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Comments and Casenotes: To Kill a Mockingbird - Star Decisis and M'Naghten in Maryland

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TO KILL A MOCKINGBIRD

Stare Decisis and *M'Naghten* in Maryland

By Kenneth L. Lasson

There are certain pillars of jurisprudence which, despite the erosive elements of time and progress, remain sacred. After more than a century of judicial dialogue the venerable *M'Naghten* Rule survives as the prevailing test to determine criminal responsibility.[1] The rule states: "To establish a defense on the ground of insanity,[2] 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 that what he was doing was wrong."[3]

Over the years various other formulations have been devised to remedy the faults occasioned by a strict application of *M'Naghten's* "right-wrong" test.[4] Among them have been the "irresistible impulse"

1. The majority of states including Maryland use either *M'Naghten* or *M'Naghten* as modified by other tests. Lindman & McIntyre, The Mentally Disabled and the Law 332 (1961).

2. It is highly doubtful that the term "insanity" is presently capable of definition. After plunging into the muddy waters of verbal characterization, few lawyers emerge with similar "clear interpretations"; doctors appear condescendingly amused by the definitive efforts of the legal profession, all the while insisting that "insanity" has no medical meaning. The term "mental illness," on the other hand, evokes a torrent of favorable response from the physicians.

> A good deal of confusion . . . can be avoided by postulating that the term "insanity" is a legal concept which has no medical counterpart. It is a difficult concept to understand, and it is even more difficult to articulate with any degree of precision.

Lindman & McIntyre, *supra* note 1, at 330. See also Thomsen, *Insanity as a Defense to Crime*, 19 Md. L. Rev. 271, 279–80 (1959).

3. Quoted by Biggs, The Guilty Mind 105 (1955). The rule was derived from an advisory opinion written in connection with M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843). The defendant had killed the Prime Minister's secretary, and the Queen, displeased when the jury rendered a verdict of not guilty by reason of insanity, called for a legislative determination of the test for responsibility.

The literature surrounding the *M'Naghten* Rule is massive. For a partial bibliography, one might start with Lindman & McIntyre, *op. cit. supra* note 1; Guttmacher, *The Psychiatrist as an Expert Witness*, 22 Chi. L. Rev. 325 (1954–55); Roche, The Criminal Mind (1958); Symposium, *Insanity as a Defense — A Panel Discussion*, 37 F.R.D. 365 (1964). Then, move on to the Report of the Royal Commission on the Law of Insanity as a Defense in Criminal Cases (1957). And finally, see 15 Md. L. Rev. 44 (1955); 15 Md. L. Rev. 93 (1955); 15 Md. L. Rev. 255 (1955); 17 Md. L. Rev. 178 (1957); 19 Md. L. Rev. 271 (1959); 20 Md. L. Rev. 376 (1960).

4. "An insane person . . . often knows the nature and quality of his act and that it is wrong and forbidden by law, and yet commit it as a result of . . . mental disease." Report of the Royal Commission on Capital Punishment 102 (1949–53).

It is the strict construction and interpretation of "knowledge of right and wrong" which elicits most of the criticism of *M'Naghten*. "Though its rigors are often overridden by the common sense of the jury, if strictly applied, the *M'Naghten* Rule is barbarously narrow and a worthy descendant of its forerunners which spoke in

rule,[5] the New Hampshire rule,[6] the *Durham* rule,[7] and the American Law Institute's Model Penal Code Rule.[8] The ALI criterion and the modern theories upon which it is based have met with increasing favor in recent years[9] but, in view of *M'Naghten's* lengthy entrenchment it may be a bit premature to hail its death.[10]

In Maryland, it seems that only an unflinching loyalty to the doctrine of stare decisis has kept the pillar strongly intact.[11]

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terms of the 'wild beast' and which prosecuted witches — the mentally ill — for their relation to the devil. Unfortunately, the literal jury can cause grave injustice in some cases even if others are not so literal." Moore, *M'Naghten Is Dead — Or Is It?*, 3 HOUSTON L. REV. 58, 70 (1965). For a summary of the various condemnations, see LINDMAN & MCINTYRE, *op. cit. supra* note 1, at 336–41.

5. Described in PERKINS, CRIMINAL LAW 762 (1957).

6. State v. Jones, 50 N.H. 369, 9 Am. Rptr. 242 (1871); State v. Pike, 49 N.H. 399, 6 Am. Rptr. 533 (1869).

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

8. The ALI test has been adopted by Illinois, ILL. ANN. STAT. ch. 38, § 6–2 (1964); Missouri, MO. ANN. STAT. § 552.030 (Supp. 1965); New York, N.Y. CONSOL. LAWS art. 104, § 1120 (1965); and Vermont, 13 VT. STAT. ANN. §§ 4801–02 (1958). As enacted by Vermont, the test provides:

> (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 adequate 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. The terms "mental disease or defect" shall include congenital and traumatic mental conditions as well as disease.

9. The latest case to overturn the 123-year-old *M'Naghten* Rule and adopt the ALI test was United States v. Freeman, 357 F.2d 636 (2d Cir. 1966). *Cf.* People v. Krugman, 141 N.W.2d 33 (Mich. 1966).

10. See Moore, *supra* note 4. Critics of the newer formulations may be classified into two groups. One combines the judicial and medical authorities who are still concerned with the exhaustive weighing of each and every word; the other consists largely of prosecuting attorneys who are fearful lest the modern tests, allegedly too broad and liberal, would exonerate too many defendants whom they strongly feel are guilty. Moore, *supra* note 4, at 61. As for the first group, so long as man is bound by the limits of language, no conceivable phraseology could ever reach the demanded perfection: every test will be subject to some criticism. The prosecutors, on the other hand, might do well to examine the data compiled by investigators in the area, whose surveys indicate that about 80% of criminals are psychiatrically normal. Thomsen, *supra* note 2, at 279. Furthermore, a finding of "not guilty by reason of insanity" does not result in the premature release of offenders into the community; one study asserts that, on the average, perpetrators of homicide committed to mental institutions spend more time in confinement than those sentenced to prison. Sobeloff, *From M'Naghten to Durham,* 15 MD. L. REV. 93, 108 (1955).

11. Maryland adopted the *M'Naghten* right-wrong test in Spencer v. State, 69 Md. 28, 13 Atl. 809 (1888) and has steadfastly adhered to its express language ever since. See, *e.g.,* Rowe v. State, 234 Md. 295, 199 A.2d 785 (1964), noted in 24 MD. L. REV. 442 (1964); Armstead v. State, 227 Md. 73, 175 A.2d 24 (1961); Dunn v. State, 226 Md. 463, 174 A.2d 185 (1961); Saldiveri v. State, 217 Md. 412, 143 A.2d 70 (1958); Cole v. State, 212 Md. 55, 128 A.2d 437 (1957); Bryant v. State, 207 Md. 565, 115 A.2d 502 (1955); Thomas v. State, 206 Md. 575, 112 A.2d 913 (1955). For what seem to be liberal readings of *M'Naghten,* see Watts v. State, 223 Md. 268, 164 A.2d 334 (1960); Daniels v. State, 213 Md. 90, 131 A.2d 267 (1957); and Deems v. State, 127 Md. 624, 96 Atl. 878 (1916).

From 1957 to the present, a new test similar to that of the Model Penal Code has been proposed several times for legislative adoption; thus far, no statute has come forth from the Maryland General Assembly. (In the Spring, 1966) legislative session, House Bill No. 69 would have replaced *M'Naghten,* but it died in committee.) Such failure to enact a statutory change for *M'Naghten,* however, should not be taken as evidence of the Legislature's approval of that rule. It is dangerous to interpret legislative silence as a vote of confidence in, or an adoption of, a judicial

One may thus readily appreciate the dilemma in which a conscientious Maryland judge — reared under the letter of the law but possessed of that sense of justice appropriate to his office — may find himself. It is with reverent admiration of the jurist who wrote the following lines, and in sympathetic cognizance of his tribulations, that this history of a criminal appeal is submitted. . . .

> Once upon a midnight dreary while I pondered, wise but weary,
> Over many a quaint and curious volume of forgotten lore,[12]
> While I plodded, wisdom-lapping, suddenly there came a tapping
> As of someone gently rapping, rapping at my chamber door.
> " 'Tis some barrister," I muttered, "tapping at my chamber door—
> Only that and nothing more."
>
> Once again I started drawing my decision, hemming, hawing,
> Still the burning question gnawing: was defendant guilty, sure?
> (True he'd fed the in-laws candy — cordials filled with poisoned brandy —
> After which, we understand, he mailed the corpses to Lahore.
> Stipulated was the fact that he'd *confessed* the awful chore;
> Though repenting, giggling more.)
>
> Could the doctors make it plainer that defendant was insaner
> Than full-half of those already in asylums kept secure?
> Seventeen physicians stated that the crime had been created
> By a mind that indicated a cerebrum sickly sore.[13]
> "Psychiatric tests have proven what we all could see before
> (From the silly grin he wore.)"

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pronouncement. See HART & SACKS, THE LEGAL PROCESS 1395–96 (1958). In Girouard v. United States, 328 U.S. 61, 69–70 (1946), the Supreme Court stated:

> It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law. . . . The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases.

12. Possibly, RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY (1st ed. 1838) or STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 154 (1883).

13. Most of the critics of the newer and broader tests for criminal responsibility seem to be suspicious of, or at least disenchanted with, the courtroom testimony of psychiatrists, even when such experts are court-appointed. (In Maryland, a *psychologist* is not permitted to testify until he has met the qualifications set out in Tull v. State, 240 Md. 49, 212 A.2d 729 [1965].) There is claimed to be a greater divergence of opinion among psychiatrists than among, say, internists, as to diagnosis of the diseases with which they are dealing. But as Professor L. Whiting Farinholt, of the University of Maryland School of Law noted in an unpublished letter to Dr. Mark B. Hollander:

> This divergence is more apparent than real. Usually the case deals with a crime, frequently an outrageous one where public interest is aroused and emotions are inflamed. In the "insanity" case the expert, in most jurisdictions, is limited to an opinion which will or will not establish criminal responsibility. One should note that psychiatric opinion is generally for the purpose of determining the existence but not the degree of disability and thus it frequently differs from the medical opinion in a personal injury case. Honest difference of opinion here does not result in a finding of ten instead of sixty percent disability but rather in guilt or innocence. Thus, what may be essentially a minor disagreement between psychiatric experts may take on unwarranted proportions in light of its effect. . . .

For the laymen on the jury *that* was a sufficient story
But the game is not yet over till the judge tells how to score;
"I don't mean to make it denser, I'm not a dogmatic censor,
But this State has followed *Spencer*[14] ever since the days of yore.
'Did defendant know that what he did was wrong, not right' for sure?
That's the test we've used before!"

With that principle recited all the darkness now was lighted,
The potential error righted, since the jury need explore
Only one consideration — just the lone interrogation —
But that simple calculation uttered often heretofore:
Whether right was known from wrong, became the issue that they bore;
Verdict: "Guilty," (nothing more).

So wrapped up in this decision, blinded by a better vision
Captured by the clear confusion wrought by Law's Now and Before —
That just then to still the beating of my heart, I stood repeating
"'Tis some barrister entreating entrance at my chamber door;
Some late barrister entreating entrance at my chamber door.
This it is and nothing more."

Soon my soul was slightly stronger; hesitating then no longer,
"Barrister," said I sincerely, "your forgiveness I implore;
But in fact I was law-lapping and so gently you came rapping
With such faint judicious tapping, tapping at my chamber door,
That I hardly thought I heard you" — here I opened wide the door —
Only whispered words: "Once more."

Nothing but that phrase kept burning so to chambers I was turning
When again I heard a tapping (somewhat louder than before.)
"Surely," said I, "surely that is something at my window lattice,
Let me see, then what thereat is and this foolishness explore.
Let my heart be still a moment and I'll soon be at the core;
"'Tis but me and nothing more — 'tis but fantasy, no more!"

Open then I flung the shutter, when, with many a flirt and flutter
In there stepped a stately creature — lo! a *mockingbird*? For sure!
Of austerely antique bearing, wings inflexible but flaring,
In he stepped while I kept staring as he perched above my door.
Perched upon the Scales of Justice just above my chamber door,
Perched, as spellbound, nothing more.

Then this balky bird beguiling my dissention into smiling
By the grave and stern decorum of the countenance it wore,
"Though thou art a beast unbending, could," I asked, "could thou be lending

14. Spencer v. State, 69 Md. 28, 13 Atl. 809 (1888). See *supra* note 11.

Counsel to opinions pending courtside on Annapolis' shore?
If so," I laughed, condescending — "inspiration I implore!"
Quoth the Mockingbird: "Once more!"

Much I marvelled this ungainly fowl to hear discourse so plainly
Though its answer little meaning — little relevancy bore,
For I cannot help agreeing that no Judge, appellate Being,
Ever yet was blessed with seeing *bird* above his chamber door . . .
Mockingbird upon the Scales of Justice on his chamber door,
With that dictum "Just once more!"

But the beast still sitting lonely on the door above spoke only
Those few words as if its soul in those few words it did outpour;
Nothing farther then he uttered — not a feather then he fluttered —
Till I scarcely more than muttered, "No — I shall affirm no more!
It is time to reconsider dicta of a dead Before."[15]
Then the bird decreed, "Once more."

Startled by the stillness broken by reply so aptly spoken,
"Doubtless," said I, "what it utters is its only stock and store:
Caught from some unyielding Master fearful of the Law's disaster
Should the rules not be kept faster, be the Law not *as before*;
Surely," I soliloquied, "yes, surely Justice would deplore
Law unchanging, Law of lore."[16]

But the Mockingbird bewitching the opinion, swaying, switching
My once strong dissenting voice now indecisive and unsure,
Still! into tradition sinking, I betook myself to linking
Precedent to folly thinking what this pompous bird of yore,
What this proud opinionated pertinacious bird of yore
Meant in mocking "Just once more."

"What of Man's progressive learning — knowledge grows," cried I, not turning
From that eerie visage of Persuasion perched upon my door;
"Does not Law," I asked, beseeching, "recognize its goal of reaching
Truth! and is not Law impeaching Truth by failing to explore
Reason of enlightened science, fallacies of the Before?[17]
Can not Progress be *de jure*?"

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15. The court in United States v. Freeman, 357 F.2d 636, 624–25 (2d Cir. 1966), declared:

> The genius of the common law has been its responsiveness to changing times, its ability to reflect developing moral and social values. Drawing upon the past, the law must serve — and traditionally has served — the needs of the present. In the past century, psychiatry has evolved from tentative, hesitant gropings in the dark of human ignorance to a recognized and important branch of modern medicine. The outrage of a frightened Queen has for too long caused us to forego the expert guidance that modern psychiatry is able to provide.

16. "Law must be stable and yet it cannot stand still. . . . The social interest in the general security has led men to seek some fixed basis. . . . But continual changes . . . demand continual new adjustments. . . . Thus the legal order must be flexible as well as stable." POUND, LAW FINDING THROUGH EXPERIENCE AND REASON 23 (1960).

17. Chief Justice Vanderbilt, dissenting in Fox v. Snow, 6 N.J. 12, 76 A.2d 877, 883 (1950) stated:

> The doctrine of *stare decisis* neither renders the courts impotent to correct their past errors nor requires them to adhere blindly to rules that have lost their

"*Stare dictus*[18] is well-grounded, but is not its province bounded
By perspectives, changing Time and values that to It inure?
Precedent is necessary but should not the Law be wary
Of an ancient test so very incorrect it holds no more?
Or is *M'Naghten* right for sure?"

Now! methought the bird had started! but my hopes were hopes half-hearted,
Still he sat, perhaps the wiser, high above my chamber door.
Little could I fight a power so entrenched in Law's fair tower
Caught by his imposing glower: was *I* right, *his* logic poor?
Could I wipe his test, his rule, his law, his form from off my door,
As he whispered, loud, "Once more?"

No. The Mockingbird, unsearching, still is perching, *still* is perching
On the sightless scales of justice just above my chamber door.
Though his eyes are now betraying battle scars of years of flaying
At the hands of Progress praying for the law of Truth, no more,
Still he sits there lacking logic, bathed in Law's "Law of Before"
Gravely uttering, "Just Once More!"*

Fair Comment — The Extent Of The Public Interest Element

Afro-American Publishing Co. v. Jaffe[1]

Mr. Jaffe owned a pharmacy in a predominately Negro neighborhood in Washington, D.C., and had a subscription to sell a number of copies each week of the Washington Afro-American, a newspaper primarily serving the Washington Negro community. Because he felt that the newspaper was spreading racial hatred and distrust,[2] he can-

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reason. . . . The common law would be sapped of its life blood if *stare decisis* were to become a god instead of a guide. The doctrine when properly applied operates only to control change, not to prevent it. The doctrine . . . tends to produce certainty in our law, but it is more important to realize that certainty *per se* is but a means to an end, and not an end in itself.

We should not permit the dead hand of the past to weigh so heavily upon the law that it perpetuates rules of law without reason. Unless rules of law are created, revised, or rejected as conditions change and as past errors become apparent, the common law will soon become antiquated and ineffective in an age of rapid economic and social change.

18. *Sic.* (*i.e.*, stare decisis.)

* *Author's note:* Offered with all due apologies to Edgar Allan Poe (1809–49), composer of "The Raven" and a great uncle of Edgar Allan Poe, Esq. (1871–1961) who was Attorney General of Maryland in 1916 and who was the unsuccessful prosecutor in Deems v. State, 127 Md. 624, 96 Atl. 878 (1916), cited *supra* note 11.

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1. Civil No. 18363, D.C. Cir., 33 U.S.L. WEEK 2634 (May 27, 1965).

2. In Beauharnais v. Pittsburgh Courier Publishing Co., 243 F.2d 705, 706 (7th Cir. 1957), the defendant's article charged that the plaintiff, the head of a white movement, "conducts a vicious and risky business — the promotion of racial hatred,