pike*,³⁶ the Supreme Court of New Hampshire affirmed a similar rule which is still followed in that state.³⁷ The court of appeals probably used the New Hampshire rule

1952); Speaking of the M'Naghten standards, Dr. Gregory Zilboorg said, "These moralistic criteria are the expression of man's horror of the revolting act of murder, but they are disguised in the formalistic, quasi-metaphysical dress of centuries gone by, which one is asked to accept as a judicial formula of logic and law." ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 17 (New York: Harcourt, Brace, and Company, 1954).

³¹ "We are aware of the criticism of this standard by some psychiatrists and others." *State v. Jenkins*, 208 N. C. 740, 741, 182 S. E. 324, 325 (1935); The court repeated this statement in *State v. Creech*, 229, N. C. 662, 51 S. E. 2d 348 (1949).

³² 30 N. C. L. REV. 25 (1951).

³³ *Durham v. United States*, 214 F. 2d 862 (D. C. Cir. 1954).

³⁴ *Id.* at 874. The irresistible impulse rule was found inadequate "in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test." *Id.* at 874.

³⁵ *Id.* at 875. This test is now the sole legal test for insanity in criminal cases in the District of Columbia, for the circuit court of appeals denied a rehearing en banc on September 10, 1954, and the time limit for filing a writ of certiorari expired October 10, 1954. In the subsequent case of *Stewart v. United States*, 214 F. 2d 879 (D. C. Cir. 1954), the new test was held to be applicable.

³⁶ The trial court of New Hampshire instructed the jury, "that whether there is such a mental disease as dipsomania, and whether defendant had that disease, and whether the killing . . . was the product of such disease, were questions of fact for the jury." The Supreme Court of New Hampshire affirmed this instruction. 49 N. H. 399, 407-408 (1870).

³⁷ The events preceding the New Hampshire case show that particular attention was given to its decision. Chief Justice Doe had voluminous correspondence with Dr. Issac Ray, a leading forensic psychiatrist, concerning responsibility of a mentally disordered person. See: Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 YALE L. REV. 183 (1953).

in formulating its own, for it said, "The rule . . . is not unlike that followed by the New Hampshire court since 1870."³⁸

The application of the rule by the court presents no great problem. The court of appeals' proposed charge to the jury³⁹ suggests the procedure applicable. Evidence is received concerning the mental disease⁴⁰ or the mental defect.⁴¹ This will, of course, include the use of expert witnesses. It is then left to the jury to determine (a) if the defendant had a mental disease or mental defect, and (b) if the criminal act was "caused" by the mental disease or defect. The jury must find both for insanity to be a good defense. The application of the rule is somewhat similar to that applied in tort cases where negligence is involved.⁴²

The function of the expert witness is to describe the mental condition of the accused. No longer does he have to pass upon the very issue of insanity by testifying to the ability of the defendant to distinguish right from wrong.⁴³ The issue of insanity must be determined by the jury from the evidence before it, as it properly should be. This also leaves the psychiatrist free to use the terminology of his profession rather than to try to interpret his diagnoses into legal terms.

Nor is there any greater chance that the defendant can feign insanity under this mental-cause rule. For there are the same two safe-guards provided: the expert witness and the jury. Under the right and wrong rule, the testimony of the expert witness, in effect, decides the outcome of the insanity issue as was demonstrated in the *Durham* case at the trial in the district court. Under the new rule, the expert witness testifies only as to mental condition and the jury determines the issue of responsibility. Thus, if one does not catch the pretense, the other should.

The *Durham* case represents an attempt to get away from a legal

³⁸ *Durham v. United States*, 214 F. 2d 862, 874 (1954).

³⁹ "If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case." *Id.* at 875.

⁴⁰ "We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating." *Ibid.*

⁴¹ "We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease." *Ibid.*

⁴² *Henderson v. Henderson*, 239 N. C. 484, 490, 80 S. E. 2d 383, 385 (1954), which states law of proximate cause for negligence.

⁴³ STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE 238.

definition of insanity. The authorities in the field of psychiatry concede that insanity cannot be defined.⁴⁴ The attempts of the courts to reach a legal definition of that state of mental disorder which renders a crime excusable have met with some difficulties because of the different interpretations of the terminology used and the difficulty of translating medical testimony into the legal terms used in the tests. The *Durham* case presents no standard to which the court may point and attempt to compare with the mind of the defendant. It is unnecessary under this test for the expert witness to attempt to translate the terms of his profession into legal concepts.

Perhaps the *Durham* case also represents a more humanitarian approach to the problem of the mentally disordered criminal, for rehabilitation rather than punishment could be stressed under this rule.⁴⁵ Take, for example, the person with a psychopathic personality. He is able to distinguish right from wrong, but has no control over his will due to emotional instability. He lives for the present, not the future, and any present impulse will control over the threat of possible punishment in the future.⁴⁶ The court of appeals speaks of the type of "mental illness characterized by brooding and reflection."⁴⁷ That is the person who knows that society has declared an act to be wrong, but after much deliberation decides in his warped manner of thinking that it is better to commit the wrong act.

It would serve no useful purpose to send this type of mentally ill prisoner off to prison to become even more unbalanced and antisocial. An eminent psychiatrist has said,

"The belief that society serves the common and individual good by a system of rigid punishment has never been fully justified by history, and its persistence looks more and more like superstitious conviction based on fact."⁴⁸

⁴⁴ GUTTMACHER AND WEIHOFEN, *PSYCHIATRY AND THE LAW* 419-420 (New York: W. W. Norton and Company, Inc., 1952).

⁴⁵ A finding of insanity by the jury would not result in the complete discharge of the prisoner, instead he should be committed to a hospital for treatment. This would entail having available adequate facilities and personnel to accommodate such patients. Unfortunately North Carolina appears unwilling to provide adequately for the criminally insane as was demonstrated by the recent defeat of H. R. 48 dealing with sexual psychopaths. Lack of facilities to handle those committed under the proposed statute would seem to be the reason for its defeat.

⁴⁶ WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 23 (Buffalo: Dennis and Co., Inc., 1954).

⁴⁷ *Durham v. United States*, 214 F. 2d 862, 874 (D. C. Cir. 1954).

⁴⁸ Dr. Zilboorg believes that society is too concerned with the idea of seeking revenge against the violator of the law. He agrees that a criminal should be punished for his crimes when punishment would be effective, but in the case of mentally ill prisoners, punishment has little or no effect as a deterrent of future crimes. ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 97 (New York: Harcourt, Brace, and Company, 1954); "Punishment, in such instances, is not useful as a means of dissuading the offender from repeating his unlawful act. . . ." Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. of PA. L. REV. 378, 379 (1952).

A program of rehabilitation based on psychiatric treatment could cure the accused in many cases, and by doing this, more serious crimes in the future would be prevented. It is society, not the defendant, which will receive the chief benefits from this rule.

In a dissenting opinion in a case in the United States Circuit Court of Appeals for the Third Circuit, there was a statement suggestive of the North Carolina situation,

"The rule of M'Naghten's case was created by decision. Perhaps it is not too much to think that it may be altered by the same means."⁴⁹

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Criminal Law—Improper Court Response to Spontaneous Jury Inquiry as to Pardon and Parole Possibilities

Does a jury which has "unbridled discretion" to recommend life imprisonment in a capital case have a right to consider what effect parole and pardon may have upon that sentence? North Carolina first answered this question in *State v. Dockery*,¹ where a private prosecutor referred to parole possibilities in his argument before the jury. In reversing, the North Carolina Supreme Court held that such argument was prejudicial and directly in conflict with the 1949 statutory proviso which granted to juries the right to recommend life imprisonment in capital cases.² Recently, in *State v. Conner*,³ the problem arose in a different manner. Here, the jury spontaneously returned to the court room after having deliberated for some time, and one of the jurors asked the court the following question: "Will the defendant be eligible for parole if given life imprisonment?" The court replied without elaboration, "Gentlemen, I cannot answer that question." The supreme court held that the presiding judge was correct in refraining from commenting on defendant's eligibility for parole, because such matters are deemed in law to be irrelevant to the issues involved in the case and prejudicial to the accused. The court granted a new trial, however, on the ground that once such a question was propounded, it became the duty of the presiding judge to positively charge the jury to put the question and matters relating thereto out of their minds.

The courts have long been divided as to the permissibility of an explanation, in response to queries from the jury, of the possible effect of

⁴⁹ *United States v. Baldi*, 192 F. 2d 540, 568 (3rd Cir. 1951). The dissenting judges were Biggs, McLaughlin, and Staley.

¹ 238 N. C. 222, 77 S. E. 2d 664 (1953).

² N. C. GEN. STAT. § 14-17 (1953). The 1949 proviso referred to above by the court was added to this section by the 1949 Session Laws of North Carolina, Chapter 299, section 1.

³ 241 N. C. 468, 85 S. E. 2d 584 (1955).