Insanity as a Defense and the Problem of Definition

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ing effect will result from a continued strict construction of these statutes, the courts will have to look to the legislative history of their enactment, or Congress will have to specifically re-define the criminal elements of the acts intended to be prohibited.

JOHN L. REITER

Criminal Law: Insanity as a Defense and The Problem of Definition—The case of State v. Esser\(^1\) involved an indictment for first degree murder. The defendant had pleaded not guilty, and not guilty by reason of insanity. The insanity instructions submitted to the jury by the trial judge were based on draft four of the Model Penal Code of the American Law Institute.\(^2\) The jury found Gregory Esser not guilty because of insanity. Esser was committed to Central State Hospital pursuant to § 957.11 of the Wisconsin Statutes.\(^3\) The State appealed the decision. Included in the grounds for appeal was the argument that the definition of insanity used by the trial court should not be adhered to upon its merits. The State’s contention was that Wisconsin has always followed the M’Naghten definition\(^4\) in criminal cases, and this long tradition should not now be changed. This case is typical of the many cases that have been arising before the high courts of several states in an attempt to reach a unanimously accepted and workable definition of what constitutes legal insanity.

\(^1\) 16 Wis. 2d 567, 115 N.W. 2d 567 (1962).

\(^2\) MODEL PENAL CODE, Proposed Final Draft No. 1 (1961), p. 4, §4:01:

> “(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.

> “(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.”

\(^3\) WIS. STAT. §957.11(3) (1961) : “If found not guilty because insane or not guilty because feeble-minded, the defendant shall be committed to the central state hospital or to an institution designated by the state department of public welfare, there to be detained until discharged in accordance with law.”

\(^4\) “... And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be 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 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 it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: ... If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong.” M’Naughten’s Case, 10 Clark and Finnelly’s Reports 200, 210-211 (1843).
When a man has committed an act contrary to the law of the state, he has committed a crime. Unless he is held not to be criminally responsible, he must suffer the penal consequences imposed for commission of such an act. Experience has shown this to be necessary for the protection of society. The question of whether or not a man is legally insane is bound up in the question of his being responsible for an act he has committed. The existence of legal insanity negates criminal responsibility. A jury is called upon to decide whether or not a man was criminally insane when he committed an act. Therefore the problem of defining legal insanity is essentially one of formulating a standard by which a jury can decide what mental condition makes a man no longer responsible for his acts in the legal sense.

The ultimate definition of insanity that a particular court arrives at is influenced by several factors. Among the most basic are what man's basic nature is thought to be, what school of psychological thought is followed, and what constitutes a sufficient standard upon which a jury may base a finding of insanity. From the view-point of general categorization, different views on the above factors have led to three basically different tests of insanity in the various jurisdictions.

The test used in the majority of the United States jurisdictions is the M'Naghten test, commonly referred to as the right-wrong test. Essentially this test means that one is not criminally responsible for his act if he does not appreciate the nature and quality of his act or is incapable of knowing right from wrong. This test of insanity has been followed strictly by the Wisconsin court since the case of Oborn v. State decided in 1910.

The term insanity as used in the special plea in a criminal case, means such abnormal mental condition, from any cause, as to render the accused at the time of committing the alleged criminal act, incapable of distinguishing between right and wrong and so unconscious at the time of the nature of the act which he is committing, and that the commission of it will subject him to punishment.6

This definition of insanity was clarified by the court in Jessner v. State where, in referring to Oborn v. State, they said: "This definition makes the only test that of whether the accused at the time of the commission of the acts was conscious that the act was one which he ought not do." In State v. Simecek7 and in State v. Johnson8 the court stated that Oborn was the law on insanity in Wisconsin.

Like most legal standards the right-wrong test of the M'Naghten

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6 Ibid.
7 202 Wis. 184, 197, 231 N.W. 634, 272 (1910).
8 243 Wis. 439, 10 N.W. 2d 161 (1943).
case is not perfect, and thus has been subject to criticism. The criticisms basically follow two lines, and it is out of these criticisms that the other two legal definitions of insanity grow.

The first criticism is that in stating the test in terms of right and wrong the M'Naghten test stresses the cognitive aspect of man's nature at the expense of the volitional aspect. Generally, the idea here is that a man can know an act is wrong and still do it, due to a so-called uncontrollable urge. This criticism has led to the irresistible impulse modification of the M'Naghten test. The proposed American Law Institute test, used by Judge Wilke in the _Esser_ case, probably fits into this category. Although this test does have some merit in terms of clarity, it seems to add little to the standard that is created by proper instructions under the M'Naghten test. In _Oborn v. State_ Wisconsin clearly rejected this test of insanity.

This court is not committed to the doctrine that one can successfully claim immunity from punishment for his wrongful act, consciously committed with consciousness of its wrongful character, upon the ground that, through an abnormal mental condition he did the act under an uncontrollable impulse rendering him insane.1

Bound up in this rejection of the irresistible impulse test is the idea that if one has knowledge of right and wrong and the nature and quality of his act he also has the capacity to make the correct choice of not performing the act. This appears to be a proper evaluation, and thus, the addition of this modification to M'Naghten is, practically speaking, unnecessary.

The second basic criticism of the M'Naghten test is one coming from some psychiatrists—the expert witnesses at insanity trials. Their criticism is directed against the limitation they feel the M'Naghten test puts upon the testimony they may present. This criticism is typified by such references as the one made by Dr. Guttmacher to the "M'Naghten straight jacket."11 Their complaint is, basically, that under M'Naghten they are not allowed to present their testimony in the fullest light in view of recent advancements in the field of psychiatry. It was this criticism that led to formulation of the Durham test which used the New Hampshire case of _State v. Pike_12 for a model in establishing a test excusing criminal responsibility if the act was the product of a mental disease or defect.13 As is apparent, this test certainly does expand the area of the opinion, and value to be given it, of the expert witness. But this test does have two funda-

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10 Supra note 6, at 272, 126 N.W. at 746.
12 40 N.H. 399 (1869).
mental weaknesses which make it an unworkable test. The first is that it does not create any standard which a jury may use in determining whether or not a man is legally insane. The second, which may be a result of the first, is the danger that opinion of psychiatrists will be substituted for an actual jury determination of the sanity question. In *Mc Donald v. U. S.*, a case involving a plea of insanity in Washington D. C., the circuit court judges sitting *en banc* recognized these fundamental weaknesses of the Durham test. In regard to the lack of standard, they attempted to clarify what is meant by a product of a mental disease or defect.

Our eight year experience under Durham suggests a judicial definition, however broad and general of what is included in the terms "disease" and "defect." Consequently for that purpose the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.

In regard to the danger of the experts' opinion being substituted for the actual jury determination of the question of sanity, the court stated in the same case:

We emphasize that, since the question whether the defendant has a disease or defect is ultimately for triers of fact, obviously its resolution cannot be controlled by expert opinion. The jury must determine for itself, from all the testimony, lay and expert, whether the nature and degree of the disability are sufficient to establish a mental disease or defect as we now have defined those terms.

It is interesting to note that after eight years the courts of Washington D. C. have finally realized the defects of the Durham test. But it appears that *Mc Donald v. U. S.* is little more than a recognition of these defects, and that if the Durham test is to be used as a workable test of insanity a satisfactory solution to its defects has yet to come. The jury is still left without a standard. *De facto*, what constitutes a disease or defect is still something that will be decided by the expert witness under this test. A jury, left with "... any abnormal condition of the mind which substantially affects mental or emotional process and substantially impairs behavior controls ..." must rely on psychiatrists to define such disease, defect, and impairment of control. Ultimately these definitions, and not a jury finding, will be determinative in the finding of insanity. In view of these defects it may be concluded that under our present legal system the Durham test of

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14 312 F. 2d 847 (D.C. Cir. 1962).
15 Id. at 850.
16 Id. at 851.
insanity is not a workable one because it is not primarily geared to a jury system.

It is the above criticisms of the three basic tests that have made attempts to reach a definition of what legal insanity is one of the most perplexing problems faced by jurists today. This perplexity is spread across the country, and dissatisfaction with the traditional tests is typified by recent Wisconsin decisions. Dissatisfaction with the strict right-wrong test first appeared in State v. Carlson where it was stated: "Some members of the court are of the opinion that this rule should be modified so that a defendant is to be found insane if an abnormal condition of the mind renders him incapable of conforming his conduct to that which he deems right." This suggests an irresistible impulse modification, but since the issue was not raised on trial, the court chose not to pass on this contention. This dissatisfaction was further brought out by the strong dissenting opinion of Mr. Justice Hallows in Kowseh v. State. In his dissent, Justice Hallows presented several arguments for adoption of the proposed test of the Model Penal Code of the American Law Institute. The dissatisfaction was clearly brought forth in the Esser case when the court adopted a new wording for the test of insanity in Wisconsin.

The term "insanity" in the law means such abnormal condition of the mind, from any cause, as to render the defendant incapable of understanding the nature and quality of the alleged wrongful act, or incapable of distinguishing between right and wrong with respect to such act.

It is true that this is still basically a right-wrong test, but it clearly indicates the fermentation in this area of the law. Mr. Justice Hallows, dissenting in part, again urged adoption of the American Law Institute test. Mr. Justice Dieterich, dissenting in part, urged adoption of the M'Naghten rule with the addition of an irresistible impulse clause. This modification of the test, in Esser, along with the close division of the court, can only allow one to speculate on what will develop in the future as far as what the legal definition of insanity will be in Wisconsin.

The test that is ultimately adopted should be based on certain fundamental considerations. Primarily it must be borne in mind that man is a rational creature, thus, the knowledge requirement of the M'Naghten test should be maintained in some form. At the same time it must be remembered that man is possessed of a free-will, and is able to chose between doing or not doing a particular act. Thus, the definition should be framed so testimony is given both in regard

17 5 Wis.2d 595, 93 N.W.2d 655 (1958).
18 8 Wis.2d 640, 100 N.W.2d 339 (1960).
19 Supra note 1, at 567, 115 N.W. 2d at 505.
to the cognitive and volitional aspects of man's nature. There is a very important distinction to be made in this area. Namely, the fact that as far as the jury standard is concerned it is not the clear cut cases of sanity or insanity that present the problem of definition. Rather it is the border line cases that need a properly clarified standard in order to be correctly decided. It is in these close areas that a strict M'Naghten test stressing cognition may be defective unless supplemented with proper instruction.

Normally, a man will not do an act which he considers to be against his basic nature. However, if a man's cognitive power is impaired, he may do an act against his nature because he does not know it to be such. Also, a man may know an act is wrong and still do it because his evaluation of that act is that it is right for him to do it here and now.

A man may be suffering from a mental disease and still have sufficient control through knowing decision to be criminally responsible. However, as noted, the degree of control may be so reduced that the accused is no longer accountable for his action.\(^2\)

A proper test of insanity must include a determination of the stage at which a deranged functioning of this evalulative aspect of man's nature is to be a basis for finding no criminal responsibility. It seems that until now this important distinction has been either over-looked or de-emphasized at the expense of stressing the knowledge aspect of the right-wrong test.

Finally it should be remembered that the determination of the sanity question ultimately lies in the hands of the jury. This jury is composed of laymen, and thus, the standard must be such that it is understandable to them.

The above listed points are the ones that must be borne in mind in formulating a workable and practical definition of insanity. Under proper interpretation, the standard created by the *Esser* case or the American Law Institute test could be so established to meet these requirements. But in all probability neither of these will be retained in unchanged form. A typical example of the type of replacements that will be proposed is the test set out by Professor Hall in an article in the Yale Law Journal.

A crime is not committed by anyone who, because of a mental disease is unable to understand what he is doing and to control his conduct at the time he commits a harm forbidden by criminal law. In deciding this question with reference to the criminal conduct with which a defendant is charged, the trier of facts should decide (1) whether, because of mental disease, the defendant

lacked the capacity to understand the physical nature and consequences of his conduct: and (2) whether, because of such disease, the defendant lacked the capacity to realize that it was morally wrong to commit the harm in question.\textsuperscript{21}

This test, like the American Law Institute test, is much like the M'Naghten test, but meets the criticism of not bearing on control of a man's conduct, that is often directed at the latter.

The test laid out by the Wisconsin Court in the \textit{Esser} case, when properly interpreted, is geared to accomplishing the same thing. As such, it is typical of the developments in this area of the law. Further developments are sure to take place along the same line, and due to the perplexity of the problems in the area, one can do no more than wait and see what course they will follow.

\textbf{DAVID A. SUEMNICK}

Negligence: The Sleeping Driver's Negligence as a Matter of Law—The defendant Louis Shepherd, having participated in the senior class play, attended a party at the home of one of the members of the cast. There was some liquor served at the party, but there was no evidence that anyone became intoxicated. About 3:00 A.M. the party broke up and five girls, including the plaintiff, got into Shepherd's car for the ride home. About four miles from the party the car left the road, hit a tree, and the plaintiff was injured.

The trial court found for the plaintiff, apportioning 95% of the negligence to defendant. The defendant appealed the decision on the theory that he had fallen asleep without warning and that he was not liable for his actions while asleep. The supreme court held that falling asleep while driving is negligence as a matter of law.\textsuperscript{1}

In reaching this decision the court reasoned that falling asleep is attended by premonitory warnings or is to be expected from prior activities and experience. "We... hold that falling asleep at the wheel is negligence as a matter of law because no facts can exist which will justify, excuse or exculpate such negligence."\textsuperscript{2}

Prior to this decision Wisconsin had adopted the majority view that was first enunciated by the supreme court of Connecticut in \textit{Bushnell v. Bushnell}, where it was stated:

\begin{quote}
(T)he mere fact of his going to sleep while driving is a proper basis for an inference of negligence sufficient to make out a prima facie case, and sufficient for a recovery, if no circumstances tending to excuse or justify his conduct are proven.\textsuperscript{3}
\end{quote}

\textsuperscript{1} Theisen v. Milwaukee Auto. Mutual Ins. Co., 18 Wis. 2d 91, 118 N.W. 2d 140 (1962).
\textsuperscript{2} Id. at 98, 118 N.W. 2d at 144.
\textsuperscript{3} 103 Conn. 583, 131 Atl. 432 (1925).