HISTORY OF THE

INSANITY DEFENSE

IN NEW YORK STATE

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by

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On January 20, 1843, Daniel M'Naghten, while attempting to assassinate the English Prime Minister, Sir Robert Peel, instead shot and mortally wounded the Prime Minister's private secretary, Edward Drummond. At his trial M'Naghten was found not guilty by reason of insanity.

Although Mr. Drummond may disagree, the case of Daniel M'Naghten was to have legal ramifications far beyond that of a murdered private secretary. M'Naghten's not guilty verdict produced an uproar in England, and, at the command of Queen Victoria, the House of Lords sought to establish what the common law was in regard to the insanity defense. They summoned fifteen judges and asked them five involved questions as to what the insanity defense should consist of. Speaking for fourteen of the judges (one declined to answer), Judge Tyndal, who had delivered the charge to the jury in the M'Naghten case, stated the following:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[1]

This enunciation was to become known as the M'Naghten rule (or test) for criminal insanity, and was to remain the basis, in varied forms, for the insanity defense for much of the English-speaking world (including New York State) for over a hundred years.

Before M'Naghten, English common law dictated that to be judged innocent by reason of insanity, the jury should ascertain that the defendant could not distinguish good from evil. The following quotations are taken from cases considered to be the basis for this rule: "If he ... could not distinguish good and evil ... he could not be guilty of any offence against any law whatsoever; ... it must be a man who is totally deprived of his understanding and memory, and does not know what he is doing, no more than an infant, than a brute, or a wild beast ..."[2]; "The single question was whether, when he committed the offense charged upon him, he had sufficient understanding to distinguish between good from evil ..."[3]; and "The single question is, whether the prisoner was laboring under that species of insanity, which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime."[4]

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Before M'Naghten, New York courts followed the established English common law. Two early cases from New York City are examples of this principle: "[N]o man could be held responsible for an act committed while deprived of his reason; ... The principal subject of inquiry, therefore, in this case, is whether the prisoner, at the time he committed this offence, had sufficient capacity to discern good from evil;"[5] and "It did not necessarily follow ... that the act of which he had been charged was the result of insanity, because from its nature, it was horrid and unnatural. The only question on this part of the case is, whether at the time he committed the offence, he was capable of distinguishing good from evil?"[6]

The earliest statute for the insanity defense in New York State is found in the 1829 Revised Statutes, Part IV, Chap. 1, Title VII, Sec. 2, which stated: "No act done by a person in a state of insanity can be punished as an offence; ..." What was missing, of course, was a definition of insanity. Probably as capable of recognizing a can of worms as the next man, the explanatory note of the revisers merely states: "New: a leading principle deemed worthy of being explicitly declared."[7]

An interpretation of this early statute, and its basis in common law, is contained in State Supreme Court Judge Samuel Beardsley's 1847 ruling. While explaining the English principle that a defendant could be found innocent by reason of insanity only if he was insane at the time of the commission of the act, he added:

> Partial insanity is not, by that [i.e. common] law, necessarily an excuse for crime, and can only be so where it deprives the party of his reason in regard to the act charged to be criminal. Nor, in my judgment, was the statute on this subject intended to abrogate or qualify the common rule law ... I interpret it as I should have done if the words had been "no act done by a person in a state of insanity, in respect to such act, can be punished as an offence." The act, in my judgment, must be an insane act, and not merely the act of an insane person. This was plainly the rule of law before the statute was passed, and, although that took place more than sixteen years since, I am not aware that it has, at any time, been held or intimated by any judicial tribunal, that the statute had abrogated, or in any respect modified this principle of the common law.[8]

The first time the M'Naghten rule was applied in New York State was Circuit Judge John Edmond's charge to the jury in People v. Klein, 1 Edm. Sel. Cases 13, 25 (1845): "[T]o establish a defense on the ground of insanity, it must be clearly proved that at the time of committing 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." Although not acknowledged, Judge Edmond's charge was taken literally from Chief Judge Tyndal's explanation in M'Naghten.

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Although People v. Kleim was the first New York case to accept the M'Naghten rule, it was up to a higher court to declare M'Naghten the rule for insanity defenses in the State. This was admitted, in fact, by Judge Edmonds in his explanatory note to his Kleim decision: "Hence it was that I made the examination of the rule, and stated the result as contained in my charge. I do not mean to be understood as saying that I have settled the rule. I have but announced an onward step, and it remains for subsequent adjudications to say whether it shall be sustained." (at p. 34). Probably the case which established M'Naghten as the rule in New York was Judge Beardsley's decision in Freeman v. People (at p. 28). This was later reaffirmed in Wills v. People, 32 N. Y. 715 (1865) and Flanagan v. People, 52 N. Y. 467 (1873).

Until the State's first comprehensive insanity defense statute was passed in 1881, what constituted insanity continued to rest on judicial opinion. Two such opinions established that a momentary loss of temper was not sufficient for an insanity defense: "[T]he insanity which was to excuse crime must be not the mere impulse of passion, an idle, frantic humor, or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind;"[9] and "The judge instructed the jury, in effect, that an irritable temper, and an excitable disposition of mind did not constitute insanity; ... The general correctness of the position laid down cannot be questioned."[10]

In a reaction to the M'Naghten rule, some states adopted the "irresistible impulse" test, which stated that even though the defendant knew what he did was wrong when he committed the crime, he could still be judged innocent by reason of insanity if he was governed by an impulse which he could neither control nor resist. The Court of Appeals rejected this test in an 1873 decision:

> The argument proceeds upon the theory that there is a form of insanity in which the faculties are so disordered and deranged that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates but cannot avoid.
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> Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law.[11]

See also People v. Waltz, 50 How. Prac. 204 (1874); People v. Coleman, 1 N. Y. Cr. R. 1 (1881); Walser v. People, 88 N. Y. 81 (1882); Casey v. People, 31 Hun. 158 (1883); People v. Taylor, 138 N. Y. 398, 34 N. E. 275 (1893), and People v. Carpenter, 102 N. Y. 238, 250, 6 N. E. 584 (1896).

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In an explanatory note to subdivision 4, the commissioners explained that it was based on understood common law, citing M'Naghten. In addition, the note suggests that if the Legislature wished to include the concept which we today would probably call "diminished responsibility" (referred to in the note as "any mental aberration, any monomania however limited in subject"), it might wish to eliminate the last portion of subdivision 4 beginning with "upon proof."[13]

The Penal Code was never adopted by the Legislature, nor was a bill even introduced. After the Commission submitted its final report in 1865 (apparently not owned by the State Library), a resolution was adopted in the Assembly appointing a committee of three to consider amendments and possible adoption.[14] In 1866, due to the Committee's pressing work load and the length of the proposed Code, the Assembly passed a resolution to postpone consideration for another year, in the meantime conferring with the Senate and Aseembly Judiciary Committees and the remaining commissioners (Mr. Noyes died in 1865 just before the final draft of the Penal Code was submitted to the Legislature) concerning possible amendments.[15] After 1866 all references to the proposed Penal Code cease. Whether the reason was the death of Mr. Noyes, who was mainly responsible for the drafting of the Penal Code,[16] (the Commissioners had also undertaken responsibility for the Political Code and the Civil Code), or political and/or technical considerations is a matter for conjecture.

Finally, in 1879, at the request of the Commissioners to Revise the Statutes,[17] a Senate Committee on Revision of the Statutes submitted a draft Penal Code to the Legislature. The insanity defense was contained in Sections 20, 21, and 23.

> Sec. 20. An act done by a person who is an idiot, imbecile, lunatic, insane, or of unsound mind is not a crime ...

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12 New York (State) Commissioners of the Code. Draft of a Penal Code for the State of New York, 1864, pp. 8-9

13 op. cit., p. 9

14 New York Assembly Journal, 1865, pp. 1091,1441

15 New York Assembly Journal, 1866, pp. 1113-1114

16 Field, Henry Martyn, The Life of David Dudley Field, 1898, p. 78

17 Senate Document 1878 No. 16, p. 10

> Sec. 21. A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, or of unsound mind, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect as either
>
> 1. Not to know the nature and quality of the act he was doing; or
>
> 2. Not to know that the act was wrong.
>
> ...
>
> Sec. 23. A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defence to a prosecution therefor.[18]

In 1881 the Penal Code was enacted as L.1881, Chap. 676, with the insanity defense sections unchanged from the 1879 draft. L.1882, Chap. 384 deleted the phrase "or of unsound mind" from Sections 20 and 21. In 1909, under a general consolidation of all the State's statutes, Sections 20 and 21 were combined into a new Section 1120 of the Penal Law, and Section 23 became Section 34. The only change in the 1909 consolidation was the deletion of the word "either" before subdivisions 1 and 2. Other than that seemingly innocuous amendment, there were no revisions to the State's insanity defense for more than eighty years after its 1880 enactment and 1881 amendment. More important, the basic concept had not been changed since Chief Judge Tyndal's explanation for his M'Naghten decision in 1843. Any changes that were made came from the bench, and even these were limited by the strict confines of M'Naghten.

The difficulty which the Commissioners of the Code foresaw in its explanatory note to its 1864 draft Penal Code proposal, i.e. the lack of a "diminished responsibility" option as well as the State's rejection of the irresistable impulse test, was reflected in an 1893 opinion by Court of Appeals Associate Judge Isaac H. Maynard:

> Partial insanity, or incipient insanity, is not sufficient, if there is still the ability to form a correct perception of the legal quality of the act and to know that it is wrong. If, when a specific act is contemplated, he has the power to know whether it is wrong to do it and right to refrain from doing it, the law presumes that he has also the power to choose between the right and the wrong course of action, and will not permit either courts or juries to speculate as to its possible non-existence. Eminent alienists criticize the rule of the Penal Code, because it excludes consideration of the question, whether the accused possessed sufficient power of self-restraint to forbear the commission of an act, which he clearly perceived to be criminal. They contend that it is unreasonable and unjust to punish a human

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18 Senate Special Committee on the Revision of the Statutes, Penal Law and Criminal Procedure, 1879, p. 5

> being for that which he does not have the power to refrain from doing, but if such a result may follow, which we by no means admit, it is an argument to be addressed to the body which makes the law, and not to the tribunal whose sole duty it is to construe, apply, and enforce it.[19]

The definition of insanity was explicitly explained in People v. Carlin, 194 N. Y. 448, 87 N. E. 805 (1909): "The phrase 'defect of reason' in the statute means disease of the mind, and a person who has committed an act otherwise unquestionably criminal may not be relieved from the consequences of that act where insanity is relied upon as the sole defense, unless at the time of the commission of the act he was suffering from some disease of the mind."

One of the most important interpretations of the State's insanity defense in the first half of the twentieth century was rendered in 1915 by Court of Appeals Judge Benjamin N. Cardozo. At issue was what the word "wrong" in subdivision 2 encompassed. After an extensive discussion of early English and American common law on the subject, Judge Cordozo reasoned:

> The definition here propounded [i.e. M'Naghten] is the one that has been carried forward into our statute. The judges expressly held that a defendant who knew nothing of the law would none the less be responsible if he knew that the act was wrong, by which, therefore, they must have meant, if he knew that it was morally wrong. Whether he would be held responsible if he knew that it was against the law, but did not know it to be morally wrong, it is a question that was not considered. In most cases, of course, knowledge that an act is illegal will justify the inference of knowledge that it is wrong. But none the less it is the knowledge of wrong, conceived of as moral wrong, that seems to have been established by that decision as the controlling test ... There is nothing to justify the belief that the words right and wrong, when they became limited by M'Naghten's case to right and wrong of the particular act, cast off their meaning as terms of morals, and became terms of pure legality.[20]

Judge Cardozo finally concluded: "We hold, therefore, that there are times and circumstances in which the word 'wrong' as used in the statutory test of responsibility ought not to be limited to legal wrong."[21]

In the same decision, Judge Cardozo digressed to lay to rest the use of the "irresistible impulse" test in New York State: "Whatever the views of alienists and jurists may be, the test in this state is prescribed by statute, and there can be no other ..."[22]

One of the criticisms of the New York law, and the M'Naghten rule in general, was its severity and inelasticity because of its right vs. wrong requirement. This is no more in evidence than in the decision in People v. Moran, 249 N. Y. 179, 163 N. E. 553 (1928): "The defendant is a psychopathic inferior; a man of low and unstable mentality, and, in all probability,

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19 People v. Taylor, 138 N. Y. 398, 34 N. E. 275 (1893)

20 People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915)

21 op. cit., p. 339

22 op. cit., p. 339

a sufferer from epilepsy ... It is the law of New York, made binding upon the court by the enactment of a statute, that a youth of that order of mentality shall suffer the penalty of death if guilty of the crime of murder."

In 1936 Court of Appeals Judge Leonard C. Couch criticized the trial judge's charge to the jury because it was not emphasized that "... a defect of reason which inhibited a knowledge either of the nature and quality of the act or that the act was wrong, excused a person from criminal liability."[23] In other words, the word "either" which had been deleted from the 1909 Penal Law consolidation was now restored, and it became incumbent on the People to prove that a defendant knew the nature and quality of his act, and that the act was wrong, to be convicted; conversely, a defendant had only to convince the jury that one of the above conditions was applicable to be found innocent by reason of insanity. See also People v. Kelly, 302 N. Y. 512, 99 N. E. 2d 552 (1951).

It was perhaps inevitable that a law that had basically remained unchanged since 1843 would be the target of criticism in the twentieth century. The chances of this increase when one considers the vagueness of the concept of insanity and the advances made by medical science in its detection, treatment, and labeling since Daniel M'Naghten killed Mr. Drummond. One of the most prominent to make his objections heard was Judge Benjamin Cardozo, the author of the People v. Schmidt decision discussed earlier, and generally considered one of the most respected jurists in New York State history. Speaking before the New York Academy of Medicine on November 1, 1928, Judge Cardozo, who at that time was Chief Judge of the State's Court of Appeals, stated:

> Physicians time and again rail at the courts for applying a test of mental responsibility so narrow and inadequate. There is no good in railing at us. You should rail at the legislature. The judges have no option in the matter. They are bound, hand and foot, by the shackles of a statute. Every one concedes that the present definition of insanity has little relation to the truths of mental life ... Of this at least I am persuaded: the medical profession of the state, the students of the life of the mind in health and in disease, should combine with students of the law in a scientific and deliberate effort to frame a definition, and a system of administration, that will combine efficiency with truth. If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method is neither good morals nor good science nor good law.[24]

In appearing before the British Royal Commission on Capital Punishment, U. S. Supreme Court Justice Felix Frankfurther testified:

> I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated ... I think that to have rules which cannot rationally be justified except

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23 People v. Sherwood, 271 N. Y. 427, 3 N. E. 2d 581 (1936)

24 Cardozo, Benjamin N., "What Medicine Can Do For Law," in Selected Writings of Benjamin Nathan Cardozo, edited by Margaret E. Hall, 1947

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> Sec. 21. A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, or of unsound mind, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect as either
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> 1. Not to know the nature and quality of the act he was doing; or
>
> 2. Not to know that the act was wrong.
> ...
>
> Sec. 23. A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defence to a prosecution therefor.[18]

In 1881 the Penal Code was enacted as L.1881, Chap. 676, with the insanity defense sections unchanged from the 1879 draft. L.1882, Chap. 384 deleted the phrase "or of unsound mind" from Sections 20 and 21. In 1909, under a general consolidation of all the State's statutes, Sections 20 and 21 were combined into a new Section 1120 of the Penal Law, and Section 23 became Section 34. The only change in the 1909 consolidation was the deletion of the word "either" before subdivisions 1 and 2. Other than that seemingly innocuous amendment, there were no revisions to the State's insanity defense for more than eighty years after its 1880 enactment and 1881 amendment. More important, the basic concept had not been changed since Chief Judge Tyndal's explanation for his M'Naghten decision in 1843. Any changes that were made came from the bench, and even these were limited by the strict confines of M'Naghten.

The difficulty which the Commissioners of the Code foresaw in its explanatory note to its 1864 draft Penal Code proposal, i.e. the lack of a "diminished responsibility" option as well as the State's rejection of the irresistable impulse test, was reflected in an 1893 opinion by Court of Appeals Associate Judge Isaac H. Maynard:

> Partial insanity, or incipient insanity, is not sufficient, if there is still the ability to form a correct perception of the legal quality of the act and to know that it is wrong. If, when a specific act is contemplated, he has the power to know whether it is wrong to do it and right to refrain from doing it, the law presumes that he has also the power to choose between the right and the wrong course of action, and will not permit either courts or juries to speculate as to its possible non-existence. Eminent alienists criticize the rule of the Penal Code, because it excludes consideration of the question, whether the accused possessed sufficient power of self-restraint to forbear the commission of an act, which he clearly perceived to be criminal. They contend that it is unreasonable and unjust to punish a human

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18 Senate Special Committee on the Revision of the Statutes, Penal Law and Criminal Procedure, 1879, p. 5

being for that which he does not have the power to refrain from doing, but if such a result may follow, which we by no means admit, it is an argument to be addressed to the body which makes the law, and not to the tribunal whose sole duty it is to construe, apply, and enforce it.[19]

The definition of insanity was explicitly explained in People v. Carlin, 194 N. Y. 448, 87 N. E. 805 (1909): "The phrase 'defect of reason' in the statute means disease of the mind, and a person who has committed an act otherwise unquestionably criminal may not be relieved from the consequences of that act where insanity is relied upon as the sole defense, unless at the time of the commission of the act he was suffering from some disease of the mind."

One of the most important interpretations of the State's insanity defense in the first half of the twentieth century was rendered in 1915 by Court of Appeals Judge Benjamin N. Cardozo. At issue was what the word "wrong" in subdivision 2 encompassed. After an extensive discussion of early English and American common law on the subject, Judge Cordozo reasoned:

> The definition here propounded [i.e. M'Naghten] is the one that has been carried forward into our statute. The judges expressly held that a defendant who knew nothing of the law would none the less be responsible if he knew that the act was wrong, by which, therefore, they must have meant, if he knew that it was morally wrong. Whether he would be held responsible if he knew that it was against the law, but did not know it to be morally wrong, it is a question that was not considered. In most cases, of course, knowledge that an act is illegal will justify the inference of knowledge that it is wrong. But none the less it is the knowledge of wrong, conceived of as moral wrong, that seems to have been established by that decision as the controlling test ... There is nothing to justify the belief that the words right and wrong, when they became limited by M'Naghten's case to right and wrong of the particular act, cast off their meaning as terms of morals, and became terms of pure legality.[20]

Judge Cardozo finally concluded: "We hold, therefore, that there are times and circumstances in which the word 'wrong' as used in the statutory test of responsibility ought not to be limited to legal wrong."[21]

In the same decision, Judge Cardozo digressed to lay to rest the use of the "irresistible impulse" test in New York State: "Whatever the views of alienists and jurists may be, the test in this state is prescribed by statute, and there can be no other ..."[22]

One of the criticisms of the New York law, and the M'Naghten rule in general, was its severity and inelasticity because of its right vs. wrong requirement. This is no more in evidence than in the decision in People v. Moran, 249 N. Y. 179, 163 N. E. 553 (1928): "The defendant is a psychopathic inferior; a man of low and unstable mentality, and, in all probability,

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19 People v. Taylor, 138 N. Y. 398, 34 N. E. 275 (1893)

20 People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915)

21 op. cit., p. 339

22 op. cit., p. 339

a sufferer from epilepsy ... It is the law of New York, made binding upon the court by the enactment of a statute, that a youth of that order of mentality shall suffer the penalty of death if guilty of the crime of murder."

In 1936 Court of Appeals Judge Leonard C. Couch criticized the trial judge's charge to the jury because it was not emphasized that "... a defect of reason which inhibited a knowledge either of the nature and quality of the act or that the act was wrong, excused a person from criminal liability."[23] In other words, the word "either" which had been deleted from the 1909 Penal Law consolidation was now restored, and it became incumbent on the People to prove that a defendant knew the nature and quality of his act, and that the act was wrong, to be convicted; conversely, a defendant had only to convince the jury that one of the above conditions was applicable to be found innocent by reason of insanity. See also People v. Kelly, 302 N. Y. 512, 99 N. E. 2d 552 (1951).

It was perhaps inevitable that a law that had basically remained unchanged since 1843 would be the target of criticism in the twentieth century. The chances of this increase when one considers the vagueness of the concept of insanity and the advances made by medical science in its detection, treatment, and labeling since Daniel M'Naghten killed Mr. Drummond. One of the most prominent to make his objections heard was Judge Benjamin Cardozo, the author of the People v. Schmidt decision discussed earlier, and generally considered one of the most respected jurists in New York State history. Speaking before the New York Academy of Medicine on November 1, 1928, Judge Cardozo, who at that time was Chief Judge of the State's Court of Appeals, stated:

> Physicians time and again rail at the courts for applying a test of mental responsibility so narrow and inadequate. There is no good in railing at us. You should rail at the legislature. The judges have no option in the matter. They are bound, hand and foot, by the shackles of a statute. Every one concedes that the present definition of insanity has little relation to the truths of mental life ... Of this at least I am persuaded: the medical profession of the state, the students of the life of the mind in health and in disease, should combine with students of the law in a scientific and deliberate effort to frame a definition, and a system of administration, that will combine efficiency with truth. If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method is neither good morals nor good science nor good law.[24]

In appearing before the British Royal Commission on Capital Punishment, U. S. Supreme Court Justice Felix Frankfurther testified:

> I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated ... I think that to have rules which cannot rationally be justified except

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23 People v. Sherwood, 271 N. Y. 427, 3 N. E. 2d 581 (1936)

24 Cardozo, Benjamin N., "What Medicine Can Do For Law," in Selected Writings of Benjamin Nathan Cardozo, edited by Margaret E. Hall, 1947

> by a process of interpretation which distorts and often practically nullifies them, and to say the corrective process comes by having the Governor of a State charged with the responsibility of deciding when the consequences of the rule should not be enforced, is not a desirable system ... I think the M'Naghten Rules are in large measure shams. That is a strong word, but I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say "We'll just juggle them ..."[25]

Probably the most sustained criticism of New York's M'Naghten rule was contained in a 1957 decision by Westchester County Judge Harold T. Gerrity. One excerpt should offer some evidence of his dissatisfaction: "The most superficial familiarity with some of the problems of mental illness and criminal responsibility renders the statutory definition untenable on any medical or logical basis. The definition was taken verbatim from the M'Naghten case and has been preserved intact for more than a century as if it epitomized man's knowledge and wisdom in this field."[26]

Similar reservations concerning Section 1120 were expressed by Judge Stanley Fuld of the Court of Appeals in a dissenting opinion in People v. Wood, 12 N. Y. 2d 69, 236 N. Y. S. 2d 44, 187 N. E. 2d 116 (1962): "[I] cannot refrain from observing that the result demonstrates the unreality, if not the invalidity, of our present standards for determining criminal responsibility. This case serves to confirm the view, frequently expressed over the years, that section 1120 of the Penal Law should be amended and the 'right-wrong' test which now controls our decisions changed."

National dissatisfaction with the M'Naghten rule was crystallized on July 1, 1954, when David L. Bazelon, Judge for the District of Columbia Circuit for the U. S. Court of Appeals, rendered his decision in Durham v. United States, 214 F. 2d 862. Judge Bazelon declared the M'Naghten rule invalid in the District of Columbia circuit, and replaced it with a version of the New Hampshire test (State v. Pike, 49 N. H. 399, and State v. Jones, 50 N. H. 369) promulgated by Judge Doe in 1870 and 1871 (excerpts from the Durham, Pike, and Jones decisions are contained in Appendix D of this monograph). Although the Durham decision generated as much controversy as M'Naghten, it was adopted only in the State of Maine (it was rejected in New York State by both the Foster and Bartlett commissions; see later discussion) and in 1972 was replaced by the ALI rule (United States v. Brawner, 471 F. 2d 969). Nevertheless, as an alternative to M'Naghten and as a focal point for a discussion of the M'Naghten rule in general, Judge Bazelon's Durham decision was a significant milestone in reforming the insanity defense.

An event of greater importance to New York State and the insanity defense per se was the April, 1955 publication of the American Law Institute's Model Penal Code, Tentative Draft No. 4. Included was the ALI's proposed insanity defense:

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25 Great Britain. Royal Commission on Capital Punishment. Report 1949-1953, p. 102.

26 People v. Johnson, 13 Misc. 2d 376, 169 N. Y. S. 2d 217 (1957)

> Section 4.01 Mental Disease or Defect Excluding Responsibility
>
> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
>
> (2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.[27]

Also included was an alternative definition for insanity and a lengthy discussion which explained the Institute's rejection of M'Naghten, Durham, irresistible impulse, and the proposal of Great Britain's Royal Commission on Capital Punishment, as well as justification for its own proposal (pp. 156-192).

Since the Institute's formal adoption of the rule in 1962, it has been the most popular alternative to the M'Naghten rule in the United States. Although accepted in toto in New York State by the Study Committee of the Governor's Conference on the Defense of Insanity and the Temporary State Commission to Revise the Penal Law and Criminal Code, due to various objections the State's final test for insanity that was finally enacted in 1965 significantly altered the ALI rule (see discussion below).

The most important crime to affect New York's insanity defense statute since M'Naghten killed Drummond occurred in the early morning hours of May 24, 1953, when an 18-year old college freshman named Norman Horton fatally stabbed his sleeping father in the back. At his trial Horton's defense of innocence by reason of insanity did not hold up, and he was convicted of murder. When the case went to the Court of Appeals a majority of the Court affirmed that, under Section 1120 of the Penal Law, he did know the nature and quality of his act and that it was wrong, and that his conviction should stand.[28] However, in a dissenting opinion, Judge John VanVoorhis, commenting on the trial judge's repeated disallowing of psychiatric testimony that Horton was a schizophrenic, stated:

> The development of psychiatry appears to have transferred the main professional attention from disorganization of the intellect to emotional disturbances. The legal definition remains focused upon

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27 American Law Institute, Model Penal Code : Tentative Draft No. 4, April 1955, p. 27

28 People v. Horton, 308 N. Y. 1, 12, 123 N. E. 2d 609 (1954)

> intellectual disorientation, that is to say, upon whether a defendant has recognized in his mind that the act was contrary to law and to accepted standards of morality, regardless of how distorted his own standards of behaving may have been due to emotional disintegration. It is now settled, however, that mental disease is relevant and necessary in order to establish the legal defense of insanity, by showing that mental disease has been the cause of impairment of a defendant's intellectual faculties to an extent such that he failed to understand the nature and quality of his act or to know that it was wrong.[29]

On December 24, 1954, a Governor's Executive Prison Commission appointed to examine the mental condition of condemned convicts certified that Horton was a paranoid schizophrenic. On January 11, 1955, Governor Averell Harriman held a clemency hearing to consider commutation of Horton's execution, scheduled for January 17. The next day, after a personal interview between the Governor and Horton in the Governor's Counsel's office, Mr. Harriman decided to go beyond the State's M'Naghten rule and issued an executive order commuting Horton's sentence to life imprisonment. The Governor's views on the State's insanity defense are reflected in the following excerpt from that executive order:

> The case presents clearly the conflict between the legal definition of insanity and the medical and psychiatric concepts. On the one hand we have a criminal who obviously was aware of the nature and quality of his act, of what he was doing and the fact that it was wrong. On the other hand, we have a confused boy, beset by terrible guilt feelings, resulting from physical and mental abnormalities which he himself is and was unable to explain and which impelled him to the commission of the crime.[30]

On October 14, 1957, a conference was held under the auspices of the State Department of Mental Hygiene and with the cooperation of the Governor's Counsel to discuss the State's statutes dealing with the criminally insane. After the meeting Governor Harriman designated a committee, headed by Dr. Richard V. Foster, to make a study of the State's insanity defense and report back to the full Conference. An indication that the trial of Norman Horton was an influential, if not overriding, factor in the convening of the Conference can be seen in a comparison of the Governor's statement concerning the Conference and his executive order commuting Horton's execution:

> Application of [the M'Naghten rule] results in the law treating an individual as sane even though he may suffer from mental defects which affect his otherwise rational activities ... At present, criminal trials in which a defense of insanity is raised are marked by a conflict in testimony between psychiatrists who rely on the one hand on the McNaughton rule and on the other upon the standards set by medical and psychiatric science.[31]

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29 op. cit., p. 19

30 Public Papers of Governor Averell Harriman, 1955, p. 500

31 Public Papers of Governor Averell Harriman, 1957, pp. 1070-1071

On May 29, 1958 Governor Harriman released the Foster Committee's Interim Report (no final report was ever issued). The report summarized the general dissatisfaction with the M'Naghten rule in New York State and other jurisdictions, and specifically discussed three areas in which the rule was felt to be deficient: the meaning of the word "know" when applied to persons suffering from a serious mental disease; the restriction of inquiry to the actor's cognitive capacity; and the clause requiring total mental incapacitation.[32] In its place the Committee recommended adoption of the rule contained in the ALI's 1955 proposal. Specifically, the Committee proposed that Section 34 be repealed and section 1120 be amended as follows:

> (1) A person may not be convicted of a crime for conduct for which he is not responsible.
>
> (2) A person is not responsible for criminal conduct, if at the time of such conduct as a result of mental disease or defect, he lacks substantial capacity:
>
> (a) to know or to appreciate the wrongfulness of his conduct; or
>
> (b) to conform his conduct to the requirements of law.
>
> (3) The terms "mental disease or defect" do not include an abnormality manifested only be repeated criminal or otherwise antisocial conduct.[33]

Note that in subdivision (2) (a) the Foster Committee replaced the word "criminality" in the ALI rule with the word "wrongfulness." When the Institute published its official model penal code in 1962, it inserted "[wrongfulnes]" after "criminality." In its explanation, the Institute stated that it "... does not disapprove the modification of the formulation by a number of groups that have considered it, including the Governor's Committee on the Insanity Defense in New York State."[34]

In 1961 Assemblyman Richard Bartlett sponsored Assembly Intro. 750, Print 3371, incorporating the proposal of the Foster Committee. After passing the Assembly by a wide margin, it died in the Senate Codes Committee. There is no record indicating why A.750 met with such little success in the Senate, although a New York Times article indicated that the bill's critics charged that it would lead to an increase in "not guilty by reason on insanity" verdicts.[35]

In 1963 the Temporary Commission on Revision of the Penal Law and Criminal Code (named the Bartlett Commission after its chairman, Assemblyman Richard Bartlett) proposed a bill[36] repealing Section 34 and amending Section 1120 which was very similar to the 1961 bill sponsored by Assemblyman Bartlett, incorporating

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32 Public Papers of Governor Averell Harriman, 1958, pp. 1020-1021

33 op. cit. pp. 1022-1023

34 American Law Institute, Model Penal Code : Proposed Official Draft, 1962, p. 66

35 New York Times, March 9, 1961, p. 19, col. 3

36 1963 Assembly Intro. 3439, Print 3509, 5671

the ALI/Foster Committee proposals. According to the Commission's 1963 Interim Report, the bill was recommended by the State's Department of Mental Hygiene and the Committee on Mental Hygiene of the New York State Bar Association and opposed by the District Attorneys' Association of New York State.[37] After the bill was amended to make insanity an affirmative defense, it advanced to the Assembly Rules Committee and was withdrawn by Assemblyman Bartlett at the request of the State District Attorneys' Association.[38]

In 1965, after consulting with the District Attorneys' Association, prosecutors, and leading psychiatrists, a bill was introduced which reworded subdivision 1 (a) of the 1963 bill and eliminated subdivision 1 (b) and 2.[39] The bill was enacted as L.1965, Chap. 593, and Section 1120 now read: "A person is not criminally responsible for conduct if, at the time of such conduct as a result of mental disease or defect, he lacks substantial capacity to know or appreciate either: (a) The nature and consequence of such conduct : or (b) That such conduct was wrong." The reasons for the Bartlett Commission's partial abandonment of the ALI rule were explained in its 1965 Interim Report:

> This formulation [i.e. Section 60.05 of the 1964 study bill] was vigorously opposed by the district attorneys of the state on the ground that subdivision 1 (b) was too broad and would tend to exempt from criminal liability the so-called sociopath or psychopath. The prosecutors were not sufficiently reassured by the exclusion provided in subdivision 2 of the section."[40]

Further commentary on Chapter 593 can be obtained from the Governor's Bill Jacket for that statute.

Later in the 1965 session a complete revision of the Penal Law was enacted as L.1965, Chap. 1030. The newly revised Section 1120 was renumbered Section 30.05 and a new subdivision 2 was added, making insanity a plain, rather than an affirmative, defense. Although there is no evidence of legislative intent for subdivision 2, Arnold D. Hechtman's Practice Commentary in West's McKinney's Consolidated Laws of New York Annotated states that it is merely a restatement of the common law under old Section 1120, citing People v. Kelly, 302 N. Y. 512, 517, 99 N. E. 2d 552. For an extended discussion of this issue, see Judge Jacob D. Fuchsberg's majority decision in People v. Silver, 33 N. Y. 2d 915, 310 N. E. 2d 520 (1974).

The differences between the State's old M'Naghten rule and its present modified ALI rule were examined in two Appellate Division cases:

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37 New York (State) Temporary Commission to Revise the Penal Law and Criminal Code, Second Interim Report, 1963, p. 25.

38 New York (State) Temporary Commission to Revise the Penal Law and Criminal Code, Third Interim Report, 1964, p. 15.

39 New York (State) Temporary Commission to Revise the Penal Law and Criminal Code, Fourth Interim Report, 1965, pp. 15-16.

40 op. cit. p. 15

In charging on this subject, on six occasions the court instructed the jury that the People must prove that the defendant knew or appreciated the nature and consequences of his conduct and that it was wrong ... But where the court on six occasions virtually charged the rejected M'Naghten rule, it can hardly be said that the law on this subject was properly explained to the jury ... [T]he legislative history of this subject, the efforts made to change the prior rule in this field, known as the M'Naghten rule, and the studies to the Legislature which led to the amendment of the law ... constrain us to require that a charge of insanity follow the revised statute with understandable clarity.

In response to increasing criticism of the M'Naghten rule the Governor had appointed a commission to make a study ... The Legislature declined to adopt the recommendation that the inability to conform one's conduct to the requirements of the law should furnish a ground for lack of responsibility ... However, the Legislature did incorporate the recommended language "substantial capacity to know or appreciate" ... The obvious intent in this amendment was to permit the defense of insanity, even though the defendant possessed some surface knowledge of the nature and quality of his act and that such act was wrong ... In this light, the court's failure to charge expressly that the defense was made out if the People failed to prove that the defendant possessed substantial capacity to know and appreciate the requisite elements constitutes reversible error."[41]

There is here presented a classic example that clearly illustrates the intent of the Legislature, when, in the Revised Penal Law, effective September 1, 1967, it sought to soften the straitjacket rigidity of the ancient McNaughton rule as contained in section 1120 of the former Penal Law. Recognizing the realities of the vastly improved psychiatric knowledge of the times, the new law substituted a much broader concept of understanding in place of the old McNaughton word "know" ... Under this new definition, it is quite clear, a sense of guilt as evidenced by concealment or by flight is not an adequate measure because it may reflect a mere surface knowledge of the wrong done ... [I]t is precisely this sort of surface knowledge of the wrong done that, more often than not, is but a childlike consciousness, totally without depth or significance and completely divorced from true comprehension.[42]

Although there have been no revisions to section 30.05 since its enactment in 1965, it should come as no surprise that the final result has not been satisfactory to all. In his 1978 Message to the Legislature, Governor Carey cited "the widespread concern that the legal defense of insanity in criminal proceedings does not protect the public," and he directed the Department of Mental Hygiene to "consider the need for limits on a legal defense of insanity."[43]

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41 People v. Buthy, 38 A. D. 2d 10, 326 N. Y. S. 2d 512 (1971)

42 People v. Wofford, 59 A. D. 2d 562, 397 N. Y. S. 2d 154 (1977)

43 Governor Hugh L. Carey, Message to the Legislature, January 4, 1978, p. 13

In February of that year DMH issued The Insanity Defense in New York, prepared under the direction of William A. Carnahan, Deputy Commissioner and Counsel to the Department. Clues as to the criticism mentioned by Governor Carey may be found in Chapter 3 of the report, entitled, "Perceptions of the Insanity Defense," by Nancy M. Burton and Henry J. Steadman. A survey revealed that "the main problems legal professionals have with the defense center on poor statutory definitions and vagueness in the law which cause its uneven application; [and] perhaps as a result of this vagueness, a lack of understanding of the law by juries and the public ..."[44] After considering various options for changing the defense (an affirmative defense, a bifurcated trial, a guilty but insane verdict, abolishing the defense, and diminished capacity) the Department recommended that a new diminished capacity proviso be added to the Penal Law:

> 15.30 Effect of Mental Disease or Defect Upon Liability.
>
> Mental disease or defect is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of mental disease or defect of the defendant may be offered by the defendant whenever such evidence is relevant to negative [sic] an element of the crime charged requiring the defendant to have acted intentionally or knowingly.[45]

As of January, 1982 the Department's recommendation has not been formally incorporated in proposed legislation. For a critical discussion of the Department's report see Pasework and Pasework, 6 Journal of Psychiatry and Law 481.

In 1980 the State's Law Revision Commission made a further study of the insanity defense. After considering such alternatives as elimination of the defense of insanity, a bifurcated trial procedure, reclassification as an affirmative defense, the ALI rule, and the "guilty but mentally ill" approach, the Commission recommended that "the defense of insanity should be retained in its present form."[46]

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44 New York (State) Department of Mental Hygiene. The Insanity Defense in New York, p. 73.

45 op. cit. p. 153

46 New York (State) Law Revision Commission. Report ... on the Defense of Insanity in New York State, p. 4.

APPENDIX A GLOSSARY OF TERMS

When possible, definitions have been taken from Black's Law Dictionary, Fifth Edition (West, 1979). When a term is not included in Black's, definitions have been excerpted from random journal articles.

American Law Institute (ALI) Rule

"Under the A. L. I. the state must prove that, despite the existence of a mental disease or defect the defendant had the substantial capacity to choose a legal course of conduct." (Inderbitzin, 44 Tulane Law Review 199)

"The law must recognize that when there is no black and white, it must content itself with different shades of gray. The draft, accordingly, does not demand complete impairment of capacity. It asks instead for substantial impairment." (American Law Institute, Model Penal Code, Tentative Draft No. 4, 1955, p. 158)

Bifurcated Trial

"Trial of issues separately, e.g. guilt and punishment, or guilt and insanity, in criminals trials." (Black's, p. 148)

Currens Rule

"A comparison of the [Currens and ALI] tests indicates only one significant change made by Currens. The court completely eliminates from the A. L. I. formulation the phrase 'to appreciate the criminality (wrongfulness) of his conduct ...' Thus, with one exception, Currens essentially adopts both subsections (1) and (2) of the A. L. I. test (Nawrot, 47 Cornell Law Quarterly 453)

Diminished Responsibility Doctrine

"Term used to refer to lack of capacity to achieve state of mind requisite for commission of crime. McGuire v. Superior Court for Los Angeles County, 274 Cal. App. 583, 79 Cal. Rptr. 155, 161. The concept of diminished responsibility, also known as partial insanity, permits the trier of fact to regard the impaired mental state of the defendant in mitigation of the punishment or degree of the offense even though the impairment does not qualify as insanity under the prevailing tests." (Black's, p. 412)

Durham Rule

"Under the Durham Rule, to find a defendant not guilty by reason of insanity or mental responsibility, the jury must find (1) that he was suffering from a diseased (or defective) mental condition at the time of the commission of the act charged and (2) that there was a causal relation between such disease or defective condition and the act. State v. Jones, 84 Wash. 2d 823, 529 P. 2d 1040, 1044 (Black's, p. 453)

Guilty But Insane

"The new [Michigan] law changes trial procedure and testimony to break down the issue more logically for the jury. The jury first considers whether the defendant was mentally ill at the time of the offense and then his or her exculpability." (Rosenbaum, 12 Trial, March 42)

Irresistible Impulse Test

"The 'irresistible impulse' test for insanity is a test which is broader than the M'Naghten test. Under the irresistible impulse test, a person may avoid criminal irresponsibility even though he is capable of distinguishing between right and wrong and is fully aware of the nature and quality of his acts, provided that he establishes that he was unable to refrain from acting. Com. v. Walzack, 468 Pa. 210, 360 A. 2d 914, 919." (Black's, p. 744)

M'Naghten Test

"The standard under the 'M'Naghten insanity test' to determine whether a person is sane is did the defendant have sufficient mental capacity to know and understand what he was doing, and did he know and understand that it was wrong and a violation of the rights of another; to be 'sane' and thus responsible to the law for the act committed, the defendant must be able to both know and understand the nature and quality of his act and to distinguish between right and wrong at the time of the commission of the offense. People v. Crosier, 41 Cal. App. 3rd 712, 116 Cal. Rpt. 447, 471." (Black's, p. 905)

Mens Rea

"A guilty mind; a guilty or wrongful purpose; a criminal intent." (Black's, p. 889)

New Hampshire Test

"The rule avoids articulating a particular test of insanity. Rather, it allows the jury to determine as a question of fact whether defendant suffered from mental disease depriving him of the capacity to entertain a criminal intent." (Kennalley, 15 Washburn Law Journal 102)

XYY Syndrome

"Stated very simply, the argument is made that the presence of an extra Y chromosome in the genetic makeup of a male ... provides him with a double dose of 'maleness,' such that he has an 'elevated aggressiveness potential which he cannot control and which predisposes him to violent acts for which he should not be held responsible." (Rosenberg and Dunn, 56 Massachusetts Law Quarterly 415)

APPENDIX B - NEW YORK STATE INSANITY DEFENSE

STATUTE AS OF JANUARY, 1982

Section 30.05 of the Penal Law - Mental disease or defect

1. A person is not criminally responsible for conduct as a result of mental disease or defect, if at the time of such conduct he lacks substantial capacity to know or appreciate either:

   (a) The nature and consequences of such conduct; or

   (b) That such conduct was wrong.

2. In any prosecution for an offense, lack of criminal responsibility by reason of mental disease or defect, as defined in subdivision one of this section, is a defense.

APPENDIX C - MATERIALS ON LEGISLATIVE INTENT OF SECTION 30.05

American Law Institute
Model Penal Code : Tentative Draft No. 4, April 1955, pp. 27, 156-192
Model Penal Code : Proposed Official Draft, 1962, p. 66

Governor's Conference on the Defense of Insanity, Albany, 1958, Interim Report of the Study Committee
Also contained in Public Papers of Governor Averell Harriman, 1958, pp. 1018-1029 and, in part, Interim Report of the Temporary State Commission to Revise the Penal Law and Criminal Code, 1963, pp. 17-22

New York (State) Temporary Commission on Revision of the Penal Law and Criminal Code
[Second] Interim Report, 1963, pp. 16-26, 60
[Third] Interim Report, 1964, p. 15
[Fourth] Interim Report, 1965, pp. 14-15

Governor's Bill Jacket, L.1965 Chap. 593

APPENDIX D - EXCERPTS FROM IMPORTANT COURT DECISIONS IN OTHER JURISDICTIONS

M'Naghten's Case, 8 Eng. Rep. 718, 10 C & F 200 (1843)

> The question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. (C. J. Tyndal's charge to the jury at M'Naghten's trial)
>
> [W]e are of the opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land. (p. 722)
>
> [W]e have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary to be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

State v. Pike, 49 N. H. 399, 402, 6 Am Rep. 533 (1870)

> The court instructed the jury, as requested by the defendant, that, if they found that the defendant killed Brown in a manner that would be criminal and unlawful if the defendant were sane--the verdict should be 'not guilty by reason of insanity' if the killing was the offspring or product of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor or transact business or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury.

State v. Jones, 50 N. H. 369, 9 Am. Rep. 242 (1871)

> At the trial where insanity is set up as a defence, two questions are presented: - First: Had the prisoner a mental disease? Second: If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent? (p. 393)
>
> In view of these considerations, we are led to the conclusion that the given to the jury in this case, that "If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty by reason on insanity'; if the killing was the offspring

or product of mental disease in the defendant," was right; that it fully covers the only general universal element of law involved in the inquiry; ... (p. 398)

Smith v. United States, 36 F. 2d 548 (1929)

The English rule, followed by the American courts in their early history, and still adhered to in some of the states, was that the degree of insanity which one must possess at the time of the commission of the crime in order to exempt him from punishment must be such as to totally deprive him of understanding and memory. This harsh rule is no longer followed by the federal courts or by most of the state courts. The modern doctrine is that the degree of insanity which will relieve the accused of the consequences of a criminal act must be such as to create in his mind an uncontrollable impulse to commit the offense charged. This impulse must be such as to override the reason and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong.

[W]e have no hesitation in declaring it to be the law of this District that in cases where insanity is interposed as a defense, and the facts are sufficient to call for the application of the rule of irresistible impulse, the jury should be so charged.

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

The fundamental objection to the right-wrong test, however, is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or manifestation, but that it is made to rest upon any particular symptom. In attempting to define insanity in terms of a symptom, the courts have assumed an impossible role, not merely one for which they have no special reference. (p. 872)

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. We find that the "irresistible impuse" test is also 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. (p. 874)

The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defects. (pp. 874-875)

United States v. Currens, 290 F. 2d 751 (1961)

We think that there are cogent reasons why the M'Naghten Rules should not be followed or applied today in the courts of the United States. (p. 763) ... The test, therefore, of knowledge of the right and wrong is almost

meaningless (p. 765) ... All in all the M'Naghten Rules do indeed, as has been asserted so often, put the testifying psychiatrist in a strait-jacket (p. 767) ... Finally, we must point out that the M'Naghten Rules are not only unfair to the individual defendant but are dangerous to society. (p. 767)

We believe that the Supreme Court in view of the present state of medical knowledge, would not approve the M'Naghten Rules and would not impose them as the test to be applied today by a jury to determine the criminal responsibility of a mentally ill defendant in a trial in a federal court. We conclude, therefore, in the light of all the circumstances, that we are not constrained to adhere to and uphold the M'Naghten Rules. (pp. 770-771)

We are of the opinion that the following formula most nearly fulfills the objectives just discussed: The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated. (p. 774)

[Note: Footnote 32 following this paragraph explains similarities and differences of this test with that proposed by ALI]

McDonald v. United States, 312 F. 2d 847 (1962)

Our eight-year experience under Durham suggests a judicial definition, however broad and general, of what is included in the terms "disease" and "defect." In Durham, rather than define either term, we simply sought to distinguish disease from defect. Our purpose now is to make it very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a disease or defect ... Consequently, ... the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. (pp. 850-851)

We think the jury may be instructed, provided there is testimony on the point, that capacity, or lack thereof, to distinguish right from wrong, and ability to refrain from doing a wrong or unlawful act may be considered in determining whether there is a relationship between the mental disease and the act charged. (pp. 851-852)

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

Despite the government's arguments to the contrary, however, we do not believe that the Supreme Court has placed its stamp of approval on M'Naghten ... (p. 613)

[M'Naghten] is faulted because it has several serious deficiencies which stem in the main from its narrow scope. Because M'Naghten focuses only on the cognitive aspect of the personality, i.e. the ability to know right from wrong, we are told by eminent medical scholars that it does not permit the jury to identify those who can distinguish between good and evil but who cannot control their behavior ... Similarly, M'Naghten's single track emphasis on the cognitive aspect of the personality recognizes no degrees of incapacity ... A further fatal defect of the M'Naghten Rules stems from the unrealistically tight shackles which they place on expert psychiatric testimony. (pp. 618-619)

or product of mental disease in the defendant," was right; that it fully covers the only general universal element of law involved in the inquiry; ... (p. 398)

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The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defects. (pp. 874-875)

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We believe that the Supreme Court in view of the present state of medical knowledge, would not approve the M'Naghten Rules and would not impose them as the test to be applied today by a jury to determine the criminal responsibility of a mentally ill defendant in a trial in a federal court. We conclude, therefore, in the light of all the circumstances, that we are not constrained to adhere to and uphold the M'Naghten Rules. (pp. 770-771)

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[M'Naghten] is faulted because it has several serious deficiencies which stem in the main from its narrow scope. Because M'Naghten focuses only on the cognitive aspect of the personality, i.e. the ability to know right from wrong, we are told by eminent medical scholars that it does not permit the jury to identify those who can distinguish between good and evil but who cannot control their behavior ... Similarly, M'Naghten's single track emphasis on the cognitive aspect of the personality recognizes no degrees of incapacity ... A further fatal defect of the M'Naghten Rules stems from the unrealistically tight shackles which they place on expert psychiatric testimony. (pp. 618-619)

The irresistible impulse test is therefore little more than a gloss on M'Naghten, rather than a fundamentally new approach to the problem of criminal responsibility. (p. 621)

The most significant criticism of Durham, however, is that it fails to give the fact-finder any standard by which to measure the competency of the accused. (p. 621)

We believe, in sum, that the American Law Institute test - which makes no pretension at being the ultimate in faultless definition - is an infinite improvement over the M'Naghten Rules, even when, as has been the practice in the courts of this circuit, those rules are supplemented by the "irresistable impulse" doctrine. (p. 624)

United States v. Brawner, 471 F. 2d 969 (1972)

We have decided to adopt the ALI rule as the doctrine excluding responsibility for mental disease or defect, for application prospectively to trials begun after this date. (p. 973)

A difficulty arose under the Durham rule in application. The rule was devised to facilitate the giving of testimony by medical experts in the context of a legal rule, with the jury called upon to reach a composite conclusion that had medical, legal and moral components. However the pristine statement of the Durham rule opened the door to "trial by label." Durham did distinguish between "disease," as used "in the sense of a condition which is considered capable of either improving or deteriorating," and "defect," as referring to a condition not capable of such change "and which may be either congenital or the result of injury, or the residual effect of a physical or mental disease" ... But the court failed to explicate what abnormality of mind was an essential ingredient of these concepts. (pp. 977-978)

A principal reason for our decision to depart from the Durham rule is the undesirable characteristic, surviving even the McDonald modification, of undue dominance by the experts giving testimony. (p. 981) ... But the difficulty - as emphasized in Washington - is that the medical expert comes, by testimony given in terms of a non-medical construct ("product"), to express conclusions that in essence embody ethical and legal conclusions ... (pp. 982-983).

Our ruling today includes our decision that in the ALI rule as adopted by this court the term "mental disease or defect" includes the definition of that term provided in our 1962 en banc McDonald opinion ... (p. 983)

APPENDIX E. BIBLIOGRAPHY

[NOTE: Professor Raymond L. Spring was probably guilty of a slight understatement when he wrote that "the 'insanity defense' has been the subject of perhaps more comment, at least since M'Naghten shot Drummond, than any other concept of the criminal law." (19 Washburn Law Journal 23). In order to keep this bibliography less cumbersome than it already is, no journal articles written before 1960 have been included (an exception has been made for articles on New York State's insanity defense statute). Although doubtless there have been significant articles that have been excluded by this arbitrary decision, hopefully the points discussed in these articles will have been covered, or at least the articles cited, in the post-1960 period. In addition, related topics that were noted in the Preface are not included in this bibliography, i.e. drug abuse, alcoholism or automatism as reasons for insanity; adjudication, commitment, and other aspects of the criminally insane covered in the Criminal Procedure Law; incompetence to stand trial, etc.]

A. New York State

1 Characteristics and Disposition of Insanity Acquittals in New York State: An Update for 7/1/76 Through 6/30/78, Henry J. Steadman and Nancy M. Burton. [Albany] January 1979, 2p.+tables.
MEN 655-4 CHADI 79-70445
Update of earlier Pasewark report.

2 "Characteristics and Disposition of Persons Found Not Guilty By Reason of Insanity in New York State, 1971-1976", Richard A. Pasewark, et al. In American Journal of Psychiatry, v.136 #5, May 1979, pp.655-660.
J616.89 A512p
"This report deals with a comprehensive depiction of the defendants' backgrounds, offenses associated with acquittal by reason of insanity, and courses of hospitalization after acquittal."

3 "Criminal Insanity: A Criticism of the New York Rule", Andrew V. Clements. In Albany Law Review, v.20 #2, June 1956, pp.155-169.
LAW/PER
Objects to law because of its right-wrong aspect and its antiquity. Calls for abandonment of M'Naghten in favor of either ALI, Durham, or the Royal Commission.

4 "Criminal Insanity: The Abyss Between Law and Psychiatry", Eugene J. Morris. In Record of the Association of the Bar of the City of New York, v.12 #8, November 1957, pp.471-497.
LAW/PER
Favors adoption of the ALI rule in New York State.

5 "Criminal Law--Capacity to Commit and Responsibility for Crime--Validity of the XYY Syndrome as Part of the Defense of Insanity", Tom Aljets. In North Dakota Law Review, v.52 #4, Summer 1976, pp.729-736.
LAW/PER
Argues that a New York Supreme Court decision barring the XYY syndrome as a part of the insanity defense (People v. Yukl, 372 NYS 2d 313) was questionable since other states adopting the ALI test of insanity have allowed it.

6 "Criminal Law--Insanity--'Defect of Reason' As a Defense". In New York University Law Quarterly Review, v.14 #2, January 1937, pp.228-232.
LAW/PER
Discussion of People v. Sherwood, 271 NY 247 (1936), which the author claims marks a "bewildering change" in the State's insanity defense. See addendum on pp.518-519.

7 "Criminal Law--Insanity--Defense That Accused Killed Child While Obsessed By Delusion--Meaning of 'Defect of Reason'--Recommendation of Mercy By Jury". In Brooklyn Law Review, v.6 #3, March 1937, pp.389-402.
LAW/PER

Discussion of People v. Sherwood, 271 NY 427 (1936) calls for reform of State's insanity test.

8 "Criminal Law--M'Naghten Test--Proposed Revision of Section 1120 of the New York Penal Law". In New York Law Forum, v.9 #2, May 1963, pp.220-225.
LAW/PER
Discussion of the State's Temporary Commission on Revision of the Penal Law and Criminal Code's proposal to replace M'Naghten with the ALI rule.

9 "Criminal Responsibility and Proposed Revisions of the M'Naghten Rule". In St. John's Law Review, v.32 #2, May 1958, pp.247-264.
LAW/PER
Discusses origins of New York's insanity defense and M'Naghten. Recommends that a new role be adopted which would meet the valid criticism of the current M'Naghten approach and yet retain the ethical concepts embodied in the basic rule.

10 "The Defense of Insanity". In Albany Law Review, v.30 #1, January 1966, pp. 140-144.
LAW/PER
Criticizes the State Legislature's 1965 amendment to the insanity defense because it didn't correct the "right or wrong" feature of M'Naghten.

11 "The Defense of Insanity", John C. Corbett. In Brooklyn Barrister, v.29 #5, March 1978, pp.99-106.
LAW/PER
Brief history of the insanity defense, with some emphasis on New York State.

12 "Insanity Acquittals in New York State, 1965-1978", Henry J. Steadman. In American Journal of Psychiatry, v.137 #3, March 1980, pp.321-326.
J616.89 A512jp
Data requested by a State Senate Committee studying the insanity defense. Concludes that there has been a substantial increase in the number of insanity acquittals in the State over the past twelve years.

13 "Insanity as a Defense in Homicide Cases in New York," William Lawrence Clark. In Bench and Bar, v.8 #2, February 1907, pp.50-59.
LAW/PER
Discussion of early New York cases on the insanity defense.

14 The Insanity Defense in New York, New York (State). Department of Mental Hygiene. [Albany] February 1978. 157p.
MEN 455-5 INSDN 78-70370
Report assesses the use of the insanity defense in New York State and offers alternatives. Recommends adoption of a rule of diminished capacity " . . . under which evidence of abnormal mental condition would be admissible to affect the degree of crime for which an accused could be convicted". Also recommends limiting the psychiatrist's testimony to "evidence of an accused's capacity for culpable conduct."

15 The Insanity Plea in New York State, 1965-1976, Richard A. Pasewark, et al. [Albany] n.d. 19p.+tables & references.
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Study of the incidence of the plea and characteristics of those employing the plea. Also appears in 51 New York State Bar Journal 187.

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LAW/PER
Argues against abolition of the insanity plea. Emphasis on New York.

17 Interim Report of the Study Committee, Governor's Conference on the Defense of Insanity, Albany, 1958. [Albany] 1958, 9p.
343.09747 fG721 1958
Concludes that New York State's insanity defense based on M'Naghten should be substantially modified per the ALI rule. Also contained in Public Papers of Governor Harriman, 1958, pp.1018-1029.

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LAW/PER
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LAW/PER
Summary of 1957 conference convened by the New York State Department of Mental Health to discuss retaining or amending the State's insanity defense. Author favors the ALI rule over M'Naghten and Durham.

20 "Legal Professionals' Perceptions of the Insanity Defense", Nancy M. Burton and Henry J. Steadman. In Journal of Psychiatry and Law, v.6 #2, Summer 1978, pp.173-188.
LAW/PER
Survey administered by the New York State Department of Mental Hygiene and Division of Criminal Justice Services to determine what legal professionals thought of the State's insanity defense. Although only 5% thought it worked well, few thought it should be eliminated.

21 "Legislative Changes in New York Criminal Insanity Statutes". In St. John's Law Review, v.40 #1, December 1965, pp.75-82.
LAW/PER
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22 "McNaghten Preferred", Samuel H. Hofstadter and Shirley R. Levittan. In The Record of the Association of the City of New York, v.18 #9, December 1963, pp.716-727.
LAW/PER
Addendum to an earlier proposal (item 23 of this bibliography). Argues against proposal of New York State Governor's Study Committee and Temporary Commission on Revision of the Penal Law and Criminal Code to replace M'Naghten with a modified ALI test. Proposes a Board of Disposition to determine final disposition of the defendant.

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LAW/X PER
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LAW/PER
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LAW/PER
Summary of a case (308 NY 1) in which Governor Harriman declared a convicted defendant insane at the time of his criminal act, citing a conflict between legal and medical definitions of insanity, and commuted his death sentence to life imprisonment. Author was Governor Harriman's counsel.

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LAW/PER
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LAW/PER
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LAW/PER
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LAW/TEXT 81-22064 NISSMAN
Intended as a guide for prosecutors. "In no other area of the law do courts allow experts to testify when their premises and conclusions are nebulous and speculative. However, unless and until the legal system recognizes and abolishes this monster it has created, the prosecution must battle with the defense expert and must rebut the aura of respectability surrounding his profession."

43 "But That is Not the Law!--An Answer to Judge Hofstadter on the Issue of Criminal Responsibility", John Phillip Reid. In New Hampshire Bar Journal, v.8 #2, January 1966, pp.98-106.
LAW/PER
Author argues that Judge Hofstadter (item 151 of this bibliography) has misinterpreted New Hampshire's insanity rule.

44 "By Reason of Insanity", Gary Rivlin. In Update on Law-Related Education, v.6 #1, Winter 1982, pp.15-17, 49-50.
LAW/PER

"There's nothing more arcane and mysterious than the insanity laws." Cites Michigan's "guilty but mentally ill" law as a hopeful sign that the legislatures will give the courts alternatives to the insanity defense.

45 "Capacity to Appreciate 'Wrongfulness' or 'Criminality' Under the A.L.I.--Model Penal Code Test of Mental Responsibility", Henry Weihofen. In Journal of Criminal Law, Criminology and Police Science, v.58 #1, March 1967, pp.27-31.
LAW/PER
Argues for substituting "wrongfulness" for "criminality" concerning defendant's capacity to appreciate the quality of the criminal act.

46 "The Concept of Mental Disease in Criminal Law Insanity Tests", Herbert Fingarette. In The University of Chicago Law Review, v.33 #2, Winter 1966, pp. 229-248.
LAW/PER
Attempts to define the term "mental disease" in a legal context. "The analysis provides justification for marginal freedom for expert testimony in court and tends to encourage the use of this freedom. . . ."

47 "The Concept of Responsibility", David L. Bazelon. In Georgetown Law Journal, v.53 #1, Fall 1964, pp.5-18.
LAW/PER
Philosophical essay by Chief Judge, United States Court of Appeals for the District of Columbia Circuit, who was responsible for the Durham test. States that in a sense our criminal justice system has failed because, after M'Naghten and Durham, we still punish or execute mentally disordered offenders.

48 "The Constitutionality of Michigan's Guilty But Mentally Ill Verdict", John M. Grostic. In University of Michigan Journal of Law Reform, v.12 #1, Fall 1978, pp.188-199.
LAW/PER
Argues that statute violates the due process clause of the U.S. Constitution because it will deprive ". . . legally insane defendants not only of their statutory rights but also of their colorable constitutional rights to acquittal."

49 Crime and Insanity, Richard W. Nice. New York, Philosophical Library, c1958. 280p.
LAW/TEXT
Includes essays on "not guilty by reason of insanity," M'Naghten, Durham, and the ALI's Model Penal Code.

50 "Criminal Insanity", Arval A. Morris. In Washington Law Review, v.43 #3, March 1968, pp.583-622.
LAW/PER
Emphasis is on the concept of insanity at the time of the criminal act. Proposes a model which entails a defendant's cognition, emotion and capacity to control his or her behavior, corroborated by medical experts. Some reference to Washington State law.

51 "Criminal Law: Abnormal Mental Condition and Diminished Criminal Responsibility", William M. Roberts. In Oklahoma Law Review, v.23 #1, February 1970, pp.93-98.
LAW/PER
Argues that Oklahoma should adopt the plea of diminished responsibility because "critical decisions concerning the criminal's insanity and responsibility should not be made upon the strict determination of ability to tell right from wrong."

52 "Criminal Law--Confusion in the Concept of Criminal Responsibility--The Doctrine of Diminished Capacity and the Use of Mental Impairment to Reduce Degree of Conviction in Massachusetts", James J. Pancotti. In Western New England Law Review, v.3 #3, Winter 1981, pp.583-608.
LAW/PER
Discussion of Commonwealth v. Gould, 405 N.E. 2d 927, which the author claims recognizes the doctrine of diminished capacity in Massachusetts.

53 "Criminal Law--Criminal Responsibility--A Jurisdictional Survey", A.Bob Jordan. In Washburn Law Journal, v.1 #3, Winter 1961, pp.462-483.
LAW/PER

Uses six different classifications to determine what insanity test is being applied to the states and other U.S. jurisdictions. Concludes that, at that time, less than a majority were using M'Naghten as the sole test of criminal responsibility.

54 "Criminal Law--Insanity--M'Naghten's Rule is the Only Test to be Applied in Murder Trials Where Insanity is Asserted as a Defense", Arnold B. Silverman. In University of Pittsburgh Law Review, v.22 #3, March 1961, pp. 621-625.
LAW/PER
In discussion of Commonwealth v. Woodhouse, 401 Pa. 242 (1960) author concludes that ". . . the time has come for the courts to make an agonizing reappraisal and dispose of the M'Naghten Rule which hampers our criminal justice so severely."

55 "Criminal Law--Insanity--Modification of the M'Naghten Rule in Favor of Model Penal Code Intended", Stanley F. Hack. In Wisconsin Law Review, v. 1960 #3, May 1960, pp.528-536.
LAW/PER
Discusses the problems that might arise if the Wisconsin Supreme Court or the Legislature adopts the ALI rule, as was hinted in Kwosek v. State, 8 Wis. 2d 640.

56 "Criminal Law--Insanity--The American Law Institute Formulation and Its Implications for South Carolina", Albert L. James, III. In South Carolina Law Review, v.18 #4, 1966, pp.661-667.
LAW/PER
Suggests that ALI rule, especially as interpreted in United States v. Freeman (357 F.2d 606), should be used in South Carolina.

57 "Criminal Law--Insanity--The Wisconsin 'Experiment' With the ALI Test", James M. Van de Water. In Buffalo Law Review, v.16 #2, Winter 1967, pp.420-428..
LAW/PER
Criticizes decision in State v. Shoffner, 31 Wis. 2d 412 because ALI test has two problems: "juror predjudice and the difficulty of communicating the standard for criminal responsibility to the jury."

58 "Criminal Law--M'Naghten Rule Abandoned In Favor of 'Justly Responsible' Test for Criminal Responsibility--State v. Johnson, 399 A. 2d 469 (R.I. 1979)", James A.G. Hamilton. In Suffolk University Law Review, v.14 #3, 1980, pp. 617-632.
LAW/PER
Discussion of case which substituted the minority formulation of the ALI test for the M'Naghten rule.

59 "Criminal Law--Mental Disease or Defect Reducing the Degree of Crime--Missouri Changes the Rule", Mark E. Johnson. In Missouri Law Review, v.40 #2, Spring 1975, pp.361-368.
LAW/PER
Discussion of Missouri Supreme Court decision, State v. Anderson (515 S.W. 2d 534) which adopted the doctrine of "diminished responsibility" as a criminal defense.

60 "Criminal Law--The A.L.I. Model Penal Code Insanity Test", Ronald R. Interbitzin. In Tulane Law Review, v.44 #1, December 1969, pp.192-202.
LAW/TEXT
Comparison of A.L.I.'s insanity test with M'Naghten rule.

61 "Criminal Law: The XYY Chromosome Complement and Criminal Conduct", Roger Houseley. In Oklahoma Law Review, v.22 #3, August 1969, pp.287-301.
LAW/PER
Argues that court should recognize the significance of the XYY situation in a defendant's mental makeup.

62 "Criminal Responsibility: A Psychiatrist's Viewpoint", Dr. Winfred Overhosler. In American Bar Association Journal, v.48 #6, June 1962, pp.527-531.
LAW/PER
Author characterizes the M'Naghten test as "unrealistic and moralistic, and out of tune with psychiatric knowledge", and comments favorably on Durham.

63 "Criminal Responsibility: An Action Language Approach", Glenn H. Miller. In Psychiatry, v.42 #2, May 1979, pp. 121-130.
J157.05 P974
Proposes a new theory for the insanity defense which states that there are no psychological processes that are responsible for criminal behavior.

64 "Criminal Responsibility and Exculpation By Medical Category--An Instance of Not Taking Hart to Heart", Martin R. Gardner. In Albama Law Review, v.27 #1, Winter 1975, pp.55-123.
LAW/PER
Favors H.L.A. Hart's suggestion that ". . . exemption from criminal responsibility should be achieved through a medical determination that the accused fits a prescribed statutory category of mental defect."

65 "Criminal Responsibility and Insanity: Past-Present-Future", Louis C. Woolf. In Tennessee Law Review, v.27 #3, Spring 1960, pp.389-403.
LAW/PER
In deciding between Durham and ALI, author suggests a compromise: "if the act committed is sufficiently caused by the mental illness of the defendant, then he is criminally irresponsible and must be found not guilty by reason of insanity."

66 "Criminal Responsibility and Insanity Tests: A Psychiatrist Looks at Three Cases", H.B. Dearman. In Virginia Law Review, v.47 #8, December 1961, pp. 1388-1398.
LAW/PER
Examines the deficiencies and advantages of the M'Naghten, Durham, and Currens rules. Characterizes the first as "useless" and the latter two as "satisfactory".

67 Criminal Responsibility and Mental Disease, C.R. Jeffery. Springfield, IL, Charles C. Thomas, c1967. 324p.
LAW/TEXT
Study of the insanity defense in the District of Columbia since the Durham decision concludes that experts from the fields of sociology and experimental psychology, rather than psychiatrists, be allowed to testify as experts on criminal behavior.

68 Criminal Responsibility and Mental Illness, F.A. Whitlock. London, Eng. Butterworths, c1963. 156p.
LAW/TEXT
Discussion of the insanity defense from a psychiatrist's viewpoint covers such areas as M'Naghten, mens rea, and diminished responsibility.

69 "Criminal Responsibility and Mental Illness as a Defense in Georgia", Harry A. Ellis, Jr. In Georgia Bar Journal, v.23 #4, May 1961, pp.538-544.
LAW/PER
Examination of the Georgia test of insanity concludes that State should adopt one of the more recent tests such as New Hampshire, Durham, or the ALI rule.

70 "Criminal Responsibility and the Psychiatrist", Gene L. Usdin. In American Criminal Law Quarterly, v.3 #3, Spring 1965, pp.116-123.
LAW/PER
Author, a psychiatrist, commends the role which his profession has taken in leading states away from "an archaic criminal law, M'Naghten."

71 "Criminal Responsibility at Random", John T. Gorrell. In Baylor Law Review, v.14 #3, Summer 1962, pp.285-298.
LAW/PER
Summary of M'Naghten, Durham, and ALI.

72 "Criminal Responsibility: Florida Legislative Reform of M'Naghten", Brian Alexander Rosborough. In University of Florida Law Review, v.19 #1, Summer 1966, pp.137-142.
LAW/PER
Urges the Florida Legislature to adopt the ALI rule per United States v. Freeman (357 F.2d 606).

73 "Criminal Responsibility of the Mentally Ill", Bernard L. Diamond. In Stanford Law Review, v.14 #1, December 1961, pp.59-86.
LAW/PER

Author, a psychiatrist, rejects M'Naghten in favor of mens rea, or diminished responsibility, which he argues would serve as a bridge between psychiatry and law. Some emphasis on California.

74 "Criminal Responsibility: Psychiatry Alone Cannot Determine It", Joseph Weintraub. In American Bar Association Journal, v.49 #11, November 1963, pp. 1075-1079.
LAW/PER
Chief Justice of the New Jersey Supreme Court argues that all insanity tests are arbitrary, and that M'Naghten should not be replaced because it has the virtue of being more precise in application.

75 "Criminal Responsibility: The Bar Must Lead in Law Reform", J.L. Bernstein. In American Bar Association Journal, v.50 #4, April 1964, pp.341-344.
LAW/PER
Argues for abolition of the M'Naghten rule in favor of a "flexible approach grounded in viewing mental illness as a medical fact" in determining insanity and criminal responsibility.

76 "Criminal Responsibility: The Durham Rule in Maine", Daniel E. Wathen. In Maine Law Review, v.15, 1963, pp. 107-117.
LAW/PER
Criticizes the Maine Legislature's 1961 abandonment of M'Naghton in favor of Durham and recommends adoption of the ALI rule instead.

77 "The Criminally Insane--An Appeal to the Sane", Fred Time. In Southwestern Law Journal, v.17 #1, March 1963, pp. 112-122.
LAW/PER
Review of rules for the insanity defense in Texas and other jurisdictions concludes that Texas should reject M'Naghten, Durham, etc. in favor of a "commitment instead of acquittal approach" which would use the advise of a panel of psychiatrists to determine defendant's sanity.

78 "The Defense of Insanity: A Survey of Legal and Psychiatric Opinion", Rita James Simon and Wendall Shackelford. In Public Opinion Quarterly, v.29 #3, Fall 1965, pp.411-424.
J301 P97
Questions covered qualifications of psychiatrists who act as expert witnesses, what effect their testimony should have on juries, and who should render the final verdict.

79 "The Defense of Insanity in South Dakota", Kenny Matt Peterson. In South Dakota Law Review, v.15 #1, Winter 1970, pp.126-142.
LAW/PER
Evaluation of the M'Naghten rule, the Durham rule, the doctrine of diminished responsibility, and the ALI test. Recommends adoption of the latter.

80 "The Definition of Mental Illness", Henry Weihofen. In Ohio State Law Journal, v.21 #1, Winter 1960, pp. 1-16.
LAW/PER
Suggests that the question of a defendant's sanity should not be "frozen" into law but should be left to psychiatrists.

81 "Detruding the Experts", Henry Weihofen. In Washington University Law Quarterly, v.1973 #1, Winter 1973, pp.38-56.
LAW/PER
Comparison of the Durham rule with the A.L.I. rule.

82 "Diminished Capacity", Stephen Kay. In California State Bar Journal, v.42 #3, May-June 1967, pp.385-392.
LAW/PER
Discusses California's new insanity test.

83 "Diminished Capacity", Grant B. Cooper. In Loyola University of Los Angeles Law Review, v.4 #2, April 1971, pp. 308-330.
LAW/PER
Examines the facts of the trial that produced the M'Naughten rule and discusses the problem of criminal responsibility in California.

84 "Diminished Capacity and California's New Insanity Test", Christopher William Woddell. In Pacific Law Journal, v.10 #2, July 1979, pp.751-771.
LAW/PER
"This comment will explore the actual and potential impact that the adoption of the ALI insanity test will have upon the related defense of diminished capacity in California."

85 "The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage", Peter Arenella. In Columbia Law Review, v.77 #6, October 1977, pp.827-865.
LAW/PER
Discusses how various American courts and commentators have handled diminished responsibility and mens rea models of criminal defense.

86 "Diminished Capacity in California: A Diminished Future or Capacity for Change?", Kenneth Held. In San Fernando Valley Law Review, v.8, 1980, pp.203-217.
LAW/PER
"Is is the purpose of this article to put further emphasis on the relationship of the two defenses [M'Naghten and diminished capacity] over the past generation, with particular regard to the goals they are designed to serve, and thereby help lay a more jurisprudentially sound basis for future development of diminished capacity."

87 "Diminished Capacity: Its Potential Effect in California", Charles Robert Lieb. In Loyola University of Los Angeles Law Review, v.3 #1, February 1970, pp.153-168.
LAW/PER
"It is the purpose of this Comment to examine the current law concerning diminished capacity in California and to analyze its effectiveness and utility as an adjunct to the traditional M'Naughton test of criminal insanity."

88 "Diminished Capacity--Recent Decisions and an Analytical Approach", P. Anthony Lannie. In Vanderbilt Law Review, v.30 #2, March 1977, pp.213-237.
LAW/PER
Contains a legal background to mens rea, three approaches involved, recent judicial decisions in various states rejecting and recognizing this defense, and statutory approaches.

89 "Diminished Capacity: The Middle Ground of Criminal Responsibility", Philip M. Adelson. In Santa Clara Lawyer, v.15 #4, Summer 1975, pp.911-938.
LAW/PER
Criticizes the use of diminished capacity as a defense in non-statutory offenses, particularly murder.

90 "Disabilities of Mind and Criminal Responsibility--A Unitary Doctrine", Herbert Fingarette. In Columbia Law Review, v.76 #2, March 1976, pp.236-266.
LAW/PER
Attempts to use valid concepts for law, morality, and common sense in order to formulate ". . . a coherent doctrine of law defining the relation between mental disability and criminal responsibility."

91 "The Disposition Hearing: An Alternative to the Insanity Defense", Marvin Schwedel and Robert N. Roether. In Journal of Urban Law, v.49 #4, May 1972, pp.711-732.
LAW/PER
General discussion of criminal responsibility in the U.S., including Durham, M'Naughten, and the A.L.I. rule, and a new proposal which abolishes the insanity defense in favor of free utilization of psychiatric opinion in determining the ultimate disposition of a convicted defendant.

92 "An Empirical Approach to Insanity Evaluations", Richard Rogers, et al. In Journal of Clinical Psychology, v.37 #3, July 1981, pp.683-687.
J157.905 J863
Description of the Rogers Criminal Responsibility Assessment Scales, which the author claims can make scientific, empirical evaluations of insanity.

93 "The End of Insanity", Raymond L. Spring. In Washburn Law Journal, v.19 #1, Fall 1979, pp.23-37.
LAW/PER
Proposes that the word "insanity" be removed from the legal vocabulary so that the mentally impaired may be excused by the criminal law" not simply because they are sufficiently mentally impaired, but because the impairment is such as to negate mens rea."

94 "Episodic Cerebral Dysfunction: A Defense in Legal Limbo", Walter S. Feldman. In Journal of Psychiatry and Law, v.9 #2, Summer 1981, pp.193-201.
LAW/PER
Description of the uncertain legal status of "a form of physiological reaction which may result in violent behavior patterns that have the characteristics of both insanity and an involuntary act."

95 Essays on Mental Incapacity and Criminal Conduct, Helen Silving. Springfield, IL, Charles C. Thomas, c1967. 379p.
LAW/TEXT
Emphasis is on analyzing and determining the true definitions of such terms as "responsibility", "guilt", "insanity", and "mental incapacity."

96 "Expertise and the Post Hoc-Judgment of Insanity or the Antegnostician and the Law", Jordan M. Scher. In Northwestern University Law Review, v.57 #1, March-April 1962, pp.4-11.
LAW/PER
Author, a psychiatrist, argues that all insanity rules should be replaced by a two-tier "guilty but insane" system.

97 First and Second Reports, July 7 and November 15, 1962, California. Special Commission on Insanity and Criminal Offenders. Sacramento, CA, 1962. 1st-106p. 2nd-77p.
343.09794 C1585 v.1-2
Among recommendations are that State should replace M'Naghten and the ALI test.

98 "From Durham to Brawner, a Futile Journey", Bernard L. Diamond. In Washington University Law Quarterly, v. 1973 #1, Winter 1973, pp.109-125.
LAW/PER
Argues that the period from Durham (1954) to Brawner (1972) demonstrates that the probelms of ascertaining criminal responsibility of the mentally ill ". . . are not soluble through manipulation of the legal rules of responsibility". Critizes Brawner decision as being insignificant except for ending Durham.

99 "From M'Naghten to Currens, and Beyond", Bernard L. Diamond. In California Law Review, v.50 #2, May 1962, pp.189-205.
LAW/PER
Argues that a strict demarcation of criminals into sane and insane makes no sense.

100 "The Future of the Insanity Defense in Illinois", Larry L. Thompson. In DePaul Law Review, v.26 #2, Winter 1977, pp. 359-376.
LAW/PER
Criticizes the State's present statute, especially its definition of "mental disease or defect," as vague. Recommends the "guilty but insane" approach, with the defendant's sanity determined at a post-trial hearing.

101 "Genetics and Criminal Responsibility", Arthur Harris Rosenberg and Lee J. Dunn, Jr. In Massachusetts Law Quarterly, v.56 #4, 1971, pp.413-435.
LAW/PER
"It is the purpose of this paper . . . to examine the historical development of the XYY syndrome [sic] in the medical context, to examine recent efforts to introduce it into the courts, and, ultimately, to explore its potential for applicability to the criminal law."

102 "Graduated Responsibility as an Alternative to Current Tests of Determining Criminal Capacity". In Maine Law Review, v.25 #2, November 1973, pp.343-357.
LAW/PER
"This comment suggests an alternative to the absolutist notion that the defendant is either completely responsible or completely irresponsibile for his unlawful act. It is contended that cognitive and volitive capacities exist by degrees and that a fairer, more socially useful legal test of

responsibility would make punishment more nearly proportional to the defendant's capacity at the time of the unlawful behavior."

103 Guilty But Insane, G.W. Keeton. London, Eng., Macdonald, c1961. 206p.
LAW/TRIALS: Coll. 308
Describes four English trials that have invoked the insanity defense: James Hadfield (1800), Daniel M'Naghten (1843), John Thomas Straffen (1952) and Gunther Podola (1959). Final chapter is an essay attacking the M'Naghten rule in favor of diminished responsibility.

104 "Guilty But Insane", Paul A.Rosenbaum. In Trial, v.12 #3, March 1976, pp.42-43.
LAW/PER
Discussion of Michigan's 1975 "guilty but mentally ill" law by Chairman of the Michigan House Judiciary Committee.

105 "Guilty But Mentally Ill", Ames Robey. In Bulletin of the American Academy of Psychiatry and the Law, v.6 #4, 1978, pp.374-381.
LAW/PER
Discussion of the adoption of GBMI in Michigan.

106 "Guilty But Mentally Ill: A Reasonable Compromise for Pennsylvania", Charles M. Watkins. In Dickinson Law Review, v.85 #2, Winter 1981, pp.289-319.
LAW/PER
"This comment will examine an alternative proposal that has been adopted in Michigan, the verdict of 'guilty but mentally ill,' and propose its adoption in Pennsylvania." Argues that such an approach is a compromise between abolition of the insanity defense and the A.L.I. test.

107 "Guilty But Mentally Ill: A Retreat from the Insanity Defense", Scott Leigh Sherman. In American Journal of Law and Medicine, v.7 #2, Summer 1981, pp. 237-264.
LAW/PER
"This Note maintains that the guilty but mentally ill verdict involves an unnecessarily severe curtailment of the mentally ill offender's constitutional rights."

108 "Guilty But Mentally Ill: An Historical and Constitutional Analysis", George D. Mesritz. In Journal of Urban Law, v.53 #3, February 1976, pp.471-496.
LAW/PER
Discussion of Michigan's insanity rule.

109 The Guilty Mind: Psychiatry and the Law of Homicide, John Biggs, Jr. New York, Harcourt, Brace, c1955. 236p.
LAW/TEXT
Presents a history of the growth of law and psychiatry, especially as they relate to homicide.

110 "The Historical Development of Insanity as a Defense in Criminal Actions", Stephen R. Lewinstein. In Journal of Forensic Sciences, v.14 #34, July, October 1969, pp.275-293, 469-500.
J614.19 J863
Traces the development of the insanity defense from the 14th century to New York's adoption of the A.L.I. code in 1965.

111 "A History of Criminal Procedures As Related to Mental Disorders", Ralph Slovenko. In West Virginia Law Review, v.71 #2, February 1969, pp.135-158.
LAW/PER
"While the insanity plea is rarely urged, . . . it is the subject of more discussion than any other issue in criminal law. The discussion, though, is not academic. The issue raises an opportunity to discuss the aims and methods of the criminal law."

112 "In Defense of the Insane: A Proposal to Abolish the Defense of Insanity", Howard Allen Cohen. In Criminal Justice Quarterly, v.2 #3, Summer 1974, pp.127-151.
J345.730505 qN532
"Given the consequence of a possible life sentence in a state mental hospital for the criminally insane to the defendant who successfully invokes the defense, the dismal conditions of such hospitals and the current reconsideration of the formulation of the defense of insanity caused by the proposed New Jersey Penal Code, it is submitted . . . that the defense, as presently constituted, should be abolished." Author is New Jersey Deputy Attorney-General.

113 "Insanity and Irresponsibility: Psychiatric Diversion in the Criminal Justice System", Thomas Szasa. In Alabama Journal of Medical Science, v.16 #2, April 1979, pp.108-112.
J610.9761 A3194
Advocates separating psychiatry from the state. "I maintain that . . . lawyers and judges should not be able to call on psychiatrists and psychologists to testify about the mental condition of persons accused of crime; and that judges should be unable to sentence criminals to imprisonment in institutions run by clinicians."

114 "Insanity as a Defense", Helen B. Shaffer. In Editorial Research Reports, January 22, 1964, pp.43-60.
J305 qE23
Uses Jack Ruby's insanity defense to summarize its pros and cons and history.

115 "Insanity as a Defense in Criminal Cases in Mississippi", Lee Davis Thames. In Mississippi Law Journal, v.32 #1, December 1960, pp.74-103.
LAW/PER
Concludes that Mississippi's test for criminal responsibility is "most inadequate and unjust", and recommends changes.

116 "Insanity as a Defense in Idaho", Larry Grimes. In Idaho Law Review, v.3 #1, Fall 1966, pp.132-141.
LAW/PER
Recommends State replace its M'Naghten rule with either the Durham or ALI tests.

117 "Insanity as a Defense: The Bifurcated Trial", David W. Louisell and Geoffrey C. Hazard, Jr. In California Law Review, v.49 #5, December 1961, pp. 805-830.
LAW/PER
Argues that the use of the bifurcated trial system for the insanity defense in California should be abolished.

118 Insanity Defense, Richard Arens. New York, Philosophical Library, [c1974] 328p.
LAW/TEXT
Temporarily missing from shelves.

119 The Insanity Defense, Abraham S. Goldstein. New Haven, CN, Yale University Press, c1967. 289p.
LAW/TEXT
Temporarily missing from shelves.

120 "The Insanity Defense", Philip B. Lyons. In University of Toledo Law Review, v.9 #1, Fall 1977, pp.31-55.
LAW/PER
Review of the arguments for and against the insanity defense. Concludes that abolishing it would lead to ". . . the less demanding alternatives of methods inimical to the freedoms of all . . . tyranny."

121 The Insanity Defense: A Blueprint for Legislative Reform, Grant H. Morris. Lexington, MA, Lexington Books, c1975. 133p.
345.7304 M876 77-23741
Recommends that the insanity defense be retained and enlarged to include those whom "an enlightened society would define as not criminally responsible;" the inclusion of diminished responsibility; and reforms in the raising of the insanity defense.

122 "The Insanity Defense--An Effort to Combine Law and Reason", Richard H. Kuh. In University of Pennsylvania Law Review, v.110 #6, April 1962, pp.771-815.
LAW/PER
"This article, after examining the jury-trial application of each of the insanity standards, present and proposed, will suggest a possible alternative: to remove the insanity issue from the jury so that contemporary scientific knowledge can be employed in a setting that will be more conducive to rendering this knowledge helpful." Proposes a "Psychiatric Offender Law."

123 "The Insanity Defense: An Uncertain Future", Richard C. Allen. In MH v.58 #4, Fall 1974, pp.4-6.
J614.58 M112
Summary of pros and cons.

124 "The Insanity Defense: Historical Development and Contemporary Relevance", Sheila Hafter Gray. In The American Criminal Law Review, v.10 #3, Spring 1972, pp.559-585.
LAW/PER
Emphasis is on the role of the psychiatrist in determining standards. Concludes that the old, broad definitions of insanity are superior to the modern methods which rely on scientific theory.

125 "The Insanity Defense in Illinois--A Psychiatric Perspective", James L. Cavanaugh, et al. In Bulletin of the American Academy of Psychiatry and the Law, v.8 #1, 1980, pp.56-61.
LAW/PER
Results of a survey of Illinois psychiatrists to determine their view on the insanity defense. A "significant majority" preferred a change to the "guilty but mentally ill" standard.

126 "The Insanity Defense in Louisiana--A Comparative Approach", Lawrence L. McNamara. In Loyola Law Review, v.12 #1 & 2, 1965-1966, pp.19-49.
LAW/PER
Examines Louisiana's insanity defense laws, compares them with Federal standards, and offers recommendations for reform.

127 "The Insanity Defense in North Carolina", Doug B. Abrams. In Wake Forest Law Review, v.14 #6, December 1978, pp.1157-1185.
LAW/PER
Examines the efficacy of the M'Naghten rule as the basis for North Carolina's insanity defense. Argues that the State's definition is too narrow, and recommends comprehensive legislation incorporating modern insanity tests.

128 "The Insanity Defense in Operation: A Practicing Psychiatrist Views Durham and Brawner", Daniel D. Pugh. In Washington University Law Quarterly, v.1973 #1, Winter 1973, pp.87-108.
LAW/PER
"The overall process for deciding insanity defense cases does not discourage domination by experts; it encourages it. Indeed, it insures it so certainly that the particular sanity test employed can influence matters only slightly."

129 "The Insanity Defense: M'Naghten v. ALI", Robert H. Sauer and Paul M. Mullens. In Bulletin of the American Academy of Psychiatry and the Law, v.4 #1, 1976, pp.73-75.
LAW/PER
Discussion of the impact of Maryland's change from M'Naghten to ALI.

130 "The Insanity Defense, the Mentally Disturbed Offender, and Sentencing Discretion", Thomas R. Litwack. In Annals of the New York Academy of Sciences, v.347, 1980, pp.185-198.
J506 N545
One of the points made is that any abolition of the insanity defense would be unconstitutional.

131 "Insanity--Guilty But Mentally Ill--Diminished Capacity: An Aggregate Approach to Madness", Joseph D. Amarillo. In The John Marshall Journal of Practice and Procedure, v.12 #2, Winter 1979, pp.351-381.
LAW/PER
"This comment recommends that the guilty but mentally ill and diminished capacity defense should be used conjunctively with the insanity defense," Objects to the "all or nothing" approach of most insanity tests.

132 "The Insanity Issue in a Public Needs Perspective", Raymond L. Spring. In Detroit College of Law Review, v.1979 #4, pp.603-622.
LAW/PER
Argues that the insanity defense is a fundamental basis of our system of defining criminality.

133 "Insanity Plea: Defense Attorneys' Views", Richard A. Pasewark and Paul L. Craig. In Journal of Psychiatry and Law, v.8 #4, Winter 1980, pp.413-441.
LAW/PER

Survey of Wyoming attorneys concludes that" . . . the plea was used infrequently and only after defense counsel perceived a need for psychiatric care for their clients."

134 "Insanity Plea in Connecticut", Betty L. Phillips and Richard A. Pasewark. In Bulletin of the American Academy of Psychiatry and the Law, v.8 #3, 1980, pp.335-344.
LAW/PER
Study of demographic factors of persons adjudicated "not guilty by reason of insanity" in Connecticut during 1970-1972.

135 "Insanity Plea, Legislator's View", Richard A. Pasewark and Mark L. Pantle. In American Journal of Psychiatry, v.132 #2, February 1979, pp.222-223.
J616.89 A512jp
Survey of Wyoming legislators concludes that most think the insanity plea is abused, but a large majority nevertheless subscribes to its underlying moral concept.

136 "Introduction: The Insanity Defense in the District of Columbia." In Washington University Law Quarterly, v.1973, #1, Winter 1973, pp.19-37.
LAW/PER
Introduction to a symposium. Relates the history of the insanity defense in the District of Columbia, with emphasis on the Durham rule.

137 "Is Bifurcation in the Insanity Defense Salvageable?", Winsor C. Schmidt, Jr. In Journal of Criminal Defense, v.6 #2, Fall 1980, pp.185-199.
LAW/PER
"The purpose of this article is to analyze the bifurcated trial system, in the company of the insanity defense, with regard to its recent review by the Florida Supreme Court."

138 "Is the Insanity Test Insane", R.J. Gerber. In The American Journal of Jurisprudence, v.20, 1975, pp.111-140.
LAW/PER
Considers abolishing the insanity defense completely, using insanity evidence only as a defense option when determining if medical commitment is preferable to incarceration.

139 "Jurors' Evaluation of Expert Psychiatric Testimony", Rita M. James. In Ohio State Law Journal, v.21 #1, Winter 1960, pp.75-95.
LAW/PER
Discusses how jurors interpret testimony of psychiatrists in order to determine how to modify the current practice of determining insanity.

140 The Jury and the Defense of Insanity, Rita James Simon, Boston, MA, Little, Brown, c1967. 269p.
LAW/TEXT
Report on a number of experiments which studied various juries' reactions to different aspects of the insanity defense.

141 "Justifications for the Insanity Defense in Great Britain and the United States: The Conflicting Rationales of Morality and Compassion", Larry O. Gostin. In Bulletin of the American Academy of Psychiatry and the Law, v.9 #2, 1981, pp.100-115.
LAW/PER
Main theme is that "the insanity defense was devised as a necessary corollary to the General Justifying Aim of the criminal law--retribution and punishment. It did not arise out of human compassion to care for the mentally ill or mentally retarded, and indeed should be regarded as the antithesis of humanitarianism."

142 "Keeping Wolff From the Door: California's Diminished Capacity Concept", Ann Fingarette Hasse. In California Law Review, v.60 #6, November 1972, pp.1641-1655.
LAW/PER
Discusses the evolution of California's diminished capacity defense, the Wolff and Conley doctrines, and rationale for revitalizing the latter (which emphasizes the defendant's ability to understand the moral and social values underlying the laws).

143 Law and Psychiatry: Cold War or Entente Cordiale?, Sheldon Glueck. Baltimore, MD, Johns Hopkins Press, c1962. 181p.
LAW/TEXT
Collection of four lectures, two of which are entitled "From N'Naghten to Durham" and "Durham and Beyond."

144 "Law and Psychiatry Must Join in Defending Mentally Ill Criminals", William J. Brennan, Jr. In American Bar Association Journal, v.49 #3, March 1963, pp.239-243.
LAW/PER
Associate Justice of the U.S. Supreme Court urges psychiatrists to extend their Hippocratic oath to include forensic services to mentally ill defendants.

145 "Law, Responsibility, and the XYY Syndrome", Melvin W. Cockrell, Jr. In Houston Law Review, v.7 #3, January 1970, pp.355-377.
LAW/PER
Survey of the present state of legal and medical theories of criminal responsibility and a discussion of the conflict between free will theory and notions of inherited criminal tendencies.

146 Lawyers, Psychiatrists and Criminal Law: Cooperation or Chaos?, Harlow H. Huckabee, Springfield, IL, Charles C. Thomas, c1980. 203p.
LAW/TEXT 81-26767 HUCKABEE
Includes discussions of the liberalization of the responsibility tests, mens rea, and proposals to substitute mens rea for traditional responsibility tests.

147 "Legal Responsibility and Mental Illness", Alfred K. Baur. In Northwestern University Law Review, v.57 #1, March/April 1962, pp.12-18.
LAW/PER
Author, Superintendent of a state hospital for the criminally insane, discusses reasons why there is still no test for delineating criminal responsibility.

148 "The Legal Standard for Determining Criminal Insanity: A Need for Reform", Jack C. Williamson. In Drake Law Review, v.20 #2, January 1971, pp. 353-382.
LAW/PER
Criticizes the legal system's management of the insanity defense and proposes a system in which the question of insanity would be determined by medical experts rather than a jury of laymen.

149 "M'Naghten is Dead--Or Is It?", John L. Moore, Jr. In Houston Law Review, v.3 #1, Spring-Summer 1965, pp. 58-83.
LAW/PER
Argues that, because of its strict right-wrong basis, M'Naghten should be replaced, whether it be by Durham, Currens, or the New Hampshire rule, or a combination of all three.

150 "M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity", Gerhard O.W. Mueller. In Georgetown Law Journal, v.50 #1, Fall 1961, pp. 105-119.
LAW/PER
Examines attempts in District of Columbia to improve on Durham while replacing M'Naghten. Concludes that it is impossible to supplant M'Naghten, and offers an insanity test ". . . which would combine the irrefutably correct analytical (M'Naghten) basis, which any capacity test must have, with modern terminology that pays heed to the advances in depth psychiatry in the last 120 years . . ."

151 "McNaghten Renewed and Implemented", Samuel H. Hofstader. In New Hampshire Bar Journal, v.7 #3, April 1965, pp. 256-266.
LAW/PER
New York Supreme Court judge suggests that New Hampshire modify M'Naghten by adding some elements of the Durham rule. See rejoinder by John Philip Reid (item 43 of this bibliography).

152 "The M'Naghten Rule: A Re-evaluation", Daniel Ward. In Marquette Law Review, v.45 #4, Spring 1962, pp.506-510.
LAW/PER
Despite its faults, author argues that ". . . the M'Naghten rules are sound and essential principles of penal responsibility."

153 "M'Naghten Rule v. Irresistible Impulse Test", Charles L. Cetti. In Mercer Law Review, v.14 #2, Spring 1963, pp.418-426.
LAW/PER
Argues that irresistible impulse tests should be included in tests for legal sanity.

154 "The M'Naghten Rules and Proposed Alternatives", Jerome Hall. In American Bar Association Journal, v.49 #10, October 1963, pp.960-964.
LAW/PER
Argues that M'Naghten should be repaired rather than replaced.

155 "M'Naghten v. Durham", Lee E. Skeel. In Cleveland-Marshall Law Review, v.12 #2, May 1963, pp.330-338.
LAW/PER
"As compared with the definite rule of M'Naghten, the Durham case introduces uncertainty into the law of criminal responsibility and abdicates the responsibility of the courts in this field, where the issue of insanity is presented to the uncertainty of the psychiatric expert."

156 "M'Naghten: Yes or No?", George R. Currie. In Wisconsin Bar Bulletin, v.34 #1, February 1961, pp.36-41.
LAW/PER
Justice of the Wisconsin Supreme Court argues that the State should either substantially modify M'Naghten or replace it with the ALI rule.

157 Make Mad the Guilty: the Insanity Defense in the District of Columbia, Richard Arens, Springfield, IL, Charles C. Thomas, c1969. 285p.
LAW/TEXT
Critical appraisal of the effects of the Durham decision concludes that it has resulted in " . . . a regression in standards of exculpatory mental illness to the point where the District of Columbia is now significantly behind jurisdictions upholding more or less enlightened versions of the M'Naghten rules.

158 "Mania, Crime and the Insanity Defense: A Case Report", Richard A. Ratner. In Bulletin of the American Academy of Psychiatry and the Law, v.9 #1, 1981 pp.23-32.
LAW/PER
"It is the premise of this paper that manic illness is easily and often overlooked or undetected in criminal defendants at the pre-trial and pre-sentence stages for reasons integral to the disease itself."

159 The Meaning of Criminal Insanity, Herbert Fingarette. Berkeley, University of California Press, c1972. 271p.
LAW/TEXT
Intends to provide ". . . a clear intellectual basis for assessing any reasonable verbal variant of the criminal insanity test that might appear desirable in the light of other policy considerations." Approach is toward a general foundation rather than a detailed superstructure.

160 Medical Jurisprudence of Insanity or Forensic Psychiatry, S.V. Clevenger. Rochester, NY, Lawyers' Cooperative Publishing Company, c1898. 616p. (volume 1)
LAW/TEXT Basement
Covers such areas as definitions, classification, criminal cases, and legal adjudications of criminal cases. Written from both a medical and legal viewpoint. Volume II covers such topics as alcoholism, drug addiction, head injuries, epilepsy, etc.

161 "Mens Rea, Due Process and the Burden of Proving Sanity or Insanity", Daniel K. Spraldin. In Pepperdine Law Review, v.5 #1, 1977, pp.113-133.
LAW/PER
Examines the development of mens rea in various states, with emphasis on California and Delaware, to clarify the role of intent in determining sanity in criminal trials.

162 "Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility", Gary V. Dublin. In Stanford Law Review, v.18 #2, January 1966, pp.322-395.
LAW/PER
Argues that through the years the mens rea concept has become unintelligible because of legislative, judicial and scholarly imprecision. Suggests that a reappraisal of the concept may make it an important definition of criminal responsibility.

163 Mental Disabilities and Criminal Responsibility, Herbert Fingarette and Ann Fingarette Hasse. Berkeley, CA, University of California Press, c1979. 321p.
LAW/TEXT 79-28795 FINGARETTE
Survey of the current law of mental disability and criminal law. Includes authors' proposed Disability of Mind doctrine, which states that ". . . whatever the cause, the condition that directly justifies ascribing nonresponsibility, insofar as this is justified at all, is the defendant's irrational condition of mind in committing the offense."

164 "Mental Disease of Defect Excluding Responsibility", Lawrence Zelic Freedman et al. In Washington University Law Quarterly, v.1961 #3, June 1961, pp. 250-254.
LAW/PER
Three psychiatrists, critical of the ALI rule, recommend ". . . adoption of the historic practice of the New Hampshire Court as recently reformulated in the case of Monte Durham."

165 Mental Disorder and the Criminal Law: A Study in Medico-Sociological Jurisprudence With an Appendix of State Legislation and Interpretive Decisions, S. Sheldon Glueck. Boston, MA, Little Brown, c1925. 693p.
LAW/TEXT Basement
Explanation of the insanity defense by a discussion of the historical origins and present state of the law of insanity and the psychology and symptomatology of mental disorder.

166 Mental Health and Law: A System in Transition, Alan A. Stone. Washington, Government Printing Office, 1975. 266p.
LAW/TEXT 76-31519 1976a STONE
Chapter 13, "The Insanity Defense" (pp.218-232) offers arguments for the insanity defense and a summary of recent trends.

167 "Mental Illness and Criminal Responsibility", M. David Riggs. In Tulsa Law Journal, v.5 #2, May 1968, pp.171-193.
LAW/PER
Discusses areas in which modern psychiatric theory clashes with the M'Naghten rule.

168 "Mental Responsibility and the Criminal Law in Missouri", Henry S. Clapper. In Missouri Law Review, v.35 #4, Fall 1970, pp.516-527.
LAW/PER
General discussion of the insanity plea and recent modifications of the M'Naghten rule in Missouri.

169 Mental Responsibility for Criminal Behavior Rhode Island. Legislative Council. Providence, RI, February 1965. 39p. (Research Report No. 12)
340.6 qR4785
Concludes that, because of the different opinions as to what constitutes insanity in criminal cases, the final decision should be left to the courts rather than the Legislature.

170 "Mental Illness, Criminal Intent, and the Bifurcated Trial", George E. Dix. In Law and the Social Order, v.1970 #4, pp.559-577.
LAW/PER
Discusses both ". . . the admissibility and weight to be accorded evidence of mental illness and . . . the value and propriety of a bifurcated trial procedure in cases raising the defendant's psychological normality . . ."

171 "The Mentally Ill Criminal Defendant", Margaret R. Leavy. In Criminal Law Bulletin, v.9 #3, April 1973, pp.197-252.
LAW/PER
Discussion of the theoretical and operational aspects of various kinds of insanity defenses.

172 "The Mentally Ill in Missouri Criminal Cases", Mack Player. In Missouri Law Review, v.30 #3, Summer 1965, pp.514-526.
LAW/PER
Discussion of Missouri's 1963 law dealing with the acquittal, commitment, and discharge of mentally ill criminal defendants.

173 "The Mentally Ill in Criminal Cases: The Constitutional Issue", Charles D. Tarlton. In Western Political Quarterly, v.16 #3, Summer 1963, pp.525-540.
J320.5 W52
Argues that there is ". . . a need for greater recognition of the special nature of mentally ill defendants and to the moral considerations, both individual and social, which make such recognition incumbent upon a civilized, twentieth-century society."

174 "Modern Insanity Tests-Alternatives", John Michael Kennalley. In Washburn Law Journal, v.15 #1, Winter 1976, pp.88-119.
LAW/PER
Provides a short history of insanity tests, discusses the M'Naghten rule, the Durham rule, and the ALI test, and offers alternatives. Concludes that we should abolish the insanity defense and treat, instead of punish, criminal offenders.

175 "A Moralist Looks at the Durham and M'Naghten Rules", Francis V. Raab. In Minnesota Law Review, v.46 #2, December 1961, pp.327-336.
LAW/PER
Prefers Durham to M'Naghten because the latter ". . . makes no allowance for one criterion of moral responsibility, namely, that a person is not responsible for his actions if he could not help doing what he did."

176 "More on M'Naghten: A Psychiatrist's View", Ralph Brancale. In Dickinson Law Review, v.65 #3, June 1961, pp. 277-286.
LAW/PER
Argues that, because of its rigid, retributive aspect, M'Naghten eventually will disappear as penology evolves into more emphasis on individualization of treatment and abolition of the death penalty.

177 "The Myth of M'Naghten", William C. Snouffer. In Oregon Law Review, v.50 #1, Fall 1970, pp.41-56.
LAW/PER
Reviews Oregon's adoption of the M'Naghten rule, with some discussion of parallel development in other states.

178 "The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey", Anthony Platt and Bernard L. Diamond. In California Law Review, v.54 #3, August 1966, pp.1227-1260.
LAW/PER
"This article outlines how the 'good and evil' test of responsibility found its way into Anglo-American jurisprudence from Hebrew law, and traces, in greater detail, its subsequent development in American criminal law during the early part of the nineteenth century."

179 "People v. Drew: Adoption of the ALI Rule of Insanity in California", David Darbyshire. In Pepperdine Law Review, v.7 #2, 1980, pp.445-456.
LAW/PER
Discusses the decision and its possible future impact on California law.

180 "People v. Drew--Will California's New Insanity Test Ensure a More Accurate Determination of Insanity", Paul A. Traficante. In San Diego Law Review, v.17 #2, 1980, pp.491-512.
LAW/PER
Traces the history of the insanity defense in California and criticizes recent court decision which abandoned the M'Naghten rule for the ALI test.

181 "The Presumption of Sanity: Bursting the Bubble", Julian N. Eule. In UCLA Law Review, v.25 #4, April 1978, pp. 637-699.
LAW/PER

Examines the theoretic foundation and practical consequences of Justice Tindal's decision in the M'Naghten trial. Conclusion is critical of the M'Naghten rule.

182 "Problems of a Psychiatrist in Operating Under the M'Naghten, Durham and Model Penal Code Rules", John R. Cavanagh. In Marquette Law Review, v.45 #4, Spring 1962, pp.478-493.
LAW/PER
Of the three rules, author favors M'Naghten as ". . . the most satisfactory and understandable to both psychiatrists, judges and juries."

183 "The Proposal to Abolish the Federal Insanity Defense: A Critique", George M. Platt. In California Western Law Review, v.10 #3, Spring 1974, pp. 449-472.
LAW/PER
Discussion of the constitutional and practical issues raised by President Nixon's proposed abolition of the insanity defense concludes that it is unacceptable.

184 "A Proposed Change in the Iowa Test of Criminal Responsibility". In Iowa Law Review, v.58 #3, February 1973, pp. 699-712.
LAW/PER
Discussion of Iowa Criminal Code Review Study Committee's recommendations that State adopt the A.L.I. rule of insanity rather than the present derivative of the M'Naghten rule. Although emphasis is on Iowa, also directed at other states which use M'Naghten.

185 Psychiatry and Criminal Law: Illusions, Fictions, and Myths, Sol Rubin. Dobbs Ferry, NY, Oceana, c1965. 219p.
LAW/TEXT
Recommends that the M'Naghten rule should be used to determine the guilt of a defendant by reason of insanity. If guilty, sentencing should be decided by the presiding judge based on psychiatric and other evidence.

186 Psychiatry and Law, Ralph Slovenko. Boston, MA, Little, Brown and Company, c1973. 726p.
LAW/TEXT 74-14963 SLOVENKO
Chapter 5, "Criminal Responsibility" (pp.77-91) gives a history of and recent trends in the insanity defense.

187 "Psychiatry and the Changing Concepts of Criminal Responsibility", Jonas Robitscher. In Federal Probation, v.31 #3, September 1967, pp.45-50.
J364.6305 qF293
Examines the various attacks on the M'Naghten rule and their effects on the treatment of mentally ill criminals by the psychiatric profession.

188 "Psychiatry, Sociopathy and the XYY Chromosome Syndrome", David B. Saxe. In Tulsa Law Journal, v.6 #3, August 1970, pp.243-256.
LAW/PER
Attempts to incorporate the XYY chromosome syndrome into the legal structure of insanity.

189 "A Psychoanalysis of the Insanity Plea--Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell", Albert A. Ehrenzweig. In The Yale Law Journal, v.73 #3, January 1964, pp.425-441.
LAW/PER
Argues that the legal definition of insanity must vary from crime to crime.

190 "Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like", George E. Dix. In The Journal of Criminal Law, Criminology and Police Science, v.62 #3, September 1971, pp. 313-334.
LAW/PER
Survey of attempts to integrate grading of offenses and the psychology of the offender. Concludes that, realistically, psychological abnormality should probably influence the term of punishment rather than the liability per se.

191 The Psychological Foundations of Criminal Justice: Historical Perspectives on Forensic Psychology, Robert W. Rieber and Harold J. Vetter, eds. New York, John Jay Press, c1978. 305p.
LAW/TEXT 79-23938 v.1
Part II, "Insanity and the Law", contains four essays on various aspects of the insanity defense.

192 Psychology and Law: Can Justice Survive the Social Sciences?, Daniel N. Robinson. New York, Oxford University Press, c1980. 221p.
LAW/TEXT 80-30521 ROBINSON
Chapter 2, "Insanity and Responsibility: Understanding M'Naghten" (pp.32-74) argues that even judges misunderstand M'Naghten. Critical of the insanity defense and the psychiatric profession.

193 "A Punishment Rationale for Diminished Capacity" Richard W. Havel. In UCLA Law Review, v.18 #3, February 1971, pp.561-580.
LAW/PER
Critical of the diminished capacity defense as it is applied in California. Proposes a revised standard which would correct the current confusion and unequal application.

194 "Recent Developments in Criminal Insanity Tests", Carl Fleetwood. In University of Illinois Law Forum, v. 1966 #4, Winter 1966, pp.1116-1124.
LAW/PER
Survey of recent efforts to ". . . formulate and implement a more enlightened definition of criminal responsibility [than M'Naghten].

195 Report, Canada. Royal Commission on the Law of Insanity as a Defense in Criminal Cases. [Ottawa, CA 1958] 73p.
340.6 C214
Includes discussion, alternatives, and recommendations.

196 Report, Great Britain. Royal Commission on Capital Punishment 1949-1953. London, Eng., Her Majesty's Stationery Office, September 1953. 506p. (Cmd. 8932)
343.23 G782
Chapters 4, 5, and 6 concern the insanity plea, with emphasis on possible modification of the M'Naghten Rule.

197 "Responsibility and Insanity--Do They Exist?", Jeffrey M. Shaman. In University of Pittsburgh Law Review, v.31 #2, Winter 1969, pp.243-254.
LAW/PER
Philisophical essay which argues that the concepts of responsibility and insanity are indispensable tools in the legal process regardless of their "real" existence.

198 "Responsibility Without Individual Responsibility?: The Controversy Over Defining Legal Insanity", Philip Lyons. In University of Colorado Law Review, v.45 #4, Summer 1974, pp.391-435.
LAW/PER
"To change the assumptions upon which the insanity defense rests is equivalent to partially severing the criminal law from the principle of individual responsibility. . .Abolition of the insanity defense . . . severs completely legal responsibility from the principle of moral accountability."

199 "The Right and Responsibility of a Court to Impose the Insanity Defense Over the Defendant's Objection". In Minnesota Law Review, v.65 #5, June 1981, pp.927-960.
LAW/PER
Emphasis on decisions in District of Columbia courts: Whalen v. United States, 346 F.2d 812; Frendak v. United States, 408 A.2d 364; and United States v. Wright, 627 F.2d 1300.

200 "The Rogers Criminal Responsibility Assessment Scales", Richard Rogers and James L. Cavanaugh, Jr. In Illinois Medical Journal, v.160 #3, September 1981, pp.164-166,169.
J610.62773 I2995
Description of a method for "(1) quantifying pertinent psychological variables at the time of the alleged crime, and (2) implementing a criterion based decision-making model with regard to the insanity defense."

201 "The Rule of the American Law Institute's Model Penal Code", Francis A. Allen. In Marquette Law Review, v.45 #4, Spring 1962, pp.494-505.
LAW/PER
"The Model Penal Code recognizes that the law of criminal responsibility must state a principle that is both intelligible and compatible with the general principles of criminal liability . . . The draftsman gave careful attention to the specific complaints made of M'Naghten and met these objections with, I believe, substantial success."

202 "Sanity: The Psychiatrico-Legal Communicative Gap", James K.L. Lawrence. In Ohio State Law Journal, v.27 #2, Spring 1966, pp.219-236.
LAW/PER
Discussion of the distance that separates the lawyer from the medical expert, especially when determining sanity. Suggests that any insanity test should be respsonsive to modern medical technology.

203 "Science, Common Sense, and Criminal Law Reform", Jerome Hall. In Iowa Law Review, v.49 #4, Summer 1964, pp.1044-1066.
LAW/PER
Argues that layman is as competent as an expert in recognizing extreme mental illness, and states that departures from the M'Naghten rule ". . . substitute the ideology of a particular group of psychiatrists for the principle of moral responsibility."

204 "Should the Insanity Defense Be Eliminated?". In Illinois Issues, v.6 #11, November 1980, pp.12-17.
J320.9773 q129 78-55411
Includes affirmative response by Dr. Robert A. de Vito, negative response by Mary McCormick and David Paull, and discussion of the insanity defense in general and in Illinois in particular by Donna Pedro.

205 "The Spirit of M'Naghten", David F. Ross. In Gonzaga Law Review, v.9 #3, Spring 1974, pp.806-815.
LAW/PER
Comment on Washington State's 1973 act defining the insanity defense, which was patterned after New York's 1967 statute.

206 "Squaring M'Naghten With Precedent--An Historical Note", Harvey Wingo. In South Carolina Law Review, v.26 #1, April 1974, pp.81-88.
LAW/PER
Examines English cases before M'Naghten and concludes ". . . M'Naghten may be seen simply as the culmination of a series of attempts to solidify British thinking on the troublesome insanity issue."

207 "Stopping the Revolving Door: Adopting a Rational System for the Insanity Defense", Andrew J. Nathan and Bonnie L. Raymond. In Hofstra Law Review, v.8 #4, Summer 1980, pp.973-1023.
LAW/PER
Argues for treating the insanity defense as an affirmative defense. Some discussion of New York law.

208 "Tentative Requiem for the M'Naghten Rule", George A. Lenzi. In Crime and Delinquency, v.12 #2, April 1966, pp. 170-178.
J364.6 N111
Argues that the M'Naghten rule "this absurd legal relic", should be abandoned in favor of Durham or Pike (New Hampshire). Claims that M'Naghten violates the U.S. Constitution's prohibition against cruel and usual punishments.

209 "Tests of Criminal Responsibility: New Rules and Old Problems", Jonas B. Robitscher. In Land and Water Law Review, v.3 #1, 1968, pp.153-176.
LAW/PER
Justifies the M'Naghten rule from both a legal and medical standpoint.

210 "Texas Rejects M'Naghten", Jenelle White Nolan. In Houston Law Review, v.11 #4, May 1974, pp.946-959.
LAW/PER

Examination of philosophical controversy surrounding Texas' 1973 rejection of the M'Naghten rule in favor of a modified version of the A.L.I. rule. Concludes that the change is beneficial.

211 A Treatise on the Medical Jurisprudence of Insanity, Issac Ray. Cambridge, MA, Harvard University Press, c1962. 376p.
LAW/TEXT
Reprint of classic interpretation of the insanity defense which first appeared in 1838 and had subsequent editions published in 1839, 1853, 1860, and 1871. Considered the basis for the New Hampshire Rule, which was later to evolve into the Durham Rule.

212 "Understanding the New Hampshire Doctrine of Criminal Insanity", John Reid. In The Yale Law Journal, v.69 #3, January 1960, pp.367-420.
LAW/PER
Argues that, while similar, the New Hampshire insanity rule and the Durham rule have enough differences to be considered separately.

213 "United States v. Brawner: The District of Columbia Abandons the Durham Insanity Test". In Alabama Law Review, v.25 #2, Spring 1973, pp.342-370.
LAW/PER
Discussion of D.C. insanity tests before Brawner, factual background and its possible effects.

214 The Urge to Punish: New Approaches to the Problem of Mental Irresponsibility for Crime, Henry Weihofen. New York, Farrar, Straus and Cudahy, c1956. 213p.
LAW/TEXT
Compares M'Naghten with Durham and ALI test.

215 "Virginia's Insanity Defense: Reform is Imperative", William C. Waddell III. In University of Richmond Law Review, v.13 #2, Winter 1979, pp. 397-419.
LAW/PER
Recommends a modification of the ALI test.

216 "The Virtues of M'Naghten", Joseph M. Livermore and Paul E. Meehl. In Minnesota Law Review, v.51 #5, April 1967, pp.789-856.
LAW/PER
Philosophical essay whose purpose is ". . . to explore the place of the insanity defense within the framework and purposes of the criminal law."

217 "Why an 'Insanity Defense'", Joseph Goldstein and Jay Katz. In Daedalus, v.92 #3, Summer 1963, pp. 549-563.
J506 A512
Examines the history, rationale, and concepts of the insanity defense.

218 "Will the XYY Syndrome Abolish Guilt?", Nicholas N. Kittrie. In Federal Probation, v.35 #1, March 1971, pp. 26-31.
J364.6305 qF293
Examines turmoil which surrounds XYY syndrome controversy, especially that no one with a chromosomatic disorder is guilty of anything, and concludes that society must still protect itself against those without moral guilt.

219 "The XYY Chromosomal Abnormality: Use and Misuse in the Legal Process", Lawrence B. Kessler. In Harvard Journal on Legislation, v.9 #3, March 1972, pp.469-497.
J328.73 H339
"This Note will consider the most recent XYY medical data as it relates to deviant behavior. Then, in light of these data, the Note will consider the role of the XYY Chromosome in the legal process."

220 "The XYY Syndrome: A Challenge to Our System of Criminal Responsibility". In New York Law Forum, v.16 #1, Spring 1970, pp.232-262.
LAW/PER
"The purpose of this paper is not to establish the validity of the XYY syndrome as a defense but rather to utilize it to poignantly illustrate the failings of our criminal legal thinking and practices."

221 "The 'XYY Syndrome': Genetics, Behavior and the Law", Kenneth J. Burke. In Denver Law Journal, v.46 #2, Spring 1969, pp.261-284.
LAW/PER
Concludes that the XYY Syndrome defense could be used in states using the ALI test, and possibly in those states using the M'Naghten rule.

END