

be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."²¹

As early as 1838, Isaac Ray, one of the founders of the American Psychia-

tric Association, in his now classic *Medical Jurisprudence of Insanity*, called knowledge of right and wrong a "fallacious" test of criminal responsibility.²² This view has long since been substantiated by enormous developments in knowledge of mental life.²³ In 1928 Mr. Justice Cardozo said to the New York Academy of Medicine: "Everyone concedes that the present [legal] definition of insanity has little relation to the truths of mental life."²⁴

Medico-legal writers in large number,²⁵ The Report of the Royal Commission on Capital Punishment 1949-1953,²⁶ and The Preliminary Report by the Committee on Forensic Psychiatry of the

Mentally Defective Offenders, 43 J. Crim.L., Criminology & Police Sci. 312, 314. (1952).

21. 8 Eng.Rep. 718, 722 (1843). "Today, Oregon is the only state that requires the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt. Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion." Leland v. State of Oregon, supra, note 20, 343 U.S. at page 798, 72 S.Ct. 1002. Since Davis v. United States, 1895, 160 U.S. 469, 484, 16 S.Ct. 353, 40 L.Ed. 499, a contrary rule of procedure has been followed in the Federal courts. For example, in compliance with Davis, we held in Tatum v. United States, supra, note 8, 88 U.S.App.D.C. 386, 389, 190 F.2d 612, 615, and text, "as soon as 'some evidence of mental disorder is introduced, * * * sanity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt.'"

22. Ray, *Medical Jurisprudence of Insanity* 47 and 34 et seq. (1st ed. 1838). "That the insane mind is not entirely deprived of this power of moral discernment, but in many subjects is perfectly rational, and displays the exercise of a sound and well balanced mind is one of those facts now so well established, that to question it would only betray the height of ignorance and presumption." Id. at 32.

23. See Zilboorg, *Legal Aspects of Psychiatry in One Hundred Years of American Psychiatry 1844-1944*, 507, 552 (1944).

24. Cardozo, *What Medicine Can Do For the Law* 32 (1930).

25. For a detailed bibliography on Insanity as a Defense to Crime, see 7 *The Record of the Association of the Bar of the City of New York* 158-62 (1952). And see, e. g., Alexander, *the Criminal, the Judge and the Public* 70 et seq. (1931); Cardozo, *What Medicine Can Do For the Law* 28 et seq. (1930); Cleckley, *the Mask of Sanity* 491 et seq. (2d ed.1950); Deutsch, *The Mentally Ill In America* 389-417 (2d ed.1949); Glueck, *Mental Disorder and the Criminal Law* (1925), *Crime and Justice* 96 et seq. (1936); Guttmacher & Weithofen, *Psychiatry and the Law* 218, 403-23 (1952); Hall, *Principles of Criminal Law* 477-538 (1947); Menninger, *The Human Mind* 450 (1937); Hall & Menninger, *"Psychiatry and the Law"—A Dual Review*, 38 Iowa L.Rev. 687 (1953); Overholser, *The Psychiatrist and the Law* 41-43 (1953); Overholser & Richmond, *Handbook of Psychiatry* 208-15 (1947); Ploscowe, *Suggested Changes in the New York Laws and Procedures Relating to the Criminally Insane and Mentally Defective Offenders*, 43 J.Crim.L., Criminology & Police Sci. 312, 314 (1952); Ray, *Medical Jurisprudence of Insanity* (1st ed.1838) (4th ed.1860); Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease*, 63 Yale L.J. 183 (1953); Weithofen, *Insanity as a Defense in Criminal Law* (1933), *The M'Naghten Rule in Its Present Day Setting*, Federal Probation 8 (Sept. 1953); Zilboorg, *Mind, Medicine and Man* 246-97 (1943), *Legal Aspects of Psychiatry*, American Psychiatry 1844-1944, 507 (1944).

26. Royal Commission Report 73-129.