
T H E M I N N E S O T A
C O U N T Y A T T O R N E Y S
A S S O C I A T I O N

MINNESOTA COUNTY ATTORNEYS ASSOCIATION

**POLICY POSITION
CONCERNING THE
MENTAL ILLNESS DEFENSE¹**

Adopted April 15, 2005

Background

Bills have been introduced in the Minnesota Legislature in 2005 to change the legal standard applicable to the mental illness defense (sometimes referred to as the insanity defense) for criminal prosecutions in Minnesota. The current standard for criminal responsibility in Minnesota is codified under Minn. Stat. § 611.026, which provides:

No person shall be tried, sentenced, or punished for any crime while mentally ill or mentally deficient so as to be incapable of understanding the proceedings or making a defense; but the person shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act the person was laboring under such a defect of reason, from one of these causes, as not to know the nature of the act, or that it was wrong. [emphasis added.]

Minnesota's law relating to the mental illness defense (i.e., the underlined portion above) is commonly referred to as the M'Naghten Rule or standard.²

House File No. 17³ proposes deletion of the M'Naghten standard and replacing it with the following:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacks substantial capacity either to appreciate the criminality of the person's conduct or to conform the person's conduct to the requirements of law.

This proposal reflects the Model Penal Code standard for mental illness/insanity developed by the American Law Institute and is commonly referred to as the ALI standard.⁴

¹ This policy position paper was prepared by James C. Backstrom, Dakota County Attorney, Hastings, Minnesota.

² In 1843 Daniel M'Naghten shot and killed the secretary of the British Prime Minister by mistake while intending to kill the Prime Minister. At trial, M'Naghten was found "not guilty, on the ground of insanity." Public outcry and royal concern about the acquittal led a panel of justices to establish a standard for insanity, which is still used by British courts today. The M'Naghten Rule in some form has been adopted by about half of the states in America (as noted on p. 8 of the 1999 Legislative Report concerning *Mentally Ill Criminals and The Insanity Defense*, completed by Stephen Coleman, Center for Applied Research Policy Analysis, School of Law Enforcement, Criminal Justice and Public Safety, Metropolitan State University, St. Paul, Minnesota, October, 1999).

³ H.F.17 was introduced in 2005 by Representative Mindy Greiling (DFL/Roseville).

Senate File No. 102⁵ initially proposed replacing Minnesota’s M’Naghten standard for the mental illness defense with the ALI standard. However, a “delete all” amendment offered at a March 8, 2005 hearing before the Senate Crime Prevention and Public Safety Committee was adopted, substituting the American Bar Association’s standard for the mental illness/insanity defense (commonly referred to as the ABA standard⁶) which provides:

- (a) A person is not responsible for criminal conduct if, at the time of such conduct, and as a result of mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct.
- (b) When used as a legal term in this standard mental disease or defect refers to:
 - (i) impairments of mind, whether enduring or transitory; or,
 - (ii) mental retardation,either of which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense.

Overview

Minnesota’s County Attorneys do not support a change in the current standard for the mental illness defense in criminal prosecutions in our state. It is very important to have a clear and distinct standard such as that provided in Minnesota law with the M’Naghten Rule⁷. The M’Naghten standard has stood the test of time, having first been adopted in England more than 150 years ago. Minnesota has followed this rule of law for decades, as do 26 other states in our nation⁸. It is a constitutional standard that is the basis for much legal precedent handed down by the Minnesota Supreme Court and others across the country. It is the most easily understood and administered standard of the many variations that have been adopted by other states or proposed for adoption by various organizations involved with criminal justice issues in America. Retaining the M’Naghten standard in Minnesota is in the interests of justice and protection of the public safety.

The M’Naghten standard is not “antiquated”, or “an injustice”, or “a rule that adversely affects the quality of life of citizens in the state of Minnesota”⁹, as some of the proponents for change would like us to believe. To the contrary, this is a rule that has been successfully used for over a hundred years to properly and clearly define the criteria by which society should excuse criminal conduct. Contrary to the assertion noted above, it is not the M’Naghten standard that adversely affects the quality of life in Minnesota, but crime that does so, and we should not excuse criminal conduct when a person

⁴ The Model Penal Code or ALI standard for the mental illness defense in criminal trials was first proposed by the American Law Institute in the 1950’s (see p. 8 of the 1999 Legislative Report, previously cited in f.n. 2). It was formally adopted in the early 1960’s and is currently used in some form in 20 states in America.

⁵ S.F. 102 was introduced in 2005 by Senator John Hottinger (DFL/St. Peter).

⁶ The ABA standard for the mental illness defense in criminal trials was adopted by the American Bar Association’s House of Delegates in August 1984.

⁷ This standard was misspelled as “McNaughtan” in the 1999 Legislative Report previously cited in f.n. 2.

⁸ According to 9 A.L.R. 4th 526 (Modern Status of Test of Criminal Responsibility), 19 states (plus the Federal courts), utilize the basic M’Naghten standard for the defense of mental illness in criminal cases and 7 other states follow a modified form of the M’Naghten standard; 18 states utilize the ALI standard concerning this issue (including Hawaii which has pending legislation to abolish this standard); one state follows the Durham test; and 5 states have abolished the mental illness defense and replaced it with the Mens Rea test.

⁹ These terms and others were used to describe the M’Naghten standard in testimony in the hearing concerning S.F. 102 before the Senate Crime Prevention and Public Safety Committee on March 8, 2005.

understands the nature of their actions and right from wrong (which is the essence of the M’Naghten test for criminal responsibility).

This issue is not something new that requires change to meet modern day advances in our understanding of mental illness, as proponents for change would have us believe. The ALI standard for mental illness/insanity in criminal trials was first proposed in the 1950’s by the American Law Institute. The ABA standard was first enacted in 1984. Concerning the notion that the M’Naghten Rule is antiquated and out-of-touch with modern understanding of psychology, it needs to be understood that the M’Naghten standard was never intended to reflect what modern psychology thinks about mental illness, but rather it properly and effectively serves the much broader and more fundamental moral question of when should society hold someone criminally responsible for their actions. The M’Naghten standard does so in a manner clearly superior to that of other insanity tests, like the ALI or ABA standards.

It should be noted that there is no public outcry for change at this time concerning this important area of our law. There is not even an outcry for change in this area, to our knowledge, from the majority of criminal justice system professionals who work directly with this issue. As we will demonstrate below, there is no justifiable reason to change this long-standing and appropriate legal standard in our state.

Also, it is important to remember that one of tests for the mental illness defense proposed for adoption in Minnesota (i.e., the ALI standard) was exactly the test in place in Federal court in 1982 when John Hinckley was acquitted on the basis of insanity for attempting to assassinate President Reagan. He was acquitted even though he planned and carried out this violent attempt on our nation’s leader, seemingly with enough present awareness of the facts and circumstances around him at the time to know where the President would be and to bring a gun with him, obviously with the intent of shooting and killing the President. Under the M’Naghten standard, because he understood the nature of his actions and right from wrong, Hinckley almost surely would have been convicted. However, because he was able to find expert witnesses to testify that due to a mental disease or defect he lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, he was found not guilty by reason of insanity. After Hinckley’s acquittal, the U.S. Congress abandoned the ALI standard, and 36 other states adopted laws making it more difficult to prove insanity.¹⁰ Notwithstanding these events, the Minnesota Legislature is now being asked to revert to a standard that will make it easier for criminal defendant’s to claim and prove insanity in our state.

If Minnesota were to adopt a new standard for the of mental illness defense, as is being proposed, situations will occur where persons who understand the nature of their actions and right from wrong are excused from criminal responsibility for their conduct. We believe this would shock and surprise the majority of citizens in our state and we see no justifiable reason to change the long-standing, fair and just standard for judging a criminal defendant’s culpability which is set forth in the M’Naghten Rule. We believe the majority of Minnesota citizens, if properly informed of all the issues surrounding this complex area of law, would agree.

¹⁰ As noted on p. 11 in the 1999 Report to the Minnesota Legislature concerning *Mentally Ill Criminals and The Insanity Defense*. (See footnote 1.)

Importance of Distinguishing Mental Illness From Culpability

If the standards for the defense of mental illness being proposed for adoption in Minnesota are enacted, the law will excuse criminal conduct based upon the application of such broad and vague concepts as “lacking substantial capacity” or “substantially affecting the mental or emotional processes” of a criminal’s mind. It should be understood that what is “substantial” to one psychiatric expert may mean something entirely different to another.

This conclusion is supported by an extremely thorough law review article entitled *The Virtues of M’Naghten*, published in 1967 in the *Minnesota Law Review*¹¹, by an Assistant Professor of Law and a Professor of Clinical Psychology at the University of Minnesota. The authors point out that the tests (including ALI) in existence at the time this article was written¹² base their analysis upon use of undefined and ambiguous terms like “mental disease and defect”¹³ (terms that leave “responsibility in the hands of the labelers”¹⁴) and “substantial” (a word that “does not provide an effective limitation” and “necessarily...must bear the meaning the user wishes”¹⁵).

The ALI test, for example, requires expert analysis and conclusion as to whether the “mental disease or defect” causes a lack of “substantial capacity” to “appreciate the criminality of the person’s conduct or to conform the person’s conduct to the law.” In other words, this test focuses on how the offender’s diseased mind worked at the time of the offense. This conclusion is “necessarily speculative”¹⁶ and consequently becomes one which is more a reflection upon what is in the eye of the beholder, rather than what was in the mind of the accused at the time the crime occurred.¹⁷

The M’Naghten Rule, to the contrary, uses in its analysis the term “defective reason” and the verb “know” (meaning “a present awareness of surrounding physical facts”¹⁸) as they relate to the offender’s present understanding of the nature of his act and that it was wrong at the time the offense occurred. In other words, M’Naghten focuses upon what was in the offender’s mind at the time the crime occurred, an analysis “containing understandable fact issues.”¹⁹ This is a test that is much less speculative and much more a function of the offender’s present awareness of basic and understandable facts at the time of the offense, such as, for example, whether John Hinckley knew that he was looking for the President of the United States to shoot, understood that he was pointing a gun in the President’s direction and realized that shooting someone with a gun is wrong and can kill them.

The bottom line of the analysis contained in this thorough 1967 law review article is that tests like those now being proposed to the Minnesota Legislature “confuse the issue of mental disease with that

¹¹ *The Virtues of M’Naghten*, Joseph M. Livermore, Assistant Professor of Law, University of Minnesota and Paul E. Meehl, Professor of Clinical Psychology, University of Minnesota.

¹² In addition to the ALI standard, the authors of the law review article cited in f.n.11 commented upon the Dunham Rule (taken from *Dunham v. United States*, 214 F.2d 862, D.C. Cir. 1954) and the test developed in 1953 by the Royal Commission for Capital Punishment (as cited in f.n. 75 on p. 824 of this law review article).

¹³ *The Virtues of M’Naghten*, Livermore and Meehl, p.826.

¹⁴ *Id.* at p.832.

¹⁵ *Id.* at p.829.

¹⁶ *Id.* at p.830.

¹⁷ The same analysis is equally applicable to the ABA insanity test which requires a psychiatric expert’s conclusion of whether a “mental disease or defect” has “substantially affected” an offender’s mind so as to render him unable to “appreciate the wrongfulness” of his conduct.

¹⁸ *The Virtues of M’Naghten*, Livermore and Meehl, p.809.

¹⁹ *Id.* at p.832.

of criminal responsibility.”²⁰ A test like the ALI (or ABA) standard “leaves the issue of moral or legal wrongfulness unanswered.”²¹ This is the basic (and in our opinion fatal) flaw with all of these proposed standards.

The same is not true with the M’Naghten Rule which uses a test hinging upon the present awareness of surrounding physical facts as they relate to whether the criminal defendant understood the nature of his actions and that they were wrong. This is a test that lay people can easily understand and apply and this is why juries in our state should be allowed to continue to apply the M’Naghten standard which is much clearer and easier to comprehend than tests like the ALI or ABA standards. These proposed new standards necessarily hinge their analysis upon the opinion of experts concerning much more complex issues than the questions posed by the M’Naghten Rule. Under the ALI test, a psychiatrist must express his opinion as to whether someone due to mental disease or defect lacks “substantial capacity” to “appreciate” the criminality of his conduct or to conform his conduct to the law. Similarly, expert analysis is required in the ABA test to show that the criminal defendant suffers from a mental disease or defect that “substantially” affects his mental or emotional processes rendering the person unable to “appreciate the wrongfulness of his conduct.” The M’Naghten test, to the contrary, and more appropriately, looks at the more basic questions of whether the defendant knew what he was doing and understood right from wrong at the time the crime occurred. These are concepts much more capable of lay understanding and application and concepts which more properly focus on the central issue of moral culpability rather than upon the extent of an underlying mental disease.

Opening the Door to Diminished Capacity and Subjective Analysis

Adoption of the ALI, ABA or similar standard for the mental illness defense may open the door to the concept of diminished capacity regarding criminal responsibility in our state, which the Minnesota Legislature and Supreme Court have never permitted under the M’Naghten standard. This is a very slippery slope down which Minnesota’s Legislature should not embark.

The most classic example of the pitfalls of injecting the concept of “diminished capacity” into the determination of criminal responsibility was the use of the so-called “twinkie defense” in the 1980’s trial of Dan White who prepared for and carried out a plan to sneak into the San Francisco City Hall to murder that city’s mayor and a council member because of an ongoing dispute surrounding White’s resignation from the city council and attempt to be reappointed. His defense was that he ate too many twinkies and other junk food immediately prior to the crime which raised his blood sugar and apparently, in the opinion of the medical experts who testified on his behalf, “substantially” affected his capacity to understand or “appreciate” the wrongfulness of his actions. He was acquitted of murder and convicted only of manslaughter, which understandably outraged most persons in California and the nation.

Adopting either the ALI or ABA standard for the mental illness defense in Minnesota, which require expert analysis of the extent to which a mental disease or defect impacts the mental or emotional processes of a criminal defendant, thereby affecting his/her ability to appreciate the criminality or wrongfulness of the conduct, will open the door to analysis of gradations of a wide-range of mental diseases or defects. If these standards are adopted, expert testimony concerning all of the mental

²⁰ Id. at p.816.

²¹ Id. at p.831. The authors also use the term “blameworthiness” to describe the basic need for society to hold individuals responsible for their criminal acts. (See Id. at p. 830).

illnesses or deficiencies articulated in the *Diagnostic and Statistical Manual for Mental Disorders* (commonly referred to as the DSM) will be allowed in the guilt phase of criminal trials in our state. The number of mental disorders identified in the DSM is extensive. These include “attention deficit and disruptive behavior disorder”, “substance abuse disorder”, “various types of depression”, “anxiety disorder”, various sexual disorders, “impulse control disorder”, “anti-social personality disorder”, and “post traumatic stress disorder”, to name a few. The authors of the previously cited 1967 Minnesota Law Review article discussed the problems that adopting new standards for the mental illness defense (like the ALI test) would cause in this respect when they stated: “[i]t would be an unusual criminal who could not be placed by a friendly expert witness in one of the following categories: inadequate personality, emotionally unstable personality, sociopathic personality disturbance, and transient situational personality disturbance.”²²

The inescapable conclusion is that tests which allow expert testimony concerning the impact of mental diseases or defects like those described above in the guilt phase of criminal trials will undoubtedly result in more defenses of insanity being raised and more acquittals on this basis occurring. The simple fact of the matter is that our laws should not excuse criminal conduct because the offender suffers from depression, post-traumatic stress, impulse control disorder, anti-social personality disorder, transient situational personality disturbance, or one of the many other mental diseases set forth in the DSM. Doing so would not be in the interests of justice or the protection of public safety in our state. We should maintain the clear, concise, easily understood and just M’Naghten test set forth by Minnesota law for decades: i.e., if you understand what you are doing and that it was wrong, you should be held criminally responsible for your conduct.

Mental Deficiency is Most Properly Considered at Disposition

Questions about the level of a person’s mental functioning or the impact that a mental illness or deficiency might have had on their thought processes while committing a crime rightfully belong in the disposition phase and not the guilt phase of a trial. It is important to note that this is exactly what current law and rules properly provide for in Minnesota. Minnesota Sentencing Guidelines set forth several mitigating factors which can be taken into consideration at the time of sentencing to reduce a defendant’s sentence, if it is determined by the sentencing judge that the convicted offender lacks substantial capacity to appreciate the wrongfulness of his/her conduct. Specifically, mitigating factor (3) under the guidelines allows physical or mental impairment and lack of substantial capacity for judgment when the offense was committed to be considered by the sentencing judge for a downward departure. Mitigating factor (5) also allows a sentencing judge to consider other substantial grounds existing which tend to excuse or mitigate the offender’s culpability. Additionally, Minn. Stat. §609.1055 allows for alternative placements for offenders who suffer from serious mental illness. Under this statute a court may consider a defendant’s serious and persistent mental illness, either at the time of initial sentencing or when revoking an offender’s probation and, if consistent with public safety provide for alternative placements in lieu of incarceration. In doing so, the judge may continue probation with conditions that such an offender successfully complete an appropriate supervised alternative living program which has a mental health treatment component.

The question of the degree to which we should punish a person who suffers from mental illness or deficiency is a vastly different question than whether society should hold the person criminally responsible for their actions, and we caution the Legislature not to mix these two issues as we believe

²² *The Virtues of M’Naghten*, Livermore and Meehl, at pp. 826-827.

will occur if either the ALI or ABA standard for the mental illness defense is adopted. Modern medical understanding of how mental illness or disease impacts the ability of persons committing crime to control their behavior is most properly done in the disposition phase of the criminal process, as is the case under current Minnesota law. The type and extent of the mental deficiency, which are central to the analysis utilized in either the ALI or ABA insanity standard, are very germane to the question of applying criminal sanctions to the behavior after a defendant is convicted. These factors are much less germane and provide little guidance, unlike M’Naghten, to the question of where society should draw the line as to completely excusing criminal behavior because of mental illness. Gradations of mental disease or deficiency should not be infused into this question of culpability, as would occur through the expansion of the subjective nature of expert analysis in the guilt phase of a criminal trial which would automatically flow from Minnesota’s adoption of the ALI, ABA or similar mental illness defense standard.

Burden of Proof

Equally as important is the need to maintain the burden of proof on the defendant concerning the mental illness/insanity defense. Shifting this burden to the prosecutors of our state will make even more acquittals a reality, either resulting in civil commitment of these offenders at much higher costs than incarceration, or potentially freeing these individuals to once again prey upon innocent victims with seeming immunity from the law. This is not something this Legislature should let occur. It should be remembered that after John Hinckley’s acquittal in 1982, many states changed their laws on the insanity defense to make acquittal more difficult. By 1990, 36 states, including Minnesota, had put the burden of proof on the defense.²³ While we believe that there is no compelling reason to change the standard for the mental illness defense in Minnesota and this should not occur, no matter what standard is established for criminal responsibility in our state, the burden of proof on this issue needs to remain with the defendant. Bear in mind that what we are discussing here is a criminal defense. The burden to prove this defense rightfully rests with the party asserting it. While the burden of proving the elements of a crime rightfully rests with the prosecutor, placing the burden of proving that someone was sane at the time they committed a crime upon the prosecutor is unfair, inconsistent with common understanding, and would bring this issue directly into the guilt phase of a criminal trial where it clearly does not belong.

Impact of Change

Adopting a new and broader standard for the mental illness defense in our state, such as the ALI or ABA standard, is a serious mistake that will undoubtedly lead to more mental illness defenses being raised in prosecutions, costly “battles of experts” occurring during criminal trials, more acquittals on this basis, and increased civil commitment of acquitted defendants (resulting in more offenders being placed in secure hospital settings at much higher cost than incarceration in prison). All of this would be at great expense to both the state (which funds the courts, public defenders, prisons and security hospitals) and local governments (which fund law enforcement, prosecutors’ offices and county jails). These consequences are not in the interests of justice or protecting public safety. As a result, the people who will suffer the most by the change in the mental illness defense standard being proposed will be the victims of crime and the taxpaying citizens of our state.

²³ 1999 Legislative Report concerning *Mentally Ill Criminals and The Insanity Defense*, Coleman, at p. 11.

Importance of Treatment

The position of Minnesota's County Attorneys concerning the importance of retaining our state's current standard for the mental illness defense in criminal trials should not be construed to mean that we do not recognize the importance of insuring that proper care and treatment is provided to those who suffer from mental illness or deficiency in our state, for this is surely and sorely needed. Our state's prosecutors understand the importance of providing adequate funding to insure that those with mental illnesses or deficiencies receive the help and care they need, be it in our prisons or in the communities where they reside. It may well be true that the majority of persons in prison in our state suffer from mental health distress, but this fact provides no justification for changing the standard of when society should hold persons criminally responsible for their conduct. What this fact tells us is that we need to make certain that those incarcerated for committing crime in our state receive the treatment and care that they need for their mental health problems. Similarly, it is extremely important for our state to provide access to mental health care for citizens who are not incarcerated and who are unable to provide that care for themselves. By doing so, we can perhaps prevent these mental health problems from flaring up and resulting in the commission of a crime in the first place. Everyone would be better served if this were the case.

Conclusion

The standard for the mental illness defense in criminal trials in our nation that most appropriately addresses the importance of distinguishing a mental disease or defect of a criminal defendant from the defendant's moral culpability for the crime committed is the M'Naghten Rule. Proper application of the M'Naghten standard in a criminal trial will result in persons with serious mental illnesses, involving defects of reason which keep them from realizing the nature of their actions or understanding right from wrong, being found not guilty by reason of insanity. Under M'Naghten, expert testimony concerning the impact that less serious mental diseases or defects had upon an offender's understanding of the wrongfulness or criminality of his/her behavior is properly excluded from the guilt phase of a criminal trial, although this issue is very relevant to the disposition phase of a criminal case. This is exactly the way the law should work in this important area and this is exactly the way it does work currently in Minnesota because we appropriately follow the M'Naghten mental illness defense standard. This would not be the case if a broader mental illness defense standard like the ALI or ABA test becomes the law in our state. Adopting such a new standard would increase costs in both the criminal justice and civil commitment processes. This is not in the best interest of the citizens of our state.

The most concise, clear, easily applied, and least subjective standard of criminal insanity remains that which was adopted over 150 years ago in England and that which has been the law of this state for decades, i.e. the M'Naghten Rule. While it is never easy to mix psychology with criminal law and responsibility, the M'Naghten Rule provides the best test for doing so. When an individual understands the nature of his or her actions and knows right from wrong, criminal responsibility should attach. This is a plain and simple test with no gradations or subjective considerations like the other standards being proposed for adoption.

It is for all of these reasons that Minnesota's prosecutors strongly support continuing the clear and concise standard established by the M'Naghten Rule as to the defense of not guilty by reason of mental illness in our state.