

December 1961

Criminal Responsibility to Determine Insanity--The Model Penal Code Test Emerges from the Currently Existing Tests

James William Sarver
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Criminal Law Commons](#)

Recommended Citation

James W. Sarver, *Criminal Responsibility to Determine Insanity--The Model Penal Code Test Emerges from the Currently Existing Tests*, 64 W. Va. L. Rev. (1961).

Available at: <https://researchrepository.wvu.edu/wvlr/vol64/iss1/6>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

West Virginia Law Review

Published by the College of Law of West Virginia University. Official
publication of The West Virginia Bar Association.

STUDENT BOARD OF EDITORS

Arthur Mark Recht, *Editor in Chief*

Peter Uriah Hook, *Associate Editor*

Robert Glenn Lilly, Jr., *Associate Editor*

William Warren Upton, *Associate Editor*

William Erwin Barr

Herbert Stephenson Boreman, Jr.

Forest Jackson Bowman

John Everett Busch

James Kilgore Edmundson, Jr.

David Mayer Katz

John Templeton Kay, Jr.

Charles Henry Rudolph, Jr.

James William Sarver

Robert Glenn Steele

Aaron David Trub

Esdel Beane Yost

Edward Andrew Zagala

Nick George Zegrea

Willard D. Lorensen, *Faculty Editor in Charge*

Agnes A. Furman, *Business Manager*

STUDENT NOTES

Criminal Responsibility to Determine Insanity— The Model Penal Code Test Emerges from the Currently Existing Tests

It is a matter of general knowledge that insanity is a defense to a criminal act. "A man's act does not make him guilty unless his mind also is guilty." No person can be criminally responsible for a crime unless he is sane at the time the offense is committed. In this discussion, the degree of criminal responsibility requisite to determine sanity, at the time of the alleged offense, is of prime importance. There are also certain safeguards in the law protecting the insane from trial and punishment, if insanity appears prior to trial or sentencing; although these phases of criminal irresponsibility are not reached in this note. The development of the American Law Institute's Model Penal Code test of determining criminal

¹ "Actus non facit reum nisi mens sit rea." II RADZINOWICZ & TURNER, MENTAL ABNORMALITY AND CRIME ix (1944).

responsibility at the time of the alleged offense, as a product of existing tests, will be outlined in this article.

The law and medicine have become so inextricably tangled that it is often erroneously supposed that insanity is a medical term. Although the exact legal meaning of insanity has not been authoritatively decided, the law does recognize that insanity is purely a legal concept.² A fair explanation of the legal philosophy of insanity is the incapacity to entertain a criminal intent: one method of avoiding criminal responsibility. The philosophy of criminal responsibility has not changed nor is it suggested that it should change, but problems appear when translating the philosophy into practical rules for everyday courtroom use.³ No exact formula has been found for a realistic determination of criminal responsibility. Several tests have been accepted and applied by the courts and without exception each test has been roundly criticized.

THE M'NAGHTEN* RULE⁴

The M'Naghten rule is the most well known and widely accepted test of criminal responsibility. Commonly, the rule is characterized as the capacity to distinguish between right and wrong.⁵ Generally, a person is not criminally responsible for an offense if at the time it is committed he is so mentally unsound as to lack knowledge that the act is wrong.⁶ The M'Naghten rule is the sole test in England and a majority of states, including West Virginia.⁷ In fact, every state in this country, except New Hampshire and Vermont, has adopted the rule, although some states have supplemented it with the irresistible impulse test, and these are considered states which employ the irresistible impulse test. As universal as the M'Naghten rule would appear, almost every word of the opinion

² WHITE, *INSANITY AND THE CRIMINAL LAW* 102 (1923); II RADZINOWICZ & TURNER, *op. cit. supra* note 1, at xiii.

³ Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957).

* There are at least four recognized methods of spelling M'Naghten. This choice was arbitrary.

⁴ M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (H.L. 1843).

⁵ CLARK & MARSHALL, *LAW OF CRIMES* § 84 (5th ed. 1952).

⁶ WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 51 (1954).

⁷ *Accord*, State v. Painter, 135 W. Va. 106, 63 S.E.2d 86 (1950); State v. Evans, 94 W. Va. 47, 117 S.E. 885 (1923); State v. Cook, 69 W. Va. 717, 72 S.E. 1025 (1911); State v. Maier, 36 W. Va. 757, 15 S.E. 991 (1892); State v. Harrison, 36 W. Va. 729, 15 S.E. 982 (1892). For an analysis of the views taken by various authorities concerning the M'Naghten rule with regard to West Virginia see Silverstein, *Psychology, Mental Illness, and the Law*, 60 W. VA. L. REV. 55, 133 (1958).

following the M'Naghten case has been criticized as ambiguous.⁸ Listed among the most objectionable words are "knowledge" and "wrong." It has been suggested that a harsh application of the word "knowledge" has required the accused to ". . . move as discreetly and circumspectly as if the undimmed light of reason . . ." were shining on his path.⁹ The confusion concerning the word "wrong" is an outgrowth of the dual construction of moral wrong and legal wrong.

THE IRRESISTIBLE IMPULSE TEST

The irresistible impulse test of determining criminal responsibility has been adopted by at least fourteen states, and in every instance it encompasses the M'Naghten rule within it.¹⁰ Basically, the irresistible impulse test denies criminal responsibility where the accused lacks the knowledge that the act is wrong (M'Naghten rule) or will power enough to resist the impulse to commit it. Similar to the M'Naghten rule, certain words of the irresistible impulse test have been labeled ambiguous. It has been suggested that the word "irresistible" be replaced by "the lack of power of control";¹¹ and "impulse" be defined so as to disallow an "urge,"¹² and do away with the requirement of a momentary impulse.¹³ The irresistible impulse test first appeared within a decade of the M'Naghten rule. In the past century, few states have added the irresistible impulse test to the M'Naghten rule; so too, few states which followed the irresistible impulse test have abandoned it in favor of the M'Naghten rule as the sole test of criminal responsibility.¹⁴ West Virginia rejected the irresistible impulse test in *State v. Harrison*.¹⁵ The court reasoned that a person who knew the nature and quality of the act and that it was wrong could not be driven to commit it by any uncontrollable impulse.

⁸ ". . . these ambiguities continue to becloud the law." WEIHOFEN, *op. cit. supra* note 6, at 76.

⁹ 1 CLEVINGER, *MEDICAL JURISPRUDENCE OF INSANITY* 21 (1898).

¹⁰ WEIHOFEN, *op. cit. supra* note 6, at 51; Irresistible impulse test has been recognized in Virginia since 1881. *Dejarnette v. The Commonwealth*, 75 Va. 867 (1881).

¹¹ WEIHOFEN, *op. cit. supra* note 6, at 84.

¹² The urge does not command the action. The impulse is the action itself. *Snider v. Smyth*, 187 F. Supp. 299 (E.D. Va. 1960).

¹³ *Accord*, *Davis v. United States*, 160 U.S. 469 (1895); *cf. United States v. Naples*, 192 F. Supp. 23 (D.C. D.C. 1961).

¹⁴ "The only development during the past century has been the progressive hardening of the rules into precedents." GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 424 (1952).

¹⁵ 36 W. Va. 729, 15 S.E. 982 (1892).

THE DURHAM RULE

In *Durham v. United States*,¹⁶ another test of criminal responsibility emerged. "The Durham rule requires that a finding of not guilty by reason of insanity ensue if the act was the product of mental disease or defect in the defendant."¹⁷ The *Durham* case has not been followed by any state.¹⁸ The ambiguous words of the Durham rule are "product" and "mental disease."¹⁹

The New Hampshire test of criminal responsibility is often said to be substantially the same as the Durham rule. Perhaps it would be more accurate to say that New Hampshire has no test of criminal responsibility;²⁰ it is a question of fact for the jury in each case.

THE MODEL PENAL CODE TEST

As a result of the general unhappiness and unrest among the authorities as to what the *true* test for criminal responsibility should be, the American Law Institute, in drafting a Model Penal Code, proposed a new test designed to satisfy the apparent need for a practicable solution to this issue. In *United States v. Currens*,²¹ the defendant was convicted of interstate transfer of a stolen motor vehicle, after entering a plea of not guilty because of insanity. The defense requested instructions which included the M'Naghten rule and the Durham rule. The court refused to instruct regarding the Durham rule, but did give the M'Naghten rule plus the irresistible impulse test instruction.²² Held, reversed, establishing a new test for determining criminal responsibility. The new test was, in substance, the American Law Institute's Model Penal Code test.

"The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease

¹⁶ 214 F.2d 862 (D.C. Cir. 1954).

¹⁷ Note, 1959 DUKE L.J. 317, 320 (1959).

¹⁸ The highest courts of the following states have rejected the Durham rule: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, Pennsylvania, Vermont, Washington. *United States v. Naples*, 192 F. Supp. 23 (D.C. D.C. 1961).

¹⁹ *Blocker v. United States*, 288 F.2d 853 (D.C. Cir. 1961).

²⁰ WEIHOFEN, *op. cit. supra* note 6, at 52.

²¹ 290 F.2d 751 (3d Cir. 1961).

²² The leading United States Supreme Court decision providing a test for insanity in federal courts is *Davis v. United States*, 160 U.S. 469 (1895), which is a combination of the M'Naghten rule and irresistible impulse test, without the requirement of resulting from a momentary impulse. *United States v. Naples*, 192 F. Supp. 23 (D.C. D.C. 1961).

or defect, lacked substantial capacity to conform his conduct to the requirements of law which he is alleged to have violated."²³

Aside from the procedural questions involved in the *Currens* case, it was necessary for the court to rule on three distinct propositions of law to arrive at its decision:

Was the M'Naghten-irresistible impulse test proper so as to allow the admission of expert testimony which would give the jury sufficient, intelligent and understandable facts on which to determine if the defendant was criminally responsible for his act?

Was the M'Naghten-irresistible impulse test the proper instruction to the jury, to assist them in determining if the defendant was capable of entertaining criminal intent?

Was the Durham rule proper to accomplish the desired admissibility of evidence and the correct instructions, if in fact, the M'Naghten-irresistible impulse test did not accomplish those requirements?

The answer to each interrogatory was *no*.

In striving to arrive at a practicable standard for measuring the degree of irresponsibility necessary to excuse a criminal act, the court, in the instant case, desired to incorporate the best qualities of the M'Naghten rule and the Durham rule, ". . . while perpetuating neither the stringency of the former nor the leniency of the latter."²⁴

The key words of the test laid down by the *Currens* case are "substantial capacity." By these terms, the psychiatrist is no longer compelled to testify by a concept which to him was without reality, in other words, knowledge of right and wrong, irresistible impulse and disease product. The jury is no longer instructed to apply an artificial standard for equating a man's mental condition with his legal responsibility. Generally, a very practical courtroom technique has evolved.

The fact that there was a great need for a change in the law in the area of criminal responsibility had been repeatedly manifested. The feeling was that it was time that the law caught up with the present day psychiatric understanding of mental disorders.²⁵ The tests of insanity available before the *Currens* case refused to acknowledge the existence of a gray area. The defendant was either

²³ United States v. *Currens*, 290 F.2d 751, 774 (3d Cir. 1961).

²⁴ Note, 1959 DUKE L.J. 317, 323 (1959).

²⁵ GUTTMACHER & WEIHOFEN, *op. cit. supra* note 14, at 415.

guilty or not guilty, sane or insane.²⁶ Under the Model Penal Code test, “. . . impulses, delusions, knowledge of right and wrong are no longer conceived as concrete entities that either are or are not.”²⁷

Although frequently denied, some authorities have felt that unconsciously juries have been applying their own individual tests of determining insanity, consistent with the safety of society but inconsistent with the rule directed by the court.²⁸ Following this line of reasoning, there is no fear that the “moral judgment” of juries will, under the Model Penal Code test, weaken the deterrent influence of criminal law. Whether the accused can be justly held responsible for his act will be the ultimate issue in any event.

In determining if the courts of this country will accept the new test from the *Currens* case, it is vital to recognize the broadening effect of some of the language contained therein. “Capacity to conform” may very well embrace the essential elements of the irresistible impulse test.²⁹ West Virginia, for one, has specifically rejected the irresistible impulse test.³⁰

Vermont has adopted the Model Penal Code test by statute.³¹ The Vermont statute substitutes the word “adequate” for the word “substantial” and adds a sentence which elaborates on “mental disease or defect.”³²

Cases are legion in their criticisms of the prevailing tests of determining the criminal responsibility of the mentally ill. There has been a crying hunger for the development of a new test, placing a more realistic legal standard on medical technology. While some courts are sure to label the Model Penal Code test a wrong step in the right direction, others may feast on this effort of the American Law Institute. To be sure, before any change can take place, the court must be persuaded, first, that the present test is not the best available; second, that the time is ripe for a change; and third, that the harvest from such a change will reap more advantages than disadvantages.

James William Sarver

²⁶ NICE, CRIME AND INSANITY 238 (1958).

²⁷ WHITE, *op. cit. supra* note 2, at 104.

²⁸ NICE, *op. cit. supra* note 26, at 144; *but see*, LINDMAN & MCINTYRE, THE MENTALLY DISABLED AND THE LAW 335 (1961).

²⁹ WEIHOFEN, THE URGE TO PUNISH 66 (1956).

³⁰ State v. Harrison, 36 W. Va. 729, 15 S.E. 982 (1892).

³¹ VT. STAT. ANN. tit. 13, § 4801 (1959).

³² LINDMAN & MCINTYRE, *op. cit. supra* note 28, at 334.