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Fred Time

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COMMENTS

THE CRIMINALLY INSANE—AN APPEAL TO THE SANE

Fred Time

It has been said frequently that one of the most important revisions possible in Texas criminal jurisprudence would be a revision of the current methods of determining insanity and caring for the criminally insane. This Comment is designed to review the existing law in the light of modern innovations in the field of mental disorders in order to determine whether the present system is conducive to justice in our society.

I. INSANITY AS A DEFENSE IN TEXAS

The early history of our state courts indicates that an accused had, upon making a timely demand that was supported by affidavit, a right to have a jury trial in advance of the trial for his alleged offense. The purpose of that trial was to determine whether a defendant was mentally competent to make a rational defense. This procedure has been and is presently the law in Texas. However, in earlier times submission of the issue of insanity at the time of the main trial was not permitted, since the courts felt that confusion would arise if both insanity as a defense to the substantive crime and present insanity were submitted at the same trial. In 1937, though, article 932a of the Code of Criminal Procedure was enacted in order to provide for the submission of the issues of present insanity and insanity at the time of the offense both during the main trial and at a preliminary trial.

A finding of insanity at the time of the act has long been recognized as a complete defense, and there can be no subsequent conviction based upon such act. However, a recent statute, passed in 1957, goes even further. The new act expressly states that a finding of insanity at the time of the commission of the offense is more than a mere defense: such a finding compels an immediate and complete

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1 Guagando v. State, 41 Tex. 626 (1874).
acquittal. The result is the same as though a jury has acquitted the accused at a main trial; thus, one can be acquitted at the preliminary trial though never really tried. Of course, if the jury finds the accused insane at the time of the trial, after having found him insane at the time of the commission of the alleged offense, the court must enter an order committing the defendant to a mental hospital, and he must remain confined until he becomes sane. A defendant who has been adjudged sane at a preliminary hearing is given the status of a sane person, but he can, nevertheless, raise the defense of insanity at the time of the commission of the act during the main trial.

II. How To Determine Insanity in Texas

How does a jury decide whether or not an accused is presently insane or whether he was insane at the time the crime was committed? Texas continues to follow the test enunciated in the old English case of Daniel M’Naghten handed down in 1843. In essence, the rule is that in order to establish a defense of insanity, it must be shown that the accused was laboring 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, that he did not know he was doing wrong. It is commonly referred to as the “right and wrong test,” because the jury must decide if the mental impairment was such as to deprive a person of the capacity and power to distinguish between right and wrong as to the particular act charged as an offense.

Although an accused may be mentally ill according to medical authority, under Texas law he may still be legally sane. The legal test is not whether a defendant is of unsound mind or is mentally ill. Rather, the question is whether his illness has rendered him incompetent to make a rational defense and whether he is laboring under such defect of reason from disease of mind as not to know the nature or quality of his otherwise criminal act or if he does know, whether he is unable to distinguish between right and wrong. The jury has the insurmountable task of determining whether or

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10 M’Naghten’s Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1841).
not the accused was mentally incompetent or insane at a particular time in the past, namely, at the time of the commission of the alleged crime. This precludes their right to find the accused insane generally, i.e., at some time prior to the commission of the act or insane only during certain seizures.14

A good illustration of what a jury is instructed to determine is the case of Freeman v. State.15 In that case the defendant was tried for the murder of his seventeen year old girl friend. His defense was insanity. Two psychiatrists testified that the defendant was suffering from schizophrenia and expressed their opinions that he was insane at the time of the commission of the offense as well as at the time of the trial. A psychiatrist for the state testified that in his opinion the accused, on the day of the homicide, had the mental capacity to know the nature and consequences of his act and that he knew that it was a wrong act. The jury was instructed that in order to establish a defense on the ground of insanity it must be proved that at the time of committing the act the party accused was laboring under such defect of reason as not to know the difference between right and wrong as to the particular act charged against him. This instruction precluded any possibility that a mind could be diseased at different intervals such as in the case of schizophrenia.16

The right and wrong test is also applied to partial,17 periodical,18 and temporary19 insanity. The defense of insane delusions is subject to the same standard.20 A person alleging that he was acting under an insane delusion is judged as if the facts that he, in his deluded state, believed to be true were actually true; he is relieved only if those facts would justify or excuse his act had they actually existed.21

The doctrine of irresistible impulse is not recognized in Texas.22 Uncontrollable passion or excitement which renders the mind in-

16 Ibid.
18 Ibid.
capable of cool reflection is not insanity. Mere mental weakness or mental impairment will not excuse a person from the consequences of his criminal acts if he is able to distinguish between right and wrong. The Texas Penal Code states that neither intoxication nor temporary insanity of the mind produced by the voluntary, recent use of ardent spirits or intoxicants constitutes any excuse for the commission of a criminal act. However, Texas decisions have made an exception for the so-called forms of insanity known as delirium tremens or mania a potu, which are generally caused by an absence of liquor after prolonged use of it. Cases have gone so far as to say that insanity of that nature is a complete defense. It has also been held that involuntary drunkenness may be an excuse for some unlawful acts. Article 36 of the Penal Code declares that temporary insanity produced by voluntary, recent use of ardent spirits, intoxicating liquor, narcotics, or any combination of these items may be introduced by the defendant to mitigate the penalty, although this form of mental disorder is not a defense. However, the cases are explicit in saying that mere intoxication is not enough. The intoxication must be such that temporary insanity is advanced to the stage that it deprives a person of the capacity and power to know the difference between right and wrong.

III. DETERMINATION OF INSANITY IN OTHER JURISDICTIONS

Our Anglo-American law of insanity has progressed somewhat from the early methods of determining legal insanity. In the beginning the courts applied the "wild beast" test, which gave an accused a defense if at the time of the commission of the act he were totally deprived of understanding. The theory was that he could not know what he had done any more than a wild beast could have known what it was doing. Next, the courts formulated a standard which resulted in a defense of insanity if an accused did not have the ordinary understanding of a fourteen year old child.

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28 Carter v. State, 12 Tex. 300 (1854); Colbath v. State, 4 Tex. Crim. 76 (1878).
30 Thomas v. State, 40 Tex. 60 (1874); Butcher v. State, 161 Tex. Crim. 169, 273 S.W.2d 672 (1953); Barnett v. State, 144 Tex. Crim. 249, 162 S.W.2d 411 (1942).
31 Rex v. Arnold, 16 How. St. Tr. 695, 764 (1724); Note, 43 Geo. L.J. 58 (1914).
32 State v. Richards, 39 Conn. 591 (1873).
Still linked to the mother country, England, because of their adoption of the English common law, most American jurisdictions embraced the then newly enunciated test for insanity set forth by the House of Lords in 1843 in *M'Naghten's Case.* Under that rule the defendant had the burden of proving his defense of insanity by a preponderance of the evidence. The *M'Naghten* rule has been severely criticized as being anachronistic in the light of modern psychiatry. On the other hand the *M'Naghten* test has been defended on the ground that courts have liberally interpreted the requirement of cognition thereby allowing a vast amount of psychiatric testimony to be introduced in each trial. Regardless of the seemingly endless criticism heaped upon the *M'Naghten* rule, it still prevails in most American jurisdictions as the only test for insanity.

Isaac Ray, a recognized psychiatrist, as early as 1871 stated that "it is [a] fundamental error of the courts to attempt a solution through the use of general formulas without the aid of scientific research and consultation." Ray recognized that there are forms of mental illness in which behavior is so disordered and can be so detrimental to the patient, to others, or to both, that, in spite of seemingly intact intellectual ability and the absence of delusion, the patient seems to be the victim of emotional or moral forces beyond his control. Ray's contributions influenced not only the field of psychiatry but apparently the Supreme Court of New Hampshire also. In *State v. Jones* that court stated that if the act of the defendant was "the offspring or product of mental disease, the defendant would not be guilty by reason of insanity." Surprisingly, the application of this new standard had a short life, because no other cases involving the defense of insanity arose in New Hampshire and few other jurisdictions were influenced by it.

In 1954, the United States Court of Appeals for the District of

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39 *M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843).*
39 *Reik, A Treatise On the Medical Jurisprudence of Insanity (5th ed. 1871).*
35 *Reik, The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease, 65 Yale L.J. 183 (1955).*
41 *State v. Jones, 50 N.H. 369 (1871); State v. Pike, 49 N.H. 399 (1869).*
46 *50 N.H. 369 (1871).*
Columbia cast off the ancient M’Naghten rule by proclaiming a new doctrine which reverberated throughout the legal world. The test set forth simply declared that an accused was not criminally responsible if his unlawful act was the product of mental disease or defect. Although that court did not define what would be considered a mental “disease” or “defect,” the same court has recently stated that mental diseases would be those so recognized by the medical profession. Under this test, the jury is required to determine whether or not the type of abnormality alleged is a disease and if so, whether the accused was actually suffering from that type of abnormality at the time of the commission of the act. It is apparent that juries will not be consistent in determining which different illnesses fit within the broad definition of “disease” and “defect.” Also, in order for a jury to determine that an accused is insane, they must find that his act is “. . . the product of such mental abnormality.” Both of the above requirements will cause conflicting results, because different juries will hear a variety of opposing psychiatric testimony. The important effect of this decision is that it leaves the psychiatrist free to speak in the realm of psychiatric knowledge rather than making him conform to preconceived legal standards.

The federal rule seems to be well stated in the Supreme Court decision of Davis v. United States, in which the Court tacitly approved the test for insanity as being either incapacity to distinguish between right and wrong with respect to the act, or, although able to so distinguish, the inability to refrain from committing the act. Although the federal court in the Durham case rejected the M’Naghten doctrine, several other federal jurisdictions have expressly spurned the Durham decision.

IV. THE MODEL PENAL CODE PROPOSES A TEST FOR INSANITY

Dissatisfaction with the various tests enunciated by the numerous courts in this country prompted the American Law Institute to draft Model Penal Code provisions with a more practical approach.
to the problem. The position taken seems to be a combination of modern psychiatric theory with recognized legal standards. Both the M'Naghten and Durham rules were rejected for a more medical-legal viewpoint as to the defense and disposition of the criminally insane.

The first section of the Model Code sets forth a determinative standard which excludes responsibility. The effect of this section is to inquire whether the accused was without capacity to conform his conduct to the requirements of the law. The second paragraph of that section is designed to exclude from the concept of mental disease or defect the case of the so-called “psychopathic” personality. The reason for this exclusion is that the psychopath differs from a normal person only quantitatively or in degree, not qualitatively, and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality.

The Model Code provides a workable means of determining legal responsibility. For the purpose of visualizing the applicability of the Code provisions, assume that a defendant intends to rely on the defense of insanity. First, he must file a notice in court that he does intend to plead and prove that defense. The court is then required to appoint at least one qualified psychiatrist or to request the superintendent of a local hospital to designate at least one qualified psychiatrist to report upon the mental condition of the defendant. The court at its discretion may order the defendant committed to a hospital or other suitable place for the purpose of the examination for a period not exceeding sixty days, but if necessary, that period can be extended. However, the defendant may hire a qualified psychiatrist, and the defendant’s psychiatrist shall be permitted to witness and participate in the examination. The examination is to be conducted by any method employed and accepted by the medical profession for the examination of those thought to be suffering from mental disease or defect. This provision allows the psychiatrist the freedom to employ broad and liberal applications of newly discovered methods of testing insanity. At the same time this section of the Code seems to acknowledge tacitly the possibility of discovering and recognizing newly found mental disorders. The report of the examination includes a complete diagnosis of the patient and,
if the court requests, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged. The Code sets out a guide to assist the psychiatrist in determining what to put in the report, although the criteria do not seem to be restrictive.

If a defendant is unwilling to participate in the examination, the report shall so state and shall include an opinion, if possible, as to whether such unwillingness of the defendant is the result of mental disease or defect. This report is to be filed with the clerk of the court who causes copies to be delivered to the district attorney and to counsel for the defendant. Then, if the defendant contends that he is unable to proceed because of present insanity, the court will determine that question based upon the report of the examining psychiatrists. However, if the finding is contested by either party, the court holds a hearing to decide the question of present insanity. If the psychiatric report is received into evidence, the party who contests the finding has the right to summon and to cross-examine the psychiatrists who joined in the making of the report. It should be noted that this hearing is not a jury trial; therefore, if the court determines that the defendant lacks the mental fitness to proceed, the court will order him committed to the local commissioner of correction to be placed in an institution until he is considered medically capable of standing trial. Anytime after the defendant is committed, the district attorney or the commissioner of correction can request a hearing to determine if the defendant has regained his sanity; if it is so found, the proceeding against him will continue. However, if the court determines that too much time has elapsed since the defendant was committed, the court may dismiss the charge and order the defendant committed to an appropriate institution for the insane.

If the defendant is found sane at the time of the trial at the preliminary hearing, but the result of the psychiatric report is that he was insane at the time of the criminal conduct, the court must enter a judgment of acquittal. However, the acquittal does not allow the defendant to return to society in his present mental condition. The finding of acquittal requires the court to order the defendant to be committed to the custody of the commissioner of correction.

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59 Id. at § 4.05(3).
60 Id. at § 4.05(3).
61 Id. at § 4.06(1).
62 Id. at § 4.06(2).
63 Id. at § 4.07(1).
to be placed in a mental institution for an indefinite period. 64 Once
committed, there are procedures available for a rehearing of his present sanity. After having been confined for at least six months,
the defendant can apply for discharge or release to the court which
committed him. That court then appoints at least two qualified psy-
chiatrists to examine the defendant, and they report within sixty
days their opinions of his present mental condition. The court de-
determines, according to the psychiatric report, if the defendant may
be discharged or released on probation. If the court is not satisfied,
it must promptly order a hearing to determine whether the de-
fendant may be safely discharged or released. This hearing is deemed
a civil proceeding, and the burden of proof shifts to the defendant.
If the court decides that the defendant is able to live in society, it
can order a discharge on probation on such conditions as it may
determine. 65 After release, if the defendant violates his probation,
he will be ordered to return to a mental institution. 66 When the
court finds against the defendant in the civil proceeding, he will
be ordered re-committed. 67 Then the defendant cannot file an ap-
application for another hearing until one year has elapsed from the
date of the preceding hearing. If the commissioner of corrections
determines that the defendant may be discharged on probation with-
out danger to himself or others, the commissioner makes applica-
tion in the same manner described above for the defendant. 68

The Model Code has many redeeming attributes. It provides for
competent medical determination of mental disorders. However, it
also provides for commitment in a mental institution on a finding
of acquittal on the grounds of insanity; this should be a deterrence
to the defendant who dishonestly claims insanity as a defense. Fin-
ally, the Code acknowledges the possibility of a normal recovery
by providing for a rehearing after commitment.

V. REFORM: LEGISLATIVE OR JUDICIAL?

If the bar in Texas wanted to revise its present standard for
determining criminal insanity, would it require legislative enactment
or could it be done judicially?

Texas adopted the M'Naghten standard as early as 1854. 69 In

64 Id. at § 4.08(1).
65 Id. at § 4.08(3).
66 Id. at § 4.08(4).
67 Id. at § 4.08(3).
68 Id. at § 4.08(2).
69 Carter v. State, 12 Tex. 500 (1854); Freeman v. State, 166 Tex. Crim. 626, 317 S.W.2d 726 (1958); McGee v. State, 155 Tex. Crim. 619, 238 S.W.2d 707 (1951); Cosby
1856 the Texas Legislature promulgated the statutory standard which was to be applied in cases of insanity. After setting out the defense of insanity in article 41 of the Penal Code, the legislators established the statutory methods for determining insanity in article 42. In these provisions lies the key to the possibility for change in the present Texas law. Nowhere in any statutes can it be found that the M'Naghten standard of right and wrong must be used. Instead, the statutes explicitly state that "... the rules of evidence known to the common law as to the proof of insanity shall be observed in all trials where that question is an issue." (Emphasis added.) Although Texas adopted the English common law in regard to the test for insanity, there is, obviously, no statutory restriction keeping the Texas courts from developing their own common law rules in regard to insanity. Therefore, only one Texas Supreme Court decision rejecting M'Naghten could develop an entire new common law concept of insanity. Of course, the only other method of discarding the ancient M'Naghten doctrine would be by legislative enactment.

VI. A PROPOSAL: A TEST FOR DETERMINING INSANITY AND THE DISPOSITION OF THE CRIMINALLY INSANE

The purposes for punishing a criminal are retribution, deterrence, and reformation. In our modern, sophisticated society, retribution is no longer considered morally justified; therefore, the important considerations of society should be deterrence and reformation.

Because the human psyche is becoming more understood with the


70 Pen. Code of Texas art. 41 (1837).
71 Pen. Code of Texas art. 41 (1837): No act done in a state of insanity can be punished as an offense. No person who becomes insane after he committed an offense shall be tried for the same while in such condition. No person who becomes insane after he is found guilty shall be punished for the offense while in such condition.

72 Pen. Code of Texas art. 42 (1837): The rules of evidence known to the common law in respect to the proof of insanity, shall be observed in all trials where that question is in issue. The manner of ascertaining whether the insanity is real or pretended, when it is alleged that the defendant became insane after the commission of the offense is prescribed in Part iii, Title viii, Chapter ii, of the Code of Criminal Procedure. (Emphasis added.)

74 Michael & Wechler, Criminal Law and Its Administration 6 (1940).
attainment of systematic knowledge and the discovery of the phenomena of the conscious and subconscious mental processes, previously unconsidered mental disorders are becoming recognized as exclusions from social responsibility. Psychiatry has made tremendous strides in the past century, and although there are divergent views within that profession, it seems only logical to acknowledge that the specialized science of mental disorder is better equipped to determine insanity than twelve untrained laymen. Oliver Wendell Holmes said: “An ideal system of law should draw its postulates and its legislative justification from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things, as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom.” In the most malignant type of psychosis, schizophrenia, the determination of whether a patient knows the nature and quality of his act cannot accurately be stated by a categorical and unqualified “yes” or “no.” Judges, lawyers, and jurors often fail to appreciate the serious condition of such an individual, because on the witness stand his mental processes are astute and often he is extremely persuasive.

What is the solution to this important social, legal, and medical problem? Those who advocate the status quo say that a modern approach, such as the one proposed in the Model Penal Code, would treat all criminals as mental patients and thereby eliminate any penal sanctions. However, a practicable approach would not label all criminals as mental patients, but it would and should openly accept the fact that the criminal needs rehabilitation and that if psychiatry can help him, it should be made available. Texas jurisprudence should allow any and all defendants in a criminal case to be subjected to an unbiased psychiatric examination. This examination should be conducted by a group of psychiatrists unprejudiced as to outcome. Let the psychiatrist, who is best trained, determine the standard of responsibility in each case, rather than apply any non-medical test such as the M’Naghten test or the Durham rule. Commitment instead of acquittal upon a finding of insanity will result in both equity to the criminally insane, deterrence to the feigning criminal, and adequate protection for society.

73 Holmes, Collected Legal Papers 138 (1920).