



South Dakota Legislative Research Council

Issue Memorandum 96-13

THE EVOLUTION OF THE INSANITY DEFENSE: JURIES ADRIFT IN THE REALMS OF PSYCHIATRY AND SEMANTICS

Introduction

In recent years the American public has had ample cause to be concerned about a wide range of criminal justice issues. Juvenile violence, the war on drugs, rising levels of incarceration, and a persistently high felony crime rate represent compelling and difficult policy debates that more than justify serious public response. But few jurisprudential questions can match the persistency of society's continual attempts to wrestle with and resolve the enigma of the criminally insane. For centuries, the courts have struggled to reflect compassion for those unfortunates who suffer from mental illness while at the same time protecting the peace and safety of the general public from criminal acts whether committed by the truly insane, the socially dysfunctional, or, worse, the cynically criminal who often attempt to hide behind the insanity defense. The frontline in this battle for social justice is a war of words between lawyers on one side and psychiatrists on the other with jurors pinned down in the crossfire.

Public dissatisfaction with the outcome of this struggle has never been deeper than in recent years. Every good faith attempt to refine the legal standard is under constant bombardment from high-profile trials,

saturation media coverage, the commission of horrendous and shocking crimes, and the obvious inability of experts and opinion leaders to agree on a solution. The public, in their frustration, have increasingly turned to their legislatures to address their fears that the courts and the mental health institutions are placing too great an emphasis on the rights of the individual and too little on the legitimate needs of the community. This memorandum will attempt to provide the briefest possible sketch of the historical development of the insanity defense as it presently exists in American jurisprudence.

Anglo-Saxon Law

The English common law is firmly rooted in the ancient Anglo-Saxon legal tradition. Like most primitive societies, the Anglo-Saxon community did not have the means to confine criminals in jails or prisons. Murderers were sometimes executed, banished, or sold into slavery. But for all lesser crimes, the perpetrator or his kin were expected to make a payment to the victim or the victim's family sufficient to cover their loss. This fine was not designed to serve as a punishment or deterrent, so much as a tort recovery. Payment precluded the victim's family from seeking revenge against the criminal. For the village, the prevention of a

blood feud was paramount since feuding perpetuated a state of lawlessness and weakened the village's defense against outside marauders. The Anglo-Saxons had no modern understanding of mental illness and did not recognize it as a legal defense. The victim of a crime was entitled to compensation for an injury whether the perpetrator was the noblest chieftain or some poor wretch beset by demons.

Rome and the Res Publica

The Romans, as masters of the first great imperial civilization and all of the public resources that were engendered by universal conquest, took a very different view of criminal law. The most civic-minded of the ancients, the Romans considered crimes to be primarily offenses against the public good, or res publica, rather than the victim. The state prosecuted criminals vigorously and, although a few jails existed, imposed a variety of harsh penalties, including death, mutilation, branding, flogging, slavery, military service, and gladiatorial combat. Sentences were designed to serve as a potent warning to anyone contemplating the commission of a crime. The Romans recognized the existence of some forms of insanity. However, since the ultimate goal of their criminal system was to protect society by deterring crime, they found it expedient to punish all wrongdoers--whether sane or not. It may not have been compassionate, but a lunatic who had had his hands cut off rarely stole anything again, and his plight was a visible object lesson to everyone.

Medieval Law

With the collapse of the Roman Empire, the church became the dominant social

institution in Western Europe for over a thousand years. During the Dark Ages, the monastic orders established and maintained all of the schools of formal education, and any professional person, whether lawyer, bureaucrat, or administrator, was either a cleric or trained to be one. Religion pervaded all aspects of life to a degree unfathomable to the modern mind. The most influential philosopher of the age, St. Thomas Aquinas, postulated that God has given Man free will, but only to be used for the greater glory of God. Man is God's agent and should do God's will on Earth. Evildoers should be punished not only by God in the Afterlife but by their fellow men, as God's agents, in this life. For the first time, punishment becomes the dominant motive in criminal law. The malefactor is punished for doing wrong, i.e., for defying the will of God, not to deter crime or rehabilitate the criminal. Crime and sin become synonymous and all justice becomes divine.

Lord Coke and the Enlightenment

With the Reformation and the Renaissance, a new age of Enlightenment dawned--founded on reason and science and stressing the moral worth of the individual. Sir Edward Coke (1552-1634) was the first to apply reason and scientific method to the English common law. His Commentaries were the standard legal textbook for all those who, like Jefferson, Madison, and Lincoln, "read" their law in preparation for admission to the Bar rather than attending law schools. Lord Coke believed that there could be no felony without felonious intent. Aquinas wanted to punish sinners who had demonstrated their sinfulness by doing evil; Lord Coke was content to punish wrongful acts and leave judgments about sin to a Higher Court.

Coke reasoned that it was the actor's intent, not the actor's character, that made an act wrongful. Homicide in self-defense, for instance, is not murder regardless of whether the defendant is of good character or bad. All felonies require mens rea or evil intent.

M'Naghten and the Infamous Rule

If mens rea is an essential element of a crime, it is a logical inference that anyone incapable of rational thought is also incapable of formulating evil intent. In 1843, a paranoid schizophrenic named David M'Naghten, believing that the Pope and the Jesuits were trying to kill him, attempted to murder the Prime Minister of England, Sir Robert Peel. The defense, citing Dr. Isaac Ray's recent popular book on mental illness, called doctors who testified that M'Naghten was so psychotic that he was incapable of self-control. The jury found him insane, and he spent the rest of his life in an asylum; but, the public was outraged, believing that countless criminals would thus escape the severe punishments that Victorian law demanded. At Parliament's request, the Lord Chief Justice Tindal formulated the rule in the M'Naghten case:

The jurors ought to be told in all cases that every man is 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 defense 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.
(1)

Although the legal community viewed the M'Naghten Rule as a liberal and compassionate expression of society's reluctance to punish unfortunate lunatics, the medical community immediately launched a vigorous attack against the Rule because, in their opinion, it failed to correspond with existing psychiatric knowledge about the capacity to distinguish between right and wrong, the theory that emotions, will, and intellect were separate mental functions, and that other aspects of behavior are more relevant to the question of responsibility. Over the course of the next one hundred years, the public gradually came to view the M'Naghten Rule as reasonable and fair; but criticism from the psychiatric community built as that science reached maturity.

The Durham Test

The case that finally overturned M'Naghten involved a defendant, Monte Durham, with a long history of housebreaking who had been in and out of jails and mental institutions all his life. There was substantial evidence that he understood the difference between right and wrong (the M'Naghten test) but that he was incapable of controlling his behavior. In a 1954 landmark decision, Judge Bazelon wrote:

We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific

knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the “irresistible impulse” test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted. (2)

The new test, the Durham test, was, superficially at least, simplicity itself: “A defendant is not criminally responsible if his unlawful act was the product of mental disease or mental defect.” The psychiatrists had won the field; the lawyers were vanquished. The problem was that now there was no one in the county--lawyer, judge, juror, police, criminal, or anyone else--who could honestly assert that a person was criminally insane unless that person was also a trained psychiatrist.

Subsequent cases quickly proved that the psychiatrists themselves could not agree about who was criminally insane under Durham. In *William v. United States*, 312 F.2d 862 (D.C. Cir. 1962), six psychiatrists agreed that the defendant was a sociopath and that sociopathy is a mental disease, but split evenly three to three about whether the defendant’s murders were a product of his mental disease. In *Blocker v. United States*,

288 F.2d 853 (D.C. Cir. 1961), the judge’s conscientious, but verbose and contradictory, jury instructions were found to be useless to the jury; the appellate court determined that it was almost impossible to explain the “simple” Durham rule to a lay person. In *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967), the same court that had formulated the Durham test admitted that the practical results had been a disaster. The same Judge Bazelon, who had written the Durham decision, now ruled that psychiatrists would no longer be permitted to testify about the defendant’s act being the product, result, or cause of mental illness. They could testify about the defendant’s mental state and provide the jury with “all information advanced by relevant scientific disciplines.” Henceforth, jurors in criminal cases would be expected to practice psychiatry without a license.

The ALI Test

After eighteen years of attempting to salvage some refinement or restatement of Durham, the court tossed it out in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). In its place, the court substituted the new American Law Institute proposal which was quickly adopted by the federal courts and is still the prevalent rule in most American jurisdictions. The ALI test provides that a person is not responsible for a criminal act if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform to the requirements of law. (3) This formulation is a partial return to M’Naghten while excluding the possibility of a defense for the psychopath who manifests no evidence of mental illness except a propensity to commit crimes. Given that the

ALI test is the most accurate and understandable yet formulated, the jury is still subject to a barrage of highly technical and usually contradictory expert medical testimony. The jury experience has been to increasingly ignore expert testimony in reaching verdicts. Nevertheless, appeals, delays, and retrials multiply while verdicts become less and less predictable.

Current South Dakota Law

South Dakota statutes have not kept pace with the case law on the insanity defense. From territorial days, two simple provisions constituted the most direct legislative policy on criminal insanity:

22-5-6. Mental illness.--An Act done by a person in a state of mental illness cannot be punished as a public offense.

22-5-7. Morbid propensity to commit crime.--A morbid propensity to commit prohibited acts existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts forms no defense to a prosecution therefor.

SDCL 22-5-6 was repealed in 1976 in the criminal code revision. It was clearly antiquated and largely superseded by SDCL 22-3-1(4):

22-3-1. Persons capable of committing crimes--
-Exceptions.--Any person is capable of committing a crime, except those belonging to the following classes:

- (1) Children under the age of ten years;
- (2) Children of the age of ten years but under the age of fourteen years, in the absence of proof that at the time of the committing the act or neglect charged against them they knew its wrongfulness;
- (3) Persons who committed the act or made the omission charged under an ignorance or mistake of fact which disproves any criminal intent, but ignorance of the law does not excuse a person from punishment for its violation;
- (4) Persons who committed the act charged without being conscious thereof; or
- (5) Persons who committed the act or made the omission charged while under involuntary subjection to the power of superiors.

South Dakota's most ambitious attempt at clarification came in 1985 with the adoption of SDCL 22-5-10:

22-5-10. Insanity as affirmative defense - Burden of proof. Insanity is an affirmative defense to a prosecution for any criminal offense. Mental disease or defect does not otherwise constitute a defense. The defendant has the burden of

proving the defense of insanity by clear and convincing evidence.

Although South Dakota has not enacted any of the reform legislation dealing with the insanity defense, it is unlikely to remain immune for long. Developments in case law continue to impact decisions in state and federal courts. Public dissatisfaction and confusion continues to grow. Resolution may be sought through legislative action.

Conclusion

After shelves of books and reams of law review articles have been written on the subject, the whole question of the appropriateness of the insanity defense can still drown in a sea of semantics. Does insanity exist, and, if so, can it be defined? If it can be defined, can it be accurately diagnosed? Does it have legal consequences or is it a purely medical concern? If it has legal implications, do they extend beyond the civil to the criminal law? Is there a causal link between a criminal act and something as inherently irrational as insanity? Can anyone be legally held responsible for his actions if others can escape responsibility because of their “irresponsibility?”

If the philosophical questions about insanity

are daunting and unsolvable, the policy questions are hardly less so. Although the insanity defense is invoked far less frequently than the public assumes, its potential for mischief and abuse is almost limitless. No attempt at cataloguing these concerns can be made here. However, a plausible argument can be made that the insanity defense no longer fulfills its original purpose. Society has long since stopped executing, flogging, and branding its most pathetic and dysfunctional members. Confinement in an asylum differs only in degree from confinement in a prison, and society attempts to address the basic medical and psychiatric needs of the inmates of both. Meanwhile, it is incontestable that many felons who were clearly culpable to some degree for their serious criminal acts have escaped punishment, often to reoffend. This may be a very high price to pay because of society’s remorse over the unfortunate fate of Dave M’Naghten.

NOTES

1. M’Naghten’s Case, 8 Eng. Rep. 718, 722, (1843).
2. *Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954).
3. Model Penal Code, section 4.01(1).

This issue memorandum was written by Reuben D. Bezpaletz, Chief Analyst for Research and Legal Services for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.
