MENTAL DISABILITY ISSUES IN THE CRIMINAL JUSTICE SYSTEM

ABOUT THE AUTHOR

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He has written an earlier book and a number of articles. In 1985, that book and one of his articles were referred to by the United States Supreme Court in a major case involving psychiatric defenses (*Ake v. Oklahoma*, 470 U.S. 68, 85 n.10). One of his articles has been published exclusively in *Westlaw*. (The citations to it and his other writings are included in a list in the Introduction to this book.)

MENTAL DISABILITY ISSUES IN THE CRIMINAL JUSTICE SYSTEM

What They Are, Who Evaluates Them, How and When

By

HARLOW M. HUCKABEE, J.D.

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PREFACE

This is a handbook for guidance of non-lawyers regarding how to handle mental disability issues in criminal justice systems. The attempt here is to use plain, understandable language and to avoid highly technical legal and psychiatric discussions. Nevertheless, because of the nature of the subject, technical discussions cannot be entirely avoided. An effort is made, however, to explain the concepts and issues in a manner understandable to those without legal backgrounds. Also, in order to demonstrate that the discussions are based on sound legal principles, there are citations to supporting legal literature, statutes and case law. This is for lawyers, professors and others who may want to delve more deeply into the issues.

The book should be helpful to investigative personnel in state and local police departments, and in federal investigative agencies. It should also be useful to legal assistants and paralegals, wherever they are assigned. In addition, psychiatrists and psychologists may find it useful in developing a better understanding of the legal concepts and issues. Lawyers can also use the book to train non-lawyers. Furthermore, criminal justice professors may be able to use the book as a supplement to other teaching materials.

One of the purposes of the book is to point out areas in which non-lawyer investigators, legal assistants, and paralegals might participate more than they do now in helping to evaluate and handle mental disability issues. Thus, depending on who employs them, there are references to ways in which they can participate in various contexts in investigations by law enforcement agencies when mental disabilities are involved, as well as be of assistance to defense attorneys or prosecutors in various stages of such cases.

For focusing my attention on the need for this type of book, I am deeply indebted to Professor H. Clint Holley, Administration of Justice Program Head, Alexandria Campus, Northern Virginia Community College. His involvement was early in this project, before the actual writing phase. Thus, I am fully responsible for the final product (and will take the blame for any errors or omissions). In any event, I am deeply grateful to Professor Holley for helping to put me on the right track.

H.M.H.

INTRODUCTION

The framework for this book is based on my career as a lawyer. This includes the years 1952 to 1955 as a major in the United States Army Judge Advocate General's Corps in Korea and Japan. An example of a case from that period is discussed in Appendix A in this book. It involves Army master sergeant Maurice L. Schick, who was charged with first degree murder of the 8-year-old daughter of a U.S. Army colonel. I was the defense counsel appointed by the Army. There was a court-martial in Japan in 1954. The defense was insanity (lack of responsibility) and also diminished capacity. There was a conviction and death sentence. In connection with the appeal, and in a presentation by the defense to President Eisenhower (who eliminated the death sentence), nationally known psychiatrists Karl Menninger, Winfred Overholser, Gregory Zilboorg and Manfred Guttmacher became involved in the case.

During the years 1956 to 1963, and 1968 to 1980 I was a specialist in handling mental disability defenses for the Criminal Section, Tax Division, United States Department of Justice. From 1963 to 1967 I was with the Chief Counsel's Office, U.S. Internal Revenue Service, and from 1967 to 1968 I was in the Organized Crime and Racketeering Section, Criminal Division, U.S. Justice Department. During all of those years I continued to be consulted as a specialist in psychiatric defenses in criminal cases.

A significant case in my career at the Justice Department was the criminal tax prosecution of Bernard Goldfine. There was a competency to stand trial hearing in February, 1961 in which Goldfine was found competent to stand trial. I was assigned to the case on the prosecution side, and worked with Elliot Richardson, the United States Attorney in Massachusetts. (In later years he held a number of high-level cabinet posts in the federal government.) Nationally known defense attorney Edward Bennett Williams represented Goldfine. The case is discussed in Appendix B in this book.

During the period I was with the Justice Department I wrote an article regarding mental disability defenses in criminal cases, which was published in 1973. Near the time of my retirement, I completed a book on that subject, which was published in 1980. Since my retirement I have written additional articles involving mental disability issues in criminal cases, which are included in the list of my writings, set forth later in this Introduction.

In my earlier writings I took positions on what is wrong with criminal justice systems with reference to mental disability defenses. I discussed possible methods for improvement. In this book my approach is different. I take things as they are, and see how we can live with the existing systems. The attempt here is to help non-lawyers have a better understanding of the concepts and issues. Thus in this book, as much as possible, I use plain language and easily understood explanations. I try to avoid highly technical legal (and psychiatric) discussions.

I recognize that such an approach cannot result in exact answers regarding the handling of the intricate and numerous variations of the issues and concepts in federal, state and local jurisdictions throughout the United States. However, it is my hope that this book can be helpful in a *general* way in assisting non-lawyers. This would include investigators for federal, state and local law enforcement agencies (including police departments), legal assistants, paralegals, and even psychiatrists and psychologists who might find that this attempt to simplify the issues and concepts is useful. This book could be helpful to such individuals, whether they are on the prosecution or defense side (or are investigators for law enforcement agencies).

My thought is that the book can cause a better understanding in a general way. Then, knowledgeable attorneys in the various jurisdictions can (and *should*) give guidance and supervision in terms of the exact issues and concepts in the particular jurisdiction and situation (whether involving the prosecution, defense, or investigating agencies).

The effort here is to give a commonsense, straightforward discussion of what the issues and concepts are; who evaluates them; and how and when they are evaluated. At least in a general way, non-lawyers need to understand the issues and concepts. The book may also be helpful to *lawyers,* who can use it in training and briefing non-lawyers.

In developing the book I have found that the best way to accomplish what I have outlined in the foregoing paragraphs is to base my discussions on my own experience and writings over the years. In my earlier book and articles I have included references to commentators and authorities in support of the points I have made. Thus, when I cite my own material in this book readers can go to the pages of my earlier book or articles for positions of others on the issues. Beyond that, as noted above, the purpose of this book is not to present exact positions on these matters. Instead, general approaches are discussed, and attorneys in particular jurisdictions can narrow things down to the exact local issue or concept.

With the foregoing discussions in mind, set forth below is a listing of my writings over the years, plus descriptions of Appendices A and B in this book. These will be cited in the references in support of discussions throughout the book. In effect, this amounts to a Bibliography of my own writings. Ordinarily, perhaps, such a list would be at the end of the book. However, the material is important in demonstrating the framework in which I have written this book. Thus, it appears appropriate to give it prominence in the Introduction.

Because I will be citing my own material so often, with reference to Appendices A and B and each of my writings I have used abbreviated citations. The shortened citations will be indicated after each of the items listed below. Other than Appendices A and B, this involves listing only the year and page number of the article or book. Of course, throughout as needed, there will also be added citations to references other than my own material, concerning which there will be citations in the usual form for this type of publication. The list of my writings is set forth below.

(1) Appendix A in this book. 1954 trial of Master Sergeant Maurice L. Schick. Short citation example: App.A1.a.(1). This refers to Appendix A1., Mental Disability Issues, a., Insanity, (1) *M'Naghten.*

(2) Appendix B in this book. February 1961 competency to stand trial hearing involving Bernard Goldfine. Short citation example: App.B3.c.(1). This refers to Appendix B3., How the Competency to Stand Trial Issue Was Evaluated, c., Briefing the Experts Before They Rendered Opinions, (1) Legal Definition of Competency to Stand Trial.

(3) *Resolving the Problem of Dominance of Psychiatrists in Criminal Responsibility Decisions: A Proposal.* Page 790, Volume 27,

Southwestern Law Journal (Southern Methodist University Law School). 1973. Short citation: 1973.

(4) *Lawyers, Psychiatrists and Criminal Law: Cooperation or Chaos?* Book published in 1980. Charles C. Thomas, Publisher, Springfield, Illinois. Short citation: 1980.

(5) *Avoiding the Insanity Defense Strait Jacket: The Mens Rea Route.* Page 1, Volume 15, Pepperdine Law Review. 1987. Short citation: 1987.

(6) *Evidence of Mental Disorder on Mens Rea: Constitutionality of Drawing the Line at the Insanity Defense.* Page 573, Volume 16, Pepperdine Law Review. 1989. Short citation: 1989.

(7) *Diminished Capacity Dilemma in the Federal System.* 1991 WL 330765. Published exclusively in *Westlaw.* Short citation: 1991.

(8) *Mental Disability: Evidence on Mens Rea Versus the Insanity Defenses.* Page 435, Volume 20, Western State University Law Review. 1993. Short citation: 1993.

Before moving into a specific description of mental disabilities in criminal justice systems, some underlying points should be mentioned. These are matters that have an effect on the issues and concepts discussed in this book. Non-lawyer investigators, legal assistants and paralegals need to be aware of them. Lawyers and mental health professionals will be fully involved with such issues in trials and hearings.

1. Problems with Opinions of Mental Health Professionals

a. A basic point is that, in evaluating mental disabilities in the criminal justice system, the psychiatrist or psychologist has the difficult task of "reaching into the defendant's mind" and "determining the actual thoughts" of the defendant.[1]

b. The adversary system is such that participants in the system (whether representing the prosecution or defense) tend to shape facts and history regarding the defendant in a manner favorable to the side they represent.[2]

c. Sometimes mental health professionals oriented towards psychodynamic psychology participate in the proceedings. This involves determinism and the effect of the unconscious on human behavior. In contrast, a basic concept in the law is free will. The law emphasizes the ability of the person to make a choice between good and evil. Commentators, and some courts, take varying positions on this issue.

Controversies surrounding psychodynamic psychology are often involved in criminal proceedings.[3]

d. The nomenclature (i.e., psychiatric jargon) causes difficulty in handling the issues.[4]

e. Mental health professionals tend to be treatment-oriented. Many of them are not trained to take positions on guilt, innocence, or competency to stand trial.[5]

f. Commentators (including some psychiatrists) have said that opinions of mental health professionals on criminal law issues are not scientific.[6]

g. Related to the lack of science issue is that, with reference to opinions of mental health professionals in criminal justice matters, in the literature and cases there are references to different schools of psychiatric thought; inadequacies of the diagnostic system and ambiguities of data used in making evaluations of mental disabilities; lack of follow-up regarding statistics; and institutional conflicts involving the effect on opinions of psychiatrists and psychologists of the needs and values of institutions employing them.[7]

h. Underlying all of the foregoing factors are the different backgrounds, training, experience and qualifications of the mental health professionals who may render opinions. In any given situation this can have an effect on their opinions. For example, in the Schick case (discussed in Appendix A) a relatively young group of Army psychiatrists took the position that he was responsible for the crime (under the Army insanity test). This resulted in the conviction and death sentence. On the other hand, during the appeal, nationally recognized forensic psychiatrists Karl Menninger and Winfred Overholser rendered opinions that Schick was not responsible for the crime. Furthermore, in successfully seeking action by president Eisenhower to eliminate the death sentence, the defense obtained letters to the President (recommending against the death sentence) from Doctors Overholser and Menninger as well as from nationally known forensic psychiatrists Gregory Zilboorg and Manfred Guttmacher. This is an illustration of the effect different backgrounds, training, experience and qualifications can have on a case.[8]

2. Problems With the Legal Definitions

Throughout this book there are explanations of the legal meanings of the various concepts. These include insanity (lack of responsibility);

diminished capacity; guilty but mentally ill; competency to stand trial and other concepts. The legal definitions of such concepts vary from jurisdiction to jurisdiction; and there are ambiguities in language in statutes and court opinions. Thus, even within the same jurisdiction there may be differing opinions regarding the meaning of the language. Added to such problems is that there are inconsistencies and ambiguities in the use of labels for the various concepts.

When these legal definition difficulties are added to the problems with the opinions of mental health professionals (1 above) it can be seen why, over the years, there has been so much difficulty in handling mental disability issues in criminal justice systems. The effort in this book is to clarify the issues and concepts as much as possible, in spite of such problems.

3. Problems in Determining Severity of Mental Disability

Whether the issue is insanity (lack of responsibility), diminished capacity, lack of competency to stand trial, or guilty but mentally ill, a basic question involves the severity (or lack thereof) of the mental disability involved. The problems with opinions of mental health professionals (1 above) and legal definitions (2 above) contribute to the difficulty of determining the level of severity required by the law. These problems cause the "battle of the experts" in trials and hearings.

All of the problems mentioned in 1, 2 and 3 above continue. I do not expect any major change for the better in the foreseeable future. Non-lawyers may not be able to do much about them. However, the attempt in this book is to provide guidance for them to be as effective as possible in their participation in this difficult area of the criminal justice system.

ENDNOTES

1. 1993 at pp. 469-70.
2. 1993 at p. 470; 1980 at pp. 101-104.
3. 1993 at p. 470; 1980 at pp. 8, 9, 12, 146.
4. 1993 at p. 470.
5. 1993 at p. 471.

6. 1980 at pp. 104-105, 145-150. See also 1993 at pp. 478-484, 509-513; 1989 at pp. 584-92; and 1987 at p.12.
7. 1980 at p. 147.
8. App.A4.a.(2); App.A4.a.(3).

CONTENTS

MENTAL DISABILITY ISSUES IN THE CRIMINAL JUSTICE SYSTEM

Chapter One

WHAT ARE THE MENTAL DISABILITY ISSUES?

INSANITY DEFENSE

Before discussing specific variations (under various labels), consideration should be given to principles generally applicable to insanity defenses. First, a distinction should be made between the ordinary use of the word "defense" in the criminal law, as compared with the use of that word in the insanity (lack of responsibility) defense.

In some situations the elements of a particular crime, as described in the statute creating it, may not be precise enough to include all who should be freed from criminal liability. For example, this would apply when the defendant is so young that it could not be said that there is criminal liability. It could also apply if the act is committed under duress in certain situations. Also, acts committed in self defense are in this group. These are situations where acts are committed that would otherwise be criminal, but there are *excuses* or *justifications* for the otherwise criminal conduct. Insanity defenses are in that category. They recognize that because of mental disability an otherwise criminal act is *excused.*[1]

In the criminal law the word "defense" also includes the broad variety of other types of defenses used in criminal prosecutions in attempting to show, for example, that the defendant did not in fact commit the act involved in the crime. Beyond that, however (and very important to the discussions in this book), is that a major use of the word "defense" applies to lack of a guilty mind or criminal intent (i.e., lack of *mens rea*) for the crime. This can include situations where there are allegations involving mental disability used directly on *mens rea* that may not be sufficiently severe to meet the insanity (lack of responsi-

bility) defense requirements. Such evidence is used to prove that the defendant did not have (or did not have the capacity for) the state of mind which is an element of the offense. This involves the presentation of mental disability evidence in order to rebut the existence of one or more elements of the crime. It can have the effect of reducing the degree of the crime. In fact the defendant can be found not guilty of any crime if there are no lower degrees (or be found guilty of a lower degree of the crime, thus reducing the potential sentence). As will be developed in detail later, this gets into the area of so-called "diminished capacity" versus insanity defenses.[2]

There are important characteristics of insanity (lack of responsibility) defenses that distinguish them from mental disability evidence used directly on *mens rea*.[3] A fundamental purpose of the insanity defense is to protect persons with serious mental disabilities from conviction. Related to that, however, is that a major purpose is to provide a legal framework in order to help control mental disability evidence so that it does not move too far into the prerogatives of the law regarding legal, social and moral issues.

A basic requirement of insanity defenses is that the defendant must suffer from a "mental disease or defect." There is a continuing debate regarding how *severe* a mental disease or defect needs to be in order to meet the requirements of the various insanity defenses. This is one of the areas where non-lawyers need to have the guidance of lawyers who are knowledgeable regarding mental disability defenses in the particular jurisdiction. It is a conflict that is often fought out under the adversary system involved in legal proceedings.

In addition to the mental disease or defect requirement, insanity defenses include functional criteria. Such criteria focus on whether the defendant has the mental capacity to know that the act is wrong (e.g., a phase of the *M'Naghten* test). Some focus on mental capacity to control conduct (i.e., the irresistible impulse test). Others use a combination of both knowledge and control (i.e., American Law Institute test). These tests will be described later. The approach contemplated in insanity defenses is that a "bright line" is supposedly drawn by the law in order to determine legal responsibility even though, to some extent, there may be impairment of mental capacity because of mental disability. All of this results in the so-called "battles of the experts." Those on the defense side tend to stress the severity of the mental disability. Those testifying for the prosecution tend to downgrade its severity.

Another important function of the insanity defense involves protection of the public. This is done by the requirement in insanity defenses of commitment of dangerous offenders who are found not guilty by reason of insanity.

M'Naghten

The *M'Naghten* insanity (lack of responsibility) test used in criminal cases is based on an old English case (1843). Over the years there has been a great deal of controversy concerning the test, and there have been numerous discussions of it in criminal cases and the literature. Important language in the test is as follows:[4]

> ....[I]t 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.

At the time of the 1954 court-martial in the *Schick* case, discussed in Appendix A in this book, the *M'Naghten* insanity test in the military justice system was as follows: "Was the accused at the time of the alleged offense so far free from mental disease, defect, or derangement as to be able, concerning the particular act charged, to distinguish right from wrong?" A tightened *M'Naghten* test is currently used in the military justice system (requiring a *severe* mental disease defect).[5]

Over the years, with reference to *M'Naghten* type insanity (lack of responsibility) tests, the problems listed at the end of the Introduction to this book have existed. They include: (1) for the reasons listed in the Introduction, the difficulties mental health experts have in rendering opinions on legal issues; (2) problems with ambiguities, inconsistencies and the meaning of language in the legal tests (including the use of varying labels for concepts); and (3) as a result of (1) and (2) the difficulty in determining the level of *severity* of the mental disease or defect required by the law.

With reference to *M'Naghten*-type tests, there have been problems involved in interpreting what is meant by "disease of the mind" and "know," as well as "nature and quality of the act" and "wrong."[6] In view of the extensive variations in federal, state and local jurisdictions it is beyond the scope of this study to go into the details of such prob-

lems (and other problems, including those mentioned in the immediately preceding paragraph). However, in a comprehensive 1984 treatise entitled *Criminal Law Defenses*, by Law Professor Paul H. Robinson, together with the 1999–2000 Supplement to that publication by Law Professor Myron Moskovitz, there are listings of the types of mental disability defenses in all U.S. jurisdictions.[7]

Professor Robinson's treatise, with the 1999 supplement by Professor Moskovitz, lists jurisdictions (including supporting authorities) that have the *M'Naghten* insanity defense. Variations are pointed out, such as the fact that some jurisdictions combine other insanity concepts with *M'Naghten.*[8] Other variations from the original *M'Naghten* version are also mentioned, including the fact that some jurisdictions do not include all phases of the original test. There are also discussions of what level of mental disability would be serious enough for the defense, and the debates concerning that issue. Also, there are discussions of the variations in interpreting wrongfulness and other language in the *M'Naghten* test.[9]

As noted in Sections 1, 2 and 3 at the end of the Introduction in this book, the many variations in the legal definitions, combined with inconsistencies regarding the severity requirements of the mental disabilities (plus the general problems with the opinions of mental health professionals regarding legal matters) all combine to create major problems in handling insanity defenses. Thus, non-lawyers (including psychiatrists and psychologists) should always seek the advice of knowledgeable lawyers in the local jurisdiction regarding all of these matters. The problems are merely mentioned here (including the references to the Robinson and Moskovitz treatise) to present a general summary of what is involved. Non-lawyers who are not mental health professionals need to do the best they can, by studying the issues and being aware of the problems. Mental health professionals are in a more difficult position, since they have to face up to all of this in their opinions, and their testimony in court.

Irresistible Impulse

In various jurisdictions the irresistible impulse test has been added as part of the insanity defense. In effect, the jurors are told to acquit by reason of insanity if they find that the defendant had a mental disease