Criminal Law—The Need for a New Conception of Insanity as a Defense to a Crime in Nebraska

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Recommended Citation
Lyman C. Johnson, Criminal Law—The Need for a New Conception of Insanity as a Defense to a Crime in Nebraska, 34 Neb. L. Rev. 690 (1954)
Available at: http://digitalcommons.unl.edu/nlr/vol34/iss4/11
CRIMINAL LAW—THE NEED FOR A NEW CONCEPTION OF INSANITY AS A DEFENSE TO A CRIME IN NEBRASKA

...at a day not far remote the teachings of biochemists and behaviorists, of psychologists and penologists will transform our whole system of punishment.¹

In 1843 a man named M’Naghten, convinced he was being persecuted, attempted to assassinate the Prime Minister of England and killed the Prime Minister’s secretary in the attempt. M’Naghten was acquitted by reason of insanity, but public uproar caused the House of Lords to make inquiry of the judges concerning the law of insanity. The most important answer to that inquiry was that a sane man understands the nature and quality of his acts or knows that they are wrong.²

In 1955, over one hundred years later, a man named Thompson fired five shots at his wife in Omaha, Nebraska; and in reviewing his case, the Nebraska Supreme Court set down in its opinion the M’Naghten formula as the only test of criminal responsibility recognized in this state.³ Though the application of the M’Naghten test was not questioned by the plaintiff in error in the Thompson case, the language of the court leaves little doubt as to its adherence to the formula.⁴ It is the purpose of this arti-

¹ Cardozo, Law and Literature 86 (1931).
⁴ One hundred and twelve years later the M’Naghten formula is the sole test of criminal responsibility in 29 states; and in 17 others and in military law it is still the main test supplemented by the irresistible impulse test. Weihofen, Insanity as a Defense in Criminal Law 66 (1933);
icle to scrutinize the tests of insanity being used by other state
courts and to determine the advisability of the continued use of
the M'Naghten test in Nebraska.

I. HISTORICAL DEVELOPMENTS OF THE TESTS OF INSANITY

In 1843 when the M'Naghten rule was established, society had
not yet completely repudiated the ancient concept that the men­
tally ill were possessed of demons and self-made victims of evil
passions. As late as March of 1862 the Lord Chancellor of Eng­
land stated, "The introduction of medical opinions and medical
theories into this subject has proceeded upon the vicious principle
of considering insanity as a disease."5 The reluctance of courts
to deviate from or repudiate the 1843 test creates glaring in­
justices in capital cases, wherein the accused falls within modern
concepts of mental illness but is guilty under the M'Naghten form­
ula. "The memorials of our jurisprudence are written all over
with cases in which those who are now understood to have been
insane have been executed as criminals."6

Advances of modern science have left the M'Naghten formula
extremely vulnerable to attack. The basic objection to the formula
is that it simply does not fit the modern medical conceptions of
mind and body.7 It is mired in the ancient concept of a compart­
mentized brain wherein reason, memory, love, and hate dwell se­
curely in their own realms. Today, reason is looked upon as only
one of the many integrated, overlapping forces constantly re­
acting within the human brain to various stimuli. The M'Naghten
formula asks society to speculate as to whether, at the moment of
the act, one of these interwoven forces was engaged in evaluating
right and wrong.8

Tulin, The Problem of Mental Disorder in Crime: A Survey, 32 Col. L.
Rev. 933, 940 (1932); authorities collected in Glueck, Mental Disorder
and the Criminal Law 227 (1925); Keedy, Irresistible Impulse as a De­

5 As quoted in Parsons v. State, 81 Ala. 577, 583, 2 So. 854. 857 (1887).
7 Report No. 26, Criminal Responsibility and Psychiatric Expert Testi­
mony, Group for the Advancement of Psychiatry (May 1954).
8 In a vigorous dissent to one of the most exhaustive opinions on legal
tests for insanity in recent years, Chief Judge Biggs declared, "M'Naghten's
case ... assumed the existence of a logic-tight compartment in which the
delusion holds sway leaving the balance of the mind intact... (and) the
criminal retains enough logic in the tight compartment so that from this
sanctuary of reason he may inform himself as to what the other part of
his mind, the insane part, has compelled or permitted the body to do. If
The glaring need for a complete revision of the concepts of legal responsibility is pointed out most vividly in the recent case of *Durham v. United States*.\(^9\) In that case the trial court rejected the defense of insanity because it was not established that the defendant "didn't know the difference between right and wrong," or that he was "subject to an irresistible impulse";\(^10\) and yet, between 1945 and 1951, following his discharge from the Navy for "a profound personality disorder," the defendant, after committing various crimes and attempting suicide, had been confined in a mental institution four times. The appeal court realistically asserted its prerogative, repudiated the archaic M'Naghten rule,\(^11\) and formulated a more scientific and retroactive test for criminal responsibility.\(^12\) The test "is simply that an accused is not criminally responsible if the unlawful act was the product of mental disease or defect."\(^13\) Yet, simple as the test may be, it employs sufficient evidentiary safeguards insofar as it requires two elements to perfect a defense of insanity. First, "some evidence of mental disorder" must be introduced to place the burden of proving sanity beyond a reasonable doubt upon the prosecution, and second, there must be a causal connection between the mental disease and the act.\(^14\) This test has long been effectively used by the courts of New Hampshire which have concluded that other tests only tend to confuse the jury.\(^15\)

While it may be argued that juries of the past, using extensions of the "right and wrong" formula, have reached verdicts similar to those now possible under the "Durham rule,"\(^16\) this is the same portion...knows what the insane part compels or permits the body to do is wrong, the body must suffer for it...obliterating both the good and bad portions as well as the residence of both." United States v. Baldi, 192 F.2d 540, 567 (3d Cir. 1951). This analysis of M'Naghten's rule was also stated in Holloway v. United States, 148 F.2d 665, 666 (D.C. Cir. 1945).

\(^9\) 214 F.2d 862 (D.C. Cir. 1954).
\(^10\) Id. at 865.
\(^11\) See note 8 supra.
\(^12\) D.C. Code § 24-301 (1951).
\(^13\) Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954).
\(^14\) Id. at 866, 875.
\(^15\) State v. Jones, 50 N.H. 369, 393 (1871); State v. Pike, 49 N.H. 399 (1870).
\(^16\) Alabama, as early as 1887, because of "discoveries of modern psychological medicine," modified M'Naghten's rule adding a defense where "duress of mental disease" destroys "the power to choose between right and wrong," and "the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product
hardly a convincing argument against adoption of a new rule which would make substantially certain the uniform rendition of decisions which are more nearly in keeping with the advancement of medical science. The "Durham test" does not exclude "right and wrong" or "irresistible impulse" as factors; rather it adds to these factors such relevant data as the presence of delusions, I. Q., abilities, general comprehension, and mental history.

II. EVIDENCIARY ASPECTS AND EXPERT OPINION UNDER THE DURHAM TEST

Perhaps more important than the factors which are involved in the Durham test is the added opportunity for scientific appraisal of all these factors in the light of modern psychiatric knowledge. Under present tests the psychiatrist must relate his medical data to the defendant's knowledge of right and wrong.17 His answer to the formalized question of right and wrong may establish as legally sane a defendant whom, from his technical insight and examination, the psychiatrist may know to be suffering from a mental condition which contributed to the crime. Under present procedure he is unable to relate or discuss information which he feels is important to any determination of the defendant's criminal responsibility. Only in instances where the defendant suffers a disturbed consciousness or idiocy can the psychiatrist make honest replies to questions under the M'Naghten formula.18 Under the new test the jury is able to make extensive inquiry and the psychiatrist is able to testify upon any relevant point and relate it to the defendant's mental state.19

III. POLICY CONSIDERATIONS

There are increasing indications that if the gulf between psychiatric knowledge and legal tests for criminal insanity continues or offspring of it solely." Parsons v. State, 81 Ala. 577, 2 So. 854 (1887). "The jury must be satisfied that at the time of committing the act, the accused, as a result of disease of the mind... (a) did not know the nature and quality of the act, or (b) did not know that it was wrong, or (c) was incapable of preventing himself from committing it." State v. White, 58 N.M. 324, 270 P.2d 727 (1954).

17 In United States v. Baldi, 192 F.2d 540, 568 (3d Cir. 1951), the dissenting judges of the United States Court of Appeals for the Third Circuit observed that, "The law, when it required 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."

18 Report No. 26, op. cit. supra note 7, at 8.

to widen it will reach a point where such tests will violate the Due Process Clause of the Fourteenth Amendment of the Federal Constitution. The Supreme Court has shown its dissatisfaction with present tests by speaking in 1948 of "law which reflects the most advanced scientific tests and law remaining a leaden footed laggard."20 In 1952, the question was again before the Court to decide the test's due process implications. It was then stated:

The science of psychiatry has made tremendous strides since that test was laid down in M'Naghten's case, but the progress of science has not reached a point where its learning would compel the states to eliminate the Right and Wrong Test from their criminal law.21

It appears, therefore, that the Court is growing impatient with the disparity between definitions of insanity used by the courts and the medical profession. In light of the substantial and constant strides that are being made by psychiatry in the diagnosis and prognosis of human behavior, it is foreseeable that if the various jurisdictions do not alter their present tests of insanity, the Court will prescribe a test which will meet the minimum requirements of the Due Process Clause.

IV. DEVELOPMENT OF THE CRIMINAL INSANITY PROBLEM IN NEBRASKA

In Nebraska progressive but inadequate statutes have been enacted in an attempt to correct the injustices caused by the application of the obsolete M'Naghten formula. In many ways these provisions are effective in mitigating the harsh exclusion of relevant mental data caused by application of M'Naghten's rule, but they are at best a devious route.

A. Prior to Imprisonment

Nebraska law provides that one who becomes "lunatic or insane" after the commission of any crime shall not be put on trial, or if after conviction for any crime shall not be sentenced, or if a capital sentence has been prescribed, execution shall not be imposed until the offender recovers. A commission is set up in the latter case to determine the criminal's sanity.22 The test ap-

21 Leland v. Oregon, 343 U.S. 790 (1952). The majority held an Oregon rule requiring the defendant to prove that he was insane at the time he committed the crime beyond a reasonable doubt was not a violation of the Fourteenth Amendment. Justice Frankfurter in the dissenting opinion points out no change displacing a state's own choice would be justified at "this stage of scientific knowledge... no matter how backward (the present test) may be in the light of the best scientific cannons." (italics supplied).
plied to the defendant under these statutes is whether “his state of mind and mental condition are such that he does not understand, and is incapable of understanding the nature of the proceedings against him and of his impending fate and execution, and therefore is unable, in a rational manner, to offer a defense or make objection to execution.” The term “insanity” as used in the state includes “exhibiting unsoundess of mind; mad; deranged in mind; delirious; distracted.” Though the clarity of the definition may be disputed, the test of capability to understand, defend, and object makes it possible for the defendant to secure a hearing before competent medical experts. Thus it is possible for trial or execution to be indefinitely postponed upon the basis of tests less strict than M'Naghten's rule. It is to be noted, however, that commitment under such circumstances could hardly be conducive to treatment of curable cases; nor does it serve the interest of the state in restoring patients to useful citizen status.

B. During Imprisonment

The Nebraska statutes provide that a mentally ill prisoner can be transferred to a mental institution upon the recommendation of the prison physician and the concurrence of the Penitentiary Medical Board. There are more than thirty prisoners at the Lincoln State Hospital who have been transferred under this procedure. No accurate estimate may be given relative to the number of psychotic inmates now in Nebraska penal institutions; however, the state has a tentative plan to provide for 150 inmates in the “new maximum security” building to be built at the Lincoln State Hospital. This building will house prisoners from the state penal institutions who, because of mental illness, have not been amenable to punishment. Since many of the mentally ill inmates never pose problems or create disturbances, they may go unnoticed by the prison physician. In other cases, because of crowded conditions of the state mental institutions, the con-

23 In re Grammer, 104 Neb. 744, 178 N.W. 624 (1920); In re Barker, 79 Neb. 361, 113 N.W. 197 (1907); Walker v. State, 46 Neb. 25, 64 N.W. 357 (1895).
24 Ibid; Witte v. Gilbert, 10 Neb. 539, 7 N.W. 288 (1880).
25 In re Grammer, 104 Neb. 744, 748, 178 N.W. 624, 626 (1920); Hawe v. State, 11 Neb. 537, 538, 10 N.W. 452, 453 (1881).
28 The author wishes to express his appreciation to Dr. F. L. Spradling, Superintendent of the Lincoln State Hospital who gave generously of his time to discuss this problem.
currence of the State Penitentiary Medical Board is not always forthcoming.

While it is recognized that these figures include mentally ill inmates whose condition arose subsequent to imprisonment, it is likewise possible that many of these inmates were within the Durham test at the time of trial. This conclusion is substantiated by a study made at the Eastern State Penitentiary in Philadelphia from 1931 to 1941 which disclosed that one out of every forty-two felons sentenced there, was either mentally disordered to a committable degree at the time of confinement or developed such a condition while imprisoned.29

Under the inadequate screening procedure existing in Nebraska, such men and women, upon completion of sentence, are once more free in a society they are no more fit to cope with than before.

C. Collateral Problems

One further problem may be briefly considered. Many defendants, not faced with extreme punishment, decline to plead insanity because they prefer the statutory sentence instead of possible extended commitment to a mental hospital following an acquittal because of insanity.30 It is possible, therefore, for a defendant with a recorded background of mental illness, by not pleading insanity, to secure a short prison sentence, rather than a longer period of commitment in a mental institution. This is directly contrary to the interests and intentions of the state and society exemplified by the state statute which gives first priority to room in state hospitals to "...patients whose care in the state hospital is necessary in order to protect the public health and safety..."31 This problem could be alleviated by setting up a procedure such as the one followed in Massachusetts.32 Under the Massachusetts procedure every person indicted by a grand jury for a capital offense, or previously indicted for any other offense more than once, or previously convicted of a felony is examined by the state to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. A report of this investigation is filed with the clerk of the court and made available to the court, probation officer, and attorneys for both parties.33 This procedure could be

33 See Glueck, Crime and Correction, 36 Yale L.J. 632 (1927).
used most effectively by courts following the Durham rule, with its broad scope of investigation and liberal concept of criminal responsibility, to place offenders, whose eventual release would be a danger to society, in mental institutions.

V. CONCLUSION

It is submitted that the "strict" rule now applied in Nebraska under the M'Naghten formula does not have the restrictive effect sought. In use its effect is only to thwart those who seek a valid insight into the defendant's acts. It is unfair to those whom we now know scientifically to be mentally ill because it applies an outworn concept of insanity which may soon be so obsolete as to violate the Fourteenth Amendment. It is hindering the treatment of curable cases of mental illness. Finally, it makes it possible for persons dangerous to society because of mental disease or defects to be released into the population. A more sure method of dealing with these cases and eliminating the evils now present is offered in the Durham rule in conjunction with examination procedures similar to those followed in Massachusetts.

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