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Criminal Law - Insanity - The Test of Criminal Responsibility and the Burden of Proof in Jury Instructions

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CRIMINAL LAW—INSANITY—THE TEST OF CRIMINAL RESPONSIBILITY AND THE BURDEN OF PROOF IN JURY INSTRUCTIONS—For the second time this court saved the defendant from paying the penalty for his crime which two juries found was not the product of a diseased or defective mind[1] but was murder in the first degree.[2] In the instant appeal the United States Court of Appeals, District of Columbia Circuit, *held,* two judges dissenting, that the giving of an instruction which improperly placed the burden of proof on the defendant of establishing his defense of insanity was reversible error, even though the instruction came between two instructions which properly imposed the burden on the prosecution to establish that the defendant was sane. *Blocker v. United States,* 288 *F.2d* 853 (*D.C. Cir.* 1961)

In criminal law "insanity", by whatever test it may be ascertained, may be said to be that degree or quantity of mental disorder which relieves one of the criminal responsibility for his actions.[3] A variety of standards have been formulated to determine criminal responsibility in connection with persons suffering from a mental condition. These are the M'Naughten rule,[4] the M'Naughten rule accompanied by the irresistible impulse test,[5] the New Hampshire[6] or Durham test,[7] and the test

1. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). (This is the Durham rule of criminal responsibility applied in the District of Columbia.)

2. Blocker v. United States, 274 F.2d 572 (D.C. Cir. 1959). (The first reversal was gained solely because of a change of opinion by psychiatrists, who had not been witnesses in the case, as to what constitutes mental disease. It was held that their testimony in other cases constituted new evidence.) See testimony in Rosenfield v. Overholser, 157 F. Supp. 18 (1959).

3. Sollars v. State, 73 Nev. 248, 316 P.2d 917, 919 (1957).

4. M'Naughten's Case, 8 Eng. Rep. 718 (1843). The rule is: " . . . . to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act which he was doing; or, if he did know it, that he did not know he was doing what was wrong." This rule is followed by approximately thirty states without addition or modification. See American Law Institute's Model Penal Code, Appendix A § 4.01 (Tent. Draft No. 4, 1955), hereinafter cited as Model Penal Code. (This rule is also known as the 'right and wrong' test).

5. United States v. Gundelfinger, 102 F. Supp. 177 (1952); Flowers v. State, 139 N.E.2d 185 (Ind. 1956). This rule is always coupled with the M'Naughten test and includes that where the defendant knew the nature of his act and the right and wrong of it, he will be excused if his insanity prevented him from controlling his acts. See Pollard v. United States, 285 F.2d 81 (6th Cir. 1960); and United States **ex rel.** Wing v. Commonwealth, 90 F. Supp. 208 (1950). This rule is followed by approximately thirteen states. See Model Penal Code, Appendix A, § 4.01 (Tent. Draft No. 4, 1955). But. it has been rejected by many jurisdictions. See People v. Nash, 338 P.2d 416 (Cal. 1959); State v. Simenson, 262 N.W. 638 (Minn. 1935); State v. Goza, 317 S.W.2d 609 (Mo. 1958); Fisher v. State, 47 N.W.2d 349 (Neb. 1951); State v. Wallace, 131 P.2d 222 (Ore. 1942); Freeman v. State, 317 S.W.2d 736 (Tex. 1958); Simecek v. State, 10 N.W.2d 161 (Wis. 1943).

6. State v. Pike, 49 N.H. 399 (1870). The rule is: " . . . . the verdict should be not guilty by reason of insanity if the killing was the offspring or product of mental disease in the defendant. . . ."

7. Durham v. United States, 214 F.2d 862, 874-5 (D.C. Cir. 1954). The rule is: " . . . . an accused is not criminally responsible if his unlawful act

of the American Law Institute's Model Penal Code.[8] The Model Penal Code test has been accepted in essence by the third circuit in a recent case.[9] This case represents the second judicial repudiation in this century with regard to the M'Naughten test, the first being the famed Durham decision.

Where insanity is pleaded as a defense the burden of proof will lie either with the prosecution[10] or the defense[11] as the rule of the particular jurisdiction dictates. There are four alternative variations of these standards which center around the degree of proof required. They are: 1) the prosecution must establish sanity beyond a reasonable doubt,[12] 2) the prosecution must establish sanity by a preponderance of the evidence,[13] 3) the defense must establish insanity beyond a reasonable doubt,[14] and, 4) the defense must establish insanity by the preponderance of the evidence.[15] The burden of proof appears not to have been assigned nor the quantum of evidence established by statute or by the courts of only two states.[16]

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was the product of mental disease or mental defect." This rule is only followed by the District of Columbia and New Hampshire and is also known as the 'products test'. But, it has been rejected by other jurisdictions. See Anderson v. United States, 237 F.2d 118 (9th Cir. 1956); Howard v. United States, 232 F.2d 275 (5th Cir. 1954); People v. Ryan, 295 P.2d 496 (Colo. 1956); State v. Kitchens, 286 P.2d 1079 (Mont. 1955); State v. Collins, 314 P.2d 660 (Wash. 1960).

8. Model Penal Code § 4.01 (Tent. Draft No. 4, 1955). The test is: "A person is not responsible for crimnial 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." (This test as adopted by Vermont differs only in that it substitutes the term "adequate" for the word "substantial" in the phrase "substantial capacity" and the addition of the sentence, "The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. The terms 'mental disease or defect' shall include congenital and traumatic mental conditions as well as diseases.")

9. United States v. Currens, 290 F.2d 751 (3rd Cir. 1961).

10. United States v. Davis, 160 U.S. 469 (1895); Holloway v. United States, 148 F.2d 665 (D.C. Cir. 1945); Limp v. State, 228 Ind. 361, 92 N.E.2d 549 (1950); People v. Eggelston, 186 Mich. 510, 152 N.W. 944 (1915); Fisher v. State, 140 Neb. 216, 299 N.W. 501 (1941).

11. People v. Harmon, 110 Cal. App. 2d 545, 243 P.2d 15 (1953); State v. Bruntlett, 240 Ia. 338, 36 N.W.2d 450 (1949); State v. De Haan, 88 Mont. 407, 292 Pac. 1109 (1930); State v. Leland, 190 Ore. 598, 227 P.2d 785 (1951); Wenck v. State, 238 S.W.2d 793 (Tex. Crim. 1951).

12. United States v. Davis, 160 U.S. 469 (1895); Martz v. People, 114 Colo. 278, 162 P.2d 408 (1945); Holloway v. United States, 148 F.2d 665, (1945); People v. Eggleston, 186 Mich. 510, 152 N.W. 944 (1915) (New York or Federal rule).

13. People v. Nino, 149 N.Y. 317, 43 N.E. 853 (1896); overruled by People v. Egnor, 175 N.Y. 419, 67 N.E. 906 (1903). (This rule has been followed very little, but would seem to have a good deal of merit if it were used with a test of criminal responsibility other than M'Naughten.).

14. Ore. Rev. Stat. § 136-390 (1955); see Leland v. Oregon, 343 U.S. 790 (1952), **affirming** 190 Ore. 598, 227 P.2d 785 (1951). (The Supreme Court held that due process does not guarantee any particular allocation of the burden of proof on the issue of criminal responsibility.) However, Oregon has amended its statute to require only a preponderance of the evidence by the defendant. See Ore. Rev. Stat. § 136-390 (1959).

15. People v. Harmon, 110 Cal. App. 2d 545, 253 P.2d 15 (1953); State v. Bruntlett, 240 Ia. 338, 36 N.W.2d 450 (1949); State v. DeHaan, 88 Mont. 407, 292 Pac. 1109 (1930); Wenck v. State, 238 S.W.2d 743 (Tex. Crim. 1951).

16. North Dakota and South Dakota.

The test of criminal responsibility and the burden of persuasion[17] are intrinsically involved with the problem of jury instruction. In the instant case the jury was charged in accordance with the Durham test of criminal responsibility[18] and the burden of persuasion was on the prosecution to prove sanity beyond a reasonable doubt.[19]

As to the latter the majority held that the instructions resulted in confusion solely on the basis of judicial construction. However, the court cited no authority to substantiate the proposition that any one portion of a charge may be construed so as to constitute prejudicial error. In opposition, there is strong authority to the effect that it is axiomatic that the charge to the jury be considered as a whole.[21] Also, it is submitted that hypercritical scrutiny of every statement in a charge, when considered alone, would practically always reveal dual meanings.[22] Therefore, as stated by the dissent in the present case,[23] the thoroughly established principle of considering a charge as a whole[24] and in connection with what precedes and follows the challenged portion[25] has completely been disregarded.

The question of criminal responsibility is perhaps the most controversial problem existing in the criminal law today.[26] The existing problem is formulating a test enabling the courts to

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17. The burden consists of two elements: (1) the initial burden of going forward with the evidence (always on the defendant) and (2) the burden of persuasion (which we are presently concerned with).
18. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
19. Davis v. United States, 160 U.S. 469 (1895). (This is the Federal rule).
20. Excerpt from instruction (1) "Basically, there is a presumption that all people are sane. But, when there is some evidence of a mental disorder, as here in this case, then the presumption of sanity of the individual . . . vanishes from the case. The burden is then upon the Government to prove beyond a reasonable doubt that at the time in question . . . the defendant was of sound mind. . . ." (It is pointed out that here, where the burden is on the state to prove insanity beyond a reasonable doubt the test of insanity seems also to be very liberal. This should be kept in mind when reading this writer's conclusions). (The first portion of the charge is correct).

Excerpt from instruction (2) "if you find that the defendant was suffering from a mental disease or defect, and if you find that the defendant did in fact commit such acts, then you must find that it resulted from or was produced by the unsoundness, or by the mental illness. Now, if you find that then you may find the defendant not guilty by reason of insanity." (This portion of the charge was considered erroneous in part by the majority of this court).

Excerpt from instruction (3) "Now, ladies and getlemen, it should be crystal clear to you that when some evidence is introduced to you the presumption of sanity disappears and the responsibility from that point on is on the Government." (This portion of the charge, being last, and the instructions read as a whole would seem to point out that the burden is on the Government).
21. Kinard v. United States, 101 F.2d 246, 247 (D.C. Cir. 1938).
22. See Stoneking v. United States, 232 F.2d 385 (D.C. Cir. 1956).
23. Blocker v. United States, 288 F.2d 853, 875 (D.C. Cir. 1961).
24. Myers v. United States, 18 F.2d 529, 530 (8th Cir. 1927).
25. Boyd v. United States, 271 U.S. 104 (1926).
26. See Sauer v. United States, 241 F.2d 640, 644 (9th Cir. 1957), **cert. den,** 354 U.S. 940 (1957).

discriminate between cases whereby the proper disposition would either result in penal-institutionalization or medical-custody whichever best benefits society and the individual defendant.[27]

Presently, North Dakota labors under a form of the M'-Naughten rule as its test of criminal responsibility.[28] This writer recommends the adoption of some form of the Model Penal Code standard in that it broadens the class of persons who could be hospitalized rather than imprisoned because this test permits cognizance of modern medical views of mental disease and defects prohibited by M'Naughten. Also, at the time of this writing, North Dakota has not judicially or by statute assigned the burden of proof nor the quantum of evidence and it is an open question. The alternative of assigning the burden to the prosecution but reducing the weight of the evidence to a preponderance rather than beyond a reasonable doubt would seem to reconcile conflicting views[29] and adapt itself to the recommended test of criminal responsibility. Policy considerations of the courts of our state could readily be effected in the jury instructions using these standards.

My views are based on the proposition that in a criminal prosecution it is for the state to prove all the necessary elements of the crime including *mens rea.* Sanity is a prerequisite to criminal intent. Thus, placing the burden on the state does not constitute an undue hardship because of the facilities available to it and for substantial policy reasons of fairness to the defendant. It is pointed out that there is a great split of authority on this point with the opposition making the defense of insanity an affirmative defense with the burden of proof on the defendant at all times. Although being logical, this concept seems to contravene sound policy and violate individual rights of the defendant by forcing him to prove or disprove an essential element of the prosecution's case; namely, *mens rea.* It is felt that a defendant, in an action of this type, is entitled to every protection which the law can afford him.

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27. Model Penal Code, § 4.01, comments at 156.
28. See State v. Throndson, 191 N.W. 628 (N.D. 1932).
29. See State v. Barton, 361 Mo. 780, 236 S.W.2d 596 (1951).