becomes an officer of the court whose duty is to exercise a high degree of candor in all his relations with the court. The principal case has adopted a sound policy, for, regardless of whether the petitioner was, in fact, a member of the Communist Party,[24] information regarding his membership in the Party is clearly relevant to his fitness to practice law.

CRIMINAL LAW—NEW TEST OF INSANITY AS A DEFENSE IN THE DISTRICT OF COLUMBIA

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

Defendant, who had a long history of mental illness, was accused of housebreaking.[1] At the trial, his only defense was insanity at the time the act was committed. His conviction was reversed on appeal to the Court of Appeals for the District of Columbia, which adopted, as a new test of insanity in that jurisdiction, the rule that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[2] The court retained the District's rule that the prosecution must prove the mental responsibility of the accused beyond a reasonable doubt.[3]

There are two principal tests utilized in determining the insanity of the defendant in criminal cases. In England and twenty-nine states,[4] the only standard of mental responsibility is the "right-wrong" test, made famous in *M'Naghten's* case,[5] which absolves the defendant of criminal responsibility if he did not "know the nature and quality of the act he was doing; or, if he did know it, that he did not know he

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24. There was no affirmative evidence in the principal case that the petitioner had ever been a member of the Communist Party. During the investigation by the committee, however, the petitioner had expressed his belief in the doctrine of revolution and the right of the people to overthrow the government by force of arms, if necessary. The court, however, based its decision upon the petitioner's refusal to disclose whether he was a Communist, and not upon the statements made by the petitioner during the committee's inquiry.

1. D.C. CODE ANN. § 22-1801 (1951).

2. Durham v. United States, 214 F.2d 862, 874-875 (D.C. Cir. 1954). The test has subsequently been rejected by the United States Court of Military Appeals. United States v. Smith, 23 U.S.L. Week 2321 (U.S. Ct. of Mil. App. Dec. 30, 1954).

3. Durham v. United States, 214 F.2d 862, 866 (D.C. Cir. 1954).

4. See WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 51 (1954). Missouri is one of these states; see State v. McGee, 361 Mo. 309, 234 S.W.2d 587 (1950).

5. Daniel M'Naghten's Case, 10 C. & F. 200, 8 Eng. Rep. 718 (H.L. 1843). Daniel M'Naghten was found not guilty by reason of insanity for the killing of Edward Drummond, secretary to Robert Peel, then prime minister of England. The furor caused by the verdict resulted in a debate in the House of Lords in which leading judges in England were asked questions regarding the law with respect to insanity. Their answers were not new law but were merely a recitation of what the law in England was at that time. See HALL, PRINCIPLES OF CRIMINAL LAW 480 (1947).

was doing what was wrong."[6] The second principal standard is the "irresistible impulse" test, adopted in at least fourteen jurisdictions, which accepts the "right-wrong" standard and, in addition, excuses the defendant from criminal responsibility if he is so mentally incompetent as to lack the will power to resist the impulse of committing the crime.[7]

The new test adopted in the District of Columbia is substantially the same as the one existing in New Hampshire since 1869[8] and is very similar to the one proposed by the Royal Commission on Capital Punishment.[9] The Commission proposal, that a defendant should not be held responsible if "at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he *ought* not to be held responsible,"[10] expressly instructs the jury to make a moral judgment as to the defendant's legal responsibility.[11] While the test in the principal case does not so instruct, the court did state that the jury, in accordance with its traditional function, should consider whether the defendant is morally responsible.[12]

Although the test adopted could be challenged on the ground that in any situation the act could be said to be the product of a mental disease,[13] the moral responsibility factor answers the attack because it allows a determination of moral guilt in addition to a consideration of whether the criminal act did not in fact stem from a mental disease or defect. Also, the test has merit in that it recognizes that the mental processes are interrelated and interdependent and not separate and distinct. Although this recognition results in a lack of definite legal criteria by which a jury can determine an accused's responsibility, it is more desirable to allow the jury to supply its own test, which stems from standards set by society, than for the court to direct the jury to apply definite but erroneous criteria.

The principal case also deals with the procedural aspects in regard to the issue of sanity. In all jurisdictions in the United States, there is a presumption that the accused was sane at the time the act was committed.[14] As to the amount of evidence needed to rebut this pre-

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6. Daniel M'Naghten's Case, 10 C. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843).

7. See WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 51, 52 (1954). Professor Weihofen, in his exhaustive book on the subject, lists three other states, Montana, New Mexico and Ohio, as possibly falling within the "irresistible impulse" group. Rhode Island is listed as not having passed on the question.

8. State v. Pike, 49 N.H. 399 (1869).

9. ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953 REPORT 116 (1953).

10. *Ibid.* Italics added.

11. The word "ought" inserts a moral element in the test. See Williams, *The Royal Commission and the Defence of Insanity* in CURRENT LEGAL PROBLEMS 1954 (Keeton and Schwarzenberger ed. 1954).

12. *See* Durham v. United States, 214 F.2d 862, 876 (D.C. Cir. 1954).

13. *See* People v. Hubert, 119 Cal. 216, 223, 51 Pac. 329, 331 (1897).

14. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 214 (1954).

sumption, the courts differ. In some states, the presumption is so strong that it is not rebutted until disproved by the defendant by a preponderance of the evidence.[15] Until the defendant meets this burden, which makes insanity a matter of affirmative defense, the prosecution need not introduce evidence of sanity. In other jurisdictions, the presumption of sanity requires only that the defendant produce sufficient evidence to create a reasonable doubt as to his sanity.[16] At this point, the presumption of sanity drops out as a rule of procedure and is given evidentiary weight as an inference of fact to aid the prosecution in producing enough evidence to prove sanity beyond a reasonable doubt.[17]

In the District of Columbia, the presumption of sanity is significant at two different stages of the trial. As soon as the defendant introduces "some evidence"[18] of insanity, that issue becomes a jury question,[19] and the presumption drops out as a rule of procedure, becoming an inference of fact which the jury must weigh against the evidence of insanity;[20] however, the burden of going forward with the evidence apparently does not shift at this point, and the mental responsibility of the accused may be proved *solely* by the evidentiary weight attached to the inference of sanity.[21] If, however, the defendant proceeds to produce enough evidence to raise a reasonable doubt as to his sanity, the burden of going forward with the evidence shifts, and the prosecution, aided by the evidentiary weight of the inference of sanity, must then produce affirmative evidence to remove the reasonable doubt.[22]

The court in the principal case held that, because the defendant had met the requirement of "some evidence," the trial court, hearing the case without a jury, was obliged to consider the issue of insanity as a factual question.[23] Although the decision could be construed as also holding that the burden of going forward with the evidence shifted at this point, the court apparently did not so hold.[24] While

15. *Id.* at 215. In one state, Oregon, a statute requires that the defendant prove his insanity beyond a reasonable doubt. ORE. COMP. LAWS ANN. § 26-929 (1940). This requirement has been upheld by the Supreme Court of the United States as not being a violation of the Due Process Clause of the Fourteenth Amendment. Leland v. Oregon, 343 U.S. 790 (1952).

16. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 215 (1954).

17. *Id.* at 217. New Hampshire is one of these states. State v. Jones, 50 N.H. 369, 400 (1871).

18. The requirement of "some evidence" is very easily met, and it is sufficient merely to produce evidence relevant to the issue of insanity. See Tatum v. United States, 190 F.2d 612, 616 (D.C. Cir. 1951).

19. *Id.* at 615.

20. *Ibid.*

21. *See* Tatum v. United States, 190 F.2d 612, 617 (D.C. Cir. 1951).

22. *See* Holloway v. United States, 148 F.2d 665, 666 (D.C. Cir. 1945); WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 227 (1954).

23. Durham v. United States, 214 F.2d 862, 866 (D.C. Cir. 1954).

24. *Id.* at 868, 869.

the distinction drawn between "some evidence" and evidence sufficient to establish a reasonable doubt does not seem realistic or practicable, the general rule that the state must establish mental responsibility beyond a reasonable doubt is sound in that it is consistent with the usual rules of criminal procedure which require the prosecution to prove all elements of its case.[25]

Theoretically, both in the District of Columbia, and in New Hampshire,[26] the prosecution has a most difficult task in obtaining a conviction as a result of the combination of rules that those jurisdictions have adopted in regard to an accused's sanity and the procedure by which it is proved: the prosecution must prove beyond a reasonable doubt that the unlawful act of the defendant was not the product of a mental disease or defect. As a practical matter, however, although it would seem that these rules will induce defendants to plead insanity more often and thereby increase the task of the prosecution, it is doubtful whether any serious increase in the number of verdicts for the defendant by reason of insanity will result because of a reluctance of juries to find an accused insane if he has committed a crime which arouses moral indignation.[27]

TAXATION—EQUITABLE APPORTIONMENT OF FEDERAL ESTATE TAX ON NON-PROBATE PROPERTY

Carpenter v. Carpenter, 267 S.W.2d 632 (Mo. 1954)

Decedent left property under a will naming his widow and two sons residuary legatees. He also left a sizeable non-probate estate consisting of an annuity contract "death benefit" payable to his widow monthly for twenty years, with his two sons as contingent beneficiaries.[1] The widow, as executrix, charged the federal estate tax[2] upon

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25. See the dissenting opinion of Mr. Justice Frankfurter in Leland v. Oregon, 343 U.S. 790, 802 (1952).

26. See note 17 *supra*.

27. See ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 56-68 (1954). Dr. Zilboorg refers to several cases in which the defendant would appear to have been insane at the time of the act yet was found sane by the jury. But see also ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953 REPORT 106 (1953), where witnesses reported that even the "irresistible impulse" test had resulted in an increase in the number of verdicts of not guilty by reason of insanity.

1. The annuity would have paid the decedent monthly amounts for life beginning at age seventy; when he died at sixty-seven an alternative clause made the principal of $128,000 payable to his widow over a twenty-year period. Calculated upon an actuarial basis, the interest of decedent's sons in the annuity benefit was approximately $3,000 each, yet on the basis of the widow's settlement each would have been compelled to pay $7,000 from his share of the residuary estate as one-third of the tax upon the entire benefit.

2. 26 U.S.C. §§ 800-939 (1952). Although there have been no decisions on this point under the Internal Revenue Code of 1954, it is believed that the effect of the law is unchanged, since Chapter 11 (§§ 2001-2207) of the new code continues the basic provisions of the estate tax in materially unaltered form.