CRIMINAL RESPONSIBILITY—*M'Naghten* and Public Security—Post-Acquittal Release Potential Reduced Under Temporary Insanity Defense—*State v. Maik*, 60 N.J. 203, 287 A.2d 715 (1972).

One evening in October of 1969, Gary Maik and John Tomlinson, friends and fellow students at Trenton State College, embarked on a scheme to track down dope pushers.[1] Having armed themselves with large hunting knives purchased that day, they pursued their adventure until Maik, according to his extra-judicial statements, was suddenly overcome by the thought that his friend wanted to die.[2] Turning on Tomlinson, he stabbed him more than sixty times. Maik wandered into a hospital sometime later, asked for the police and a psychiatrist, and told the police when they arrived that a murder had occurred and that he had committed it.[3]

Maik had been referred for psychological assistance before the incident,[4] and all psychiatrists who later examined him, including the state psychiatrist, agreed that he was schizophrenic, paranoid type.[5] They disagreed, however, as to the origin of the psychotic episode or "break" accompanying the homicide.[6] Maik had taken LSD[7] on at least two occasions prior to the killing, and had smoked hashish[8] weekly up until the time of the homicide.[9] Moreover, he had experienced a romantic failure prior to the psychotic break which was considered, together with the use of drugs, as a potential precipitating factor of the psychotic break.[10]

He was tried and convicted of second degree murder, having defended on the ground that the psychotic episode accompanying the homocide constituted temporary insanity thereby relieving him of

1 State v. Maik, 60 N.J. 203, 211, 287 A.2d 715, 719 (1972). The statement of facts in the appellate division report clarifies this view. There it is indicated that defendant and Tomlinson believed they were being pursued by a narcotics ring. State v. Maik, 114 N.J. Super. 470, 475, 277 A.2d 235, 237-38 (App. Div. 1972).

2 60 N.J. at 211, 287 A.2d at 719.

3 *Id.* at 207, 287 A.2d at 717.

4 *Id.* at 210-11, 287 A.2d at 718-19. The court elaborated on details of his family background and included discussion of psychiatric problems experienced by both his parents and a brother.

5 *Id.* at 210, 287 A.2d at 719.

6 *Id.* at 211, 287 A.2d at 719.

7 "Lysergic acid diethylamide . . . [is] a crystalline compound . . . that causes psychotic symptoms similar to those of schizophrenia." WEBSTER'S INTERNATIONAL DICTIONARY (3d ed. 1963).

8 "[A] narcotic drug derived from the hemp *(Cannibis sativa)* that is smoked, chewed, or drunk for its intoxicating effect . . . ." *Id.*

9 60 N.J. at 210, 287 A.2d at 718.

10 *Id.* at 211, 287 A.2d at 719.

criminal responsibility.[11] The jury was charged that if they believed his voluntary use of LSD and/or hashish caused the alleged illness, then the defense of insanity was unavailable.[12] The superior court, appellate division, reversed, holding that the trial court should have directed an acquittal on the ground of insanity at the time of the homicide.[13] The Supreme Court of New Jersey, in a unanimous decision, modified and remanded, deciding that the trial court was correct in refusing the motion for acquittal because the issue of insanity must be resolved by the jury.[14] Recognizing error in the charge, however, the court declared that the fact of a psychotic episode or break is sufficient to comport with the spirit of the *M'Naghten* rule[15] without speculating about the origin or cause of the break, so long as the alleged insanity otherwise meets the *M'Naghten* standard.[16]

After acquitting a defendant on the ground of insanity, New Jersey juries are required by statute to find specially whether the insanity continues; if it does, the court must commit the person to confinement in the New Jersey State Hospital in Trenton.[17] Balancing the defense of insanity with the demands of public security,[18] the *Maik* court further held that the applicable statutory phrase "restored to reason,"[19] the required standard for release from such confinement,[20] requires the neutralization of any latent personality disorder from which the psychotic break stems; not merely a remission of the psychotic condition.[21]

The defense raised by the defendant brought into conflict the general rules concerning two areas of criminal responsibility, those regarding insanity and those regarding voluntary intoxication. Because insanity is a defense to crime and voluntary intoxication generally is not,[22] a controversy arises when a factual situation like that in *Maik* requires reconciling the two areas under a single ruling.

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11 *Id.* at 207, 287 A.2d at 717. Temporary insanity is a defense under prior New Jersey law, State v. Lynch, 130 N.J.L. 253, 32 A.2d 183 (Ct. Err. & App. 1943).

12 60 N.J. at 212, 287 A.2d at 719-20. The trial court apparently followed the reasoning of State v. Wolak, 26 N.J. 464, 140 A.2d 385 (1958) (drunkenness could not raise a weak mental state to the level of legal insanity).

13 114 N.J. Super. at 478, 277 A.2d at 239.

14 60 N.J. at 206, 221, 287 A.2d at 717, 724.

15 Daniel M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843).

16 60 N.J. at 216, 287 A.2d at 722.

17 N.J. STAT. ANN. § 2A:163-3 (1971).

18 60 N.J. at 215-19, 287 A.2d at 721-23. *See* State v. Lucas, 30 N.J. 37, 83-86, 152 A.2d 50, 75-76 (1959) (Weintraub, C.J., concurring).

19 N.J. STAT. ANN. § 2A:163-3 (1971).

20 *Id.*

21 60 N.J. at 218, 287 A.2d at 722.

22 *See* note 44 *infra* and accompanying text.

The philosophical foundation of criminal liability at common law required the concurrence of an unlawful act with a guilty mind, or mens rea.[23] The *M'Naghten* rule of criminal responsibility, presently adhered to in New Jersey,[24] is a natural outgrowth of this reasoning, as it negates accountability where mens rea is absent.[25] Put another way, liability for crime must involve the ability to visit on the accused "blameworthiness in a personal sense."[26] The *M'Naghten* rule is intended to test whether such blameworthiness is negated by lack of conscious knowledge of the wrongfulness of one's acts through mental disease or defect. Thus, under the rule, a defendant is not criminally responsible for acts committed while

> 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 what he was doing was wrong . . . .[27]

It should be stressed that when courts are speaking of the state of mind under *M'Naghten*, they are concerned with the conscious mind, so that the capability of the mind to consciously know the difference between right and wrong is the pivotal factor in deciding whether criminal responsibility exists.[28] Criminal conduct under this rule is not excused purely on the basis of medical theses of unconscious, predestined, or automatic behavior.[29]

The *M'Naghten* rule has been extensively criticized,[30] and has been modified in some jurisdictions.[31] The most persistent critics charge that the rule is obsolete because it fails to recognize well ac-

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23 Morrissette v. United States, 342 U.S. 246, 250-51 (1952); 4 W. BLACKSTONE, COMMENTARIES 21 (5th ed. 1773); Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 988 n.51 (1932): " '[*A*]*ctus non facit reum nisi mens sit rea.*' " (An act does not make [the actor] guilty, unless the mind be guilty; that is, unless the intention be criminal).

24 60 N.J. at 212, 287 A.2d at 720. *See* State v. Sikora, 44 N.J. 453, 210 A.2d 193 (1965); and State v. Lucas, 30 N.J. 37, 152 A.2d 50 (1959), for the history of the *M'Naghten* test in New Jersey, the competing concepts of legal insanity, and the reasons for their rejection. *See generally* MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962); NEW JERSEY PENAL CODE § 2C:4-1, Comment (Final Report, 1971).

25 60 N.J. at 212-13, 287 A.2d at 720.

26 State v. Lucas, 30 N.J. 37, 83, 152 A.2d 50, 75 (1959) (Weintraub, C.J., concurring).

27 60 N.J. at 212, 287 A.2d at 720 (emphasis added).

28 "Criminal responsibility must be judged at the level of the conscious." State v. Sikora, 44 N.J. 453, 470, 210 A.2d 193, 202 (1965). *See id.* at 479, 210 A.2d at 207 (Weintraub, C.J., concurring).

29 *Id.* at 468-70, 210 A.2d at 201-03.

30 MODEL PENAL CODE § 4.01, Comment 156 (Tentative Draft, 1955); Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond* [sic], 41 A.B.A.J. 793, 795 (1955). *Cf.* Hall, *Responsibility and Law: In Defense of the McNaghten* [sic] *Rules*, 42 A.B.A.J. 917 (1956).

31 *See, e.g.*, Robinson, *Oregon Murders M'Naghten*, 51 ORE. L. REV. 437 (1972).

cepted principles of psychiatric knowledge,[32] chiefly the theory of "integrated personality."[33] Commentators claim *M'Naghten* places undue stress on the cognitive faculty of the personality and thereby fails to recognize the lack of responsibility of those suffering impairment of volitional or emotional faculties through mental disorder. The latter, they assert, are unable to conform their behavior to avoid performance of criminal acts, though they may be able to distinguish right from wrong.[34]

Analysis of the competing tests of insanity reveals that the debate is really one among basic philosophical positions.[35] Because *M'Naghten* is posited on the existence of free will, it imposes a greater moral burden of choice upon the individual.[36] By presupposing the dominance of reason, or the ability to freely and rationally govern our behavior, *M'Naghten* excuses only where that reason becomes defective to the extent that free will is no longer possible. Other approaches, however, tend to be deterministic in their outlook on human behavior,[37] claim-

32 *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 449, 472-86 (2d ed. 1960). *See generally* United States v. Currens, 290 F.2d 751 (3d Cir. 1961); United States v. Baldi, 192 F.2d 540 (3d Cir. 1951):

> The human mind, however, is an entity. It cannot be broken into parts, one part sane, the other part insane. The law, when it requires the psychiatrist to state whether in his opinion the accused is capable of knowing right from wrong, compels the psychiatrist to test guilt or innocence by a concept which has almost no recognizable reality.

Id. at 568 (Biggs, J., dissenting); B. CARDOZO, LAW AND LITERATURE: WHAT MEDICINE CAN DO FOR LAW 70, 106 (1931) ("Every one concedes that the present definition of insanity has little relation to the truths of mental life.").

33 Durham v. United States, 214 F.2d 862, 871 (D.C. Cir. 1954); J. HALL, *supra* note 32, at 494.

34 Three major tests which claim to come to terms with this phenomenon are: the "irresistible impulse" test, outlined in State v. Maish, 29 Wash. 2d 52, 185 P.2d 486 (1947); the provisions of the AMERICAN LAW INSTITUTE proposal negating responsibility where the actor is "unable to conform his conduct to the requirements of the law," MODEL PENAL CODE § 4.01 (Proposed Official Draft); and the *Durham* or "product" test which negates criminal responsibility if the act was a product of a mental disease. Durham v. United States, 214 F.2d 862, 873-74 (D.C. Cir. 1954). The District of Columbia has recently adopted the MODEL PENAL CODE test, however, in lieu of the Durham test. *See* United States v. Brawner, — F.2d — (D.C. Cir. June 23, 1972). For recent criticism of the control aspect of these tests, *see* Robinson, *supra* note 31, at 442.

35 *See* Insanity As A Defense, 37 F.R.D. 365 (1964); J. HALL, *supra* note 32, for a thorough analysis of all competing tests of criminal responsibility.

36 Indeed, the whole notion of criminality from which *M'Naghten* was derived is based on free will. Sayre, *supra* note 23, at 1004, states:

> The conception of blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choosing evil rather than good; there can be no criminality in the sense of moral shortcoming if there is no freedom of choice . . . .

See State v. Noel, 102 N.J.L. 659, 680-84, 133 A. 274, 285-86 (Ct. Err. & App. 1926) (Kalisch, J., concurring).

37 For a discussion of the dichotomy between determinists and free will advocates,

ing that a scientific discipline cannot be based on such a metaphysical notion.[38] Insofar as they claim to be more attuned to modern theories,[39] the competing tests of criminal responsibility have challenged the traditional notion of mens rea,[40] and by necessary implication, the traditional notion of criminality itself.[41] The New Jersey courts have entertained arguments in favor of these new approaches, but have thus far refused to abandon the *M'Naghten* test.[42]

Attempts to build a defense based on intoxication have, of course, incurred far more hostile reception by the courts than those based on insanity.[43] New Jersey has rejected voluntary intoxication as a defense even where there is an entire prostration of the mental faculties caused by the use of alcohol or drugs.[44] The general intent, or mens rea, required for criminality is imputed from the intentional use of the intoxicant.[45] This rule is widely accepted subject only to the exceptions that the defendant was too intoxicated to have committed the act,[46]

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and the consequences of their ideas insofar as they relate to the notion of criminal law, *see* Lawrence, *Sanity: The Psychiatrico-Legal Communicative Gap*, 27 OHIO ST. L.J. 219, 220-25 (1966). For a scientist's view of the existence of free will, see A. WHITEHEAD, SCIENCE AND THE MODERN WORLD 78 (1967).

38 White, *The Need for Cooperation Between the Legal Profession and the Psychiatrist in Dealing with the Crime Problem*, 7 AM. J. PSYCHIATRY 494 (1927).

39 Durham v. United States, 214 F.2d at 875. This hypothesis is criticized in J. HALL, *supra* note 32, at 455.

40 Sayre, *supra* note 23, at 1017:

> Our modern objective tends more and more in the direction, not of awarding adequate punishment for moral wrongdoing, but of protecting social and public interests. To the extent that this objective prevails, the mental element requisite for criminality, if not altogether dispensed with, is coming to mean, not so much a mind bent on evil-doing as an intent to do that which unduly endangers social or public interests. As the underlying objective of criminal administration has almost unconsciously shifted, and is shifting, the basis of the requisite *mens rea* has imperceptibly shifted, lending a change to the flavor, if not to the actual content, of the criminal state of mind which must be proved to convict (footnotes omitted).

41 Sayre, *supra* note 23.

42 *See* State v. Sikora, 44 N.J. 453, 461, 210 A.2d 193, 197 (1965); State v. Lucas, 30 N.J. 37, 63, 152 A.2d 50, 64 (1959).

43 J. HALL, *supra* note 32, at 529.

44 State v. Sinclair, 49 N.J. 525, 544, 231 A.2d 565, 575 (1967) ("Prostration of the mental faculties by voluntary intoxication . . . cannot lead to acquittal . . . ."). In State v. Marriner, 93 N.J.L. 273, 276, 108 A. 306, 307-08 (Sup. Ct.), *aff'd*, 95 N.J.L. 265, 111 A. 688 (Ct. Err. & App. 1919), a charge specifying that:

> Even if you believe the faculties of this defendant were so prostrated as to, in your minds, amount almost to a condition of insanity, if it was the result of voluntary drunkenness, it is no defence for the crime . . . .

was deemed "entirely justified."

45 60 N.J. at 214, 287 A.2d at 721.

46 Jenkins v. State, 93 Ga. 1, 18 S.E. 992 (1893).

that he acted under duress,[47] or that he was under the influence of prescribed medication.[48]

Moreover, there is the "exculpatory rule" whereby proof of intoxication may preclude the possibility of the defendant's having formed the specific intent requisite to the commission of a crime.[49] In a homicide case, for example, a defendant may be able to sustain the second degree murder presumption[50] by showing that, because of the degree of intoxication, he was incapable of the deliberation and premeditation necessary to raise the crime to first degree murder.[51] Therefore, in the absence of the enumerated exceptions, voluntary intoxication may be a mitigating factor, but not a complete defense, due to the demands of public policy.[52]

These general rules concerning insanity and voluntary intoxication have clashed on the merging ground of insanity precipitated by alcohol or drug intoxication,[53] and the *Maik* decision presents a realistic approach to resolving the problem. The issue broadly presented was: can insanity which may have been precipitated by the use and effects of alcohol or other drugs that are voluntarily taken be considered a disease of the mind within the meaning of *M'Naghten*?

Though there were no prior New Jersey cases turning on the point, the general rule in other jurisdictions appears to be that where

47 Burrows v. State, 38 Ariz. 99, 297 P. 1029 (1931).

48 Perkins v. United States, 228 F. 408 (4th Cir. 1915).

49 New Jersey has recognized the rule. *See* State v. White, 27 N.J. 158, 165, 142 A.2d 65, 68 (1958), where the court stated:

> [T]he voluntary use of drugs, like the voluntary use of alcohol . . . in some situations . . . may be pertinent with respect to the degree of that crime by negating the existence of the specific intent to kill.

Later cases did not frame the rule in terms of "specific intent," but rather spoke of mental operations. State v. Trantino, 44 N.J. 358, 369, 209 A.2d 117, 122 (1965), held:

> [V]oluntary intoxication or use of drugs may be considered with respect to the degree of murder, i.e., in determining whether the defendant in fact performed the mental operations which the state must prove to elevate murder in the second degree to murder in the first degree.

The *Maik* court stated the rule in terms of public security. 60 N.J. at 215, 287 A.2d at 721. *See* State v. Sinclair, 49 N.J. 525, 544, 231 A.2d 565, 575 (1967); State v. Di Paolo, 34 N.J. 279, 295-96, 168 A.2d 565, 575 (1961); Note, *Intoxication as a Criminal Defense*, 55 COLUM. L. REV. 1210 (1955); Note, *Intoxication as a Defense to a Criminal Charge in Pennsylvania—Sequel*, 76 DICK. L. REV. 324 (1972).

50 State v. King, 37 N.J. 285, 293, 181 A.2d 158, 162 (1962).

51 State v. Wolak, 26 N.J. 464, 477, 140 A.2d 385, 392 (1958).

52 60 N.J. at 215, 287 A.2d at 721.

53 *Compare* Brown v. United States, 331 F.2d 822, 823 (D.C. Cir. 1964) (drug addiction is a state of mental and physical illness, and a defense of insanity based on such addiction is therefore a question of fact for the jury), *with* State v. Bower, 73 Wash. 2d 634, 646, 440 P.2d 167, 175 (1968) (the effects upon the mind of the accused induced by the use of drugs is not a state of insanity and therefore the issue of insanity is precluded and should not go to the jury for their consideration).

a fixed or permanent state of insanity results from voluntary intoxication, such insanity will be treated as insanity arising from any other cause,[54] even where intoxication continues at the time of the crime.[55]

Where the thesis is that voluntary intoxication has resulted in temporary insanity, the courts have been far less receptive,[56] and have tended to equate the state of temporary insanity with the state of intoxication.[57] The leading case in New Jersey recognizing temporary insanity is *State v. Lynch*,[58] where the psychotic condition was produced by poisoning from the excessive use of bromides.[59] The court recognized the defense of temporary insanity with no discussion of the causative factors, even though the defendant appeared to be in a "stupified condition" shortly after the killing.[60] *Maik*, however, did not rely upon this case, but distinguished it because it involved the use of medications and because their effect could be termed "bizarre."[61] Whether the voluntary use of the drug should have been read in terms of medication is questionable, as the use was clearly excessive;[62] moreover, if the use of the drugs in *Maik* in fact precipitated the psychotic episode, was that result not also bizarre?

The temporary insanity defense precipitated by voluntary intoxication was raised again in *State v. White*,[63] where it was stated generally:

> [T]he voluntary use of drugs, like the voluntary use of alcohol, is not a defense to murder (in the absence of mental disease resulting therefrom) . . . .[64]

That case indicates that mental disease produced by the use of drugs is nonetheless insanity, and if the standards of *M'Naghten* are other-

54 Beasley v. State, 50 Ala. 149, 152 (1874); People v. Cochran, 313 Ill. 508, 518, 145 N.E. 207, 211 (1924). *Contra*, Commonwealth v. McGrath, — Mass. —, 264 N.E.2d 667, 671 (1970).

55 Parker v. State, 7 Md. App. 167, 172, 254 A.2d 381, 388 (1969), *cert. denied*, 402 U.S. 984 (1969).

56 United States v. MacLeod, 83 F. Supp. 372, 373 (E.D. Pa. 1949) ("[T]emporary insanity induced by voluntary drunkedness [sic], or intoxication, or addiction to alcohol does not render a person free from criminal process."); McIntyre v. State, 379 P.2d 615, 616-17 (Alaska 1963). *Contra*, Askew v. State, 118 So. 2d 219 (Fla. 1960).

57 United States v. MacLeod, 83 F. Supp. 372 (ED. Pa. 1949); *see* Parker v. State, 7 Md. App. 167, 254 A.2d 381 (1969).

58 130 N.J.L. 253, 32 A.2d 183 (Ct. Err. & App. 1943) (prosecution for murder).

59 *Id.* at 255, 32 A.2d at 184.

60 *Id.*

61 60 N.J. at 214, 287 A.2d at 721.

62 130 N.J.L. at 254, 32 A.2d at 183.

63 27 N.J. 158, 161-62, 142 A.2d 65, 67 (1958) (felony-murder case involving a heroin addict who struck and killed the victim during a robbery).

64 *Id.* at 165, 142 A.2d at 68.

wise met, then it would be a complete defense to criminal liability. Whether the *White* court intended its statement to apply to a temporary state of insanity remained an open question, because the court found the defendant had failed to prove the existence of a mental disease or defect, a necessary element under any test of insanity.[65] However, the case is significant as an indication that once a clear mental disorder is shown independent of the state of intoxication itself, the fact of the defendant's intoxication will not bar the defense of insanity. Viewed from this perspective, it is easy to reconcile the statement in *State v. Hudson*[66] that "prior intoxication may well be part and parcel of the total picture upon which the claim of insanity depends . . . ."[67]

The importance of the existence of mental disease sufficient to comport with *M'Naghten* was further evidenced in *State v. Wolak*.[68] There the court heard testimony that the defendant manifested a "constitutional psychopathic personality,"[69] apparently not of itself sufficient to constitute *M'Naghten* insanity.[70] However, the defendant had used some unidentified narcotics known as "goof balls,"[71] combined them with heavy use of alcohol,[72] and based his defense on the mental state produced by the joint effect of these factors.[73] The court rejected this theory, holding that where

> voluntary *drunkenness* was superimposed on that mental weakness to the extent that it produced for the time being an inability to distinguish between right and wrong, the crime would not be excused on the ground of insanity.[74]

In other words, a state of intoxication cannot raise a weak mental state to the level of legal insanity.

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65 *Id.* at 164, 142 A.2d at 68.

66 38 N.J. 364, 185 A.2d 1 (1962).

67 *Id.* at 368, 185 A.2d at 3.

68 26 N.J. 464, 140 A.2d 385 (1958) (murder).

69 *Id.* at 475, 140 A.2d at 391.

70 *Id.* at 477, 140 A.2d at 392. The court stated:

> A critical evaluation of the doctor's testimony indicates that he did not say that Wolak's status as a constitutional psychopathic personality of itself rendered him insane when the gun was fired.

71 *Id.* at 473, 140 A.2d at 389-90.

72 *Id.* at 474, 140 A.2d at 390.

73 *Id.* at 476, 140 A.2d at 391. As the court surmised:

> It was Dr. Policastro's opinion that the combination of the "goof balls" taken on Saturday evening and the long period of drinking was such that Wolak was "mentally sick" at the time of the killing and "did not know the quality of the act," that is, he did not know its "harmfulness" or its "seriousness;" . . . "he did not know that somebody would die." At the time he could not "differentiate between right and wrong; . . . he had no judgment whatsoever."

74 *Id.* at 478, 140 A.2d at 392 (emphasis added).

Thus, where defense theories may delineate between permanent and temporary insanity, the courts seem more interested in whether the alleged impairment is merely a manifestation of the present effects of the intoxicant or the result of true mental disease.

Maik settles this area of law by holding that where the fact of a mental disease in the form of a psychotic break is clearly shown, the possibility that the break was triggered by voluntary intoxication will not bar the defense of temporary insanity. To disallow a defense of insanity where there is a clear showing of mental disease, merely because it was triggered by voluntary intoxication, would, as pointed out by the appellate division, be a finding of " 'voluntary insanity,' thereby whittling away the defense of 'legal insanity.' "[75]

Thus, while leaving the voluntary intoxication rule intact,[76] the court held that where a psychotic episode is factually shown constituting legal insanity under *M'Naghten*,[77] courts should accept it "without inquiry into its etiology."[78] Because the episode could be associated with an underlying personality disorder, suggesting a strong possibility of future breaks, the remaining question before the court was to determine the proper procedure for insuring adequate post-acquittal disposition of the defendant.

By drawing on the common law concept distinguishing between the sick and the bad,[79] the court developed the central theme of the decision, a balance between a defendant's right to an insanity defense and the demands of public security.[80] In essence, this public policy argument is that society should not be subjected to harm from the mentally ill, and that the law strives to protect the innocent from injury whether at the hands of the sick or the bad.[81] Thus, following directly on the heels of the holding eliminating the need for inquiry into the origin of true psychotic episodes is the following pregnant statement:

> If protection against further harm can reasonably be assured by

[75] 114 N.J. Super. at 476, 277 A.2d at 238. One is reminded of the well-known phrase from Horace, "Insanire paret certa retione moduque" (he prepares to go mad with fixed rule and method).

[76] 60 N.J. at 215, 287 A.2d at 721.

[77] The fact that a psychotic episode was medically shown may have been the salient factor making this aspect of the decision unavoidable, notwithstanding the voluntary intoxication. *See* State v. Guido, 40 N.J. 191, 205, 191 A.2d 45, 53 (1963), where the court stated that under *M'Naghten*: "[I]t is clear, of course, that a psychosis, as that disease is generally understood medically, is a competent cause of the required mental state."

[78] 60 N.J. at 216, 287 A.2d at 720.

[79] *Id.*

[80] *Id.* at 218, 287 A.2d at 722.

[81] *Id.* at 213, 287 A.2d at 720.

> measures appropriate for the sickness involved, it would comport with *M'Naghten* to deal with the threat in those terms.[82]

The procedure for dealing with one acquitted on grounds of insanity is prescribed in N.J. STAT. ANN. § 2A:163-3, which provides in part:

> [T]he jury shall be required to find specially by their verdict whether or not such person was insane at the time of the commission of such offense . . . and to find specially by their verdict also whether or not *such insanity continues*, and if the jury shall find by their verdict that such insanity does continue, the court shall order such person into safe custody and commit him . . . until such time as he may be restored to reason.[83]

The *Maik* court stressed the words "restored to reason" as the criterion for continued commitment, but in so doing glossed over the necessary prerequisite to commitment—that the jury determine "such insanity continues." This latter phrase would seem to require that the jury determine whether *M'Naghten* insanity continues as a condition precedent to the court's order of commitment.[84] Yet the court states, "insanity continues notwithstanding remission so long as the underlying latent condition remains . . . ."[85]

Keeping in mind that the latent personality defect, standing alone, would not meet the *M'Naghten* test, we see that the court has advanced two standards of legal insanity, one for the purpose of determining criminal responsibility and quite another for continuing insanity and commitment under § 2A:163-3.

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82 *Id.* at 216, 287 A.2d at 720.

83 N.J. STAT. ANN. § 2A:163-3 (1971) (emphasis added).

84 The court stated that, "[w]hen the Legislature spoke of restoration to 'reason,' it must have had in view *M'Naghten's* concept that legal insanity resides in a 'defect of reason'. . . ." If this is true, then it would seem clear that the Legislature also had in mind *M'Naghten's* concept of insanity when they required a jury finding that "such insanity continues." 60 N.J. at 217, 287 A.2d at 722. *But see* Reid, *Disposition of the Criminally Insane*, 16 RUTGERS L. REV. 75, 106 (1961), where the author suggests:

> The phrase "such insanity continues" seems to imply that the jury should limit itself to a determination of whether the defendant still suffers from the same insanity by reason of which he was acquitted. But this is not very realistic . . . . This would mean that, in deciding whether the accused should be committed, the jury is limited to the issue of whether he still does not know that the act committed was wrong and cannot consider whether he is mentally ill or potentially dangerous. It is more likely that, despite the wording of the statute, New Jersey juries . . . are either instructed to equate "insanity" with mental illness as would a *Durham* jury or else insanity is not defined but is left a question of fact as in a New Hampshire trial.

While this proposition is logical, the author cited no authority, and it was not until *Maik* that the court was squarely faced with the problem of transcending the plain meaning of the statute.

85 60 N.J. at 218, 287 A.2d at 723.

To illustrate, prior to *Maik*, the statute afforded three possible determinations by a jury when the defense of insanity was raised:

> (1) Defendant was guilty or not guilty on the merits because he did not meet the *M'Naghten* standard and was therefore legally sane.
> (2) Defendant was not guilty by reason of insanity, but the insanity did not continue (temporary insanity) and he was released.
> (3) Defendant was not guilty by reason of insanity and the insanity did continue (continuing insanity); he was committed.

But under a charge suggested by *Maik*,[86] the second possibility is significantly eroded while the third is greatly enlarged, giving rise to still a fourth determination:

> (4) Defendant is not guilty by reason of insanity, and though his insanity does not presently fall within the *M'Naghten* definition, his potential for experiencing psychotic episodes stemming from a latent personality disorder continues. For the purposes of public security, his insanity must be deemed continuing, and he must be committed until that latent personality disorder is eliminated.[87]

This interpretation, however, cannot be readily drawn from the legislative history of § 2A:163-3. By the law of 1922,[88] which provided for the disposition of persons who had escaped indictment or who had been acquitted on the ground of insanity at the time of the offense, the trial judge determined whether "insanity in any degree"[89] continued. As a test for determining continuing insanity, this phrase might have been applicable to a *Maik* situation, where there was evidence of a continuing personality disorder and a concomitant potential for future harm. However, as the statute evolved into its present form, the test was altered.

The law of 1922 was incorporated into the statutory revision of

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86 *Id.* at 221, 287 A.2d at 724, where the court in summary stated:
The sole issues to be retried are whether defendant was legally insane at the time of the killing, and if he was, *whether insanity, as we have defined it* . . . continues (emphasis added).

87 *Id.*

88 Law of March 11, 1922, ch. 101, § 3, [1922] N.J. Laws 189.

89 *Id.*, which provided in pertinent part:
When any person shall have escaped indictment or have been acquitted of the criminal charge upon trial upon the ground of insanity . . . or otherwise, the court being certified by the jury or otherwise of the fact, shall carefully inquire and ascertain whether his insanity in any degree continues, and if it does, shall order him in safe custody, and direct such person to be sent to the New Jersey State Hospital at Trenton . . . .

1937, where it was set forth as N.J. STAT. ANN. § 2:190-17.[90] In 1943, that statute was amended and supplemented[91] by the addition of section 17.1, providing for a special jury determination of continuing insanity in lieu of the court determination. The amendment substituted the phrase "such insanity" for "insanity in any degree" as the test for continuing insanity.[92] While section 17.1 thus obviated the need for a court determination of continuing insanity in acquittal cases, the old provision, for some unexplained reason, was retained in section 17.[93] Subsequently, section 17, in part, became the basis of N.J. STAT. ANN. § 2A:163-2, by which the court, at a hearing to determine competence to stand trial, may alone or with a specially impanelled jury, determine whether defendant was insane at the time of the offense, and if so, whether insanity continues "in any degree."[94] But such an inquiry can only be made after a finding of incompetence.[95] Section 17.1, on the other hand, became the basis for § 2A:163-3,[96] which alone provides

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90 N.J. STAT. ANN. § 2:190-17 (1938) retained the wording "insanity in any degree continues."

91 Law of March 27, 1943, ch. 41, §§ 1-2, [1943] N.J. Laws 81-82.

92 N.J. STAT. ANN. § 2:190-17.1 (1944) provided:

> [T]he jury shall be required to find specially by their verdict whether or not such person . . . acquitted by them by reason of the insanity of such person at the time of the commission of such offense and to find specially by their verdict also whether or not such insanity continues and if the jury shall find by their verdict that such insanity does continue, the court shall order such person into safe custody and direct him to be sent to the New Jersey state hospital at Trenton . . . .

93 N.J. STAT. ANN. § 2:190-17 (1944) provided:

> Whenever any person shall have escaped indictment, or shall have been acquitted of the criminal charge against him upon the trial thereof on the ground of insanity, the court, being certified by the jury or otherwise of the fact, shall carefully inquire and ascertain whether his insanity in any degree continues, and, if it does, shall order him into safe custody and direct him to be sent to the New Jersey state hospital at Trenton . . . .

94 N.J. STAT. ANN. § 2A 163-2 (1971) provides:

> It shall be competent for the judge if sitting without a jury, or the jury, if one is impanelled, to determine not only the sanity of the accused at the time of the hearing, but as well the sanity of the accused at the time the offense charged against him is alleged to have been committed.
>
> . . . .
>
> If it shall be determined after hearing as aforesaid, that the accused was insane at the time the offense charged against him is alleged to have been committed, the charge against him shall be dismissed on this ground and the records of the proceedings so noted. In this event, the judge or jury, as the case may be, shall also find separately whether his insanity in any degree continues, and, if it does, shall order him into safe custody and direct him to be sent to the New Jersey state hospital at Trenton . . . .

95 Aponte v. State, 30 N.J. 441, 455, 153 A.2d 665, 672 (1959), where the court held:

> [I]f the accused is found to be fit for trial, the issue of insanity at the time of the crime should not be adjudged, and if both issues are tried together with a jury, the jury should be so instructed.

96 N.J. STAT. ANN. § 2A:163-3 (1971). (The historical note accompanying the statute sets forth N.J. STAT. ANN. § 2:190-17.1 (1940) as the sole source of the statute.).

the basis for a determination of continuing insanity in acquittal cases.

Therefore, where a defendant has raised the defense of insanity at the time of the offense, the plain meaning of the statute appears to be that the jury test continuing insanity by the same standard employed to judge insanity at the time of the offense—*M'Naghten* insanity.

Although the court's method of determining continuing insanity is not fully supported by the statute, the result sought may well be justified in the light of the psychiatric testimony and the interests to be protected. As was stated by the court:

> [T]here was no medical assurance that this latent personality disorder would not be triggered again into violent expression by reason of some stress defendant could reasonably be expected to experience. On the contrary, the tenor of the testimony would suggest there is no medical basis for such assurance as a probability.[97]

For the purpose of commitment under § 2A:163-3, therefore, the court has incorporated a far more deterministic definition of legal insanity.[98] The idea is not new. As was pointed out in *Aponte v. State*,[99] " 'Insanity' has many meanings. A man may be insane for one purpose and sane for another."[100] The court therein enumerated three concepts of insanity, each involving different standards:

> 1. As a defense to crime [in which case M'Naghten must be met] . . . .
>
> 2. For the purpose of commitment to a mental institution, insanity usually comprehends any disease or disorder of the mind which renders its victims dangerous to himself or to others. . . .
>
> 3. As a test of ability to stand trial [in which case he must be able to comprehend his position and consult intelligently with counsel] . . . .[101]

The second standard appears on its face to include the *Maik* situation, but a closer look reveals that all cases supporting this proposition are cases involving construction of the civil commitment statutes,[102] and not the pertinent criminal statute, § 2A:163-3.

This dangerousness criterion is, however, similar to the provisions

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97 60 N.J. at 217, 287 A.2d at 722.

98 *Id.* at 218, 287 A.2d at 723.

99 30 N.J. 441, 153 A.2d 665 (1959).

100 *Id.* at 450, 153 A.2d at 669.

101 *Id.* (citations omitted).

102 State v. Caralluzzo, 49 N.J. 152, 156, 228 A.2d 693, 695 (1967) (interpreting N.J. STAT. ANN. § 30:4-82 (1964)); DiGiovanni v. Pessel, 104 N.J. Super. 550, 552, 250 A.2d 756, 768 (App. Div. 1969), *modified on other grounds*, 55 N.J. 188, 260 A.2d 510 (1970) (interpreting N.J. STAT. ANN. § 30:4-27 (1964)); *In re* J.W., 44 N.J. Super. 216, 221-22, 130 A.2d 64, 67 (App. Div.), *cert. denied*, 24 N.J. 465, 132 A.2d 558 (1957) (interpreting N.J. STAT. ANN. §§ 30:4-23 *et seq.* (1964)); *In re* Heukelekian, 24 N.J. Super. 407, 409, 94 A.2d 501, 502 (App. Div. 1953) (interpreting N.J. STAT. ANN. § 30:4-27 *et seq.* (1964)).

of the proposed *New Jersey Penal Code*[103] and its source, the *Model Penal Code*.[104] The *New Jersey Penal Code* provides for release after commitment, "on condition without danger to himself or others, or [that he be] treated as in civil commitment . . . ."[105]

A general comparison between the proposed *Code* provision for post-acquittal disposition and this decision reveals other similarities. The *Code* provides for mandatory commitment[106] while commitment under § 2A:163-3 is contingent upon the finding of continuing insanity. Under *Maik*, however, because a link between a latent personality disorder and a psychotic episode requires a finding of continuing insanity, the possibility of release after acquittal is significantly lessened, and New Jersey has moved closer to requiring mandatory commitment.[107] The *Code* also places exclusive power for release in the committing court[108] and where § 2A:163-3 was previously silent in this respect, the *Maik* court held the omission was clearly legislative oversight.[109]

The societal protection rationale explicit in the court's reading of § 2A:163-3 is further illuminated by reading the decision in conjunction with Chief Justice Weintraub's concurring opinion in *State v. Lucas*.[110] There the court rejected any modification of the *M'Naghten* standard until such time as the court could be convinced by real scientific evidence that another standard would more fully serve the interests of justice in New Jersey.[111] In his opinion, the Chief Justice advanced as his most important reason for upholding the validity of the *M'Naghten* standard, the

> inability of the judiciary to deal with the total problem. . . . If we are to excuse an offender from the criminal process because of insanity, there must be a civil process adequate for the area abandoned. I doubt that civil commitment could be ordered under existing statutes in all cases in which an acquittal would follow under *Durham* or some such doctrine.[112]

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103 NEW JERSEY PENAL CODE § 2C:4-8 (Final Report, 1971).

104 MODEL PENAL CODE § 4.08 (Proposed Official Draft).

105 NEW JERSEY PENAL CODE § 2C:4-8.

106 The section cited (*id.*) further provides:

> When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the Court shall order him to be committed to the custody of the Commission of Institutions and Agencies for custody, cure and treatment.

107 *See* Note, *Acquittal by Reason of Insanity: Is Mandatory Commitment Constitutional?* 39 U.M.K.C.L. REV. 213 (1971).

108 NEW JERSEY PENAL CODE § 2C:4-8.

109 60 N.J. at 219-20, 287 A.2d at 723-24.

110 30 N.J. 37, 82, 152 A.2d 50, 74 (1959).

111 *Id.* at 72, 152 A.2d at 68.

112 *Id.* at 85, 152 A.2d at 76.

This opinion suggests the difficulty which would be incurred in attempting to have expert witnesses agree that a specific defendant suffered from some form of psychosis for which he should be committed.[113] The Chief Justice then stressed the protection of the public (which he subsequently emphasized in *Maik*): "I am not willing to let the security of society depend upon a science which can produce such conflicting estimates of probable human behavior."[114]

In *Maik*, the court found it necessary to extend this protection theory to a case where the *M'Naghten* standard was met under a plea of temporary insanity. By establishing the defendant's underlying personality disorder, *i.e.*, his propensity to do harm, as the standard by which to measure continuing insanity for commitment and release under § 2A:163-3, the statutory phrase "such insanity" no longer appears to have any utility. This judicial melding of the standard of continuing insanity with the court's interpretation of the phrase "restored to reason," while arguably necessitated by the exigencies of the case at hand, amply demonstrates the need for statutory revision. What remains now is for the legislature to review the statute in light of the realities of this decision. Any revision of the statute should provide for adequate post-acquittal disposition of individuals and procedural safeguards against unwarranted or overzealous deprivation of liberty based on as broad a concept as public security. Further, where the state acquits on the ground of insanity, it should guarantee treatment,[115] not just custody in a state hospital for what may well be the rest of the patient's life.[116]

If the legislature wishes to continue to provide for post-acquittal jury determination of continuing insanity, § 2A:163-3 could be revised to allow the jury to reach this determination as a question of fact based on the individual's present danger to himself and to others. In other words, the test for commitment could be modified to reflect the same standard as now exists for the purpose of civil commitment. Subsequent hearings for release could also be based on this standard.

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113 *Id.* at 85-86, 152 A.2d at 76.

114 *Id.* at 86, 152 A.2d at 76.

115 In Wyatt v. Stickney, 325 F. Supp. 781, 784, *modified on other grounds*, 334 F. Supp. 1342 (M.D. Ala. 1971), it was held that at least in the area of involuntary civil commitment there is a constitutional right to treatment. While constitutional protections are afforded defendants in criminal proceedings, this would not justify a failure to treat those committed following acquittal.

116 60 N.J. at 213, 287 A.2d at 720, where the court stated:

> Indeed, an offender may fare better as bad than as sick, for, if merely bad, his maximum term may be limited even though his disposition for badness may continue, whereas, if he is adjudged sick, he may be confined for his remaining years.

In this area, the courts would greatly benefit from clinical research geared toward evaluating dangerousness.[117]

That aspect of the decision pertaining to the defense of insanity presents a realistic approach to the problem of criminal responsibility under *M'Naghten*. Where testimony clearly demonstrates the existence of serious mental impairment, the fact that a psychotic episode may have been triggered by an obscure voluntary act should not provide the basis of positing culpability.

Too much attention, however, has been placed on the area of responsibility in the psychiatric-legal dichotomy,[118] and this decision evinces the necessity for future emphasis on the area of commitment and treatment. The burden of going forward would now seem to be shifted to the legislature.

Stephen S. Robbins

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117 *See* Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxtrom Patients: 1966-1970*, 129 AM. J. PSYCHIATRY 304 (1972), for a more recent article discussing the necessity for more longitudinal research to aid in the clinical determination of dangerousness by studying the characteristics of the criminally insane.

118 Robitscher, *The New Face of Legal Psychiatry*, 129 AM. J. PSYCHIATRY 315, 318 (1972):

> Although criminal responsibility remains interesting and although it represents complicated moral and philosophical questions that underlie all phases of social-legal psychiatry, it has not deserved the 90 percent of the attention that it has received.