

Volume 10 | Issue 4

1959

Criminal Insanity--A Study of Legal Inertia

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Recommended Citation

Robert A. Goodman, *Criminal Insanity--A Study of Legal Inertia*, 10 *Wes. Res. L. Rev.* 597 (1959)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol10/iss4/14>

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merchant who attempts to exercise the privilege. That the privilege shields the merchant from liability for all related torts if he acts reasonably should be expressly stated, and more precise standards regarding the amount of investigation and degree of force permissible should be established. These matters ought not to be left to the interpretation of the Ohio courts, which heretofore have hesitated to grant positive protection to the merchant. Furthermore, the effectiveness of the statute is greatly weakened by the provision requiring the apprehension to be made outside of the store, a limitation which no other legislature has deemed necessary.

The statute is unnecessarily narrow in its scope, since there is no logical reason to legislate in favor of the mercantile trade and ignore the similar problem faced by the restaurateur. But this statute is better than none at all, since it at least indicates that there are public policy reasons which demand protection for the merchant, and perhaps the courts will construe this as a mandate for giving the statute the broadest possible interpretation. The merchant now has a weapon with which to combat the shoplifting problem, and even if the privilege is not often exercised, it should be widely publicized, for in this manner the light-fingered customer might be discouraged from giving vent to that "little bit of larceny" in his character.

JAMES AMDUR

Criminal Insanity—A Study of Legal Inertia

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 defect.¹

This last sentence, pronounced by Judge David Bazelon of the Court of Appeals for the District of Columbia, in 1954, has been the source, in the short space of four years, of one of the most heated controversies in the history of Anglo-American jurisprudence. It has set the legal and medical professions against one another, and has even caused a relative upheaval among the ranks of the respective fields. It has served as the basis for countless essays and commentaries in law reviews and bar association journals throughout the country, and in the reports of numerous medical and psychiatric committees and conventions. It has evoked the consternation or plaudits of the great names of medicine, law, and the social sciences; Zilboorg, Menninger, Cardozo, Hand, Weihofen and

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

Guttmacher are just a few of those whose teachings lend strength to one side or the other.

Committees of the United States Congress are this very day studying two proposed measures of legislation; one directed at embellishing, and the other at eliminating, the possible effects of this solitary sentence.² For these few words, so profound in meaning, are the context of the celebrated, but not necessarily lauded, *Durham* rule.

Monte Durham, tried for housebreaking, had a long history of confinement and treatment at mental institutions. In spite of this, the trial court ruled out psychiatric testimony to the effect that the accused was of an extremely unsound mental condition, because it was not directed to defendant's capacity to distinguish right from wrong. The appellate court held this was error. "In the field of law as in other fields, the fact finder should be free to consider all information advanced by relevant disciplines."³

Actually, this view of the criminal law of insanity, although regarded by the majority of today's legal authorities as present day radical heresy, is merely the reiteration of what was expressed in New Hampshire nearly a century ago. In the 1870 case of *State v. Pike*⁴ the court held that the verdict should be "not guilty by reason of insanity" if the killing was the product of mental disease in the defendant, that knowledge of right and wrong was not as a matter of law a test of mental disease, but that all symptoms of mental disease are purely matters of fact to be determined by the jury.⁵

The entrenchment of the present rule of criminal insanity is of such depth that only two jurisdictions until 1954 have dared to attack it. Their efforts succeeded only in evoking such disdain as was expressed in *Anderson v. United States*:⁶

This court has no desire to join the courts of New Hampshire and D.C. in their magnificent isolation of rebellion against McNaughton, even though New Hampshire has been travelling down that lonesome road since 1870. Rather than stumble along with Pike, we prefer to trudge along the now well travelled pike blazed more than a century ago by McNaughton.⁷

HISTORY OF MCNAUGHTON

The seemingly omnipotent McNaughton, alluded to almost reverently

2. Newsweek, April 23, 1959, p. 31.

3. *Durham v. United States*, 214 F.2d 862, 872 (D.C. Cir. 1954).

4. 49 N. H. 399 (1870).

5. *Ibid.*

6. 237 F.2d 118 (9th Cir. 1956).

7. *Id.* at 127.

by the *Anderson* court, was an unfortunate soul who killed the secretary of Robert Peel in 1834 in England, while under the delusion that his supposed enemies were persecuting him.⁸ He was acquitted by reason of being mentally irresponsible, whereupon fifteen members of the bench were called upon to promulgate, once and for all, a steadfast rule of criminal insanity.⁹ Such an immutable object did they create that it has, unlike other aspects of the law, medicine, science, philosophy, and education, withstood the best efforts of progress and time, man and nature, with only one slight lapse.¹⁰ This archaic, and rather antiquated piece of judicial wisdom is herein set forth:

. . . jurors ought to be told . . . that to establish insanity it must clearly be found that, at the time of . . . the act the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of what he was doing, or if he did know it, that he did not know what he was doing was wrong.¹¹

This right-wrong test, established well over one hundred years ago, is, as of this day, accepted as the sole test of insanity in thirty of our states, while fifteen others and the federal system have adopted it along with the *irresistible impulse* modification.¹² It would seem more than just possible that, after one hundred and twenty years of almost complete inertia in this area of the law, the advent of a decision such as in the *Durham* case would be a welcomed breath of fresh air. Yet five years after its pronouncement the *Durham* rule has been rejected by all but two of the jurisdictions that have considered it,¹³ these two being New Mexico¹⁴ and Vermont.¹⁵

8. Ellison and Hass, *A Recent Judicial Interpretation of the McNaughton Rule*, 4 BRIT. J. DELINQUENCY 129 (1953).

9. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

10. *Smith v. United States*, 36 F.2d 548 (D.C. Cir. 1929). The test adopted by this court, and fifteen other jurisdictions was to the effect that if an accused knew his act was wrong, but his will was involuntarily destroyed so completely that his action was not subject to the will, but was beyond his control, the verdict must be not guilty by reason of insanity.

11. 10 CL. & Fin, 200, 210, 8 Eng. Rep. 718, 722 (1843).

12. See note 10 *supra*.

13. See *Howard v. United States*, 232 F.2d 274 (5th Cir. 1956); *People v. Ryan*, 140 Cal. App. 2d 412, 295 P.2d 496 (1956); *State v. Iverson*, 77 Idaho 103, 289 P.2d 603 (1955); *People v. Carpenter*, 11 Ill.2d 60, 142 N.E.2d 11 (1957); *Flowers v. State*, 236 Ind. 151, 139 N.E.2d 185 (1956); *Thomas v. State*, 206 Md. 575, 112 A.2d 913 (1955); *Johnson v. State*, 223 Miss. 56, 76 So.2d 841 (1955); *State v. Kitchens*, 129 Mont. 331, 286 P.2d 1079 (1955); *Commonwealth v. Chester*, 150 N.E.2d 914 (Mass. 1958); *Berryman v. State*, 283 P.2d 558 (Okla. 1955).

14. *State v. White*, 58 N.M. 324, 270 P.2d 727 (1954).

15. VT. PUB. ACTS 1957, No. 228, at 200.

The truly appalling aspect of this situation is not that *Durham* has not been accepted, but that it has been cast aside with what amounts to almost contemptuous disregard. It is criticized not so much on a technical basis, *i.e.*, that it may be unsound scientifically, or that the implications of its terminology are not absolutely clear, but merely because it attempts to alter something that lawyers and judges have become so accustomed to that they cannot believe another alternative could possibly exist, let alone a better one.

LEGAL INERTIA

What is even more dismaying about this indifference expressed for the possible significant import of the *Durham* decision, is that the right-wrong test has been vigorously denounced by several of our most outstanding authorities from the very time of its inception. In fact, in 1838, five years even before the test was incorporated in the *McNaughton* rule, Doctor Isaac Ray, great nineteenth century American authority on legal psychiatry, criticized the basing of responsibility on the ability to distinguish right from wrong.¹⁶ His English contemporary, Dr. Henry Maudsley, further declared that in setting forth the *McNaughton* rule the judges had held "to an absurd dictum which has long since been discredited by medical science."¹⁷

The list of psychiatrists who discredit the *McNaughton* rule is too endless to attempt to set forth here. But such outstanding men in the field as William White, Menninger, Overholzer and Zilboorg, have been unrelenting in their criticism of the test.¹⁸ In polls conducted by the American Psychiatric Association and by the Group for the Advancement of Psychiatry, the right-wrong test has been convincingly rejected as a competent basis for determining criminal insanity.¹⁹

The legal disdain for the psychiatrist's views in this area could almost be considered ludicrous, if the subject weren't of such a vital nature. The court in *United States v. Sauer*²⁰ quoted one authority in saying, "psychiatry is still more of an art than a science."²¹ What this court overlooked, as so many have, was that its own cherished right-wrong test was

16. RAY, *MEDICAL JURISPRUDENCE OF INSANITY* 47 (1938).

17. Guttmacher, *The Psychiatrist As An Expert Witness*, 22 U. CHI. L. REV. 325 (1955).

18. *Ibid.*

19. *Ibid.*; See also MODEL PENAL CODE 268 (Tent. Draft No. 4, 1955).

20. *Sauer v. United States*, 241 F.2d 640 (9th Cir. 1957).

21. *Id.* at 650, quoting Sullivan, *Psychiatry*, 12 ENCYC. SOC. SCI. 580 (1934). For full discussion of this view see Hall, *Mental Disease And Criminal Responsibility*, 45 COLUM. L. REV. 677 (1945).

originally formulated in the early 1800's on the basis of the then existing psychiatric theories. Having accepted for its own use the scientific knowledge of 1800, the Law has subsequently refused to acknowledge that medical science may have progressed any further in the succeeding century and a half.

The situation as it exists today, can possibly be illustrated in its entirety by the following commentary concerning the rejection by the Louisiana State Institute of Law of an insanity rule similar in nature to that of the *Durham* decision.

The really depressing thing was the spectacle of a group of prominent lawyers, judges, and law teachers sitting calmly by, and on the basis of the personal experiences of each, either denying or ignoring the existence of scientific facts about mental diseases. Personal experience and intuitive judgment perhaps remain practically the only sources of reference in many legal fields, but here is one in which other factual scientific bases exist, which cry out to high heaven for recognition. . . . Nevertheless . . . Louisiana remains saddled with a test of legal insanity that is about as modern as a witchcraft trial.²²

Such inertia would surely seem to be the complete antithesis of the very vital and vibrant American way of life. If the lethargy itself is dismaying, then the reasons behind it must be considered even more so. Perhaps the answer was best expressed by Judge Harold Medina of the Court of Appeals, Second Circuit, in his address on law reform to the New York Law Association in 1956.

. . . I think we lawyers are seriously delinquent. Whether through selfishness and a desire to avoid . . . learning new law, or over conservatism, or fear of getting in wrong with judges and losing clients or sheer laziness, the fact is we lawyers on the whole shrink from battle when it comes to fighting for improvements in the administration of justice.²³

Rather a damning condemnation of one's profession, but who can summarily deny its validity? The reader should not gain the impression that it is only the legal theorist or the psychiatric idealist who advocate a change after so many years. Quite the contrary. Two present members of our Supreme Court Bench, Justices Frankfurter²⁴ and Douglas,²⁵ and former Solicitor General of the United States Simon Sobeloff,²⁶ presently a judge in the Court of Appeals, Fourth Circuit, have joined in renounc-

22. Morrow, *The Louisiana Criminal Code of 1942*, 17 TUL. L. REV. 1, 17 (1942).

23. 12 RECORD OF N.Y.C.B.A. 471, 475 (1957).

24. MODEL PENAL CODE § 4.01, p. 174 (Tent. Draft No. 4, 1955).

25. Douglas, J., *The Durham Rule: A Meeting Ground For Lawyers & Psychiatrists*, 41 IOWA L. REV. 485 (1956).

26. Sobeloff, *The Law of Criminal Insanity; From McNaughton to Durham & Beyond*, 41 A.B.A.J. 793 (1955).

ing this unyielding regard for judicial precedent in the area of criminal insanity.

Appearing before the British Royal Commission on Capital Punishment, Justice Frankfurter decried the situation presently existing that "rules of law should be arrested at the state of psychological knowledge at the time when they were formulated. . . . I dare to believe that we ought not to rest content with the difficulty of finding an improvement in the *McNaughton* rule."²⁷

EVOLUTION OF INSANITY RULE

The *Durham* rule is something new in that it is only the second decision of its nature, but the underlying stimulus for it goes back to the very beginning of time. For the true motivation behind *Durham* is evolution, or advancement, or progress; it is still the same regardless of what name it is given. Judge Bazelton, like many, yet comparatively so few before him, realized that the Law is not a static entity; it is not an absolute. It is flexible; it must shift and bend to meet the needs of the society it serves. Those who still maintain that the precedent of the right-wrong test must not be upset, are closing their eyes and their minds to the history of Anglo-American jurisprudence. The right-wrong test itself is but a modification of a prior insanity test. At the turn of the nineteenth century, the public began to rebel, on the basis of the then latest medical knowledge, against the inhumanity of the "*Mad Beast Rule*" of *Rex v. Arnold*.²⁸ Thus it was that the ability to distinguish right from wrong became the criterion for determining mental responsibility.

Through the years there have been sporadic outbursts of judicial rebellion against the heavy hand of precedent. Unfortunately, these singular individuals were unable to voice a majority opinion, with the exception of the New Hampshire court, until the recent District of Columbia decision.

What is even more remarkable about this almost religious adherence to the right-wrong test is that, but for the public outcry at *McNaughton's* acquittal, the law of insanity might well have been that of the *Durham* decision as early as the 1840's. There was a definite trend toward the shaping of such a law prior to the *McNaughton* case, following the lead

27. Guttmacher, *The Psychiatrist As An Expert Witness*, 22 U. CHI. L. REV. 325, 326 (1955).

28. *Glueck*, MENTAL DISORDER AND CRIMINAL LAW, 138, 139 (1925), citing *Rex v. Arnold*, 16 How. St. Tr. 695, 764 (1724). An accused could escape punishment if he did not know what he was doing "no more than a wild beast." Also at p. 142, citing *Earl Ferrer's Case*, 19 How. St. Tr. 886 (1760).

of the brilliant defense made by the eloquent Thomas Erskine in gaining the acquittal of the defendant in the *James Hatfield* case of 1800.²⁹

Advocating that people might know the difference between right and wrong yet still be held insane, Erskine described them as persons who:

. . . often reason with a subtlety which puts in the shade the ordinary conceptions of mankind: their conclusions are just and frequently sound: but the premises from which they reason, when within the range of the malady, are uniformly false: not false from any defect of knowledge of judgment, but, because a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resistance because unconscious of attack.³⁰

Justice Douglas, commenting on the insanity rule, felt that the law might well have been evolved upon this line of reasoning, had not politics and the press conspired against the development in that direction.³¹

AN EVER-PRESENT UNDERCURRENT

Despite the efforts of every jurisdiction (except New Hampshire) the reasoning of Erskine has never been completely eradicated from our court decisions. It is frequently found in the vigorous dissents of the leading cases cited by proponents of the right-wrong test.

In *State v. Horton*,³² the defense psychiatrist had testified that the defendant, a college youth who had killed his father, was mentally deranged to the extent that he harbored delusions of persecution by his father, which in his mind, was the cause of the decline of his grades from average to failing, the reduction of his intelligence quotient from one hundred and eight to eighty-one, his social rejection, and finally his engaging in homosexual relations. In commenting on the trial court's striking of all such psychiatric testimony, except that which related to defendant's ability to distinguish right from wrong, Justice Van Voorhees, in dissent, cited *People v. Odell*³³ for the contention that:

The better principle for a court in a criminal case, emphatically in a capital case, . . . is to present to the jury the case on trial in all the phases in which the jury ought to consider it. Much latitude must be allowed in the application of this precept but to charge . . . without advertent in any respect to the testimony might result in harmful prejudice. The trial judge should not . . . limit himself to stating good set terms of law culled from the codes; . . . jurors need not legal definitions merely.

29. Trial of James Hatfield, 27 How. St. Tr. 1282 (1800).

30. *Id.* at 1314. See also 41 IOWA L. REV. 485, 487, (1956).

31. Douglas, J., *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485 (1956).

32. 308 N. Y. 1, 123 N.E.2d 609 (1954).

33. 230 N. Y. 481, 130 N.E. 619 (1921).

They require proper instructions as to the method of applying such definitions after reaching their conclusions on the facts.³⁴

A similar desire to escape the confines of the right-wrong test was expressed in the dissent of Chief Justice Biggs in *United States ex rel, Smith v. Baldi*:

From this hundred year old conception, unchanged by the passage of time, or the advance of science, grew the right and wrong test. . . . This doctrine has plagued the law of Pennsylvania as it does that of most other states. . . . It need not always be so. Changes can be effected and reason can be brought to the law of criminal insanity. The rule of *McNaughton's* case was created by decision. Perhaps it is not too much to think that it may be altered by the same means.³⁵

It is of more than minor significance, in considering this issue, that the proponents of enlarging the scope of our insanity rule have not always been confined to the role of minority dissenters. Courts in several of the leading cases which uphold *McNaughton* have been clearly cognizant of the need of a more flexible and comprehensive standard. In *People v. Sherwood*, in reference to the defense's claim that the accused killed her child because she had become obsessed with the delusion that only in death could the child gain freedom from pain and suffering, the court pointed out that: "[t]he time was gone by when such a claim could seem fantastic, either to judge or juror. While we still — and rightly — accept the validity of such claims with the utmost of caution, we nevertheless know now that they may be valid."³⁶ In a subsequent case, *People v. Schmidt*, the New York court further declared: "[w]e must not . . . exaggerate the rigor of the rule . . . if in so doing, we rob the rule of all relation to the mental health and true capacity of the criminal."³⁷

Perhaps no one case has ever presented as complete and complex a picture of the relevant aspects of legal insanity as the *Parsons* case of 1886 in Alabama.³⁸ Time and again this court's decision has been cited by those who advocate the tenets of *McNaughton*. Yet the context of the opinion reflects much the same attitude as expressed by the *Pike* and *Durham* courts. So true is this, that Judge Somerville cited *Pike*, in support of his view that the concepts of criminal insanity must be enlarged to coincide with the latest scientific doctrines.³⁹ Thus it is that we have

34. 308 N. Y. 1, 21, 123 N.E.2d 609, 616 (1954).

35. 192 F.2d 540, 567 (3rd Cir. 1951).

36. 271 N. Y. 427, 430, 3 N.E.2d 581, 582 (1936).

37. 216 N. Y. 324, 339, 110 N.E. 945, 949 (1915).

38. *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887).

39. *Id.* at 592, 2 So. at 859. The *Parsons* case in turn was cited for this view of the law of insanity by Cardozo, J. in *People v. Schmidt*, *supra* note 37, at 388.

the paradoxical situation of a *Parsons Rule* and a *Parsons Law*.⁴⁰ The court upheld the right-wrong test as a valid criterion for determining mental responsibility, while at the same time criticizing those who adamantly refuse to recognize that the Law must not stand with feet of clay.

May there not be insane persons, of a diseased brain, who while capable of perceiving the difference between right and wrong . . . so far under the duress of such disease as to destroy the power to choose. . . ? Will the courts assume as a matter of fact, not to be rebutted by any amount of scientific evidence or any new discoveries of medical science, that there is and can be no such state of mind as that described by the writer on psychological medicine. . . ?⁴¹

It is indeed curious that the jurists who years later cite the rule of *Parsons* never pay heed to the profound judicial wisdom of the *Parsons* opinion.

DURHAM — A STEP FORWARD

The problem presented thus far is not one which will be resolved merely by a general adoption of the *Durham* decision and a rejection of *McNaughton*. Nor does there seem to be any likelihood that any one absolute rule can be set forth which will meet the necessities of all possible fact situations. Certainly the *Durham* rule is no such end, in and of itself. It is, in fact, subject to much valid criticism. But it does appear to be a step forward in the direction of progress and enlightenment. In a jurisdiction which allowed the broader consideration of criminal insanity, the psychiatrist would be permitted to testify to the complete mental condition of an accused; his emotional and volitive faculties as well as those of cognition and intellect.⁴² The jury would still make their traditional moral judgments based upon our basic philosophy of imposing no punishment where there is no blame.⁴³ But in making such judgments they would at least now be guided by wider knowledge and insight of the mental condition of a fellow human being's mind.

This is directly in line with the apparent objectives of the American Law Institute's Model Code,⁴⁴ which criticizes both *McNaughton*, for being too narrow in scope, and *Durham*, for being too ambiguous. In proposing its test, whereby one is not criminally responsible if he lacks substantial capacity either to appreciate the criminality of his conduct or to

40. Note, 10 ALA. L. REV. 118 (1957).

41. *Parsons v. State*, 81 Ala. 577, 584, 2 So. 854, 859 (1887).

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

43. *Id.* at 876.

44. MODEL PENAL CODE § 4.02 (Tent. Draft No. 4, 1955).

conform his conduct to the requirements of the law,⁴⁵ the Model Code seems to contemplate a combination which would give recognition to the individual whose mental condition lay somewhere between the poles of complete mental collapse and complete understanding.

In its present status, the law of criminal insanity may well be considered to have failed to carry out the very purpose of our legal system. The Law is but a manifestation of the needs and wants of the society it serves. When it fails to fulfill the duty impressed upon it, it loses all reason for its existence.

What is the purpose of our system of criminal law? The purpose is punishment,⁴⁶ from which we desire to derive retribution, deterrence, rehabilitation, and protection.⁴⁷ Although the layman may express disbelief, retribution alone is not the sole objective of society's punishment measures. If this weren't true, why then would we excuse children under a minimum age, persons under duress, and the mentally disordered?⁴⁸ Obviously because these people are not responsible and any civilized society abhors inflicting punishment upon those not responsible for their acts.⁴⁹

If these four elements be our objectives, then it is the author's contention that our criminal law fails in the area of insanity; a contention clearly illustrated in the case of *United States ex rel. Smith v. Baldi*.⁵⁰

Schizophrenia is medically defined as "a severe emotional disorder of psychotic depth, characteristically marked by a retreat from reality with delusion formations, hallucinations, emotional disharmony and aggressive behavior."⁵¹ In the *Baldi* case the defendant was a classic schizophrenic,⁵² nonetheless he was declared sane and convicted because he could distinguish right from wrong.⁵³

Here is a classic example of the stifling effect of the *McNaughton* constriction. Did this conviction serve society's purpose? It would seem not. Obviously there can be no rehabilitation without the aid of psychiatric treatment, which is not likely to be found within prison walls. Because there could be no rehabilitation, there could be no permanent or lasting protection for society from such an individual unless he was confined for life or executed. It is doubtful also that a prison sentence

45. *Ibid.*

46. GOODHART, ENGLISH LAW AND MORAL LAW 91 (1953).

47. *Ibid.*

48. *Ibid.*

49. *Ibid.*

50. 192 F.2d 540 (3d Cir. 1951).

51. AM. PSYCH. ASS'N, A PSYCHIATRIC GLOSSARY 41 (1957).

52. BIGGS, THE GUILTY MIND 208 (1955).

53. *Ibid.*

would deter this type of person, due to his complete withdrawal from reality. If such a conviction is anything but a failure, it would indeed be difficult to prove.

Again, let it be made clear that the *Durham* rule should not be considered a panacea for all the ills of our criminal insanity law. But it is quite probable that offenders such as Baldi would be acquitted under a rule such as that of New Hampshire, D. C., Vermont, New Mexico, or the Model Code. With the proper commitment procedures, as provided for in the nation's capital,⁵⁴ they would be confined in institutions where they might be treated and rehabilitated to the point where they could safely be returned to society with the expectation of their filling useful and worthwhile roles in our scheme of life.

It would be the height of naivete, of course, to suppose that all these people could be successfully treated. But surely it would benefit society far more to help those who are capable of responding, than to merely lock them behind bars for a period of time and then send them back to our streets just as dangerous to themselves and to the public as ever. Yet this is precisely what happens to our *McNaughton* criminal; he is convicted and imprisoned knowing right from wrong, and with this same knowledge he is released. But his mental condition in all likelihood is the very same if not worse, when he walks out of, as when he walked into, the prison.

Justice Musmanno crystallized this problem in his dissenting opinion in *Commonwealth v. Elliot*:

Of course, if a tiger is to be killed simply because he is a tiger, then discussion in a case of this character is superfluous. But if in ascertaining the reasons and cause which make a man-tiger, we find a moral responsibility which does not keep pace with the bestial development, we are charged with the duty of considering whether that failure in moral capacity should not soften the blow of the iron hammer of retribution.⁵⁵

CONCLUSION

In the final analysis the question to be resolved is a simple one: whether we shall adhere to an old rule of legal responsibility, based on medical theories promulgated one hundred and fifty years ago, which refuses to recognize any evidence of insanity except the solitary test of mental capacity to distinguish right from wrong, or whether the courts will recognize as a possible fact the doctrine now alleged by those who have made the study of insanity their lives' work — that the old test is wrong and that there is no single test by which the existence of the

54. D.C. CODE ANN. §§ 24—301 (1951).

55. 371 Pa. 70, 83, 89 A.2d 782, 788 (1952).

disease, to that degree which exculpates from punishment, can in every case be unfallibly detected? The answer seems obvious:

The inquiry must not be unduly obstructed by the doctrine of *stare decisis*, for the life of the Common Law system and the hope of its permanency consist largely in its power of adaptation to new scientific discoveries, and the requirements of an ever advancing civilization.⁵⁶

These were the words of Judge Somerville seventy-three years ago in the *Parsons* case. It is to be regretted that such a small segment of the legal profession has seen fit to heed his advice.

ROBERT A. GOODMAN

56. *Parsons v. State*, 81 Ala. 577, 584, 2 So. 854, 858 (1887).