

Revised as C. 7 (1970)

Chapter 8

As I sat brooding of a Sunday afternoon on my high river bank a trout rose in the pool below me and I watched <sup>beadily as</sup> ~~with the~~ <sup>avidity of</sup> an otter the mysterious unfolding ring, but I could not move, being at the moment in the grip of insanity--legal insanity, that is. Could we possibly defend Randall Kirk--I kept turning over in my mind--under the spacious ~~of~~ <sup>leaky</sup> umbrella of legal insanity?

As a battered ex-DA I knew that criminal responsibility in our society had for centuries been bottomed on the notion-- at least ~~partly~~ <sup>partly</sup> religious in its inspiration and rationale-- that a sapient human being, exercising free moral choice, chose consciously to do wrong rather than right. And if Randall Kirk had no recollection of killing Connie Spurrier did not his situation contain at least one of the crucial elements in a successful plea of insanity, namely, a lack of conscious wrongdoing? Wasn't there something inherently addled and unbalanced about a man who could calmly snuff out the life of a woman he said he adored?

I knew that while insanity was one of the chanciest and prickliest defenses in the whole broad arsenal of criminal defenses, that at least when it worked it possessed the enormous utility of being one of the most effective of all: it was a total defense. In this it was akin to the claim of self-defense in the realm of homicide; the two differed in that self-defense claimed justification, insanity excuse; in the former the defendant came into court saying in effect, "Yes, I killed the deceased but I had to in order to save my own life" while in the other he said, "I may have killed him, granted, but I didn't know what I was up to or that it was wrong, so please kindly excuse me."

Put another way, every punishable crime required two things, a criminal act done with criminal intent; if either ingredient was lacking the accused could not be held responsible. Just as self-defense went to the first element so too did alibi: "I couldn't possibly have done it because I wasn't there" while insanity went to the second: "I may have done it but I really didn't mean to be mean." All this was elementary, of course, apparent to even a moderately savvy first-year law student.

The rub came when one tried to apply the defense of insanity to the "facts" in a particular case--especially when one's client couldn't remember what happened and his lawyer wasn't sure what those facts were.

All we really knew about our case so far was largely negative: that Randall Kirk, if he killed Connie Spurrier and if he was telling the truth, had apparently no recollection of what he did or why he did it. Did this curious state of affairs suggest any possible legal defense? I didn't know but at least I knew that I didn't know. I also knew that no lawyer could <sup>possibly</sup> carry all the law in his head and that those who tried tended to wind up sitting pensively in institutional rocking chairs. Old Parnell had recently put it this way: "Nobody can teach or learn all the law," he had declaimed. "All any law school can possibly do is help an aspiring lawyer to think like one." And so I sat of a Sunday perspiring in my waders trying to think like one.

It took no massive cerebation on my part to discern that the subject of amnesia loomed large in our case and that research

into it as a possible legal defense was rather clearly indicated.

But <sup>if</sup> Randall Kirk had killed Connie Spurrier--an active, healthy, life-loving outdoor woman--he must also have possessed considerable muscular control and coordination when he did it, which in turn suggested some form of ~~ambulant~~ sleepwalking.

And if he couldn't remember what he'd done possibly he'd done it unconsciously. So it seemed possible that amnesia, somnambulism and unconsciousness were smack in the middle of our case. In

fact a fatigued Parnell and I had tentatively concluded as much only hours before <sup>during our pre-dawn conversation</sup> in our office <sup>after Doc Salter had left</sup> after <sup>old</sup> Doc Salter had left.

Were any of these things ever a defense to crime? Again we didn't know. All we possessed was a vague and professionally acquired inkling of where one might begin to look. But first I had to consider and weigh the possible defense of insanity, about which I did know something. I had to for a number of reasons, one being that if we were going to invoke the defense we would have to notify the prosecution in advance, <sup>for</sup> another, ~~big one~~ being that we dared not risk spreading and diluting our defense efforts in the amiable blunderbuss fashion of old Amos Crocker. Only he

could blandly try to persuade a jury that his client was crazy  
~~as a loon~~ and ~~merely~~ walking in his sleep...And after all it  
was not only smart but common courtesy for a lawyer to offer  
a jury a decent way to spring his client while still saving  
face...

So I was back grappling with insanity, about which I was  
wryly aware that in criminal cases where insanity was pleaded  
as a defense most jurisdictions still applied the "right and  
wrong" test of the famous and controversial M<sup>g</sup>Nahten's Case,  
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historic advisory opinion bluntly laid down that thenceforth  
the sole judicial test of mental responsibility for crime was  
whether the accused--I had learned the magic phrase by heart,  
even to the English spelling--"was labouring under such 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." I also knew that  
during the long years of its subsequent judicial application the

test of M'Naghten had become one of the most controversial and bitterly criticized in the whole tangled forest of criminal law.

I knew further that in Michigan--unlike in most northern states--there was clear legal authority for invoking the related defense of "irresistible impulse"--though in current psychological jargon it was more often called "dissociative reaction"--a doctrine designed to relieve against the claimed rigors of the traditional "right or wrong" test of M'Naghten's Case; and that when a defendant pleaded "irresistible impulse" he was in effect *saying:*  
~~say~~ "Yes, I admit I knew I was doing wrong, but, alas, in my addled mental state I simply couldn't resist doing it."

I was further aware <sup>that</sup> the irresistible impulse and all the other enlightened legal devices designed to relieve against the claimed simplistic harshness of the prevailing "right and wrong" doctrine of M'Naghten--and there were many such devices-- pretty well boiled down to the proposition that the rule of M'Naghten too much ignored the realities of modern psychological knowledge and progress; that it isolated and capriciously rewarded but one type or symptom of mental aberration--only that fortuitously

involving moral blackout; and that consequently it tended unduly to restrict, distort, and ultimately pervert medical testimony on the issue of insanity, making a forensic "game" out of it; and that, worst of all, if justice dictated that a mentally afflicted person who didn't know he was doing wrong deserved to be excused, perhaps that was all the more reason for pitying and excusing the poor tormented bastard who knew he was doing wrong but still couldn't help doing it. And so the battle raged...

I sighed and stirred in my hot waders and lit an Italian cigar. These esoteric ruminations on the ramifications of legal insanity were depressing me. And anyway how did any of this apply to the situation of poor Randall Kirk who had simply forgot that he had strangled his lady love and who moreover was presently manifestly as sane as, say, our own shrewd Judge Maitland?

I thought of my client sitting in his stinking cell poring over his Sunday papers and rummaging <sup>despondently</sup> in his paper bag. How could we possibly make out a plausible case of insanity for a man who could only keep telling the jury he couldn't remember? But a conscientious lawyer had to explore the legal waterfront, hadn't he?

Especially when he had only the ~~grossest~~<sup>haziest</sup> idea concerning the efficacy of any possible alternatives?

Another and bigger trout rolled below me but still I did not stir; this time I was in the midst of exploring some of the reasons why we shouldn't plead insanity in the case of People versus Randall Kirk. Let's see...One, because in the present state of our case we lacked sufficient data; two, because under the law we would have to give the prosecution advance notice of our defense and thus tip our hand; three, and perhaps most serious, because all defendants pleading insanity in Michigan took a calculated risk because the state law provided, as did that of most states, that a defendant who was acquitted on such grounds might nevertheless be held and hospitalized indefinitely--  
X a legislative device calculated <sup>both protect the public and</sup> to discourage phoney pleas of insanity; four, because under an insanity plea the trial could rapidly become reduced to an expensive and uncertain war of opposed psychiatrists; five, because of the growing skepticism toward and reluctance of juries over allowing the defense; six,



because, win or lose, of the lasting stigma frequently haunting those who invoked the defense; seven, because--coming full circle-- we lacked at the moment sufficient data to risk making such a chancy defense...

A tremendous splash in the pool below <sup>me</sup> shattered my reveries, and I grabbed up my fly rod and plunged down the steep bank accompanied by a shower of sliding gravel. I waded in knee-deep below the rise, my boots suddenly clamping tight against my <sup>chilled</sup> ~~lower~~ legs, busily paying out line in false casts until I had his range. Then I hauled back for the crucial cast and, accompanied by a wee prayer, sent the little dry fly out on its way. X

The singing line sped forward, undulant as a fleeing serpent, and then the leader lazily folded over beyond it as languid as the unfolding gesture of a ballerina's arm, the fly lighting beyond everything gently as a tuft of thistledown. There it circled uncertainly for a moment and then bravely began its float, and then the thing was indecently simple--the trout rose and kissed it, I flicked my wrist, and the battle was on.

First the fish went deep, boring powerfully upstream, the leader cleaving the water taut and vibrant as the plucked string of a harp; then in his fury he turned and rushed my way and I swiftly retrieved line to keep precious tension; then he saw me and darted cross-stream, then crazily headed downstream, crossing obliquely back on my side, almost charging up on the gravelly shore; then he gallantly tore past me upstream with such dizzying speed that I apprehensively started to run <sup>after</sup> ~~with~~ him...

Suddenly the mighty fisherman slipped and performed a curious *shot into the air, poised <sup>there</sup> for a moment in a kind of suspended swan dive, matinee dance and then fell abruptly on his can, over his waders, <sup>splashing and</sup> emerging gasping just in time to hear the faint ping of his leader and see his line go slack.* *got a cramp in his leg and* *and then (crashed)*

I had lost him...

I stood there looking and dripping and then I saluted the river with my rod. All was not lost; at least for several precious moments Randall Kirk and his case had been banished from my conscious mind. Even, <sup>↓</sup> poetically <sup>^</sup> I thought, M'Naghten had been forgotten. Then I sighed and <sup>limped across</sup> ~~crossed~~ the river and sloshed and squished my way back to my car where I knew I would

find dry clothes and plenty of wet bourbon. It had been a  
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Rewritten as C. 7.

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find dry clothes and ~~plenty~~ of wet bourbon. It had been a  
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2nd  
1/29/70

1 draft,  
please

Chapter 7

"Are you thinking of making <sup>some sort of</sup> insanity plea?" Parnell inquired, stifling a yawn.

"Sort of," I said, <sup>spreading my hands.</sup> "What other chance has the poor bastard ~~got~~ got?"

"Beats me. Let's kick it around a little."

didn't

helplessly "Let's," I said, and tired as we were, we talked on and on, exploring the <sup>tangled subject of the</sup> ~~art~~ <sup>defense of</sup> insanity in criminal <sup>under law</sup> ~~cases~~ and its possible application to my ~~own~~ <sup>case</sup>. For in solemn truth a lawyer with a big case on his hands is like a man newly fallen in love: the thing <sup>utterly absorbs</sup> ~~obsesses~~ him, and whether he is bathing or shaving, drafting a lease or dropping a drink, fishing or even fornicating, <sup>every waking hour</sup> all the while he is <sup>obsessed</sup> ~~obsessed~~ by his lovely baffling <sup>goddamn</sup> case and how he might win it. And ~~then~~ when ~~he~~ <sup>he</sup> finally sleeps it haunts his dreams.

a bit of a pedagogue at heart,  
Parnell, ~~began by pointing out what we~~  
~~both knew~~ was <sup>also</sup> a stickler for getting down to the  
base fundamentals of any new legal situation, and so  
he began by reviewing what we both <sup>well</sup> knew, namely,  
that while [ Here go to P. 2  $\frac{1}{2}$  \* pick up with  
word "inamir." ]



1st  
1/28/70.

Chapter 7

helplessly

"Offhand it <sup>some sort of</sup> ~~looks like an insanity plea is~~ the man's only chance," Parnell said, stifling a yawn, whereupon, tired as we were, the two of us talked on and on about our enigmatic new case. For in <sup>solenn</sup> truth a lawyer with a big case on his hands is like a man newly fallen in love: the thing obsesses him, and whether he is shaving or bathing, drafting a lease or downing a drink, fishing or <sup>even</sup> fornicating, eternally he is haunted by his lovely baffling goddam case and how he might win it.

"You may be right, Parn," I agreed. "Let's

explore it a little" ~~Mostly but I'll be~~

Start

Both Parnell and I knew that while insanity was one of the chanciest and prickliest defenses in criminal law <sup>it was</sup> ~~that~~ when it worked ~~it~~ also one of <sup>best in that it was</sup> ~~possessed~~ the enormous utility of being a total defense. In this it was akin to the claim of self-defense in the realm of homicide; they differed in that self-defense claimed legal justification, insanity <sup>and</sup> excuse, that in the former the accused came into court in effect saying, "Yes, I killed the deceased but I had to in order to save my own life" while under ~~an~~ insanity ~~plea~~ he <sup>was instead</sup> in effect saying, "Look, I may have killed him," granted, but I didn't know what I was doing or that it was wrong."

"Or to put it another way, pard," I chimed in, "every punishable crime requires two things, ~~one~~, a criminal act done with, ~~them~~, a criminal intent, and if either ingredient is lacking there can be no criminal responsibility."

"Very good," Parnell said, spurring me on.

"And ~~and so~~ first as self-defense goes to the first element of any crime -- the criminal act -- so too does alibi in which the accused in effect says: 'I couldn't possibly have committed ~~the~~ any crime <sup>folks</sup> because I wasn't there' so insanity goes to the second element, the criminal intent, where he in effect says: 'I may have done it, folks, but I didn't mean to be mean.'"



for making possible  
our chances, the defense of  
"How about irresistible impulse?"

Parnell put in at about this stage in our  
application. ~~the defense~~ In Michigan, this was  
a defense under the general defense of insanity, ~~in~~  
under which the accused in effect argued: "Yes, I know  
I killed the deceased and at the time I knew it was  
wrong but due to ~~the~~ <sup>my</sup> mental state ~~in~~ I simply  
couldn't resist doing it."

If we knew that

The doctrine was aimed at ameliorating the  
alleged harshness of the "right and wrong" insanity  
test, still prevailing in most states, inherited from  
England in 1843 in the following the advisory opinion

(in <sup>modern</sup> psychological circles more often called  
"dissociative reaction")

If we also  
Parnell and I know that the defense  
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the ~~the~~ House of Lords <sup>in an historic</sup> <sup>advisory opinion</sup> laid down that  
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doing what was wrong."

English

M'N  
not

Mc

We also knew <sup>two</sup> that <sup>still</sup> other jurisdictions had invented other legal pleas and devices aimed at relieving against the claimed simplistic harshness of the prevailing "right and wrong" test, most of which stemmed from the <sup>growing</sup> belief and ~~led down to the~~ proposition that the classic rule of M'Naghten too much ignored modern psychological knowledge and progress; that it isolated and capriciously rewarded but one type or symptom of mental aberration -- only that which fortuitously involved moral blackout; ~~and~~ <sup>and</sup> that consequently it tended to distort, restrict and ultimately pervert medical testimony on the issue of insanity, making a forensic game out of it <sup>as well as</sup> and ~~heard out~~ <sup>heard out</sup> of the witnesses ~~those~~ <sup>many</sup> who testified, perhaps

Finally we knew that <sup>the gravest charge</sup> of all against the "right and wrong" <sup>of insanity</sup> test was that if <sup>under M'Naghten</sup> a mentally afflicted person who didn't know he was doing wrong deserved to be excused from his crime, <sup>as the rule permitted,</sup> wasn't that all the more reason for pitying and excusing the poor tormented bastard who knew he was doing wrong yet still genuinely couldn't help doing it. And so the battle raged...

"Parn," I finally said, <sup>look at my watch,</sup> "seems to me we still don't know enough about our case or our man to make any decision on insanity <sup>or</sup> irresistible impulse." "Agreed," he said, "Pretty hard slidding to have <sup>who claims his mind was blank also</sup> ~~our~~ man try to claim he couldn't help doing what he did."

"Seems to me one of our big research problems, ~~is to find~~ I continued, "is to find out whether amnesia is ever a defense to crime, either generally or under a plea of insanity."

"Agreed. And if he killed her by strangling; ~~and~~ she, <sup>being</sup> a healthy outdoor gal and all, he must have possessed considerable muscular control -- right?"

"Right," I said, "which in turn may suggest some form of sleepwalking."

"And if he can't remember what he did maybe he did it unconsciously."

"Yes," I <sup>said</sup> ~~agreed~~, making no attempt to get up. "So maybe not only amnesia but <sup>some form of</sup> somnambulism and unconsciousness are smack in the middle of our case. Who's for bed?"

"Agreed," Parnell said, waving me <sup>back</sup> down. "But before we disband let's wrap up what we may have going for us if we ~~do~~ <sup>should</sup> make an insanity plea."

either generally or under a plea of insanity!

~~"Agreed again, But before learning insanity  
doesn't we have at least this, that if our man truly  
had no recollection of killing his lady love  
let's review briefly what we do have going for  
us."~~

"Let's have it," I said.

"Proceed," isn't it elementary

western "First, (that criminal responsibility in  
our society is bottomed on the <sup>venerable</sup> notion that a  
sapient human being, exercising free moral choice,  
consciously chooses to do wrong rather than right?"

<sup>it</sup>  
"Yes," "Certainly no," I said.

"So that if our man truly had no  
recollection of killing his lady love doesn't his  
case have at least one of the crucial elements of  
of a successful insanity plea?"

"What's that?"

"Lack of consciously wrongdoing?"

"Seems like, pard," <sup>I said,</sup> "Very good, in fact."

"And isn't there something basically screwy  
and unbalanced about a man who can calmly snuff  
out the life of a woman he says he adored?"

<sup>massive</sup>  
"Rather," I agreed, unsuccessfully stifling  
a yawn and again ~~noticing~~ moving as though to  
arise.

"Just a few more minutes," Parnell begged.  
"Let's take a quick gander at why maybe we shouldn't  
plead insanity. You first."

"Easy," I said, <sup>still</sup> "we don't have enough dope."

8

"Yes, and two, because under ~~our statute~~  
Michigan law, as in most <sup>states,</sup> places, we'd have to give the  
prosecution advance notice of our insanity defense and  
thus tip our hand."

"And <sup>that way</sup> ~~also~~ alert the other side to <sup>gather and</sup> prepare  
rebuttal medical and other testimony on the issue."

"True, Paul, and maybe worst of all because  
Michigan law, <sup>as in</sup> like that of most states, provides that ~~all~~  
<sup>any</sup> dependants acquitted on their <sup>own</sup> successful plea of insanity  
may nevertheless be held and hospitalized indefinitely --  
a legislative device calculated, as you ~~to~~ know, to protect  
~~the public~~ the public and to discourage  
phony insanity pleas."

"Against that, ~~here,~~ I said, <sup>is that here</sup> "we have the  
rather obvious situation that ~~the~~ our man is not now  
crazy <sup>and</sup>. We could probably block any post-trial  
acquittal detention under <sup>with</sup> "habeas corpus or some such."

"Possibly," Parnell agreed, pushing on. <sup>Still</sup>  
"Further an insanity plea might reduce ~~to~~ the trial to an expensive  
and uncertain war of psychiatrists."

"Yes, and <sup>again</sup> ~~possibly~~ <sup>because juries may</sup> growing skeptical  
of the <sup>insanity</sup> defense, so many of which are phony."

"True, Paul and further because, win or  
lose, <sup>of the</sup> a lasting stigma <sup>that often</sup> ~~may~~ haunts anyone involving  
the defense."

~~I arose, stretching and yawning~~

"Back to you," Parnell prompted me.

"I'm out of gas," I said. "Moreover I'm going  
home. Wanna ride?"

"I'm staying here, boy. See you tomorrow.  
Goodnight, Chat"

"Goodnight,

"I said, lurching on <sup>my</sup> way."

9



I remained silent, instead rising and stretching and heading for the door.

"Back to you," Parnell prompted me.

"I've run out of gas," I said. "Moreover ~~but~~ I'm heading home to the sock. Want a ride?"

"Nope, I'm staying right here, boy. Gonna sleep on your sofa."

"Better ~~come~~<sup>go</sup> home, Parn," I suggested.

"Stayin' here," he repeated, wagging his head. "Goodnight, Chet."

"Goodnight, David," I said, lurching on my way.

*Rewritten & replaced (70)*

Chapter 7

There is a certain high, lonely, wooded, water-blasted river bank overlooking a slow double bend on the Big Escanaba river, one of my favorite places, and that Sunday afternoon I sat there under the tall white pines in my waders, drinking in the sights and sounds and smells--looking at the sweep and rush and glitter of the broad river, listening to its subdued purl and gulp and gurgle mixed with the discreet strum of the pines overhead, smelling the hot resinous odor of the matted cushion of rusted pine needles where I sat--ostensibly looking for trout rises but really brooding about my case.

For in solemn truth a lawyer with a big case on his hands is like a man newly fallen in love: the thing obsesses him, and whether he is shaving or bathing, drafting a lease or downing a drink, fishing or fornicating, eternally he is haunted by his lovely, enigmatic, goddam case and by how in his wooing he might win it.

That Sunday morning I had visited my client at the jail

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2/3/70

2 final in duplicate, please.

Chapter 7

"Are you thinking of making ~~some kind of~~ insanity plea?"

Parnell <sup>politely</sup> inquired, stifling a yawn.

"Sort of," I said, spreading my hands. "What other chance has the poor bastard got?"

"Beats me. Let's kick it around a little."

"Let's," I said, and tired as we were we talked helplessly on ~~and on~~ <sup>so -> instead of going to bed,</sup> exploring the tangled subject of the defense of insanity ~~and on~~ <sup>along on that one</sup>

in criminal law and its possible application to our client. For

in solemn truth <sup>when has new</sup> a lawyer with a big case on his hands is like a

man newly fallen in love: the thing utterly absorbs him, and <sup>general tipilation sets in and</sup>

<sup>what else he may be doing</sup> whether he is bathing or shaving, drafting a lease or downing a

drink, <sup>perchance</sup> fishing or even fornicating, every waking hour he is

obsessed by his lovely baffling goddam case and how he might win

it. And when <sup>finally he falls asleep it dependably</sup> he sleeps ~~it~~ haunts his dreams.

Parnell, a bit of a pedagogue at heart, was ~~also~~ <sup>also</sup> a stickler  
for getting down to the ~~bare~~ <sup>and appreciating</sup> fundamentals of any new legal situ-  
ation, <sup>he faced,</sup> and so he began by reviewing <sup>that which</sup> what we both well knew, namely,  
~~that~~ <sup>the fact that</sup> while insanity was one of the chanciest and prickliest <sup>of all</sup>  
~~criminal~~ defenses in ~~criminal law~~, it was when it worked also one of the  
best in that it was a total defense. In this it was akin to  
the claim of self-defense in the realm of homicide; <sup>the two</sup> they differed  
in that self-defense claimed ~~legal~~ justification, insanity excuse,  
and ~~that~~ <sup>in which</sup> in the former the accused came into court in <sup>substance</sup> effect  
saying, "Yes, I killed the deceased but I had to in order to save  
my own life" while under insanity he was <sup>in effect</sup> ~~instead~~ saying, "Look,  
I may have killed him, granted, but I didn't know what I was  
doing or that it was wrong."

"~~to~~ to put it another way, pard," I chimed in, "every punishable crime requires two things, a criminal act done with a criminal intent, and if either ingredient is lacking there can be no criminal responsibility."

"Very good," Parnell said, spurring me on.

"And just as self-defense goes to the first element of ~~any~~ crime--the criminal act--so too does alibi, in which the accused in effect says: 'I couldn't possibly have committed any crime, folks, because I wasn't there so insanity goes to the second element, the criminal intent, where ~~he~~ in effect says: 'I may have done it, folks, but I didn't mean to be mean.' "

single  
quote →

All this was elementary, of course, readily apparent to even a moderately savvy first-year law student, but Parnell and I also knew that the big rub <sup>after</sup> came when one tried to apply <sup>what was</sup> ~~the~~ essentially <sup>the expert</sup> medical defense of insanity to the "facts" in a particular case-- especially when one's client couldn't remember what happened and his groping lawyers weren't <sup>remotely aware</sup> ~~sure~~ <sup>too sure</sup> what the facts were.

"How about our chances for making the defense of irresistible impulse?" Parnell put in at ~~about~~ this stage in our exploration. In Michigan this was a possible defense under the general defense of insanity in which the accused in effect argued: "Yes, I know I killed the deceased and at the time I <sup>also</sup> knew it was wrong but due to my addled <sup>mental</sup> state I simply couldn't resist doing it."

~~We knew that the doctrine was aimed at ameliorating the alleged harshness of the "right and wrong" insanity test, still prevailing in most states, inherited from England following the advisory opinion.~~

We ~~also~~ knew that the defense of irresistible impulse (in modern psychological circles more often called "dissociative reaction") was aimed at ameliorating the claimed harshness of the <sup>old</sup> "right and wrong" insanity test--still followed in most states--of the famous and controversial English M'Naghten's Case, decided in 1843, wherein the House of Lords in an historic advisory opinion bluntly laid down that thenceforth the sole judicial test of mental responsibility for crime was whether the accused--I had learned the magic phrase by heart, even to the English spelling--"was labouring

under such 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."



We knew too that still other <sup>resourceful</sup> jurisdiction had invented other <sup>still</sup> legal pleas and devices aimed at relieving against the claimed simplistic harshness of the prevailing "right and wrong" test, most of which <sup>improvisations</sup> stemmed from the growing belief <sup>in some legal circles</sup> that the classic rule of M'Naghten too much ignored modern psychological knowledge and progress; that it isolated and capriciously rewarded but one type or symptom of mental aberration—only that which fortuitously involved moral blackout; and that consequently it tended to distort, restrict and ultimately <sup>pervert</sup> ~~medical~~ <sup>expert</sup> testimony on the issue of insanity, making a forensic game out of it as well as liars out <sup>of the medical men</sup> of many who testified.

Finally we knew that perhaps the gravest charge of all against the "right and wrong" insanity test, <sup>is</sup> was that if under M'Naghten a mentally afflicted person who didn't know he was doing wrong <sup>truly</sup> deserved to be excused from his crime, as the <sup>old</sup> rule permitted, wasn't that all the more reason for pitying and excusing the poor tormented bastard who knew he was doing wrong yet still genuinely couldn't help doing it. And so the battle raged...

"Parn," I <sup>finally</sup> said, looking at my watch, "seems to me we still don't know enough <sup>either</sup> about our case or our man to <sup>reach</sup> ~~make~~ any <sup>final</sup> decision on insanity or irresistible impulse."

*The old way*  
"Agreed," he said. "Pretty hard sledding to have a man who  
*a total* blank  
claims his mind was ~~blank~~ also to have a man ~~try to claim he~~  
*claiming he* couldn't help doing what he did."

*first*  
"Seems to me one of our *first* big research problems," I *went on,* continued,  
"is to find out whether amnesia is ever a defense to crime, either  
generally or under a plea of insanity."

*"Parnell said"*

"Agreed, <sup>^</sup> "And if he killed her by strangling, she being a healthy outdoor gal and all, he must have <sup>been ambulant and</sup> possessed considerable muscular <sup>coordination</sup> *and* control—right?"

"Right," I said, "which in turn may suggest some form of sleep-walking."

<sup>then</sup> "And if he can't remember what he did <sup>^</sup> maybe he did it unconsciously."

"Yes," I said, making as though to get up. "So maybe not only amnesia but some form of somnambulism and unconsciousness are smack in the middle of our case. <sup>"I made as though to get up."</sup> <sup>^</sup> "Who's for bed?"

"Agreed," Parnell said, waving me back down. "But before we disband let's wrap up what we may have going for us if we should make an insanity plea."

"Let's have it," I said.

"First, isn't it elementary that criminal responsibility in our Western society is bottomed on the venerable <sup>notion</sup> ~~notion~~ that a sapient human being, exercising free moral choice, consciously chooses to do wrong rather than right?"

"It certainly is," I said.

"So that if our man truly <sup>has</sup> had no recollection of killing his lady love doesn't his case <sup>have</sup> ~~have~~ at least one of the crucial elements of a successful insanity plea?"

"What's that?"

"Lack of conscious wrongdoing?"

"Seems like, pard," I said. "Very good, in fact."

"And isn't there <sup>also</sup> something basically screwy and unbalanced about a man who can calmly snuff out the life of a woman he says he adored?"

"Rather," I agreed, unsuccessfully stifling a massive yawn and again moving as though to arise.

"Just a <sup>little bit</sup> ~~few minutes~~ more," Parnell begged. "Let's take a quick gander at why maybe we shouldn't <sup>ever</sup> plead insanity. You first."

"Easy," I said. "We still don't have enough dope."

"Yes, and ~~two~~ <sup>also</sup> because under Michigan law, as in most states, we'd have to give the prosecution advance notice of our insanity defense and thus tip our hand."

"And that way ~~also~~ alert the other side to gather ~~and prepare~~ <sup>rebuttal</sup> medical and other testimony on the insanity issue," <sup>scame back.</sup>

"True, Paul, and maybe worst of all because ~~under~~ Michigan law, again like that of most states, provides that any defendant acquitted on his successful plea of insanity may nevertheless be held ~~and hospital-ized indefinitely~~ <sup>in a hoosegow euphemistically called a hospital for the criminally insane</sup>—a legislative device calculated, as you know, to protect the public, and to discourage phoney insanity pleas."

"Against that," I said, "is that ~~here we have the rather obvious situation that our man is not now crazy and we could probably block any post-acquittal detention under a writ of habeas corpus or some such.~~" <sup>here,</sup> <sup>we seem to have a</sup> <sup>who</sup> <sup>attempted</sup>

"Possibly," Parnell agreed, pushing on. "Further ~~an insanity plea might reduce the trial to an expensive and uncertain war of psychiatrists.~~" <sup>And making an insanity</sup>

"Yes, and again because ~~juries may possibly be growing skeptical of the insanity defense, so many of which are phoney.~~" <sup>allowing any</sup> <sup>undoubtedly</sup>

"Yes," I ran on, "and because there have been so many <sup>outrageous and</sup> obviously phoney insanity pleas <sup>made</sup> in <sup>the</sup> recent past that skeptical jurors <sup>seem to be</sup> growing reluctant to allow any insanity defense."

"True, Paul, and further because, win or lose, of the lasting stigma that often haunts anyone invoking the defense."

<sup>so</sup> ~~I made no comment but instead~~  
I remained silent, instead rising and stretching and heading

*headed*

~~and stretched and headed~~  
for the door.

*got up and*

"Back to you," Parnell prompted me.

"I've run out of gas," I said. "Moreover I'm heading home to

*pooped and*

the sack. Wanta ride?"

"Nope, I'm staying right here, boy. ~~Gonna~~ sleep on your sofa."

*Paul*

"Sure, but ~~but~~ better you

~~Better~~ go home, Parn," I suggested.

*"I'm stayin' here"*

"~~Stayin'~~ here," he repeated, wagging his head. "Goodnight,

Chet."

*yawning and*

"Goodnight, David," I said, lurching on my way.

Two final, please.

## Chapter 8

The next morning, Sunday, it was nearly noon before I showed up at the county jail, <sup>dressed</sup> in my fishing clothes. <sup>There</sup> I found Sheriff Wallenstein ~~on duty~~ <sup>chatting</sup> with ~~the~~ his day janitor and, after our greetings, I arranged with the sheriff <sup>to let me</sup> henceforth visit my client up in his cell. <sup>It</sup> will save all of us time and bother all around," I told him.

"That it will, <sup>to</sup> Polly," he agreed, "and thanks for suggesting it. Also it won't cost anybody a dime."

Callahan

C. 8, p 1

X

Chapter 7

There is a certain high, lonely, wooded, water-blasted river bank overlooking a slow double bend on the Big Escanaba river, one of my favorite places, and that Sunday afternoon I sat there under the tall white pines in my waders, drinking in the sights and sounds and smells—looking at the sweep and rush and glitter of the broad river, listening to its subdued purl and gulp and gurgle mixed with the discreet strum of the pines overhead, smelling the hot resinous odor of the matted cushion of rusted pine needles where I sat--ostensibly looking for trout rises but really brooding about my case.

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That Sunday morning I had visited my client at the jail



2 final, please.

I remonstrated,

"But aren't you overlooking <sup>jurisdictional</sup> good

Right during

sheriffs like Abe Paquette <sup>to</sup> their time really

"dedicated intelligent <sup>to</sup> guys who really

tried to do a decent job of law enforcement."

"You could count 'em <sup>all</sup> on the fingers of one hand," Parnell <sup>quietly</sup> came back, "and moreover to a man they <sup>quietly</sup> got their ass beat."

He shook his head. "It's the ~~obsolete~~ <sup>obsolete</sup> system that's wrong, not the men who run for sheriff."

the

"It's the obsolete office that's <sup>not</sup> ~~necessarily~~ wrong, not ~~the~~ <sup>necessarily</sup> the men who run for it."