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The Judicial Evolution of Ohio's Insanity Defense

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ESSAY

THE JUDICIAL EVOLUTION OF OHIO'S INSANITY DEFENSE

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I. INTRODUCTION

After more than a century of confusion among Ohio courts over the appropriate standard for the insanity defense, the Ohio Supreme Court finally settled the issue in *State v. Staten.*[1] Curiously, the *Staten* test[2] mirrors the test used by the trial court in *Clark v. State,*[3] a case decided a mere forty years after Ohio became a state and in the same year that the English courts pronounced the famous *M'Naghten's Case*[4] decision. A comparison of that well-known English judgment with the test for insanity contained in the *Clark* jury charge[5] shows the Ohio position to be an unabashedly superior one, which encompasses facets of the contemporary Model Penal Code rule[6] adopted by many

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1. (Staten I), 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969), *overruled in part as stated in* State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977) (discussed *infra* note 214). The *Staten* test has been reaffirmed by the Ohio Supreme Court on numerous occasions. *See, e.g.*, State v. Coombs, 18 Ohio St. 3d 123, 480 N.E.2d 414 (1985); State v. Brown, 5 Ohio St. 3d 133, 449 N.E.2d 449 (1983); State v. Anders, 29 Ohio St. 2d 1, 277 N.E.2d 554 (1972).

2. The *Staten* test is quoted *infra* text accompanying note 214.

3. 12 Ohio 483 (1843) (in bank), *overruled in part in* Kelch v. State, 55 Ohio St. 146, 154–55, 45 N.E. 6, 8 (1896) *and in part in* State v. Austin, 71 Ohio St. 317, 322, 73 N.E. 218, 219 (1904).

4. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

5. *See Clark,* 12 Ohio at 494 n.(a) (reprint of jury charge). For an explanation of the circumstances surrounding the promulgation of the *Clark* insanity test, see *infra* notes 91–95 and accompanying text.

6. *See* MODEL PENAL CODE § 4.01(1) (1962). The relevant provision states:

> 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 substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

While the Model Penal Code test has not been adopted in Ohio, the *Staten* court pointed out that the two tests had much similarity. Both tests allowed for acquittal by reason of insanity when mental disease or defect impaired either a defendant's ability to understand "the wrongfulness of his act" or his ability to "refrain from doing the act"; the major difference was that the Ohio rule

jurisdictions.[7] Ironically, Ohio, after enunciating a more enlightened rule, seemed often to abandon it, as much through desuetude as through judicial reasoning, and to embrace *M'Naghten*.[8] Thus Ohio, too, was consigned to the long intellectual struggle and judicial plodding that formed the search for a fair and sensible position on just what should constitute the defense of insanity.

Beginning with pre-*Clark* and pre-*M'Naghten* cases, this article examines the early strivings of the judiciary in both England and Ohio to lay the foundation for the development of later pertinent case law. While at first blush, the comparison of forty years of Ohio statehood with more than a century of English history might seem a bit self-important, the thread of the common law is the focus of examination and not any particular block of time.

Next, this article examines and compares *Clark* and *M'Naghten* for the messages that they carry. From that point, this paper will largely occupy itself with the twists and turns that the Ohio courts have taken on the insanity defense issue, and will also discuss national developments and how some of these developments seeped into Ohio law and others failed to have any impact.

II. PRE-*CLARK* AND PRE-*M'NAGHTEN*

A. *Five Well-Known English Insanity Cases*

The pre-*M'Naghten* years in England can be described as an era of inquiry and development in the insanity defense area.[9] Of course, for most of that period, Ohio was not even a state. When the state was carved from the Northwest Territories in 1803, its nascent judiciary, lacking case law of its own, sought precedent by copying what it could from the former colonies and referring back to the bulwark of English case law.[10] Included by the time of Ohio statehood in that body of English law on the insanity defense were the well-known cases of *Rex v. Arnold*[11] (1724), *Rex v. Ferrers*[12] (1760), and *Hadfield's Case*[13]

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required that such impairment be complete while the Model Penal Code only required that his impairment be "substantial." *See Staten I*, 18 Ohio St. 2d at 17–18, 247 N.E.2d at 297; *see also* State v. Wilcox, 70 Ohio St. 2d 182, 188, 436 N.E.2d 523, 527 (1982) (*Staten* test is "arguably less expansive" than Model Penal Code test). *See generally* Annotation, *Modern Test of Status of Criminal Responsibility—State Cases*, 9 A.L.R.4TH 526, 541 (1981).

7. *See, e.g.*, People v. Miller, 33 Ill. 2d 439, 211 N.E. 2d 708 (1965); Hill v. State, 252 Ind. 601, 250 N.E.2d 429 (1969); Edwards v. Commonwealth, 554 S.W.2d 380 (Ky. 1977), *cert. denied*, 434 U.S. 999; *see also* Annotation, *supra* note 6, at 536–43.

8. *See infra* notes 114–216 and accompanying text.

9. *See generally* 1 N. WALKER, CRIME AND INSANITY IN ENGLAND 15–87 (1968).

10. *See, e.g.*, Wilbur v. Paine, 1 Ohio 251 (1824); Key v. Vattier, 1 Ohio 132 (1823) (in bank); Lessee of Moore v. Vance, 1 Ohio 1 (1821).

11. 16 How. St. Tr. 695 (C.P. 1724).

12. 19 How. St. Tr. 885 (H.L. 1760).

13. 27 How. St. Tr. 1281 (K.B. 1800).

(1800); in addition, English courts would later decide *Bellingham's Case*[14] (1812) and *Regina v. Oxford*[15] (1840). These cases deserve some examination[16] before considering Ohio case law decided prior to *Clark v. State*[17] and *M'Naghten's Case*.[18]

1. *Rex v. Arnold*[19] (1724)

In *Arnold*, Mr. Justice Tracy of the Common Pleas expounded his observations of insanity by noting:

> [I]t is not every kind of frantic humour or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment: 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, such a one is never the object of punishment . . . .[20]

Through this conception of insanity, which came to be called the "Wild Beast Test,"[21] the absence of cognitive, intellectual capacity was the line of demarkation between the sane and the insane; however, this absence had to be complete.

The strategy of the prosecution in *Arnold*, therefore, was to show that the defendant was not totally devoid of reason, despite the considerable evidence of his madness.[22] The prosecution attempted to prove purpose and design by calling witnesses who testified that, on the day of the crime, Arnold had bought ammunition, test-fired his gun, and

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14. 54 Old Bailey Session Papers 263 (1812) (No. 433) (available in Harvard Law School Library, Special Collections).

15. 9 Car. & P. 525, 173 Eng. Rep. 941 (Cent. Crim. Ct. 1840).

16. While these five cases are among those most commonly cited in narrating the pre-*M'Naghten* history of the insanity defense in England, their preeminence has been questioned in light of numerous, often successful insanity defenses of the same era in cases that were reported only in the *Old Bailey Session Papers*. *See* 1 N. WALKER, *supra* note 9, at 52–91.

17. 12 Ohio 483 (1843) (in bank), *overruled in part in* Kelch v. State, 55 Ohio St. 146, 154, 45 N.E. 6, 8 (1896) *and in part in* State v. Austin, 71 Ohio St. 317, 322, 73 N.E. 218, 219 (1904).

18. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

19. 16 How. St. Tr. 695 (C.P. 1724).

20. *Id.* at 764–65 (Tracy, J., jury charge).

21. *See generally* Platt & Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. HIST. BEHAVIORAL SCI. 355 (1965).

22. *See Arnold*, 16 How. St. Tr. at 725, 729, 731–40 (testimony that Arnold believed his intended victim had bewitched him, was "in his belly," and had prevented him from going fishing by being "with him"; that he complained he was tempted by the devil and surrounded by "imps"; that he asked his barber to cut his throat; and that he tore up his landlady's rug and stuffed the pieces in his ears).

asked two people where his intended victim could be found. Other prosecution witnesses testified that Arnold had attempted to evade capture after the shooting and later professed remorse when he was in prison.[23]

The state's argument carried the day. The jury returned a verdict of guilty and the judge sentenced Arnold to be hanged.[24] The judicial acceptance of partial insanity would have to wait.

2. *Rex v. Ferrers*[25] (1760)

In 1760, the House of Lords tried and convicted Lawrence Earl Ferrers, an English nobleman who had shot and killed his steward.[26] The Solicitor General's summation preserved the "Wild Beast Test" by stating that total permanent lack of reason would be grounds for an acquittal.[27] However, a new twist was added when he acknowledged that a total but temporary lack of reason could also lead to acquittal.[28] Partial insanity, which by definition would be intermingled with some degree of reason, could not.[29]

Lord Ferrers, who by all accounts committed the crime because of a delusional and pathological hatred of his steward, was nevertheless convicted, partly as a result of his conducting his own defense.[30] Apparently his self-representation was so competently and carefully performed that it was impossible to believe he was insane.[31] Hence, the defense of insanity failed, not for want of evidence, but for an abundance of skill on the part of the defendant in his alternate role as counselor for the defense. His Lordship was executed.[32]

3. *Hadfield's Case*[33] (1800)

In 1800, James Hadfield stood up on his seat at the theatre and fired a shot at King George III.[34] At Hadfield's trial for treason, his attorney, Thomas Erskine, raised the defense of insanity and set upon the task of challenging the accepted test of the day. The "Wild Beast Test," he said, was not an appropriate test, since a total deprivation of

23. *See id.* at 702–54 (testimony).

24. *Id.* at 766 (Tracy, J., pronouncement of sentence). It is ironic that Arnold's intended victim showed more compassion than had the jury. Lord Onslow asked the judge for mercy for his would-be slayer, and the judge thereupon commuted Arnold's sentence to a prison term. *Id.*

25. 19 How. St. Tr. 885 (H.L. 1760).

26. *Id.* at 887–88 (Henley, Lord High Steward, reading of indictment).

27. *Id.* at 947 (Yorke, Solicitor Gen., summation) (discussing existing precedents).

28. *Id.* (Yorke, Solicitor Gen., summation).

29. *Id.* (Yorke, Solicitor Gen., summation).

30. *See generally id.* at 902–45 (testimony).

31. *See* T. MAEDER, CRIME AND MADNESS 11 (1985).

32. *Ferrers*, 19 How. St. Tr. at 973–79 (report of the execution).

33. 27 How. St. Tr. 1281 (K.B. 1800).

34. *See id.* at 1284 (Abbott, Counsel for the Crown, reading of indictment).

reason and memory was found only in mere idiots or those so deranged that they were hardly conscious of the world around them.[35] "In other cases, reason is not driven from her seat, but distraction sits down upon it along with her, holds her, trembling, upon it, and frightens her from her propriety."[36]

From the nature of Hadfield's madness, Erskine had no choice but to confront the accepted tests for insanity as laid down by *Arnold* and *Ferrers:* his client *did* know right from wrong and *did* appreciate the illegality and enormity of his attempted murder of the King. In fact, it was this very knowledge of his act that demonstrated Hadfield's insanity.

To understand this, one must first note that James Hadfield was a valorous soldier of the King who had served in the French Revolutionary Wars. It was only after receiving two severe head wounds from sword blows that his lunacy began. At first he believed himself to be King George and would search for his crown. He apparently had seizures so violent that his doctor had him lashed to his bed. Later, his delusion changed and he believed himself to be God and decided that mankind was doomed to perish unless he could bring about his own martyrdom.[37] Since suicide was a sin, Hadfield hatched a scheme whereby he would fire a shot in the general direction of the monarch, but aimed to miss (Hadfield held the king in high estimation, and did not want to kill him). Such an attempt was punishable by death and, he reasoned, death would be the result, either at the hands of a frenzied mob or by the executioner. Thereby the world would be saved.[38]

Hadfield's twisted plan failed, not because he was unable or unwilling to perform the act, but because the prosecution was unable to derail Erskine's successful argument that delusion was and should be a valid test of insanity. After a parade of twelve witnesses had presented the woeful tale of James Hadfield, Lord Chief Justice Kenyon of the King's Bench interrupted, only to be informed that twenty more witnesses were willing to do the same.[39] In his wisdom, Lord Kenyon subsequently advised the jury to enter a verdict of not guilty.[40] The jury complied, adding as the reason for the acquittal that Hadfield was "under the influence of Insanity at the time the act was committed."[41] James Hadfield was sent to an insane asylum and died forty-one years

35. *Id.* at 1312 (Erskine, defense counsel, opening statement).
36. *Id.* at 1313 (Erskine, defense counsel, opening statement).
37. *Id.* at 1332, 1336, 1338, 1347 (testimony).
38. *Id.* at 1319–21 (Erskine, defense counsel, opening statement).
39. *Id.* at 1353.
40. *Id.* at 1355 (Kenyon, L.C.J., jury charge).
41. *Id.* at 1356 (jury verdict).

later in Bedlam.[42]

It would have been interesting to see the result had the case against Hadfield gone to the jury without such an instruction. One may suspect that Hadfield's plan for world salvation would have been carried out: juries then—like juries now—seemed disposed to reject the insanity plea generally, as well as variations on that theme particularly.[43] Speculation that a jury might have returned a guilty verdict in *Hadfield* is strengthened by the result in the trial of John Bellingham.

4. *Bellingham's Case*[44] (1812)

John Bellingham operated under the delusion that his failed business ventures in Russia and his five years of imprisonment there for bad debts were the fault of the English government. Thus, because of his government's refusal to protest the abuse of an Englishman at the hands of a foreign government or to provide him with some form of compensation for his suffering, Bellingham came to believe that assassination was his only remedy.[45]

On May 11, 1812, Bellingham shot and killed the Right Honorable Spencer Perceval.[46] Four days later, the trial of this seemingly sane man began and ended on the same day. Lord Chief Justice Mansfield of the Common Pleas commented to the jury that the evidence of Bellingham's mental derangement, "[far from showing him to have been insane,] ha[d] most distinctly proved . . . that he was in every respect a full and competent judge of all his actions."[47] In fact, Bellingham himself denied being insane and addressed the court coherently and politely about his incredible story.[48] However, the bizarre content of his tale made no difference and the jury returned the expected guilty verdict.[49] Three days later, he mounted the gallows.[50] The defense of in-

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42. *See* T. MAEDER, *supra* note 31, at 16.

43. *See generally id.* at 109–10.

44. 54 Old Bailey Session Papers [O.B.S.P.] 263 (1812) (No. 433) (available in Harvard Law School Library, Special Collections). An account of this case is printed in G. COLLINSON, A TREATISE ON THE LAW CONCERNING IDIOTS, LUNATICS, AND OTHER PERSONS NON COMPOS MENTIS 636 add. (London 1812). *See generally* 1 N. WALKER, *supra* note 9, at 272 (noting likelihood that the two sources were derived from "two independent reports").

45. 54 O.B.S.P. at 267–70 (testimony of defendant); *see also* G. COLLINSON, *supra* note 44, at 649–51 (Gibbs, Att'y Gen., opening statement).

46. 54 O.B.S.P. at 263–64 (testimony); *see also* G. COLLINSON, *supra* note 44, at 636. Perceval held the offices of First Lord of the Treasury and Chancellor of the Exchequer. *See* G. COLLINSON, *supra* note 44, at 636.

47. 54 O.B.S.P. at 273 (Mansfield, L.C.J., jury charge); *see also* G. COLLINSON, *supra* note 44, at 674 (same).

48. 54 O.B.S.P. at 267–70 (testimony of defendant); *see also* G. COLLINSON, *supra* note 44, at 663 (summarizing defendant's testimony).

49. 54 O.B.S.P. at 273 (jury verdict); *see also* G. COLLINSON, *supra* note 44, at 674 (same).

50. *See* T. MAEDER, *supra* note 31, at 19 ("As Bellingham stood cheerfully at the gallows

sanity based on delusion did not see the light of day of judicial reason.[51]

5. *Regina v. Oxford*[52] (1840)

In *Oxford*, the last of the five pre-*Clark*, pre-*M'Naghten* foundation cases, the defendant discharged two pistols at Queen Victoria and then volunteered himself as the culprit when the crowd seized the wrong man. Evidence admitted into trial clearly showed him to be mentally deranged. Documents found in Oxford's residence detailed what appeared at first to be the existence of a sinister revolutionary group, but what was actually an elaborate delusional system with no basis in reality.[53]

As expected, the prosecution attempted to show guilty intent by introducing evidence of Oxford's rational behavior prior to the crime. He had bought pistols and bullets and had practiced firing the pistols. Just as predictably, defense counsel tried to prove Oxford's insanity by parading before the court a troop of witnesses, both lay and professional,[54] willing to attest to the same.[55] The case is notable not for the testimony or strategy but for the judge's instructions to the jury, because it is at this junction that the departure from precedent began. In part, Lord Chief Justice Denman of the Central Criminal Court informed the jury that the issue to be considered was the nature and effect of Oxford's mental "disease":

> [T]he very important question comes, whether the prisoner was of unsound mind at the time when the act was done? Persons *prima facie* must be taken to be of sound mind till the contrary is shewn. But a person may commit a criminal act, and yet not be responsible. If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible. . . . [U]pon the whole,

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three days later, he was asked if he had any last words, but was cut short when he began speaking of Russia.").

51. Lord Chief Justice Mansfield expressly rejected a defense based on such a type of insanity. *Bellingham*, 54 O.B.S.P. at 273 (Mansfield, L.C.J., jury charge); *see also* G. COLLINSON, *supra* note 44, at 672 (same).

52. 9 Car. & P. 525, 173 Eng. Rep. 941 (Cent. Crim. Ct. 1840).

53. *See id.* at 527–30, 173 Eng. Rep. at 942–43 (Campbell, Att'y Gen., opening statement); *id.* at 537–38, 173 Eng. Rep. at 946 (Taylor, defense counsel, opening statement).

54. *Id.* at 541, 173 Eng. Rep. at 948. Lord Chief Justice Denman, in commenting to the jury upon the value of the professional testimony, said:

> It may be that medical men may be more in the habit of observing cases of this kind than other persons; and there may be cases in which medical testimony may be essential; but I cannot agree with the notion that moral insanity can be better judged by medical men than by others.

Id. at 547, 173 Eng. Rep. at 950 (Denman, L.C.J., jury charge).

55. *See id.* at 538–41, 173 Eng. Rep. at 947–48 (summary of testimony for the defense).

> the 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.[56]

The Judge's charge, and the defense counsel's witnesses, were apparently persuasive. The jury found Oxford guilty of firing two pistols, but also found that he was insane.[57] The judge ordered that he be sent to an insane asylum. Twenty-seven years later, Oxford was released upon his agreement to leave England.[58]

The instructions in *Oxford* laid out a formula that would presage the test in *M'Naghten.* The defense, it would seem, would be successful if it satisfied either one of two categories of insanity. The first was the clear "right-from-wrong" test, which demonstrated the cognitive aspect of the insanity defense.[59] An individual "incapable of distinguishing right from wrong" because of "a disease in the mind" was insane and would be acquitted for that reason.[60] The second category introduced unconsciousness as a successful insanity defense.[61] Presumably, this would be comparable in modern psychiatric parlance to a dissociative disorder.[62] In any case, if the person acted without awareness of acting because of a disease of the mind, the conclusion was that he was insane.

It is difficult to understand how a bona fide delusional system of the type that Oxford[63] or Bellingham[64] suffered from would fit into ei-

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56. *Id.* at 546–47, 173 Eng. Rep. at 950 (Denman, L.C.J., jury charge).
57. *Id.* at 548, 551, 173 Eng. Rep. at 950–51, 952 (jury verdict).
58. T. MAEDER, *supra* note 31, at 22.
59. *Id.* at 50.
60. *Oxford,* 9 Car. & P. at 547, 173 Eng. Rep. at 950 (Denman, L.C.J., jury charge).
61. *Id.* (Denman, L.C.J., jury charge).
62. *See generally* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 253–60 (3rd ed. 1980). The introduction to the section on dissociative disorders begins as follows:

> The essential feature [of a dissociative disorder] is a sudden, temporary alteration in the normally integrative functions of consciousness, identity, or motor behavior. If the alteration occurs in consciousness, important personal events cannot be recalled. If it occurs in identity, either the individual's customary identity is temporarily forgotten and a new identity is assumed, or the customary feeling of one's own reality is lost and replaced by a feeling of unreality. If the alteration occurs in motor behavior, there is also a concurrent disturbance in consciousness or identity . . . .

Id. at 253.
63. *See supra* text accompanying note 53.
64. *See supra* text accompanying note 45.

ther of the *Oxford* court's categories of insanity. It has been shown that one suffering from such a mental derangement can both distinguish right from wrong and be aware of his actions.[65] In any case, *M'Naghten* would subsequently settle the issue by holding that a defendant who claimed insanity based upon delusion was to be judged "as if the facts with respect to which the delusion exists were real."[66] Under *M'Naghten,* then, Oxford and Bellingham should probably have received the same jury verdict.[67]

*B. The Insanity Defense in Pre-*Clark *Ohio Law*

With the conclusion of *Oxford,* the Ohio judiciary considering *Clark* could look to the English courts for guidance and find the cognitive prong of the insanity test firmly established. In addition, court and counsel in *Clark* were able to identify and cite a smattering of American cases that discussed the issue of insanity in general.[68] However, none of these American cases dealt with a standard for insanity in the criminal law context.[69]

It should be noted, though, that one of the three reported Ohio cases prior to *Clark* in which insanity was an issue[70] could have provided some guidance to the *Clark* court in formulating an insanity test. In *State v. Thompson,*[71] Judge John Wright of the Ohio Supreme

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65. *See generally* I. RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY (W. Overholder ed. 1962) (1st ed. 1838).

66. *M'Naghten,* 10 Cl. & Fin. at 211, 8 Eng. Rep. at 723 (statement of Lord Chief Justice Tindal).

67. The *M'Naghten* opinion stated:

> For example, if under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

Id. (statement of Lord Chief Justice Tindal).

68. *See Clark,* 12 Ohio at 485–86 (summary of appellate arguments of both parties) (citing Harrison v. Rowan, 11 F. Cas. 658 (C.C.D.N.J. 1820) (No. 6141); Grant v. Thompson, 4 Conn. 203 (1822); Dickinson v. Baker, 9 Mass. 225 (1812); Hathorn v. King, 8 Mass. 371 (1811); Buckminster v. Perry, 4 Mass. 593 (1808); Poole v. Richardson, 3 Mass. 330 (1807); Wogan v. Small, 11 Serg. & Rawle 141 (Pa. 1824; Irish v. Smith, 8 Serg. & Rawle 573 (Pa. 1822); Rambler v. Tryon, 7 Serg. & Rawle 90 (Pa. 1821)).

69. *See, e.g., Wogan,* 11 Serg. & Rawle at 141 (propriety of inquiry into a testator's fitness of mind). However, there were extant at the time of the *Clark* decision a number of reported American cases applying a version of the "right-from-wrong" test that predated *M'Naghten. See* 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 CALIF. L. REV. 1227 (1966). Most of the cases mentioned were from local courts in New York City. *See id.* at 1247–56.

70. *See* State v. Thompson, Wright 617 (Ohio 1834); State v. Gardiner, Wright 392 (Ohio 1833); Wallace v. Bevard, Wright 114 (Ohio 1832).

71. Wright 617 (Ohio 1834).

Court[72] instructed the jury:

> If [the facts] satisfy you that when the prisoner struck the deceased he was laboring under insanity, or, such an estrangement of mind as left him without discretion to discern the difference between good and evil, or unconscious that he was doing wrong, he should be acquitted *altogether.* But, on the other hand, if his mind was such, that he retained the power of discriminating, or to leave him conscious he was doing wrong, a state of mind in which at the time of the deed, he was free to forbear, or to do the act, he is responsible as a sane man.[73]

By declaring that sanity includes "free[dom] to forbear or to do the act," Judge Wright anticipated the elements of the Ohio test as enunciated in *Clark.*[74] Interestingly, the *Clark* court failed to mention the *Thompson* decision and—in fact—no reported Ohio case has ever applied or even cited *Thompson* as a test for insanity.[75]

In sum, the situation in Ohio prior to *Clark* showed meager reported case law from beyond the English shore that could provide guidance to a young judiciary seeking to formulate a standard for the defense of insanity. Given this scarcity of case law, Ohio Supreme Court Judge Matthew Birchard—the author of the *Clark* jury charge—chose to discuss considerable secondary authority on the issue of insanity when he wrote the opinion of the Supreme Court in bank upholding the trial court's decision in *Clark.* His enlightened discussion on the nature of insanity suggests that he must have been a probing scholar in his own right.[76]

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72. The then-common practice of Supreme Court judges presiding at trials is discussed *infra* note 91.

73. *Thompson,* Wright at 646 (Wright, J., jury charge).

74. *Compare id. with Clark,* 12 Ohio at 494 n.(a) (reprinting jury charge) (defendant accused of first-degree murder cannot be convicted unless it can be shown that he is "a free agent, capable of acting or of abstaining from action—free to embrace the right and reject the wrong.").

75. *Thompson* has been cited by the Ohio Supreme Court for the proposition that first-degree murder requires proof of deliberation and premeditation. *See* Fouts v. State, 8 Ohio St. 98, 112 (1857); *cf.* Fisher v. United States, 328 U.S. 463, 483 n.6 (Frankfurter, J., dissenting).

In addition, both *Thompson* and *Clark* have been categorized by some courts and commentators as early examples of the "irresistible-impulse" test. *See, e.g.,* State v. Riley, 30 P.2d 1041, 1046 (Ore. 1934); Kuh, *The Insanity Defense—an Effort to Combine Law and Reason,* 110 U. PA. L. REV. 771, 786 (1961–1962).

The Ohio Supreme Court has rejected any comparison of the Ohio test to the "irresistible-impulse" test. State v. Staten (Staten I), 18 Ohio St. 2d 13, 22 n.8., 247 N.E.2d 293, 299 n.8 (1969), *overruled in part as stated in* State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977). The "irresistible-impulse" test and its lack of acceptance in Ohio is discussed *infra* notes 154–66 and accompanying text.

76. Of Judge Birchard's public service during the years before he became a member of the Ohio Supreme Court, it has been written:

> Matthew Birchard was born at Becket, Massachusetts, in 1803, and came to Ohio at the age of eight with his parents, who settled in Trumbull County, near the town of Warren. After the preparatory course of study he was admitted to the bar in 1827, and six years

III. INCIPIENT PRECEDENT: *M'NAGHTEN* AND *CLARK*

A. M'Naghten's Case[77] *and the "Right-from-Wrong" Test*

On March 4, 1843, an English court found Daniel M'Naghten not guilty by reason of insanity for the shooting death of Edward Drummond, private secretary to Prime Minister Sir Robert Peel.[78] The *M'Naghten* test for insanity was not formulated by the trial court; instead, it was conceived in the opinion of the panel of judges summoned by the House of Lords after the trial largely in response to widespread negative reaction to the *M'Naghten* jury's findings.[79] Asked to respond to five questions on the issue of the insanity defense, the judges pronounced an answer that can still be heard in one form or another in every American courtroom today:

> [T]o 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 he was doing; or, if he did know it, that he did not know he was doing what was wrong.[80]

The immediate value of the *M'Naghten* test was that it made room for partial insanity, disposing of the difficult cases like *M'Naghten,* where the medical evidence suggested that Daniel M'Naghten suffered from

> a [morbid] delusion which carried him away beyond the power of his own control, and left him no . . . perception [of right and wrong]; and that he was not capable of exercising any control over acts which had connexion with his delusion: that it was of the nature of the disease with which the [defendant] was affected, to go on gradually until it had reached a climax, when it burst forth with irresistible intensity: that a man might go on for years quietly, though at the same time under its influence, but would all at once break out into the most extravagant and violent paroxysms.[81]

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later was elected judge of the Common Pleas. He was a Jackson Democrat and interested sufficiently in politics to turn aside from the main drift of his life and leave the leadership of the Common Pleas circuit to accept the commissionership of the general land office tendered him by President Jackson. His written opinions are characterized by felicity of expression and perspicuity of thought.

1 E. MARSHALL, A HISTORY OF THE COURTS AND LAWYERS OF OHIO 244 (1934).

77. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

78. *See id.* at 202, 8 Eng. Rep. at 720.

79. *See* T. MAEDER, *supra* note 31, at 30–32.

80. *M'Naghten,* 10 Cl. & Fin. at 210, 8 Eng. Rep. at 722 (statement of Lord Chief Justice Tindal), *quoted in* T. MAEDER, *supra* note 31, at 32–33.

81. *M'Naghten,* 10 Cl. & Fin. at 201–02, 8 Eng. Rep. at 719.

The part of the opinion of the judges that came to be known as the *M'Naghten* rule did not [illegible] unless "defect of reason" is interpreted to subsume this condi-

The temporary but all-consuming nature of Daniel M'Naghten's insanity fell within the test's provision that the defendant must be insane "at the time of the committing of the act."[82]

The long-term effect of *M'Naghten* was to solidify the "right-from-wrong" test, giving jurists a formula to apply for years to come. The test in fact has two parts: a defendant may be found insane if he either "does not know the nature and quality of his act" or "does not know right from wrong."[83] Although the first phrase, "nature and quality of his act," is a "broader and more inclusive concept,"[84] courts have usually preferred the "right-from-wrong" phrase of the test.[85]

The general theme of the *M'Naghten* test emphasizes knowledge and ignores self-control; this irrelevance of self-control is one of the grounds upon which *M'Naghten* has received considerable comment, most of it critical.[86] Today, while the legal community recognizes the word "know" in its cognitive, intellectual scope, the psychiatric profession, called to expound as experts on the mental conditions of defendants, takes the word as connoting a broader and fuller knowledge embracing emotional processes.[87] The practical effect of the narrower legal definition is that a great many people who are seriously disturbed would be precluded from establishing a successful insanity defense. Recognizing this, courts embracing *M'Naghten* have often adopted a broad construction of the term "know"[88] and ignored the narrow wording of *M'Naghten*. The test is generally applied to all types of mental aberrations; thus, emotional and delusional disorders are merely special subcategories that still fall within the ambit of the rule.[89]

Despite the extensive debate *M'Naghten* would trigger, the House of Lords had its answer and the test to which the English judiciary

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tion. In a separate response, the judges stated that partial delusion was not exculpatory when the defendant "knew he was acting contrary to law." *See id.* at 209, 8 Eng. Rep. at 722 (statement of Lord Chief Justice Tindal); *see also id.* at 211, 8 Eng. Rep. at 223 (statement of Lord Chief Justice Tindal) (the guilt of a defendant operating under a delusion should be judged on the basis of the facts as he perceives them) (discussed *supra* notes 66–67 and accompanying text).

82. *Id.* at 210, 8 Eng. Rep. at 722 (statement of Lord Chief Justice Tindal).

83. *See, e.g.*, State v. Creech, 229 N.C. 662, 51 S.E.2d 348 (1949); Commonwealth v. Heller, 369 Pa. 457, 87 A.2d 287 (1952); MINN. STAT. ANN. § 611.026 (West 1987); *see also* Annotation, *supra* note 6, at 529.

84. *See, e.g.*, Annotation, *Modern Status of the* M'Naghten *"Right-and-Wrong" Test of Criminal Responsibility*, 45 A.L.R.2D 1447, 1451 n.2 (1956) (citing Weihofen, *The* M'Naghten *Rule in Its Present-Day Setting*, FED. PROBATION, Sept. 1953, at 8).

85. *Id.*

86. *See, e.g.*, F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 109 (1964); Platt & Diamond, *supra* note 68, at 1247; *see also* Annotation, *supra* note 84, at 1456.

87. Guttmacher, *The Psychiatrist as Expert Witness*, 22 U. CHI. L. REV. 325, 326 (1955).

88. Weihofen, *supra* note 84, at 8 (courts seldom delve deeply into the definition of "knowledge").

89. *See* Annotation, *supra* note 84, at 1452.

thereafter proclaimed its allegiance. The *M'Naghten* test would prove to be a trenchant tool in the hands of judges eager to pare the insane from the sane. It did not matter in 1843 that over one hundred years would pass before the test would be broadened enough in application to encompass all those it was intended to benefit.

B. Clark v. State[90] *and the Free-Will Test*

The facts in the *Clark* opinion are sparse. It is known that William Clark was on trial for the murder of Cyrus Sells, but their relationship and the circumstances surrounding the crime were not reported. The case was heard in a jury trial before two judges of the Ohio Supreme Court on circuit[91] in Franklin County; a verdict of "guilty of murder in the first degree" was returned, and a sentence of death pronounced.[92] Judge Birchard's charge to the jury, which had been set down in writing and approved by the other judges of the supreme court before trial,[93] contained the touchstone for determination of the insanity defense that Ohio courts in years to come would proffer or reject.[94] The relevant portion of the charge, reprinted as a footnote to the opinion of the supreme court in bank, was stated as follows:

> "The statute defining the crime, is in these words:—"If any person shall purposely, and of deliberate and premeditated malice, kill another, every such person shall be guilty of murder in the first degree." The words *purposely, of deliberate and premeditated malice,* as applied to the act of killing, have much meaning. *Purposely* implies an act of the will; an

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90. 12 Ohio 483 (1843) (in bank), *overruled in part in* Kelch v. State, 55 Ohio St. 146, 154–55, 45 N.E. 6, 8 (1896) *and in part in* State v. Austin, 71 Ohio St. 317, 322, 73 N.E. 218, 219 (1904).

91. The organization of the Ohio Judiciary before 1851 provided for "[t]he *supreme court in bank,* [which denoted the] sessions of the court at the capitol, composed of all four judges of the state, and the . . . *supreme court,* [which denoted] the sessions held in the several counties by two of the judges of the supreme court in bank." Webster v. State, 43 Ohio St. 696, 699 (1885); *cf.* OHIO CONST. of 1802, art. III, §§ 1–2. Under this system, supreme court judges served both as trial and appellate judges, often serving in both roles on the same case. For example, Judge Birchard presided at the *Clark* trial and later wrote the appellate opinion of the supreme court in bank. *See Clark,* 12 Ohio at 483, 487.

The Ohio judiciary was reorganized in 1851. "[T]he [Ohio] [C]onstitution of 1851 provided that [the modern supreme court] was to be the successor of the supreme court in bank, and that the district court [later designated circuit courts, and now courts of appeals] should be the successor of the supreme court." *Webster,* 43 Ohio St. at 699 (emphasis omitted) (discussing OHIO CONST. schedule, § 12; *id.* art. IV, § 1 (1851, amended 1883) (providing for district courts)). Later amendments to the Ohio Constitution changed the designation of intermediate state courts from district courts to circuit courts, and later from circuit courts to courts of appeal. *See* OHIO CONST. art. IV, § 1 (1912, amended 1968) (courts of appeal); *id.* (1883, amended 1912) (circuit courts).

92. *Clark,* 12 Ohio at 484.

93. *Id.* at 494 n.(a).

94. *See infra* notes 121–216 and accompanying text.

> intention; a design to do the act. It presupposes the free agency of the actor. *Deliberation* and *premeditation* require action of the mind. They are operations of the intellectual faculties, and require an exercise of reason, reflection, judgment and decision, and can not happen in any case where the faculties of the mind are deranged, destroyed, or do not exist. The crime of murder in the first degree can, therefore, only be perpetrated by a free agent, capable of acting or of abstaining from action—free to embrace the right and to reject the wrong. He must have a sound intellect, capable of reason, reflection, premeditation, and under the control of the will.[95]

Under Judge Birchard's charge to the jury, the requisite elements of first-degree murder (or what would be aggravated murder under current Ohio law)[96] are negated where there is a lack of free will, or "where the faculties of the mind are deranged, destroyed, or do not exist."[97] In other words, the *mens rea* of the crime must be absent. Exculpation from the crime does not necessarily come from lack of knowledge of what is right or wrong, but from lack of capacity to act or abstain from a certain behavior. While the element of knowledge may be read into the requirement that a person have a "sound intellect"[98] to be declared sane, this too is under the control of free will: impliedly, a test of capacity to "embrace the right and reject the wrong"[99] is first a test of knowledge of what it is that is right or wrong, and secondly a test of capacity to choose what is right. Thus, the charge to the jury set out a two-part test that 126 years later would become the foundation of Ohio's current insanity defense.[100]

The assignments of error in *Clark* related to evidentiary issues regarding the competency of lay witnesses to give opinion testimony as to a defendant's sanity and the admissibility of the testimony of the one professional, a physician, on the ultimate issue of the "defendant's general knowledge of right and wrong."[101] In rejecting the application for a writ of error, Judge Birchard cited cases supporting the general rule that lay witnesses were permitted to testify as to sanity[102] and quoted a Massachusetts case in holding that professional witnesses may be properly questioned on their opinion as to the soundness of mind of the

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95. *Clark*, 12 Ohio at 494 n.(a) (reprint of jury charge).

96. *See* OHIO REV. CODE ANN. § 2903.01 (Anderson 1987).

97. *Clark*, 12 Ohio at 494 n.(a) (reprint of jury charge).

98. *Id.*

99. *Id.*

100. *See* State v. Staten (Staten I), 18 Ohio St. 2d 13, 21, 247 N.E.2d 293, 299 (1969), *overruled in part as stated in* State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977) (discussed *infra* note 214). The *Staten* test is quoted *infra* text accompanying note 214.

101. *Clark*, 12 Ohio at 485.

102. *Id.* at 493-94 (discussing cases cited *supra* note 67).

defendant if they "state the circumstances or symptoms from which they drew their conclusions."[103]

Judge Birchard spent a good deal of the opinion discussing secondary authority drawn from writers on medical jurisprudence. The purpose, apparently, was not only to explain what was admissible in testimony on the issue of insanity, but also to present learned opinion on the nature of insanity itself. Conjecturally, then, it would seem that Judge Birchard was setting the stage for readers to understand his charge to the jury, which he appended to the *Clark* opinion.[104] For example, he quoted the Englishman Leonard Shelford, Esq., as saying that "insanity is a disease of the mind, which assumes as many and various forms as there are shades of difference in the human character."[105] He also cited the English physician, John Haslam, for the familiar proposition that the determination of insanity is an inexact process that often leads to differing opinions by professionals diagnosing the same case.[106]

In the motion for a writ of error, the attorneys for William Clark cite, *inter alia,* the English barrister Joseph Chitty.[107] In *A Practical Treatise on Medical Jurisprudence,*[108] Chitty had repeated the entrenched cognitive element of the insanity defense by asking "[w]hether, at the time the alleged criminal act was committed, the prisoner was incapable of judging between right and wrong, and did not then know he was committing an offence against the law of God and of Nature?"[109]

Presumably, then, by the time of *Clark,* Judge Birchard was thoroughly familiar with the established insanity rule of the day, which stressed knowledge of right from wrong. It can also be presumed that the judge was familiar with another book cited by Clark's attorneys, the influential *A Treatise on the Medical Jurisprudence of Insanity.*[110] In this work, the American physician Isaac Ray cites numerous anecdotal cases where the patient was perfectly lucid and aware of the wrong. He describes this condition of "moral mania," a subspecies of the more generic diagnosis of insanity, as follows:

Thus far mania has been considered as affecting the intellectual faculties

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103. *Id.* at 487–88 (quoting Hathorn v. King, 8 Mass. 371, 372 (1811)).

104. *See id.* at 494 n.(a) (reprint of jury charge).

105. *Id.* at 489 (quoting L. SHELFORD, A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND 38 (London 1833)).

106. *Id.* at 489–90 (citing J. HASLAM, MEDICAL JURISPRUDENCE AS IT RELATES TO INSANITY ACCORDING TO THE LAW OF ENGLAND 5 (1817 London & photo. reprint 1979)).

107. *See id.* at 487 (summary of argument of appellant).

108. J. CHITTY, A PRACTICAL TREATISE ON MEDICAL JURISPRUDENCE (Philadelphia 1836).

109. *Id.* at 354.

110. I. RAY, *supra* note 65, *cited in Clark,* 12 Ohio at 486 (summary of argument of appellant).

> only; but a more serious error on this subject can scarcely be committed than that of limiting its influence to them. It will not be denied that the propensities and sentiments are also integral portions of our mental constitution; and no enlightened physiologist can doubt that their manifestations are dependent on the cerebral organism. Here then we have the only essential conditions of insanity—a material structure connected with mental manifestations; and until it is satisfactorily proved that this structure enjoys a perfect immunity from morbid action, we are bound to believe that it is liable to disease, and consequently, that the *affective* as well as *intellectual* faculties are subject to derangement.[111]

And furthermore:

> It is clear . . . that mania may exist uncomplicated with mental delusion; it is in fact only a kind of mental exaltation, . . . a state in which the reason has lost its empire over the passions and the actions by which they are manifested, to such a degree that the individual can neither repass the former, nor abstain from the latter. It does not follow that he may not be in possession of his senses and even his usual intelligence, since, in order to resist the impulses of the passions, it is not sufficient that the reason should impart its counsels; we must have the necessary power to obey them. The maniac may judge correctly of his actions without being in a condition to repress his passions, and to abstain from the acts of violence to which they impel him.[112]

Regardless of the source, it is apparent that Judge Birchard was influenced by those who felt that insanity was more than the knowledge of right from wrong. That there existed at the time of *Clark* ample medical authority supporting this fact is undisputed. That this was also the minority view jurisprudentially before *M'Naghten,* and a view that would be overwhelmed by the force of *M'Naghten* after its pronouncement, is also hardly open to doubt. Commenting on the judicial inability to thus conform to then-current medical opinion, Ray wrote:

> Few, probably, whose attention has not been particularly directed to the subject, are aware how far the condition of the law relative to insanity is behind the present state of our knowledge concerning that disease. While so much has been done within a comparatively short period to promote the comfort of the insane, and so much improvement has been effected in the methods of treating their disorder as to have deprived it of half its terrors, it is both a curious and a melancholy fact that so little has been accomplished towards regulating their personal and social rights, by more correct and enlightened principles of jurisprudence.[113]

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111. I. RAY, *supra* note 65, at 127.
112. *Id.* at 131.
113. *Id.* at 21.

For the next 126 years, Ohio courts often followed the pack by straying to *M'Naghten.*

IV. JUDICIAL SCHIZOPHRENIA: *CLARK* OR *M'NAGHTEN*, THAT WAS THE QUESTION

The first American case to espouse the rule of law on insanity as laid down by the House of Lords in *M'Naghten's Case*[114] was the 1844 Massachusetts case of *Commonwealth v. Rogers*[115] wherein Chief Justice Shaw cited an English case that reprinted and relied upon *M'Naghten.*[116] Three years later, the *M'Naghten* name appeared in the New York case of *Freeman v. People,*[117] which adopted the "right-from-wrong" test.[118] Surprisingly, *M'Naghten* itself did not appear in any Ohio case until 1942[119] although the "right-from-wrong" standard itself was widely discussed by that time.[120]

The first Ohio case to cite *Clark v. State*[121] was *State v. Summons*[122] (1852), heard in the District Court of Hamilton County. In this insanity defense case, Ohio Supreme Court Judge Allen Thurman, later a United States Senator, agreed that Judge Birchard's charge to the jury in *Clark* was the proper instruction; however, he contradicted the element of free agency embodied in the *Clark* test and repeated the traditional, unidimensional "right-from-wrong" test by instructing the jury that "a man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong[,] . . . a knowledge and consciousness that what he is doing is wrong."[123]

In spite of Judge Birchard's attempt to fashion a rule that went beyond the simple "right-from-wrong" test, the next insanity defense case heard by the Ohio Supreme Court did not embrace his effort. In

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114. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

115. 48 Mass. (7 Met.) 500 (1844).

116. *Id.* at 502 n.* (Shaw, J., jury charge) (citing Regina v. Higginson, 1 Car. & K. 129, 130 n.(a), 174 Eng. Rep. 743, 744 n.(a) (Stafford Assizes 1843) (reprinting *M'Naghten*)).

117. 4 Denio 9 (N.Y. Sup. Ct. 1847).

118. *Id.* at 29 (citing *M'Naghten*).

119. *See* State v. Cumberworth, 69 Ohio App. 239, 242, 43 N.E.2d 510, 511 (1942) (citing *M'Naghten*).

120. *See, e.g.,* Loeffner v. State, 10 Ohio St. 598 (1857); State v. Summons, 1 Ohio Dec. Reprint 416 (Dist. Ct. 1852), *aff'd,* 5 Ohio St. 325 (1856).

121. 12 Ohio 483 (1843) (in bank), *overruled in part in* Kelch v. State, 55 Ohio St. 146, 154–55, 45 N.E. 6, 8 (1896) *and in part in* State v. Austin, 71 Ohio St. 317, 322, 73 N.E. 218, 219 (1904).

122. 1 Ohio Dec. Reprint 416, 423 (Dist. Ct. 1852) (Thurman, J., jury charge) (citing *Clark*), *aff'd,* 5 Ohio St. 325 (1856).

123. 1 Ohio Dec. Reprint at 423 (Thurman, J., jury charge) (quoting *Rogers,* 48 Mass. (7 Met.) at 502 n.* (Shaw, J., jury charge)).

Farrer [sic] v. State,[124] decided ten years after *Clark,* the defendant, a young female nurse,[125] entered a plea of insanity upon being charged with murder in the poisoning of an eight-year-old boy under her care. Evidence suggested, in fact, that altogether five people in her care had died as a result of ingesting large quantities of arsenic. Her subsequent conviction was appealed because of jury misconduct.[126] Affidavits showed that jury members had been rather relaxed about their duty during deliberations, obtaining liquor for the occasion, conversing about the case with their friends on the sidewalk below their window, and reading newspaper accounts of the trial. On this basis, a new trial was ordered.[127] However, in his separate opinion, Ohio Supreme Court Judge John Corwin saw fit to comment on the trial court's charge to the jury regarding the insanity defense. While Judge Corwin cited *Clark* as being an acceptable test of insanity, he could find no reason to disturb the trial court's instruction, which was centered completely on the "right-from-wrong" test.[128] This cognitive definition, he said, "is such as we frequently find in the books."[129]

In the next insanity defense case heard in Ohio, *Loeffner v. State*[130] (1857), the citation to *Clark* appears in the trial court's charge to the jury, which was reprinted in full in the Supreme Court opinion.[131] However, even though the high court did not reject the trial court's emphasis of free agency, it ignored this concept and stuck to the rigid "right-from-wrong" test.[132] Chief Justice Thomas Bartley, writing the opinion, stated:

> The accused in a criminal case, is not entitled to an acquittal on the ground of insanity, if at the time of the alleged offense, he had capacity and reason sufficient left to enable him to distinguish between right and wrong, and understand the nature of his act, and his relation to the party

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124. 2 Ohio St. 54 (1853).

125. The young defendant was described by one judge as "remarkably ugly." *Id.* at 61 (Corwin, J., concurring in the result).

126. *Id.* at 54–55 (summary of assignment of error).

127. In separate opinions, three of the five judges of the Ohio Supreme Court concurred in the result; the only common point of agreement among the three opinions was that jury misconduct warranted a new trial. *Id.* at 55–57, 69 (Corwin, J., concurring in the result); *id.* at 73 (Thurman, J., concurring in the result); *id.* at 77 (Ranney, J., concurring in the result).

128. *Id.* at 70 (Corwin, J., concurring in the result) (discussing State v. Ferrer, 1 Ohio Dec. Reprint 428, 432 (C.P. 1852) (Carter, J., jury charge), *rev'd on other grounds*, Farrer [sic] v. State, 2 Ohio St. 54 (1853)).

129. *Id.* at 70 (Corwin, J., concurring in the result).

130. 10 Ohio St. 598 (1857), *overruled in Staten I,* 18 Ohio St. 2d 13, 16, 247 N.E.2d 293, 296 (1969).

131. *See Loeffner,* 10 Ohio St. at 605–06 (reprint of jury charge).

132. *See id.* at 615–16.

injured.[133]

Fouts v. State[134] (1857), a fourth case during this period that cited *Clark,* was not concerned with the defense of insanity per se but rather with the precise interpretation of the words "purpose" and "intent" as they were rendered in the then-current Ohio murder statute.[135] However, there is a clear connection between these artful words and the cognitive elements of the insanity defense, a connection not explored by the *Fouts* court. Indeed, there was no reason for the court to do so, since Mr. Fouts did not assert a defense of insanity. It was merely stated in *Fouts* that *Clark* supports an interpretation of the murder statute that makes first degree murder a function of *intentional, deliberate,* and *premeditated* behavior and makes second degree murder a function of *intentional* behavior without the latter two additional elements of deliberation and premeditation.[136]

If the four preceding cases suggest that Ohio courts were not quite sure what to do with *Clark,* whether to embrace it or to reject it, that interpretation would appear to be correct. Let it simply be said that some courts did embrace it, some did not, and others confused the issue beyond hope. An example of the latter situation can be found in a comparison of the two 1867 trials of George Maxwell in the Montgomery Common Pleas and Superior Courts. In Maxwell's common pleas trial for the murder of Augustus VanHouten, Judge Smith correctly cited the *Clark* test in his jury charge but broadly interpreted the inability to distinguish right from wrong as necessarily leading to or being the same as an inability to control one's behavior.[137] By contrast, in Mr. Maxwell's trial in the superior court[138] for the same offense, Judge Al-

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133. *Id.*

134. 8 Ohio St. 98 (1857).

135. *Id.* at 112.

136. *Id.*

137. State v. Maxwell, Dayton 362, 366–67 (C.P. 1867) (Smith, J., jury charge) (citing *Clark,* 12 Ohio at 495 n.(a)). Judge Smith stated:

> If the mind of a party accused of committing a crime, is so deranged, disordered or destroyed by disease, or other visitation of God, as to render him wholly incapable of distinguishing or determining between right and wrong; if his mind is so unhinged, his reason so unbalanced, and his intellectual powers so thoroughly disordered, as to render him incapable of reasoning or reflecting, incompetent to choose the right and reject the wrong, he is not a free, voluntary agent, and is legally incompetent to commit a crime.

Id. at 366 (Smith, J., jury charge).

138. In addition to the obvious question of why Mr. Maxwell had two separate jury trials for the same offense, it is also surprising that one of the cases was tried in the Superior Court of Montgomery County—criminal cases were excluded from the jurisdiction of that court by statute. *See* 1856 Ohio Laws 38, *repealed,* 1885 Ohio Laws 84. There is also some question as to the identity of the court on which Judge Allen sat: he instructed the jury in the superior court case, but also rendered a decision for the common pleas court on the issue of bail for Mr. Maxwell. *See* State v. Maxwell, Dayton 376 (C.P. 1867) (Allen, J., bail order).

len did not mention the concept of free will in his jury instruction but employed instead the traditional, unidimensional "right-from-wrong" test.[139]

Still, *Clark* had utility for the courts of Ohio, because it propounded the rule of evidence that the insanity defense was an affirmative defense.[140] It was not enough that some evidence of insanity had to be presented; the burden was on the defendant to overcome the presumption of sanity by a preponderance of the evidence.[141] This particular aspect of *Clark* was upheld[142] by Ohio courts until 1977, when the Supreme Court concluded that it had been superseded by statutory enactment.[143] In addition, *Clark* is frequently cited as support for the proposition that a lay witness may testify as to his opinion of a person's sanity as well as to facts relevant to such a determination.[144]

It was not until *Blackburn v. State*[145] (1872) that the Ohio Supreme Court upheld *Clark*, describing it as the "true rule" regarding the insanity defense.[146] In paragraph four of the syllabus, the *Blackburn* court stated:

> Where the defense of insanity is set up on the trial of an indictment for murder, it is not error to the prejudice of the accused, to instruct the jury that the questions to be decided, as regards this defense, are these: Was the accused a free agent in forming the purpose to kill; was he at the time capable of judging whether *that act* was right or wrong; and did he know at the time that it was an offense against the laws of God and man?[147]

This reaffirmation of the *Clark* free-will test in 1872 would be the Ohio Supreme Court's last word on the insanity defense until 1948.[148]

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139. State v. Maxwell, Dayton 370, 375 (Super. Ct. 1867) (Allen, J., jury charge).

140. *Clark*, 12 Ohio at 495 n.(a) (reprint of jury charge).

141. *Id.*

142. *See, e.g.*, State v. Jackson, 32 Ohio St. 2d 203, 291 N.E.2d 432 (1972); Long v. State, 109 Ohio St. 77, 141 N.E. 691 (1923); Silvis v. State, 22 Ohio St. 90 (1871); *see also* Kelch v. State, 55 Ohio St. 146, 154–55, 45 N.E. 6, 8 (1896) (*Clark* does not provide support for imposition of burden of proof greater than preponderance).

143. *See* State v. Humphries, 51 Ohio St. 2d 95 (1977) (discussed *infra* note 214).

144. *See, e.g.*, Kettemann v. Metzger, 13-23 Ohio C.C. Dec. 61, 66 (1901) (citing *Clark*, 12 Ohio at 493–94) (action to set aside will on grounds that testator was mentally incapacitated); *cf.* OHIO R. EVID. 701.

145. 23 Ohio St. 146 (1872).

146. *Id.* at 165.

147. *Id.* at 146 para. 4 (syllabus). *But see* State v. Staten (Staten I), 18 Ohio St. 2d 13, 16, 247 N.E.2d 293, 296 (1969) (questioning the *Blackburn* formulation of the correct test for insanity, while citing with approval the *Blackburn* court's statement that the *Clark* jury charge was the "true rule"), *overruled in part as stated in* State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977) (discussed *infra* note 214).

148. *See* Frohner v. State, 150 Ohio St. 53, 80 N.E. 868 (1948) (discussed *infra* notes 184–85 and accompanying text).

During the interim years the test espoused in *Blackburn* and *Clark* received a suprisingly uniform application in the lower courts of Ohio. However, facility with the test was not immediate. In the 1876 case of *State v. Adin,*[149] an Ohio common pleas court seemingly misconstrued *Clark* and *Blackburn,* instructing the jury on the "right-from-wrong" test in evaluating the defendant's insanity plea.[150] Two years later, though, the free-will standard was correctly explained and employed in *State v. Bowsher.*[151] In the two decades following *Bowsher,* the free-will test was consistently applied in the lower courts of Ohio[152] and the "right-from-wrong" test would not rear its head again until the middle of the twentieth century.

V. OHIO'S REACTION TO THE "IRRESISTIBLE-IMPULSE" TEST AND THE *DURHAM* RULE

Although the "right-from-wrong" test would find its way back into Ohio's court system in 1942,[153] it is surprising to note that lower courts were fairly unified in their resistance to other formulations of the insanity defense such as the "irresistible-impulse" test and the *Durham* rule. While the resistance to the latter was stronger than to the former, neither concept played a leading part on the jurisprudential stage in Ohio.

A. The "Irresistible-Impulse" Test

In *Parsons v. State*[154] (1867), the Alabama Supreme Court set forth a clear and consise formulation of the "irresistible-impulse" test. The *Parsons* formulation would discharge a defendant from criminal resposibility where:

> [B]y reason of the duress of . . . mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of

149. 7 Ohio Dec. Reprint 25 (C.P. 1876).

150. *Id.* at 27 (Hamilton, J., jury charge). Judge Hamilton did employ free will in his description of a defendant who should not be found insane. *Id.* (Hamilton, J., jury charge) ("[I]f his mind was such that he retained the power of discriminating [between right and wrong] . . . [and] was free to forbear or to do the act, he is responsible as a sane man.").

151. 7 Ohio Dec. Repr. 442, 444 (C.P. 1878) (Minshall, J., jury charge).

152. *See, e.g.,* State v. Miller, 13 Ohio C.C. 67 (1896) (quoting with approval *Blackburn,* 23 Ohio St. at 146), *aff'g* 7 Ohio N.P. 458 (C.P. 1895), *aff'd,* 55 Ohio St. 685, 48 N.E. 1114 (1896); Cottell v. State, 12 Ohio C.C. 467 (1896); State v. Leuth, 5 Ohio C.C. 94 (1890); State v. Kalb, 7 Ohio N.P. 547 (C.P. 1894).

153. *See* State v. Cumberworth, 69 Ohio App. 239, 242, 43 N.E.2d 510, 511 (1942) (citing *M'Naghten*) (discussed *infra* notes 161–63 and accompanying text).

154. 81 Ala. 577, 1 So. 854 (1887).

it *solely*.[155]

At first glance, the concept of "irresistible impulse" might appear openly similar to Judge Birchard's free-will test; indeed, Judge Corwin's opinion in *Farrer [sic] v. Ohio*[156] seems to sound a great deal like "irresistible impulse": "[E]very correct definition of sanity . . . must suppose freedom of will . . . ."[157] Moreover, in *State v. Adin*[158]—an 1876 insanity decision that cited no case authority—"irresistible impulse," defined as "a special propensity impelling [one] to [commit] a particular bad act,"[159] was held to be an acceptable defense when the defendant is "mentally deranged."[160] On the other hand, in *State v. Cumberworth*[161] (1942), an Ohio appellate court mistakenly applied *M'Naghten*—which the court described as the test that "has been generally accepted by all courts"[162] but rejected "irresistible impulse":

> To establish insanity as a defense in a criminal prosecution . . . it is not sufficient that he knew what he was doing was wrong but that because of disease of mind he did not have power to resist committing the act and therefore acted under "irresistible impulse."[163]

Rejected as well in numerous modern cases, including *State v. Staten*,[164] the "irresistible-impulse" test was never able to establish its domain in Ohio.[165] A footnote in the *Staten* case made Ohio's position on the test very clear and pragmatically differentiated it from the "capacity to refrain":

> Sometimes, where a defendant lacks the ability to refrain from doing a criminal act, it is stated that his doing it is the result of an irresistible impulse. *Such a statement limits the defense of lack of capacity to refrain from doing the act to sudden occurrences; it also suggests that*

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155. *Id.* at 597, 2 So. at 866–67. For cases adopting the "irresistible impulse" test, see generally Annotation, *Irresistible Impulse as an Escape for Crime*, 173 A.L.R. 391 (1948).

156. 2 Ohio St. 54 (1853).

157. *Id.* at 70 (Corwin, J., concurring in the result). *Compare id. with Parsons*, 81 Ala. at 597, 2 So. at 866–67 (quoted *supra* text accompanying note 155).

158. 7 Ohio Dec. Reprint 25 (C.P. 1876).

159. *Id.* at 27 (Hamilton, J., jury charge).

160. *Id.* (Hamilton, J., jury charge).

161. 69 Ohio App. 239, 43 N.E.2d 510 (1942).

162. *Id.* at 242, 43 N.E.2d at 511.

163. *Id.* at 239, 43 N.E.2d at 510 (syllabus).

164. (Staten I), 18 Ohio St. 2d 13, 20–22, 247 N.E.2d 293, 299–300 (1969), *overruled in part as stated in* State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977) (discussed *infra* note 214).

165. *See also* State v. Schaffer, 113 Ohio App. 125, 177 N.E.2d 534 (1960); State v. Ross, 92 Ohio App. 2d 29, 108 N.E.2d 77, *appeal dismissed for want of debatable question*, 158 Ohio St. 248, 108 N.E.2d 282 (1952).

there may be a defense where a defendant momentarily becomes angry and loses control over himself. Fortunately, our [supreme] court has never used the term "irresistible impulse."[166]

B. *The* Durham *Rule*

The roots of the *Durham* rule[167] can be found in the scholarly works of Dr. Isaac Ray.[168] In *A Treatise on the Medical Jurisprudence of Insanity,*[169] Ray argued that the appropriate legal position on insanity would be to replace all existing tests with some equivalent of the French Penal Code, which stated that "there is no crime nor offence when the accused was in a state of madness at the time of the action."[170] This belief was later adopted by a correspondent of Dr. Ray's, New Hampshire Supreme Court Justice Charles Doe,[171] who incorporated Ray's theme into his concurrence in *State v. Pike*[172] and into the jury instructions he gave at the trial level in *State v. Jones.*[173]

Almost a century later, Judge David Bazelon of the United States Court of Appeals for the District of Columbia Circuit echoed the Ray position in the case of *Durham v. United States.*[174] Judge Bazelon's ruling was disarmingly attractive for its simplicity: "An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[175]

But, suffice it to say that this radical departure from the traditional tests for insanity made hardly a ripple in Ohio judicial thinking. Although *Durham* was briefly cited in *Columbus v. Zanders,*[176] a 1970

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166. *Staten I,* 18 Ohio St. 2d at 22 n.8, 247 N.E.2d at 299 n.8 (emphasis added).

167. *See* Durham v. United States, 214 F.2d 862, 874–75 (D.C. Cir. 1954) (holding that "an accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect"), *overruled in* United States v. Brawner, 471 F.2d 969, 973 (D.C. Cir. 1972) (en banc) (holding the *Durham* test overly inclusive and adopting instead the Model Penal Code test).

168. *See Durham,* 214 F.2d at 870. The works of Dr. Ray are discussed *supra* notes 110–13 & *infra* notes 169–74.

169. I. RAY, *supra* note 65.

170. *Id.* at 27 & n. 21 (quoting and translating CODE PÉNAL art. 64 (Fr.) ("Il n'y a ni crime ni délit lorsque le prévenu était en état de démence au temps de l'action")), *quoted in* T. MAEDER, *supra* note 31, at 43.

171. *See* T. MAEDER, *supra* note 31, at 43–47 (detailing the two men's views on the insanity defense, which was the subject of their correspondence).

172. 49 N.H. 399, 443 (1869) (Doe, J., concurring), *overruled on other grounds in* Hardy v. Merrill, 56 N.H. 227 (1875).

173. 50 N.H. 369, 394 (1871) (quoting jury charge).

174. 214 F.2d 862, 870 (D.C. Cir. 1954) (citing I. RAY, *supra* note 65), *overruled in* United States v. Brawner, 471 F.2d 969, 973 (D.C. Cir. 1972) (en banc) (discussed *supra* note 167).

175. *Durham,* 214 F.2d at 875.

176. 25 Ohio Misc. 144, 266 N.E.2d 602 (Franklin County Mun. Ct. 1970).

municipal court case involving violation of an ordinance prohibiting the wearing of clothing of the opposite sex, the *Durham* rule was criticized by the Ohio Supreme Court in *Staten*[177] and was expressly rejected by the court two months later in *State v. Crampton.*[178]

VI. THE CONTEMPORARY FOUNDATION OF THE *STATEN* DECISION

The Ohio Supreme Court's opinion in *State v. Staten*[179] pays appropriate homage to *Clark v. State*[180] and *Farrer v. State.*[181] In addition, *Staten* criticizes the early contrary case of *Loeffner v. State,*[182] noting that "*Loeffner* . . . does not mention the inability of a defendant to refrain from doing a criminal act as excusing him from criminal responsibility therefor."[183]

By his acknowledgment of these cases, Chief Justice Kingsley Taft, author of the *Staten* opinion, traced the lineage of the *Staten* insanity test back to 1843 and to the thoughts of Judge Birchard. However, as has been shown so far, the free-will test for criminal insanity was not always uniformly applied in the lower courts of Ohio. After *Clark* in 1843, the thread of Judge Birchard's charge to his jury was occasionally frayed and broken. It was not until 1948 and the case of *State v. Frohner*[184] that the Ohio Supreme Court began to weave together the strands of this judicial thread into a solid opinion on the insanity defense.

In *Frohner,* the supreme court held in the syllabus that "[a] person accused of crime who knows and recognizes the difference between right and wrong in respect of the crime with which he is charged, *and has ability to choose the right and abjure the wrong,* is legally sane."[185] Although *Clark* was not cited in *Frohner,* the *Frohner* court's determination of sanity clearly includes volition, and therefore is compatible with the doctrine of free agency expressed by Judge Birchard.

Furthermore, in the 1964 case of *State v. Stewart,*[186] the supreme

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177. *Staten I,* 18 Ohio St. 2d at 18, 247 N.E.2d at 297.

178. 18 Ohio St. 2d 182, 185, 248 N.E.2d 614, 616 (1969), *aff'd,* 402 U.S. 183 (1971), *vacated in part per curiam,* 408 U.S. 941 (1972).

179. (Staten I), 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969), *overruled in part as stated in* State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977) (discussed *infra* note 214).

180. 12 Ohio 483 (1843), *cited with approval in Staten I,* 18 Ohio St. 2d at 15, 247 N.E.2d at 295–96.

181. 2 Ohio St. 54 (1853), *cited with approval in Staten I,* 18 Ohio St. 2d at 16, 247 N.E.2d at 296.

182. 10 Ohio St. 598 (1857), *overruled in Staten I,* 18 Ohio St. 2d at 16, 247 N.E.2d at 296.

183. *Staten I,* 18 Ohio St. 2d at 16, 247 N.E.2d at 296.

184. 150 Ohio St. 53, 80 N.E. 868 (1948).

185. *Id.* at 55 para. 15, 80 N.E.2d at 871 para. 15 (syllabus) (emphasis added).

186. 176 Ohio St. 156, 198 N.E.2d 459, *cert. denied,* 379 U.S. 947 (1964).

court found it necessary to affirm *Frohner* by claiming it to be the test for legal sanity in Ohio. Perhaps the court felt moved to do so because, in intervening cases, some lower courts had shown an independent streak in clinging to their own formulae for the insanity defense. For example, the 1952 case of *State v. Ross*[187] embraced the "right-from-wrong" test,[188] as did the 1960 case of *State v. Schaffer*.[189] Not all courts ignored *Frohner;* responding to charges that *Frohner* was too narrow and that *Durham* should be adopted, an appellate court in *State v. Robinson*[190] (1958) stated

> If [the *Frohner*] rule is outmoded in the light of modern development in the field of psychiatry and for that reason a new and different rule should be adopted, under the doctrine of stare decisis, the Supreme Court of Ohio is the only tribunal to make such change . . . .
>
> Adherence to this rule is necessary to preserve the certainty, the stability and the symmetry of our jurisprudence.[191]

Those hoping that the Ohio judiciary at all levels would come to a consensus on the application of a proper insanity defense after the supreme court's 1964 pronouncement in *Stewart* must have been disappointed with *State v. Colby*,[192] a 1966 common pleas decision. In that case, *M'Naghten* and *Clark* were implicitly cited as synonymous:[193]

> Now the court noted that after each of the psychiatrists had completed narrating his observations and conclusions concerning the mental condition of the defendant, based upon many and varied signs and symptoms of significance to specialists in their field, each doctor was asked to compress his final conclusion into the straight jacket popularly known as the *M'Naghten* Rules, that is, *the knowledge of right and wrong test, as*

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187. 92 Ohio App. 29, 108 N.E.2d 77, *appeal dismissed for want of debatable question,* 158 Ohio St. 248, 108 N.E.2d 282 (1952).

188. 92 Ohio App. at 46, 108 N.E.2d at 87.

189. 113 Ohio App. 125, 132, 177 N.E.2d 534, 539 (1960).

190. 83 Ohio L. Abs. 259, 168 N.E.2d 328 (Ct. App. 1958).

191. *Id.* at 262, 168 N.E.2d at 331.

192. 6 Ohio Misc. 19, 215 N.E.2d 65 (C.P. 1966) (per curiam).

193. It is hard to fault the *Colby* court for confusing the two cases, considering that the Ohio Supreme Court itself had made a similar mistake one year earlier in Krauter v. Maxwell, 3 Ohio St. 3d 142, 209 N.E.2d 571 (1965). In *Krauter,* Justice Paul Brown quoted the *Frohner* test but labelled it the "so called *McNaughten's* [sic] test [which is] the test of legal sanity [in Ohio]." *Id.* at 144, 209 N.E.2d at 573 (citing M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843) & quoting *Frohner,* 150 Ohio St. at 55, 80 N.E.2d at 871 (syllabus)).

At least the *Krauter* court applied the correct test. That same year, a panel of the federal sixth circuit actually stated that "the *M'Naghten* test . . . is in effect in Ohio." Schaber v. Maxwell, 348 F.2d 664, 672 (6th Cir. 1985) (citing *Ross,* 92 Ohio App. at 46, 108 N.E.2d at 87).

In 1981, an appellate court repeated the *Krauter* error, this time quoting *Staten,* which the court claimed was "rooted in the so-called *M'Naghten* rule." State v. Grandstaff, No. C-800193, slip op. at 2 (Ohio Ct. App., Hamilton County March 11, 1981) (LEXIS, States library, Ohio file).

applied in Ohio since Clark v. State . . . .[194]

Then, after applying *M'Naghten* to the case, the court proceeded to criticise it for its obsolescence and to recommend that the Model Penal Code test be adopted.[195] One wonders where the three judges on the court had been spending their time. None of the cases mentioned in this article (other than *M'Naghten*) were cited in *Colby*.[196] Moreover, there was no awareness whatsoever of the route the insanity defense had taken through the Ohio courts since 1843. In view of its unenlightenment, the court makes an ironic plea:

> The Court is convinced, however, that, having carefully examined into all facets of the "right and wrong" test, it has a duty to speak out on the subject of Ohio's legal test for insanity in criminal cases. Unless and until some trial court under proper circumstances has the courage to point the way to a better method of submitting to the triers of the facts the issue of the insanity of the accused when insanity is tendered as a defense, then Ohio will continue to adhere to criteria which more and more are challenged as being false.[197]

While *Colby* makes it clear that some trial court judges had failed to get the message on what was an acceptable insanity defense in Ohio, *State v. Keaton*[198] (1967) suggests that the intermediate courts might have been more in tune with emerging developments on the insanity defense in Ohio. The *Keaton* court rejected the call of defense counsel for adoption of the Model Penal Code test, pointing out that the jury instruction given by the trial court, which was based on the *Stewart* test, was more favorable to the defendant anyway.[199]

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194. *Colby*, 6 Ohio Misc. at 21, 215 N.E.2d at 66 (citation omitted) (emphasis added).

195. *Id.* at 22, 215 N.E.2d at 67 (discussing MODEL PENAL CODE § 4.01(1) (1962) (quoted *supra* note 6)).

196. The *Colby* court did cite an *Ohio Jurisprudence 2d* annotation on the subject. *See Colby*, 6 Ohio Misc. at 21, 215 N.E.2d at 66 (citing O. JUR. 2D *Homicide* § 77). However, the annotation itself described the test for insanity in "right-from-wrong" terms: "The general test . . . is whether the accused's mind was so afflicted with disease as to render him incapable of distinguishing between right and wrong as to the particular act done . . . ." O. JUR. 2D *Homicide* § 77, at 620 (1957). This seeming confusion on the insanity standard is even more inexplicable when one considers that the footnote to the "right-from-wrong" language at this point, after citing to State v. Thompson, Wright 617 (Ohio 1834); Loeffner v. State, 10 Ohio St. 598 (1857); State v. Adin, 7 Ohio Dec. Reprint 25 (C.P. 1876), cites both *Clark* and *Blackburn* as "the test of insanity given in some cases" and proceeds to quote the *Clark* free-will test word for word. O. JUR. 2D *Homicide*, *supra*, § 77, at 620 n.11. It also mentions the *Frohner* test. *See id.* at 620–21.

While one can only guess as to whether the supplements to the annotation available to the *Colby* court in 1966 removed the confusion in the volume itself, one can be reassured that the *Ohio Jurisprudence 3d* annotation did cite the correct test and cases. *See* O. JUR. 3D *Criminal Law* § 48 (1981).

197. *Colby*, 6 Ohio Misc. at 22, 215 N.E.2d at 67.

198. 9 Ohio App. 2d 139, 223 N.E.2d 631 (1967), *cert. denied*, 390 U.S. 971 (1968).

199. 9 Ohio App. 2d at 149, 223 N.E.2d at 637–38 (discussing MODEL PENAL CODE §

VII. *STATE V. STATEN*:[200] THE OHIO RULE

The supreme court had read *Colby* and *Keaton*,[201] it was clear that confusion abounded and that some lower courts in Ohio were still unsure of themselves when it came to applying a legal test for insanity. Thus, in *Staten* the supreme court took it upon itself to lay down the law again.

Like its ghostly predecessor, *Clark v. State*,[202] there are no facts in the supreme court's *Staten* opinion to tell why Mr. Staten was sentenced to death for murder. It was simply stated that the trial court judgment affirmed by the court of appeals was being heard by the supreme court on appeal because of defense counsel's sole contention that the three-judge common pleas court had not used the proper test for legal insanity.[203] The high court noted the record of the trial court wherein the presiding judge said, "At this time, I will state that the court feels that the *McNaughten* . . . rule is the law of Ohio."[204] Immediately following this, the supreme court wrote on its own, "[t]here is nothing further in the record to indicate what test the trial court used in determining that defendant should not be acquitted by reason of insanity."[205]

The *Staten* court then proceeded to discuss the *M'Naghten* test and what it considered to be the weak acceptance of it in Ohio.[206] *Clark* was then brought to the fore and it was stated that this rule was the dominant persuasion in Ohio courts.[207] There was an admission that perhaps some Ohio tribunals in the distant past had lost their way and strayed from the lighted path, but, on the whole, "decisions of this court have made it clear that *an accused will have no criminal respon-*

4.01(1) (1962)). *But see* State v. Wilcox, 70 Ohio St. 2d 182, 188, 436 N.E.2d 523, 527 (1982) (*Staten* test is "arguably less expansive" than Model Penal Code test). The *Staten* court criticised the test employed in *Keeton* as "too favorable to the accused." *Staten I*, 18 Ohio St. 2d at 21 n.5, 47 N.E.2d at 299 n.5.

200. (Staten I), 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969), *overruled in part as stated in* State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977) (discussed *infra* note 214).

201. *See* 18 Ohio St. 2d at 17 n.1, 47 N.E.2d at 296 n.1 (citing *Colby's* "failure to recognize [the free-will aspect] of the Ohio rule"); *id.* at 21 n.5, 47 N.E.2d at 299 n.5 (criticising *Keaton* as giving an instruction "too favorable to the accused").

202. 12 Ohio 483 (1843) (in bank), *overruled in part in* Kelch v. State, 55 Ohio St. 146, 154–55, 45 N.E. 6, 8 (1896) *and in part in* State v. Austin, 71 Ohio St. 317, 322, 73 N.E. 218, 219 (1904).

203. *Staten I*, 18 Ohio St. 2d at 14, 247 N.E.2d at 295.

204. *Id.* (quoting trial judge's comments).

205. *Id.*

206. *Id.* at 15, 247 N.E.2d at 295 (citing State v. Ross, 92 Ohio App. 29, 108 N.E.2d 77, *appeal dismissed for want of debatable question*, 158 Ohio St. 248, 108 N.E.2d 282 (1952); State v. Cumberworth, 69 Ohio App. 239, 43 N.E.2d 510 (1942)).

207. *Id.* at 15–16, 247 N.E.2d at 295–96.

sibility for an act if he had no ability to refrain from doing that act."[208]

Thereupon, the court flew by *Durham* to a discussion justifying the need for an insanity defense in the first place. To allay fears that the insanity defense leads to the release of violent criminals back onto the streets, appropriate sections of the Ohio Revised Code were summoned up to show that a successful not-guilty-by-reason-of-insanity plea does not result in freedom for the accused, but instead leads to a period of confinement in Lima State Hospital with release conditioned upon determination that sanity has been restored and that the released defendant will not be dangerous.[209] "It is apparent therefore that Ohio provides its public with adequate protection against those who are found not guilty by reason of insanity."[210]

From this apparent attempt to speak to the fears of an anxiety-ridden public, the court launched into the purpose of *Staten*. "By its [many] pronouncements," the court said, it had

> concluded that a person should not be punished . . . if, by reason of mental disease, he either does not know that what he did was wrong or could not prevent himself from doing it; and that punishing such an irresponsible individual would deter neither him nor others from doing what he did.
>
> . . . To punish such an individual would be like inflicting punishment upon an inanimate object, such as a machine, because it had, without any intelligent human intervention, caused some damage.[211]

Unfortunately, a short paragraph followed discussing the concept of diminished capacity. The court said that "such diminished capacity may represent a reason for diminished punishment but not for an absence of any punishment."[212] Furthermore, the court added, some punishment might very well have a deterrent effect on those who might be inclined to "feign . . . diminished capacity."[213] The inclusion of this topic in the opinion is unfortunate, for the court failed to explain why feigning diminished capacity is not an attractive ploy for an accused, who may, if successful in his attempt, thereby diminish the severity of punishment. The opinion would not have suffered had this commentary been omitted.

The court then concluded by clearly spelling out what the proper

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208. *Id.* at 17, 247 N.E.2d at 296 (emphasis added).

209. *See id.* at 18–19, 247 N.E.2d at 297–98 (citing OHIO REV. CODE §§ 2945.03, .39 (Anderson 1987)).

210. *Id.* at 19, 247 N.E.2d at 298.

211. *Id.* at 19–20, 247 N.E.2d at 298.

212. *Id.* at 20, 247 N.E.2d at 298.

213. *Id.*

language to a jury would be when the defense of insanity is raised:

> In order to establish the defense of insanity, the accused must establish by a preponderance of the evidence that disease or other defect of his mind had so impaired his reason that, at the time of the criminal act with which he is charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act.[214]

With this seminal pronouncement, the Ohio Supreme Court sent the case back to the common pleas court with instructions to follow either the new rule just laid down or paragraph four of *Stewart*, embodying the same essential features. Parenthetically, the trial court reached the same result and the verdict was appealed again to the Ohio Supreme Court.[215] This time, the court affirmed.[216]

VIII. SUMMARY: *STATEN* RULES, *CLARK* LIVES

The *Staten* opinion was the death blow to *M'Naghten* in Ohio.[217] Since its pronouncement in 1969, *Staten* has been cited and followed almost uniformly.[218] In only one case, *State v. Humphries*[219] (1977), has any of its holdings met with disapproval, and that case did not concern the proper test for insanity, but rather the characterization in *Staten* of the defendant's burden of proof, which the *Humphries* court held had been superseded by later statutory enactment.[220]

Moreover, it would seem that the rule is well established in the

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214. *Id.* at 21, 247 N.E.2d at 299 (footnotes omitted), *overruled in part as stated in* State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977). In *Humphries*, the Ohio Supreme Court held that the requirement that defendant prove insanity by "a preponderance of the evidence" had been superseded by the General Assembly's enactment of section 2901.05 of the Ohio Revised Code, which provided that all issues must be proved by the prosecution beyond a reasonable doubt—including the issue of sanity when defendant has met his burden of production by raising a question as to his mental capacity. 51 Ohio St. 2d at 98–102, 364 N.E.2d at 1357–59 (citing OHIO REV. CODE § 2901.05 (Anderson 1987)).

215. State v. Staten (Staten II), 25 Ohio St. 2d 107, 267 N.E.2d 122 (1971), *vacated per curiam in part on other grounds*, 408 U.S. 938 (1972).

216. *Staten II*, 25 Ohio St. 2d at 110, 267 N.E.2d at 125. This was not the end of the *Staten* case. The United States Supreme Court granted certiorari and vacated the judgment "insofar as it leaves undisturbed the death penalty imposed." Staten v. Ohio, 408 U.S. 938 (1972) (per curiam), *vacating in part* 25 Ohio St. 2d 107, 267 N.E.2d 122 (1971); *see also* Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (death penalty held to "constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments").

217. *See Staten I*, 18 Ohio St. 2d at 15, 247 N.E.2d at 295 (by implication) (supreme court has "generally" neither "mentioned the *M'Naghten* rule" nor been as conservative as the *M'Naghten* court); *see also supra* notes 204–07 and accompanying text.

218. *See, e.g.*, State v. Coombs, 18 Ohio St. 3d 123, 480 N.E.2d 414 (1985); State v. Brown, 5 Ohio St. 3d 133, 449 N.E.2d 449 (1983); State v. Anders, 29 Ohio St. 2d 1, 277 N.E.2d 554 (1972).

219. 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977).

220. *Id.* at 98–102, 364 N.E.2d at 1357–59 (discussed *supra* note 214).

lower courts. In *State v. Coombs*[221] (1985), the Ohio Supreme Court noted that

> [a] close examination of the record before us reveals that the *Staten* standard was the central subject of inquiry during the considerable portion of the trial proceedings which related to the insanity defense. That standard was repeatedly referred to during questioning of the expert witnesses for both sides in an effort to establish whether or not defendant's alleged mental disorder met the level required in *Staten*. The defendant's ability to appreciate the wrongfulness of his actions at the time of the offenses, or to restrain himself from so acting, was the subject of substantial examination by both sides. The record contains page after page of testimony on whether the defendant had a mental disease or defect, whether he had the capacity to conform his conduct to the law, and whether his alcohol consumption on the night in question was the true cause of his alleged loss of self-control. The *Staten* test was accurately and repeatedly articulated by counsel for both parties in their closing arguments. Clearly, the trial as a whole was conducted with a view towards determining whether defendant's mental condition constituted legal insanity under *Staten*.[222]

Nothing lasts forever. Someday, after a long and arduous fight, no doubt, the *Staten* test will be pushed aside in favor of one more "reasonable" and "descriptive." Perhaps by that time, all human behavior, emotions, and thoughts will be discernible from examining a string of DNA on the end of a pin. But until that time, *Staten* rules the State of Ohio, and through *Staten*, the long-ago charge of Judge Birchard to twelve true citizens sitting in the jury box in judgment of William Clark can still be heard.

221. 18 Ohio St. 3d 123, 480 N.E.2d 414 (1985).

222. *Id.* at 124-25, 480 N.E.2d at 416.