

*Spring 1968*

### Rita James Simon, *The Jury and the Defense of Insanity*

Max Cohen

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

---

#### Recommended Citation

Max Cohen, *Rita James Simon, The Jury and the Defense of Insanity*, 2 Val. U. L. Rev. 398 (1968).  
Available at: <https://scholar.valpo.edu/vulr/vol2/iss2/10>

This Book Review is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



**THE JURY AND THE DEFENSE OF INSANITY.** By Rita James Simon.  
Boston: Little, Brown and Company. 1967. Pp. xiv, 269. \$10.00.

Mrs. Simon has written an extremely provocative study which marks the beginning of a worthwhile experiment. She describes her text as a "Social psychological study of a legal institution: the American jury system . . . involving the defense of insanity."

Mrs. Simon obtained the transcripts of two actual cases that had been tried and decided. The transcripts were then edited and condensed from a trial that lasted two or three days to one that could be heard in sixty to ninety minutes. The experimental trials were then tape recorded.

The two cases presented two distinct factual situations, one involving a charge of housebreaking and the other a charge of incest.

Juries were selected with the cooperation of presiding judges from three jurisdictions: Chicago, St. Louis and Minneapolis. Their services were not voluntary; it was part of their regular period of jury duty. The jurors listened to the recorded version of the trial. Each jury was then asked to deliberate and reach a verdict.

The deliberations of the respective juries—thirty juries were used in the housebreaking case and sixty-eight in the incest case—were analyzed with respect to the impact of the jury's response to legal rules defining insanity and the jury's assessment of the psychiatric testimony. A study was also made on the influence of social status and attitudes of the individual jurors as affecting their results.

Mrs. Simon is quick to acknowledge that the experimental technique and design employed in this study are subject to some readily apparent criticisms. One obvious criticism is that the verdicts of her experimental juries cannot be regarded as valid, since the jurors were not deciding the fate of a defendant but were merely playing a game. This is met by the response that the recordings of the deliberations of the respective juries demonstrate that the juries accepted their responsibility seriously and rendered their verdict in the same fashion as if they were deliberating an actual case. While the appendix, which records the deliberation of a specific jury, demonstrates that the discussion was lively and spirited, one cannot completely accept the author's contention that the experimental nature of the case made no significant difference.

Most trial lawyers would agree that the most adamant juror in a criminal case is the one who espouses a "not guilty" verdict. The experimental juror who favors a not guilty verdict and who is in a distinct minority is much more inclined to yield to the persuasion of the

majority, since acquiescence to that majority will not result in the actual conviction of a real defendant.

Perhaps the most significant objection to the validity of the results of the study lies in the fact that the experimental jurors listened to a taped recording of the trial which lasted only sixty to ninety minutes. This method deprived the jurors of the opportunity to assess or evaluate the testimony of a witness by observing the demeanor of that witness. Judges and lawyers have long agreed that in many instances the appearance and demeanor of a witness can be pivotal in the outcome of any given case. This is not merely a part of the trial folklore. Post-trial discussions with jurors, not only in this writer's experience but the experience of innumerable other trial lawyers, demonstrate that the demeanor and appearance of a witness on the stand play a significant role as to the weight the jury attaches to the testimony of that witness.

Condensation of the experimental trial, reducing a two or three day trial into a sixty or ninety minute tape, is also unrealistic. The editing of the original transcripts consisted primarily of deleting repetitious testimony; that is, if more than one witness was incorporated in the recording. Tedium and boredom in the trial of any lawsuit is the rule rather than the exception. The drama, if any, in the trial of a lawsuit is usually confined to the testimony of one or two pivotal witnesses and in the summation of counsel. By capsuling two or three days of testimony into sixty or ninety minutes, the impact of the boredom experienced by the jurors is no longer a factor.

The two factual situations involving the defense of insanity which were presented to the experimental jurors represent a poor choice. The defense of insanity is most often raised in homicide cases. It is indeed peculiar that this did not occur to the author. Assuming that the experimental jurors could project themselves into the same mood and temperament as if they were deciding the fate of an actual defendant, and assuming that the capsuled recorded version of the trial would not significantly affect their deliberations, the choice of defendants, a thief and sexual pervert asserting the defense of insanity, is not representative.

In the case of the thief, the experimental jurors' deliberations must necessarily be clouded by the ordinariness of the criminal act. In the case of the sexual pervert, the experimental jurors must necessarily be appalled by the atrocity of the criminal act. Had the author selected a factual situation in which the criminal act was murder, the results would not only have been more significant, but would have had more validity. Nevertheless, the study was worthwhile and the conclusions reached cannot be ignored.

One of the procedures employed in the study was to instruct one

experimental jury under the McNaghten rule<sup>1</sup> another experimental jury under the Durham rule<sup>2</sup> and to give no instruction to a third. In the latter version the jury was merely told "if you believe the defendant was insane at the time he committed the act of which he is accused, then you must find the defendant not guilty by reason of insanity."

In the housebreaking case, ten experimental juries were instructed under the McNaghten rule, ten under the Durham rule, and ten uninstructed. The McNaghten juries were the most favorable to the defendant, voting seven acquittals and one deadlock. The uninstructed juries voted six not guilty, one hung jury. To everyone's surprise, including Mrs. Simon, the Durham juries were more unfavorable to the defendant, voting four acquittals, three convictions, with three juries deadlocked.

The McNaghten rule, as every law student knows, defines legal insanity as :

Whether on the whole of the evidence you are satisfied at the time the act was committed that the defendant had that competent use of his understanding as that he knew that he was doing by the act itself a wicked and a wrong thing . . . if on balancing the evidence in your minds you think the defendant capable of distinguishing between right and wrong then he was a responsible agent and liable to all the penalties the law imposes . . .<sup>8</sup>

The Durham rule, which was generally regarded by bench and bar as a significant advance in expanding and modernizing the concept of legal insanity, is defined as :

If you believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the criminal act but believe beyond a reasonable doubt that the act was not the product of such mental abnormality you may find of such mental abnormality you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition or that the act was not the product fo such abnormality you must find the accused not guilty by reason of insanity . . . he would still be

---

1. McNaghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

2. Durham v. U.S., 214 F.2d 862.

3. Queen v. McNaghten, 4 Rep. State Trials (n.s.) 925 (1839).

responsible for his unlawful act if there was no causal connection between such mental abnormality and the act.<sup>4</sup>

Thus the Durham juries, who had the benefit of the so-called enlightened rule on legal insanity, returned the most convictions and demonstrated the most confusion. The author attributes this "lack of clarity" to the smallness of the sample.

The surprising results in the housebreaking case, this writer submits, are primarily attributable to the factual situation involved. One does not ordinarily associate insanity with thievery. The comparative results of the experimental juries in the incest case are much more meaningful.

Of the total of sixty-eight experimental juries used in the incest case, twenty-two were uninstructed, twenty were instructed under the McNaghten rule and twenty-six under the Durham rule. The McNaghten juries deadlocked once and voted nineteen convictions. The uninstructed juries voted four acquittals, fourteen findings of guilt, with four hung juries. The Durham juries voted five not guilty, fifteen guilty, with six hung juries.

The findings in this portion of the study demonstrate that under the McNaghten rule jurors are less likely to acquit the defendant on grounds of insanity than they are under the Durham rule. One may, however, question the validity of these findings. The McNaghten jury faced with the problem of a sexual pervert experienced little difficulty in finding that the defendant did know right from wrong—this is understandable.

The loathsomeness of the criminal act in the incest case had to be a decisive factor in the deliberation of the McNaghten juries. All of us know that incest is wrong; therefore, under the right or wrong test, it would have been, as a practical matter, mandatory for the defendant to prove beyond a reasonable doubt that he did not know right from wrong. There would necessarily have been a subconscious shifting of the burden of proof. The McNaghten juries would, therefore, tend not to require the prosecution to prove beyond a reasonable doubt that the defendant knew right from wrong, but to require the defendant to prove at least by a preponderance of the evidence that he did not know right from wrong.

The wide divergence between the results of the McNaghten juries and the Durham juries may not have been manifest had the subject matter of the alleged crime been homicide rather than incest. One would hope that further studies in this area would be made in that direction.

Judges and trial lawyers will find some comfort in the analysis of the verdicts as to the social status of the jurors. The breakdown affirms

---

4. 214 F.2d at

to a large extent the belief that jurors with advanced educations are unfavorable to a defendant, lower income groups are more likely to favor the defendant, housewives are generally more sympathetic to the defendant, and Negroes are more willing to acquite the defendant than are jurors in all other ethnic categories.

If there is one salient feature that this book demonstrates it is the confusion, lack of predictability and archaicness of medico-legal concepts of insanity. The law is continually searching for fixed and objective standards in an area where the practioners of the art, the psychiatrists themselves, frequently find their positions poles apart.

It is quite common in the trial of criminal cases in which a defense of insanity is interposed to have not one but several confilcting opinions of so-called medical experts as to the sanity of the defendant involved. Until our brothers in the medical profession provide us with more meaningful and comprehensible standards of what constitutes insanity, we will continue to have this diffuse area of confusion and uncertainty. The Durham rule is a step forward ; it is by no means the ultimate solution.

MAX COHEN\*

---

\* Member of the Indiana Bar.