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Insanity as a Defense in Criminal Law.

The great advancement which has been made by the scientists of our day in the study and treatment of insanity; the alarming increase in prevalence of the malady; and especially the large number of important criminal prosecutions in which the plea of insanity is entered, unite to make our subject one which is not only of considerable moment but of vital and absorbing interest. Speaking generally, it may be said that insanity in some form has always been regarded by law as an excuse for the commission of crime. Perhaps the earliest common law case on the subject is that recorded in the Year Book of 21st. year of Henry VII (1) where it is simply said that "A man was arraigned for the murder of a child, and it was found that at the time of the murder the felon was not of sane memory, by which it was determined that he should go free, quod nota bene". But the difficult problem has been, to establish a test by which we may determine what constitutes such insanity as will, by law, exempt a criminal from punishment. (2) To determine upon the amount of evidence necessary to establish such insanity.

(1) Y. B. 21 H. VII 31 b.
I. What is the legal test of insanity?

Upon the very threshold of the study of this vexed question, it must be remembered that accurately speaking, the insanity of a person is never at issue in criminal cases, but only his punishability. As has been said by another (D. B. Ogden in 11 Am. L. Rev. 66) "A man maybe admittedly as mad as King Lear, and yet be, in the eyes of the law, as amenable to punishment for crimes not resulting from such madness as the most clear-headed citizen of the land.

The earliest attempt to lay down a test for criminal responsibility was made by Lord Hale (1 H. P. C. 290). "There is a partial insanity", he said, "and a total insanity, xxx and the partial insanity seems not to excuse them in the committing of any offence in matters capital, for doubtless most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit those offences xxxx. Such a person as laboring under melancholy distemper, hath yet ordinarily as great understanding as a child of fourteen years hath, is such a person as may be guilty of a felony or treason".

This test is doubtless a very vague one but it has nevertheless exerted a considerable influence over
the subsequent development of the law. At any rate it affords a convenient starting point from which to trace the variations of the law in the later cases.

In the case of Edward Arnold (16 How. St. Trials 695) who was indicted in 1724 for an attempt to murder Lord Onslow, the plea of insanity was entered as a defense and the rules laid down by Lord Hale were practically followed. The prisoner was undoubtedly insane. His habits were idle, irregular, and disordered. Disregarding the entreaties of his friends, he lived alone in a desolate, unfurnished house and had been in the habit of lying about in barns and under hay ricks. He was accustomed to curse and swear to himself for hours at a time, would laugh wildly without any apparent cause, and his sleep was troubled by fancied noises and apparitions. Among his other delusions he believed that Lord Onslow was the cause of all the tumults and trouble that happened to the country and seemed to fancy that he was the special object of his malevolence, declaring frequently that he sent his imps and devils into the room at night. And yet in spite of this evidence he was found guilty, Mr. Justice Tracy instructing the jury that "It is not every kind of frantic humor or something unaccountable in a man's action that points
him out to be such a mad man as is exempted from punish-
ment; it must be a man that is totally deprived of his
understanding and memory, and doth not know what he is
doing, no more than an **infant**, than a **brute**, or a wild
beast; such a one is never the subject of punishment".

The theory which has been called by Mandsley the
"wild beast" theory seems to have been followed for
many years although the cases of Lord Ferrer decided in
1760 (19 How. St. Trials 866) and James Hatfield decided
in 1800 (27 How. St. Trials 1282) indicate a tendency
toward a more humane test. In the latter case, the
great Lord Erskine in arguing against the "wild beast"
theory said that "No such madness ever existed in the
world, that in all the cases the insane persons had not
only had the most perfect knowledge and recollection of
all the relations they stood in toward others, and of
the acts and circumstances of their lives but had in
general been remarkable for subtilty and accuteness and
that delusion, of which the criminal act in question
was the immediate, unqualified offspring, was the kind
of insanity which should rightly exempt from punishment.
Delusion where there is no frenzy or raving madness, is
the true character of insanity". The trial of this
case attracted a good deal of attention and seems to
have had a modifying influence upon the judicial minds. Accordingly, twelve years later, in the case of Billingham (5 C. & P. 168 Note (a)) we find Lord Mansfield declaring that the true test for determining the prisoner's responsibility is the capability of distinguishing between right and wrong. "It must be all proved beyond doubt," he says, "that at the time he committed the atrocious act he did not consider that murder was a crime against the laws of God and Nature."

These two cases were followed for several years, although the law on the subject continued to be in an unsettled and vacillating condition until the decision in the famous Mc Naghton Case in 1843 (10 C. & P. 200). Mc Naghton murdered one Drummond, under the delusion that he was one of a band of conspirators whom he believed to be following him, blasting his character and making his life miserable. There was very strong expert testimony going to show that the knowledge of right and wrong was not the true test of responsibility and despite the fact that he was able to transact business and evinced no symptoms of mental disorder in his conduct; he was acquitted on the ground of insanity. The verdict filled all England with indignation and alarm, and raised a perfect storm of protest. It was finally
made a subject of debate in the House of Lords, and it was there determined to state the opinion of the judges on the law governing such cases. Four questions were propounded, only two of which, however, are of great importance, namely the second and third. These are as follows:

"2nd. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defense?"

"3rd. In what terms ought the question to be left to the jury as to the prisoner's state of mind when the act was committed?"

In answering these questions, Mr. Justice Maule spoke for himself, but the court, through Lord Chief Justice Tindal, said, "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, he did not know that it was wrong."

We have dwelt upon this case at some length, because of its great influence upon the existing law. The so-called "Knowledge of right and wrong" test laid down by Tindal C. J. as above, has remained in England practically unchanged, and is followed as well in most of our American courts.

As early as 1851, only eight years after the decision in Mc Naghtons case, Mr. Justice Curtis of the United States Circuit Court in United States v Mc Glue, Curtis C. C. l, declared the test to be "the capacity to distinguish between right and wrong, as to the particular act with which the accused is charged. If he understands the nature of his act; if he knows his act to be criminal, and that if he does it he will do wrong and deserve punishment; then, in the judgement of the law, he has a criminal intent and is not insane so as to be exempt from responsibility. On the other hand if he is under such delusion as not to understand the
nature of his act, or if he has not sufficient memory and reason and judgement to know that he is doing wrong or not sufficient conscience to discern that his act is criminal and deserving punishment, he is not responsible." This rule has been adopted in at least sixteen of the states, viz: California, New Jersey, Wisconsin, Missouri, Tennessee, Texas, Alabama, Virginia, Louisiana, North Carolina, Maine, Georgia, Mississippi, Delaware, and Nebraska (1). In the New York case of Flannigan vs People, 52 N. Y. 467, a strong effort was made to change the test, but it was unsuccessful, the court declaring the rule as laid down in Mc Naghtons case to be the settled law of the state. And it may be added that in the present Penal Code of this state the rule remains unchanged. In a few states however the test has been considerable altered. Thus, Judge Dillon of Iowa in the case of Tetter vs State 25 Iowa 68 said"if by the observation and concurrent testimony of medical men who make the study of insanity a speciality, it should be definitely established to be true that there is an unsound condition of the mind, that is a diseased condition of the mind in which though a person knows

(1) See Art. by Hill in 15 Am. Law Rev.
that a given act is wrong, he is yet by an insane impulse, that is an impulse proceeding from disease of the mind, irresistibly driven to commit a crime, the law must modify its ancient doctrine and recognize the truth and give to this condition, when it is satisfactorily shown to exist, its exculpation." This is an admirable statement of the so-called doctrine of uncontrollable impulse and it seems to us to be the doctrine which should have been adopted in all American Courts. It has been adopted in Pennsylvania, Ohio, Minnesota, Kentucky, and perhaps a few other states. In Massachusetts the matter does not seem to be entirely clear for although in the leading case of Commonwealth vs Rogers, 7 Metcalf 500, Chief Justice Shaw distinctly says that a person acting in an "irresistable and uncontrollable impulse" is not punishable for crime, a careful reading of his opinion leaves one in considerable doubt as to whether he really intended to recognize this doctrine.

The question as to whether or not an "uncontrollable impulse" should be recognized by law as an excuse for the commission of crime, has provoked endless discussion and controversy, not only in the courts, but among scientists and philanthropists. And it is at present difficult to predict to what extent the more liberal...
Doctrine may in the future be adopted. Both sides have already received the support of many strong authorities. Gibbon, C. J. in charging the jury in Commonwealth vs Mosler, 4 Pa. St. 267, said "But there is a moral or homicidal insanity, consisting of an irresistible inclination to kill or to commit some other particular offense. There may be an unseen ligament pressing on the mind, drawing it to the consequences which it sees, but cannot avoid, and placing it under a coercion, which, while its results are clearly perceived, is incapable of resistance." In Parsons vs State, 81 Ala. 577, the court acknowledged that the "right and wrong" test had been adopted by the state but reopened the question and after thorough consideration held that "uncontrollable impulse" should be a defense, Somerville, J. declaring that the law had not kept pace with the progress of thought and discovery, in the present advanced stages of medical science.

It cannot be denied that the above decisions are in accord with modern scientific theories of insanity. The capacity to distinguish between right and wrong, whether abstractly or as applied to the particular act, as a legal test of insanity and responsibility for crime is repudiated by all modern authorities in medi-
cal jurisprudence. "With regard to this test" says Dr. Reynolds in his work on "The Scientific Value of the Legal Tests of Insanity" on p. 34 "I may say, and most emphatically, that it is utterly untrustworthy, because untrue to the obvious facts of nature." Other great specialists have expressed similar views. A striking instance is found in the following Resolution unanimously passed at the Annual meeting of the British Association of medical officers of Asylums and Hospitals for the Insane held July 14, 1864:

"Resolved that so much of the legal test of the mental condition of an alleged criminal lunatic as renders him a responsible agent, because he knows the difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently in those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions." (1)

Nor are the modern law writers backward in expressing disapproval of the old "right and wrong" test.

(1) See Ordronaux's "Judicial Aspects of Insanity" pp. 423 - 4.
"it ought to be the law of England that no act is a crime if the person who does it is at the time when it is done prevented either by defective mental power from controlling his own conduct, unless the absence of the power of control has been produced by his own default." (1)

The theory of uncontrollable impulse has also been accepted in the Codes of several European countries. The Criminal Code of Germany contains the following provision, which is said to have been the formulated result of a very able discussion both by the physicians and lawyers of that country: "There is no criminal act when the actor at the time of the offense is in a state of unconsciousness or morbid disturbance of the mind, through which the free determination of his will is excluded." (2) It is provided in the code of France that "There can be no crime or offence if the accused was in a state of madness at the time of the act."

(1) See 1 Bisb. Cr. L. (7th. Ed.) Sec. 386 et seq. and 1 Whart Cr. Law (9th. Ed.) Sec. 45.
(2) Encyc. Brit. (9th. Ed.) Vol. 9 p. 112 citing German Cr. Code (Sec. 51 R. G. B.)
At first the French courts were inclined to interpret this law in such a manner as to follow in substance the law of England. But it is now construed in accordance with the modern scientific view.

In spite of this great mass of testimony against the old test, however, the majority of our courts as has been seen still cling to it, and firmly refuse to adopt the theory of "uncontrollable impulse." In State vs Pagels, 92 Mo. 300, the court said: "It will be a bad day for this state when uncontrollable impulse shall dictate a rule of action to our courts." In State vs Morey, 37 Kan. 369, the jury was directed that "The law recognizes no form of insanity, although the mental faculties may be destroyed or deranged, so long as the person committing the crime knew what he was doing and that the act was wrong." The California Supreme Court, in People vs Hoin, 62 Cal. 120, held that an irresistible impulse to commit a criminal act "does not absolve the actor, if at the time and in respect to the act he had the power to distinguish between right and wrong." Another very interesting case is the recent one of State v. Harrison, 36 W. Va. 729 decided in 1892. The court reviews with great thoroughness the cases on both sides of the question and
concludes that the old test of "right and wrong" is best suited to the practical administration of justice, and as the safest rule for the protection of human life.

"This 'irresistible impulse' test has been only recently presented" said Brannor, J., "and while it is supported by plausible arguments, yet it is rather refined and introduces what seems to me a useless element of distinction for a test, and is misleading to juries, and fraught with danger to human life, so much so that even its advocates have warningly said it should be very cautiously applied, and only in the clearest cases.

It will thus be seen that the opposition to this new test does not arise from ignorance on the part of our courts or from their inhumanity; but because they fear that its introduction would be dangerous, and might tend to defeat the protection which the law affords against the acts of criminals. As Andrews, J. said in the New York case of Flanagan vs People (Supra) "Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law. The vagueness and uncertainty of the inquiry which would be opened and the manifest danger of introducing the limitation claimed into the rule of responsibility, in cases of crime, may well cause courts to
pause before assenting to it. Indulgence in evil passions weaken the restraining power of the will and conscience; and the rule suggested would be the cover for the commission of crime and its justification." No doubt but that there is great force in this argument and it may be that the courts will cling to it for a long time. But as the theory which considers every criminal tendency as a disease seems to grow in favor among our scientists and is indeed rapidly gaining a foothold in the popular mind, it may be expected that the rule of punishability of insane criminals will gradually soften and in time will reach the point where the true test will be - was the commission of the crime the result, in any way, of the prisoner's insane delusion? There is no doubt in our own minds but that this is the true test and it ought to be applied in our courts of justice.

II. What is the rule of evidence as to the proof of insanity?

The consideration of this part of our subject involves almost as much difficulty as that of the first one. Of course the courts are more certain of their ground and are not deceived and confused by any scientific theories, but nevertheless their disagreement
is just as marked. And it may be premised that to ask a jury comprised of men of only ordinary intelligence and education, to determine whether or not certain proved facts constitute insanity, seems rather strange. Such a duty, it would seem could only be properly performed by experts in mental diseases. But such is universally the law and moreover, it seems on the whole to work satisfactorily.

In their answer to the questions of the House of Lords, the judges in Mc Naghton's case said that in every case the jury should be told 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. This general rule is conceded by all courts but the difficulty is to determine where lies the burden of proof. This question does not seem to have been much discussed in the earlier cases. Lord Erskine, one of the counsel in Hatfield's case (Supra) said in the course of his opening address to the jury: "The whole proof, therefore, is undoubtedly cast on me." Singularly enough, however, he voluntarily assumed a position more difficult than the court desired to impose upon him for Lord Kenyon said: "His sanity must be made out to the
satisfaction of a moral man, xxxx yet if the scales hang any thing like even,throwing in a certain proportion of mercy to the party." But history has justified Lord Erskine, for it cannot be denied his rule and not that stated by Lord Kenyon, is the law in England today.

The cases on this question both in England and America are almost numberless and it would profit little to discuss them at any great length. The different rules of evidence which they support are these:

1. Insanity must be proved by a preponderance of evidence.

2. Insanity must be proved beyond a reasonable doubt.

3. If any evidence of insanity is introduced, the burden is on the plaintiff to show sanity by a preponderance of evidence.

The first of these rules depends upon the premise that insanity is a simple question of fact to be proved like any other fact and any evidence which reasonably satisfies the jury that the accused was insane at the time of committing the act, should be sufficient for an acquittal. This view is taken by the United States courts and by the courts of at least fourteen states
viz: Massachusetts, Maine, Virginia, California, Louisiana, Minnesota, Georgia, Mississippi, Alabama, Ohio, Missouri, Pennsylvania, Delaware, and Texas. In some of these states however, the degree of proof remains an unsettled question.

The second of these rules throws the burden of proof upon the accused and in order to establish his insanity and thus secure his acquittal it rests upon the defendant to prove his insanity beyond a reasonable doubt. The theory of this rule was that inasmuch as the presumption of innocence attends the defendant on trial and the state must prove his guilt beyond all reasonable doubt and inasmuch as the general rule above stated as to the presumption of sanity attends the case of the state, the same amount of evidence should be brought before the jury to remove the presumption in one case as in the other. And as the state must establish the guilt of the defendant beyond a reasonable doubt so the defendant must establish his insanity beyond a reasonable doubt if he take advantage of that plea. As was said by Chief Justice Hornblower in State v Spenser, 12 A. & N. 196, "The proof of insanity at the time of committing the act ought to be as clear

(1) See Art. of E. B. Hill in 15 Am. L. Rev. at p. 727.
and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be in order to find a man guilty." This rule is in reality very weak and entirely without foundation. The effect of the presumption in favor of the innocence of the defendant is to protect innocent persons from punishment. If this be the object of the law it certainly would not impose an equally heavy burden upon a person who is trying to prove that by reason of insanity he was morally innocent of the crime. The only state which has adopted this rule is New Jersey(1). Delaware at one time was inclined to adopt it but it has since refused to do so and now follows the first rule stated above. It seems also that the state of Oregon has by statute adopted this rule.

The third rule is the one that is most favorable to the accused and it rests upon the theory that a man is presumed sane but when the question of his insanity is raised and evidence is introduced to show that he was insane there rests with the prosecution to show that the man was sane as a part of their case. In fact it becomes a part of their case and the state must prove

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(1) State v Spenser 1 N.J. Ab. 196.
it beyond all reasonable doubt like other facts of the case. This rule has been accepted in New Hampshire, Nebraska, Tennessee, Illinois, Indiana, Kansas, Kentucky, Michigan, New York, and North Carolina (1).

It would thus appear that as between the first and third rules the states are very evenly divided. Perhaps a slight weight of authority favors the theory that a defendant alleging insanity must prove it by a preponderance of evidence. The third rule which provides that whenever the jury has reasonable doubt of sanity they should acquit the prisoner would seem to be more in accord with the general principles of criminal law. It is universally acknowledged that the true rule is that where the jury has a reasonable doubt as to a man's guilt it is their duty to acquit. But if the person is insane he morally is not guilty and therefore it clearly follows that a reasonable doubt of his sanity is in reality a reasonable doubt of his guilt and should result in his acquittal.

This is the reasoning which has been followed in our own state of New York. It was said as early as

(1) See Art. by Hill (Supra).
1857 in the leading case of Mc Cann v People, 16 N. Y. 57, that "If there should be a doubt about the killing, all will concede that the prisoner is entitled to the benefit of it; and if there is any doubt about will, the faculty of the prisoner to discern between right and wrong, why should he be deprived of the benefit of it, when both this act and the will are necessary to make out the crime." This is a most convincing argument and although for some time the New York Courts wavered, they finally settled upon the rule under discussion. And it should be noted that the New York Courts are so liberal as to require only that the jury be plainly instructed that a reasonable doubt in their minds upon the question of insanity entitles the prisoner to an acquittal. Nice distinctions in regard to the burden of proof may be made, but are entirely unnecessary.

Although, as we have seen, this rule appeals very strongly to our reason and sense of justice, it must be admitted that in the light of general principles of evidence and pleading it does not appear to be logical. The plea of insanity is not a traverse but a plea of confession and avoidance. One who pleads insanity to an indictment admits facts from which malice is always, if there is nothing more, conclusively presumed,
but avoids the presumption by the fact of insanity, and so denies the malice. As Danforth J. puts it in State v Lawrence 57 Me. at 583, the plea of insanity "does not deny a single allegation in the indictment, but simply says, grant all these allegations to be true, and still guilt does not follow, because the doer of them is not responsible therefor. It does not meet any question propounded by the indictment, but raises one outside of it. It is not a mere denial but a positive allegation, xxxxx. When insanity is found, it does not show that the act was any the less wilful, or deliberate, or even intentional; but it does show an excuse, an irresponsibility for what would have otherwise been criminal. It would seem then, that the question of insanity can never be raised, unless by the prisoner; and by him only in an affirmative allegation, such as carries with it the burden of proof." It is impossible to foretell which of these two radically conflicting rules will survive the test of time. Indeed it is probable that both will find support until the rising tide of popular and scientific opinion wears away entirely the present theory of insanity as a defense to crime, and lifts the unfortunate insane criminal to a position where he will be safe from
the ignorance and prejudice by which he is continually menaced.

P. Mathew Reed.