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SQUARING M'NAGHTEN WITH PRECEDENT —AN HISTORICAL NOTE

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The famous advisory opinion of *M'Naghten's Case*[1] has often been viewed as establishing a *new* test for insanity in England.

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* *Editor's Note:* The test of criminal responsibility recognized in the overwhelming majority of Anglo-American jurisdictions, including South Carolina,is the *M'Naghten* rule. Prior to 1886, South Carolina had followed a rather vague test of insanity which left, with little guidance, the question of criminal responsibility to the jury. *See* State v. Stark, 1 Strat. 479 (1847). In State v. Bundy, 24 S.C. 439 (1886), the South Carolina Supreme Court, expressly approving the test authorized by the opinion of the English judges, in answer to the question of the House of Lords growing out of the *M'Naghten Case*, used the following formulation:

> In order to relieve himself from responsibility for a criminal act by reason of mental unsoundness, he (the prisoner) must show that he was under a mental delusion by reason of mental disease, and that at the time of the act he did *not know* that the act he committed was wrong, or criminal, or punishable, either the one or the other. Because, notwithstanding his mind may be diseased, if he is still capable of forming a correct judgment as to the nature of the act, as to its being morally or legally wrong, he is still responsible for his act and punishable as if no mental disease existed at all. 24 S.C. at 445.

There has been little change or elaboration of the test since *Bundy*. More recent statements differ only in length, defining the test as ". . . the mental capacity or the want of it sufficient to distinguish moral or legal right from moral or legal wrong." State v. Thorne, 239 S.C. 164, 169, 121 S.E.2d 623, 625 (1961), *cert. denied*, 368 U.S. 979 (1962). *See also* State v. Allen, 231 S.C. 391, 98 S.E.2d 826 (1957); State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956); State v. Keller, 224 S.C. 257, 78 S.E.2d 373 (1953); State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951); State v. Gilstrap, 205 S.C. 412, 32 S.E.2d 163 (1944).

The most recent challenge to South Carolina's use of the *M'Naghten* rule came in State v. Cannon, 260 S.C. 537, 197 S.E.2d 678 (1973), *cert. denied*, 42 U.S.L.W. 3309 (U.S. Nov. 20, 1973), when the court was asked to abandon the rule as a means of establishing legal sanity. The court's response to this suggestion was unequivocal:

> It would serve no useful purpose in this opinion to rehash the merits and demerits of the M'Naghten rule. We are aware of the alternatives which some courts have adopted, but are not convinced that the other rules set forth a better formula for determining whether a person accused of crime should be excused because of his mental condition. It should be comforting to those who attack the M'Naghten rule to realize that a layman jury, regardless of the rule recited, normally takes a common sense approach and determines whether the accused person is, first, guilty or not guilty, and if guilty, whether his mental condition is such that he ought to be excused of the crime because of his mental condition. *We adhere to the M'Naghten rule.* 260 S.C. at 548-49, 197 S.E.2d at 682 (emphasis added).

It is hoped that this article, by putting *M'Naghten* in its proper historical context, will aid the practitioner in gaining an insight into the *M'Naghten* rule.

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1. Daniel M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

One view, held by Chief Justice Warren Burger, has quite properly emphasized the historical significance of the case: "[O]bsolete is the wrong term to apply to M'Naghten, unless we say that the Magna Charter [*sic*] is obsolete . . . . [E]ach of them is incomplete and would not be adequate for today. Each needs something more . . . ."[2] Burger apparently sees *M'Naghten* as a great stride forward in the historical development of insanity as a defense *because* it actually marked the *abandonment* of the right and wrong test for insanity. "The M'Naghten test," he has noted, "does not even use the word 'right.' "[3] Two questions are raised, however, by such a reading of *M'Naghten*: (1) Is the *M'Naghten* test really not the "right and wrong" test that has been so unmercifully condemned by so many? (2) Did *M'Naghten* work an abrupt change in the test for insanity in England?

While it is true that *M'Naghten* rejected any existing English precedent for use of a standard which focused on the offender's ability to know right from wrong in the abstract, the *M'Naghten* judges, in announcing and explaining their test for determining legal insanity, did not cast aside the "right and wrong" terminology:

> [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. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged.[4]

While the actual statement of the test itself, as noted by Chief

2. Burger, *Panel Discussion — Psychiatry and the Law*, 32 F.R.D. 481, 560 (1962) (Proceedings os the Annual Judicial Conference of the Tenth Judicial Circuit of the United States).

3. *Id. See also* Burger, *Psychiatrists, Lawyers, and the Courts*, 28 FED. PROBATION, June 1964, at 4.

4. 8 Eng. Rep. at 722-23.

Justice Burger, does not include the word "right," the explanation as to how the test should be put to the jury does specifically employ a "right and wrong" formulation of the standard. The question, the *M'Naghten* court said, should be put with "reference to the party's knowledge of right and wrong in respect to the very act with which he is charged."[5] Thus, even if it could be said that the case marked the abandonment of what may have been previously an abstract "right and wrong" standard, the test adopted by the judges in *M'Naghten* was clearly one which still looked to the offender's ability to know right from wrong, if only as to the act charged.

A second, more interesting problem raised by contemporary interpretations of *M'Naghten* is whether *M'Naghten* actually represents a departure from existing precedent in its statement of the test for insanity. A close reading of the language quoted above indicates that the *M'Naghten* judges were apparently reaffirming what they believed to be the *established* English test for insanity, merely wishing to emphasize that the test should be put to the jury in terms of the particular act charged rather than in the abstract. It must be conceded that there is a great difference between the two standards — knowledge of right and wrong in the abstract and knowledge of right and wrong with respect to the particular act charged — and far too frequently the distinction has been ignored.[6] Nevertheless, the *M'Naghten* judges seem to have concluded that the latter approach had long been intended by the courts in England, despite the general "mode of putting [it] to the jury . . . which . . . rarely, if ever, [had misled] the jury."[7] They passed over the significant difference between the two instructions as though they felt that English juries had always understood that they were to determine the offender's ability to know right from wrong as to the act charged *even if* the instruction were phrased in terms of knowing right from wrong in the abstract.

An examination of some of the more important pre-*M'Naghten* cases involving the insanity issue will aid in deter-

5. *Id.* at 723.

6. *See, e.g.*, Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1241 (1966).

7. 8 Eng. Rep. at 722-23. This statement is perhaps the most remarkable statement in the case, as will be demonstrated shortly.

mining whether the *M'Naghten* judges were correct in concluding that the test as formulated by them had already been established by precedent. In *Arnold's Case,*[8] decided in 1724, Judge Tracy of the Court of Common Pleas charged the jury in part as follows:

> That he shot, and that wilfully [is proved]: but whether maliciously, that is the thing: that is the question; whether this man hath the use of his reason and sense? If he was under the visitation of God, and *could not distinguish between good and evil, and did not know what he did,* though he committed the greatest offence, yet he could not be guilty of any offence against any law whatsoever; for guilt arises from the mind, and the wicked will and intention of man. If a man be deprived of his reason, and consequently of his intention, he cannot be guilty . . . . On the other side, we must be very cautious . . . it must be a man that is *totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast* . . . therefore I must leave it to your consideration, whether the condition this man was in, as it is represented to you on one side, or the other, doth shew a man, who *knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did.* . . . [a]nd if you believe he was *sensible, and had the use of his reason,* and *understood what he did,* then he is not within the exemptions of the law, but is subject to punishment as any other person.[9]

A challenge to draw from this instruction a specific test for determining legal insanity would be foolishly accepted. Unfortunately, the case has generally been cited as establishing a so-called "wild beast" test by reason of the use of that term at one point in the instruction. The charge has been more accurately described by Glueck as "an excellent illustration of the kind of hotch-potch handed out in judicial charges to juries, in this field."[10] Glueck saw the "wild beast" reference as only one of a number of attempts by Judge Tracy to "help the jury decide the vexing question of where to draw the line in insanity cases between responsibility and irresponsibility."[11] A careful reading of the charge in *Arnold's Case* indicates, however, that there was some support for the *M'Naghten* formulation as early as 1724. There are no less

8. 16 How. St. Tr. 695 (1724).

9. *Id.* at 764-65 (emphasis added).

10. S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 139 n.2 (1925).

11. *Id. See also,* H. WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 21 n.24 (1933).

than five references to the question of whether the defendant knew or understood what he was doing or, in *M'Naghten* terms, whether he knew "the nature and quality of the act he was doing."[12] While in one instance Judge Tracy submitted the question of whether Arnold could "distinguish between good and evil," he later modified or expanded this instruction by posing the question in terms of Arnold's ability "to distinguish whether he was doing good or evil."[13] This particular guideline for the jury focused upon the knowledge of right and wrong as to the particular act charged.

Perhaps the case most frequently cited as establishing the abstract "right and wrong" standard is *Ferrers' Case,*[14] decided in 1760. The Solicitor General, in addressing the House of Lords, explained the insanity defense more nearly in terms of whether the defendant was capable of knowing right from wrong in the abstract. If, he said, the defendant had a "competent use [of his reason] sufficient to have restrained those passions, which produced the crime; if there be thought and desion; a faculty to distinguish the nature of actions; to *discern the difference between moral good and evil,*"[15] then he would be criminally responsible for his act. Interestingly, while employing the "right and wrong" test in its abstract form here, the Solicitor General also used language that at least borders on the irresistible impulse concept in his reference to reason "sufficient to have restrained those passions, which produced the crime."[16] Or, this specific reference to the particular crime, coupled with the language of the "good and evil" formula, could have been an effort to tie the formula to the crime charged. This notion certainly could have been the purport of the very next paragraph:

> My lords, the question therefore must be asked; is the noble prisoner at the bar to be acquitted from the guilt of murder, on account of insanity? It is not pretended to be a constant general insanity. Was he under the power of it, *at the time of the offence committed?* Could he, did he, *at that time,* distinguish between good and evil?[17]

12. 8 Eng. Rep. at 722.
13. 16 How. St. Tr. at 695.
14. 19 How. St. Tr. 886 (1760).
15. *Id.* at 947-48 (emphasis added).
16. *Id.* at 947.
17. *Id.* at 948 (emphasis added).

Of course, the primary emphasis here is on whether the alleged insanity overpowered the accused at the *time* the particular offense was committed. Expressed differently, however,.the import is that the mental disorder need only affect the accused's ability to distinguish good and evil at the very moment he committed the crime. Was he able to realize, at that moment, that he was doing evil? This formulation could be exactly the kind of instruction the *M'Naghten* judges had in mind when they concluded that the manner of submitting the insanity defense to juries in the past had "rarely, if ever [led to] any mistake with the jury."[18]

Probably the most often quoted of the earlier English cases in the field of insanity is *Hadfield's Case,*[19] where Thomas Erskine made his famous appeal for the defense in terms which foreshadowed the "disease-product" test of *Durham v. United States.*[20] Erskine's oratory apparently so impressed the Chief Justice, Lord Kenyon, who presided at the trial, that an acquittal was directed, although Hadfield was retained in custody for disposition "for the safety of society."[21] The following excerpts from Erskine's speech indicate his view of the insanity defense:

> I must convince you, not only that the unhappy prisoner was a lunatic, within my own definition of lunacy, but that the act in question was the IMMEDIATE, UNQUALIFIED OFFSPRING OF THE DISEASE. . . . [T]he relation between the disease and the act should be apparent.
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> But it is said, that whatever delusions may overshadow the mind, every person ought to be responsible for crimes, *who has the knowledge of good and evil* . . . . [T]he knowledge of good and evil is too general a description. . . . [Y]our province today will, therefore, be, to decide, whether the prisoner, when he did the act, was under the uncontrollable dominion of insanity, and was impelled to it by a *morbid delusion*; or whether it was an act of a man, who, though occasionally mad, or even at the time not perfectly collected, was yet not actuated by the disease, but by the suggestion of a wicked and malignant disposition.[22]

Here is an outright rejection of the "right and wrong" standard

18. 8 Eng. Rep. at 722-23.
19. 27 How. St. Tr. 1281 (1800).
20. 214 F.2d 862 (D.C. Cir. 1954).
21. Hadfield's Case, 27 How. St. Tr. 1281, 1354 (1800).
22. *Id.* at 1314-19 (emphasis in original).

and an emphasis on the effect of delusion. In this regard, however, it should be noted that the defendant, Hadfield, was allegedly obsessed with the idea that he must give his life for the salvation of the world and shot at King George III hoping to be executed in order to fulfill this supposed role. Thus, Erskine was obviously tailoring his defense to the facts of his case. It is probably safe to conclude that "Hadfield's acquittal was not a judicial adoption of delusion as the test in the place of knowledge of right and wrong [but was undoubtedly] an instance of the bewildering effect of Erskine's adroitness, rhetoric and eloquence."[23]

At this point, it is certainly not at all clear whether the "right and wrong" test being employed by the pre-*M'Naghten* cases in England was concerned with the offender's knowledge of right and wrong in the abstract or as to the particular act charged. Two other pre-*M'Naghten* cases, however, weigh heavily in favor of the *M'Naghten* judges' determination. In *Rex v. Offord*[24] the jury was told that the question was: "[D]id [the accused] know that he was committing an offence against the laws of God and nature?"[25] Finally, in *Regina v. Oxford*,[26] just three years before *M'Naghten*, Lord Denman instructed the jury:

> On the part of the defence it is contended, that the prisoner at the bar was *non compos mentis,* that is (as it has been said), *unable to distinguish right from wrong, or, in other words,* that from the effect of a diseased mind *he did not know at the time that the act he did was wrong.* . . . [T]he question will be, whether all that has been proved about the prisoner at the bar shews that he was insane at the time when the act was done — whether the evidence given proves a disease in the mind as of a person *quite incapable of distinguishing right from wrong.* . . . The question is, whether the prisoner was labouring 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.*[27]

This instruction is precisely the type of instruction which has so

23. H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 58 (1954), *quoting from* State v. Pike, 49 N.H. 399, 434 (1869).

24. 172 Eng. Rep. 924 (K.B. 1831).

25. *Id.* at 925.

26. 173 Eng. Rep. 941 (Q.B. 1840).

27. *Id.* at 950 (emphasis added).

confused the issue, for us at least, if not for the English juries of the time. In fact Lord Denman at one point actually stated both formulations of the "right and wrong" test as though they were the same. In other words, being able to distinguish right from wrong meant being able to "know at the time that the act he did was wrong."[28]

The conclusion is inescapable that, prior to *M'Naghten,* explanations of the insanity defense varied considerably from case to case, and instructions in a single case sometimes included glaringly contradictory guidelines. As early as 1724, however, in *Arnold's Case,*[29] there is support for the assertion that the courts contemplated the use of a "right and wrong" formula applied with regard to the particular act charged. On the other hand, if *Ferrers' Case*[30] in 1760 is considered to be the genesis of the "right and wrong" standard, then the offender's knowledge of right and wrong in the abstract may have prevailed for a time, although the explanation in that case is also subject to conflicting interpretations. Finally, even assuming that *Ferrers' Case* made use of the abstract standard, later cases such as *Offord* and *Oxford* would seem to dictate the *M'Naghten* view. Thus, *M'Naghten* may be seen simply as the culmination of a series of attempts to solidify British thinking on the troublesome insanity issue. *M'Naghten's* unequivocal recognition of the "right and wrong" standard as an established rule and the national attention it attracted at the time, make it a case of special significance.[31] With its sharp focus on the offender's ability to know right from wrong with respect to the particular act charged, *M'Naghten* clarified and brought order out of existing but confusing precedent and produced a distinct, workable rule from which the more modern tests for insanity have evolved. While the historical importance of *M'Naghten* and its value as precedent can certainly not be denied, the insanity test announced there was by no means a revolutionary development.

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28. *Id.*

29. 16 How. St. Tr. 695 (1724). *See* notes 8 and 9 *supra* and accompanying text.

30. 19 How. St. Tr. 886 (1760). *See* notes 14-17 *supra* and accompanying text.

31. *See generally* H. WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL CASES 24-25 (1933): "[T]he first reason for the important position which M'Naghten's Case has obtained in the development of the law, was the popular interest caused by the sensational facts of the case."