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Insanity Defense How Far Have We Strayed

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THE INSANITY DEFENSE
HOW FAR HAVE WE STRAYED?

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George Santayana wrote: "Progress, far from consisting in change, depends on retentiveness . . . and when experience is not retained . . . infancy is perpetual."[2] Santayana's enduring words underscore the wisdom of Cicero who wrote: "To be ignorant of what occurred before you were born is to remain always a child"[3] It is with Santayana and Cicero in mind that this brief critical analysis of the origins of the insanity defense, and its evolution to the present, begins.

Cicero said: "Crimes are not to be measured by the issue of events but from the bad intentions of men."[4] There is evidence that the early Hebrews, ancient Romans, early Church scholars, the Goths, and the Vandals, all believed that conduct must be evaluated in the context of mental health and maturity. Since modern American law has arisen primarily from early English jurisprudence, however, this analysis of the evolution of the insanity defense will begin with an overview of the seminal English cases.

In the thirteenth century, the English jurist Henry de Bracton wrote:

> [W]e must consider with what mind . . . a thing is done . . . in order that it may be determined accordingly what action should follow and what punishment. For take away the will and every act will be indifferent because your state of mind gives meaning to your act, and a crime is not com-

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[2] GEORGE SANTAYANA, THE LIFE OF REASON, VOL. I. 184 (Charles Scribner's Sons eds., 1905-06)(2d ed. 1954).

[3] CICERO, ORATOR XXXIV. 120 (Loeb Literary Classics ed. & H.M. Hubbell trans. 1939)(3d ed. 1962).

[4] CICERO, PARADOX III, *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 34a (13th ed. 1955).

> mitted unless the intent to injure intervenes, nor is a theft committed except with the intent to steal.[5]

For de Bracton, a consideration of the individual's will was essential to the judgment of his act. In the thirteenth century, William Lambard wrote: "If a madman or a natural fool, or a lunatic in the time of his lunacy, or a child that apparently hath no knowledge of good nor evil do kill a man, this is no felonious act, nor anything forfeited by it . . . for they cannot be said to have an understanding will."[6] Historians of the insanity defense often evidence the antiquity and primacy of the "knowledge of right and wrong test" by citing to these passages. However, these historians fail to recognize that the last part of Lambard's passage explains *why* it is important to evaluate the knowledge of good and evil. It is because the presence or absence of that knowledge is an *indicator* of the presence or absence of an "understanding will." But, it is not necessarily the *only* indicator of the presence or absence of an understanding will. Thus, like de Bracton, Lambard believed that consideration of both intellect and volition must precede the judicial determination of a criminal act or a criminal sanction.

Sir Matthew Hale, the renowned English judge of the seventeenth century, furthered the evolution of legal thought on the subject of culpability through his effort to define more clearly the concepts that are principal to the debate. Hale believed that:

> [m]an is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of a law. . . . [T]he consent of the will is that which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so . . . where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or

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[5] HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, *reprinted in*, F.B. Sayre, *Mens Rea*, 45 Harv. L. Rev 974, 985 (1932).

[6] WILLIAM LAMBARD, 1 EIRENARCHA: OR OF THE OFFICE OF THE JUSTICES OF PEACE 218 (Newberry & Byneman 1581)(*cited in* J. BIGGS, JR., THE GUILTY MIND 83-4 (Harcourt Brace 1955).

> sanction of that law instituted for the punishment of crimes or offenses.[7]

Hale found a distinct difference between partial insanity and total insanity: partial insanity should excuse no crime but total insanity *should* so excuse. In defining the concept of partial insanity, Hale wrote: "[T]he best measure I can think of is this: such a person as laboring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath. . . ."[8]

Courts historically had used age categories to support significant presumptions about an individual's ability to comprehend right and wrong. In Hale's time, it was an unrebuttable presumption of law that an infant under the age of seven could not commit a felony, and that a child of fourteen or older was *a priori* capable of committing a felony. Children between the ages of seven and fourteen were considered incapable of felonious behavior. If they understood that they were doing wrong, however, they *could* be found guilty of a criminal act. Thus, "malitia supplet aetatem" or "malice supplies the [want of] age" was a popular maxim of the time. Hale's conclusion that an insane adult with less understanding than an average fourteen-year-old, was exculpable before the courts. His writing on the subject of insanity and the law not only led to an enlightened application of the law in regard to the disabilities of the insane, but also empowered juries with the responsibility of determining whether individuals should be held accountabile for their actions under the law. The modern standard for a determination of insanity—complete, perfect, or absolute absence of all understanding (i.e. mindlessness)—retains none of Hale's sensitivity.

After Hale, the concept of criminal insanity continued to develop in English law until it reached its zenith in *Regina v. Oxford*.[9] Justice Denman charged: "[I]f some controlling disease was, in truth, the acting power within him, which he could not resist," he would not be responsible. After *Oxford*, the standard for criminal insanity moved away from the broad and merciful

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[7] SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE (The History of the Pleas of the Crown) 14-15 (Robert H. Small ed., 1847).

[8] *Proceedings on the Trial of James Hadfield, at the Bar of the Court of the King's Bench, for High Treason, June 26: 40 George III. A.D. 1800., in* HOWELL'S STATE TRIALS, VOL. XXVII, at 1281 (Thomas Jones Howell, Esq. ed) (London, 1820).

[9] *Regina v. Oxford*, 173 Eng. Rep. 941 (1840)(Lord Denman).

approach advocated by Hale and Denman and toward the narrow and punitive standard utilized by courts today.

The first major blow to the approach of Hale and Denman came in 1843, when Daniel M'Naghten was acquitted of murder after the examining physicians declared him insane.[10] The resulting public outrage came at a time when England was in a period of economic and social instability. Consequently, the House of Lords responded by demanding that the fifteen judges of the Queen's Bench clarify England's criminal insanity law. Initially, the judges were concerned that too narrow a definition would reduce the judges' and juries' discretion and thereby prevent the orderly evolution of the common law. The judges were also skeptical of the prospect of defining the law in the realm of the hypothetical, without the benefit of facts stemming from a specific case. Nonetheless, the judges of the Queen's Bench declared that intellectual functions would be the sole criteria for determining insanity. The courts could no longer consider affective and volitional factors.

The following year, Lemuel Shaw, the noted Chief Justice of the Massachusetts Supreme Court, presided over the murder trial of a convict who had stabbed and killed his warden. That case, *Commonwealth v. Rogers*,[11] has gone down in American legal history as the first case in which the *M'Naghten* rules were applied in America. In fact, Chief Justice Shaw did not apply the rule of *M'Naghten*, but rather, he charged the jury in the specific language of the Court in *Oxford*. He instructed that "if some controlling disease was . . . the acting power within [the accused], . . . he would not be responsible." In spite of this original application of the *Oxford* principal,however, the *M'Naghten* rules soon became the general standard in American courts.

Almost a quarter of a century later, in the case of *Commonwealth v. Haskell*, Judge Brewster set forth the applicable standard, as he viewed it:

> [[T]he true test [of insanity] lies in the word "power." Has the defendant in a criminal case the power to distinguish

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[10] *Daniel M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843).

[11] G.T. BIGELOW & G. BEMIS, REPORT OF THE TRIAL OF ABNER ROGERS, JR.,LATE WARDEN OF THE MASSACHUSETTS STATE PRISON; BEFORE THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, HOLDEN AT BOSTON, ON TUESDAY, JANUARY 30, 1844. (Boston, Charles C. Little and James Brown 1844).

> right from wrong, and the power to adhere to the right and to avoid the wrong? In these cases has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate?[12]

Once again, the historical development of the law returned to volition. The ability to control one's mind and body became crucial in determining the degree of criminal responsibility, because the law demands less of a will disabled by mental disease.

New Hampshire Supreme Court Justice Charles Doe meticulously reviewed the English cases and precedents on insanity and their significance in civil and criminal law. In 1868, he wrote a dissenting opinion in a case involving a decedent's testamentary capacity. He concluded that "[a] product of healthy, infantile immaturity, or of disease of the mind, is not a contract, a will, or a crime."[13] Further, the judge concluded that the question of whether a defendant has a mental disease was a ". . . question of fact for the jury, and not a question of law for the court."[14] Four years later, the New Hampshire Supreme Court applied Judge Doe's conclusion in *State v. Pike*.[15] Two years after *Pike*, this principle was reaffirmed on appeal in *State v. Jones*.[16]

In 1954, the Court of Appeals for the District of Columbia established the *Durham* Rule, which commentators then characterized as "not unlike" the rule estabished by the court in New Hampshire. Under the *Durham* Rule, "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[17] The court would look only to "whether the defendant's mental disease or defect caused the criminal behavior."[18] Since the *Durham* Court failed to provide an adequate explanation of the legal

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[12] *Commonwealth v. Haskell*, Ct. of Common Pleas (Philadelphia, 1868) (Hon. F. Carrol Brewster, Judge).

[13] *Boardman v. Woodman*, 47 N.H. 120, 147 (1865).

[14] *Id.*

[15] *State v. Pike*, 49 N.H. 399, 442 (1869).

[16] *State v. Jones*, 50 N.H. 369 (1871).

[17] John Q. LaFond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?, 39 Vill. L. Rev. 71 (1994) (citing Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954)).

[18] *Id.*

principles, precedents, or rationale upon which its opinion was based, the rule survived less than two decades.

The American Law Institute Model Penal Code (hereinafter MPC)[19] succeeded the *Durham* Rule. The MPC restored explicit recognition of the vulnerability of intellectual, affective, and volitional functions to differential damage by mental disease. With only minor variations, the MPC was generally accepted in the United States until the acquittal of John Hinckley Jr. in 1982, after his attempted assassination of President Reagan. The *Hinckley* verdict sparked mass media hysteria, which was exacerbated by the hysteria of the leadership of the American Psychiatric Association and the American Bar Association. Both organizations issued position statements calling for a regressive and exclusionary law for criminal insanity. They demanded that the law restrict findings of exculpatory insanity exclusively to mental illness which affected the intellect and required a diagnosis of severe psychosis.

The goal of psychiatric and legal professionals had always been to protect those disabled by mental illness. In contrast, the positions now adopted by the American Psychiatric Association and the American Bar Association sacrifice the rights of the most vulnerable members of the mentally ill population. The question "How far have we strayed?" is one that must be asked.

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[19] Model Penal Code § 4.01 (1962)(*cited with approval in United States v. Freeman*, 357 F.2d 606, 622-25 (2d Cir. 1966)).