

## Anglo-American Criminal Insanity: An Historical Perspective\*

JACQUES M. QUEN, M.D. \*\*

The history of Anglo-American attitudes regarding the criminal responsibility of the insane is characterized by a resonance between the wish to punish and the wish to protect and treat. The present state of the legal machinery for dealing with the insane is, on almost all levels, a source of dissatisfaction, confusion and controversy. I propose to review the history of our present laws, with the belief that a more thorough understanding of their historical vicissitudes may allow for a stabilizing influence on future legal changes and will highlight the problems requiring attention from behavioral scientists.

Anglo-American law is largely rooted in the Judaic-Christian traditions and principles. Jewish law, stemming from the time of Moses, was traditional and verbal. It was first written about the second century by the scholar known as "Rabbi" or Judah the Prince. Throughout the *Mishnah*, as this body of law is called, there is a consistent grouping of the imbecile (insane), the minor and the deaf-mute.<sup>1</sup>

"It is an ill thing to knock against a deaf-mute, an imbecile, or a minor: He that wounds them is culpable, but if they wound others they are not culpable.<sup>2</sup> . . . For with them only the act is of consequence while the intention is of no consequence."<sup>3</sup> This reference to the intention behind the act relates to the earliest biblical reference to the principle determining our current legal irresponsibility of the insane. "And this is the case of the manslayer . . . whoso killeth his neighbor unawares, and hated him not in time past; as when a man goeth into the forest with his neighbor to hew wood . . . [and accidentally kills him] . . . he is not worthy of death inasmuch as he hated him not in time past."<sup>4</sup> Thus the biblical injunction is that the absence of malice or intent exempts the "manslayer" from criminal punishment. Another biblical reference that would seem to relate to this, although not mentioned in discussions of the problem, are the words uttered by Jesus, "Forgive them, Father, for they know not what they do."<sup>5</sup>

Few outside the legal profession realize that there is more than one body of law relating to crime. Statutory law is that law which is legislated by governmental bodies, while the common law is the "unwritten law of England, administered by the King's courts, based on ancient and universal usage, and embodied in the commentaries and court cases."<sup>6</sup> In effect, the law that develops from the accumulation of decisions and interpretations by the judges in individual cases. In America it is also referred to as case law. It is in this body of law that legal precedent has maximum weight. The principles governing the status of the insane originated in the common law. A common law crime consists of a criminal act and a criminal intent. In the absence of either, there is no common law crime. This contrasts with statutory crimes, which may consist only of a criminal act. Statutory rape is an example of a statutory crime in which the intent is completely irrelevant.

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\*\* Cornell University Medical College.

Criminal law recognizes two major categories of the insane. One is the insane criminal, a person convicted of a crime who becomes insane later, or one whose insanity is not of an exculpable nature. The criminally insane is one whose insanity leads to criminal acts without the presence of criminal intent. A sub-category of the criminally insane includes those under criminal indictment but not yet tried because of insanity.

Earliest records suggest that pre-Norman British law was one of strict liability. The criminal was held to making material reparation, or retribution, to the extent of the material damage. The seriousness of the crime was independent of the intent. However, even during these times, in such a legal system, the insane were not held responsible for making reparations. The burden of responsibility fell on the family of the insane.

Most legal historians date the inception of modern Anglo-American law regarding the criminally insane to the time of Henry Bracton (d. 1268).<sup>7</sup> He was a secular judge in the King's court and an ecclesiastic judge in the Church court. He is credited with initiating the merger of strict liability or secular law and moral intent or Church law. In his book, *On the Laws and Customs of England*,<sup>8</sup> he says, "we must consider with what mind or with what intent 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 committed unless the intent to injure intervene, nor is a theft committed except with the intent to steal. . . . And this is in accordance with what might be said of the infant or the madman, since the innocence of design protects the one and the lack of reason in committing the act excuses the other."<sup>9</sup> Bracton equates the infant and the madman in their shared incapacity to form a criminal intent.

The next English legal commentator of significance was William Lambard (1536-1601), who said in his book, *Eirenarcha*: "If a mad man 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 any understanding will. But if upon examination it fall out, that they knew what they did, and that it was ill, then seemeth it to be otherwise."<sup>10</sup> Here we have introduced the critical factor of an understanding will.

Lambard was followed by Edward Coke (1552-1634), who wrote the *Institutes of the Laws of England*,<sup>11</sup> in which he defined the four classes of *non compos mentis*: "1. An idiot, who from his nativity by a perpetual infirmity is *non compos*; 2. He that by sickness, grief, or other accident, wholly loseth his memory and understanding; 3. A lunatic that hath sometime his understanding, and sometimes not, . . . and therefore he is called *non compos mentis*, so long as he hath not understanding; 4. He that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken. But that kind of *non compos mentis* shall give no privilege to him or his heirs."<sup>12</sup> This last category would appear to relate to the question of "voluntary insanity" as in the case of psychotomimetic drugs.<sup>13</sup>

Mathew Hale (1609-1676) was probably the most learned of the early English commentators on criminal insanity. His *History of the Pleas of the Crown* was published posthumously in 1736.<sup>14</sup> "Man is naturally endowed," he says, "with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of a law. . . . The 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 regularly, where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offenses. And because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen . . . it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions."<sup>15</sup>

"Some persons that have a competent use of reason in respect of some subjects" he says, "are yet under a partial *dementia* in respect of some particular discourses, subjects or applications; or else it is partial in respect of degree; and this is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offense . . . for doubtless most persons, that are felons of themselves, . . . are under a degree of partial insanity, when they commit these offenses: it is very difficult to define the indivisible line that divides perfect and partial insanity, but it must rest upon circumstances duly to be weighed and considered both by the judge and the jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes: the best measure I can think of is this; such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony."<sup>16</sup>

Though Hale speaks of *total* insanity, he does not mean the total absence of reason or understanding, but only less than that possessed by the average fourteen-year old child. Hale left room for the use of discretion by the jury, strengthening its function as the determiner of fact. Such an interpretation is also consistent with Hale's concern that there not be an inhumanity toward the defects of human nature.

The first of the historically significant "insanity trials" took place twelve years before the posthumous publication of Hale's *History of the Pleas of the Crown*. Edward Arnold shot and wounded Lord Onslow in a homicide attempt. The trial was presided over by Judge Robert Tracy in 1724.<sup>17</sup> At that time the English did not permit the accused to have an attorney. The judge was supposed to serve as adviser to the accused and as definer and interpreter of the law. The defendant conducted his own defense.<sup>18</sup> The prosecution demonstrated that Arnold could figure, bargain, make purchases, and had never been under medical care for his mental condition. However, defense testimony brought out the fact that he was known as "Crazy Ned." complained frequently that Lord Onslow had bewitched him, had put "bugs and bolleroyes" in his body, and that Lord Onslow had entered his body at times to torment him.

In his charge to the jury, Judge Tracy said, "That he shot, and that wilfully [is proved]: but whether maliciously . . . that is the question. . . . If he was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, though he committed the greatest offense, yet he could not be guilty of any offense against any law whatsoever; for guilt arises from the mind, and the wicked will and intention of the man. If a man be deprived of his reason, and consequently of his intention, he cannot be guilty; and if that be the case, though he had actually killed my lord Onslow, he is exempted from punishment: punishment is intended for example, and to deter other persons from wicked designs; but the punishment of a mad-man, a person that hath no design, can have no example. This is on one side. On the other side, we must be very cautious. . . . When a man is guilty of a great offense, it must be very plain and clear, before [he] is allowed such an exemption . . . 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 object of punishment; therefore I must leave it to your consideration, whether the condition this man was in, as it is represented to you . . . doth shew a man, who knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did . . . they admit he was a lunatic. You are to consider what he was at this day . . . and if you believe he was sensible, and had the use of his reason, and understood what he did, then he is not within the exemptions of the law, but is as subject to punishment as any other person."<sup>19</sup>

In 1838, Isaac Ray, the American psychiatrist, commented on this case, "The proof

of insanity was strong enough, but not that degree of it which the jury considered sufficient to save him from the gallows, and he was accordingly sentenced to be hung. Lord Onslow himself, however, thought differently; and by means of his intercession, the sentence was not executed, and Arnold was continued in prison for life. . . . It appears, then, that the law at that time did not consider an insane person irresponsible for crime in whom there remained the slightest vestige of rationality.”<sup>20</sup>

The next major “insanity trial” that concerns us is that of James Hadfield.<sup>21</sup> In the Theatre Royal, in Drury Lane, on May 15th, 1800, as the audience was entering, a twenty-nine year old ex-soldier, discharged from the army as insane, fired a pistol in the direction of the King. He knew that the punishment for attempted regicide was death. There is reason to believe that Hadfield wished no harm to the King. God was going to destroy the world, but Hadfield knew that he could prevent it by sacrificing his own life. Not wanting to commit the moral crime of suicide, he shot at the King in order to have the state execute him. Hadfield had extensive and deep scars about the head and neck from wounds he had received in the battle of Roubaix, in 1794 near Lille, France. His head almost had been severed from his body. Part of his skull was gone. Until that battle, he’d been an exemplary soldier. Afterwards, he was subject to fits of insanity, believing that he was King George.

The law requiring the accused to defend himself at the trial did not apply because the charge was treason. Fortunately for Hadfield, the court-appointed attorney was Thomas Erskine, a brilliant and outstandingly successful lawyer, later Lord Chancellor.

Erskine set out first to weaken the strength of the precedential legal definition of exculpatory insanity, as stated by the attorney-general in his opening remarks to the jury. Erskine said, “The attorney-general, standing undoubtedly upon the most revered authorities of the law, has laid it down, that to protect a man from *criminal responsibility*, there must be a *TOTAL deprivation of memory and understanding*. I admit that this is the very expression used both by lord Coke and lord Hale; but the true interpretation of it deserves the utmost attention and consideration of the court. If a *TOTAL deprivation of memory* was intended by these great lawyers in the *literal* sense of the words:—if it was meant that to protect a man from punishment, he must be in such a state of prostrated intellect as not to know his name, nor his condition, nor his relation to others—that if a husband, he should not know he was married; or if a father, could not remember that he had children; nor know the road to his house . . . then no such madness ever existed in the world.”<sup>22</sup> He went on to say that in his experience with the insane “they have not only had the most perfect knowledge and recollection of all the relations they stood in towards others, and of the acts and circumstances of their lives, but have in general, been remarkable for subtlety and acuteness. . . .”<sup>23</sup> Erskine omitted Hale’s standard “as great understanding, as ordinarily a child of fourteen years hath. . . .” This may have been due to ignorance of what Hale had actually said (see above), perhaps because he did not have time to review the accuracy of the attorney-general’s statement, since the trial lasted only one day (June 26th). It is also possible that Erskine knew that Hale defined perfect insanity with the fourteen-year old standard. If so, this was an instance in which Erskine’s action, in non-judicial human intercourse, would have been flagrant intellectual dishonesty, but in the legal context of the adversary procedure, was quite ethical. However, one would have to assume that neither Judge Kenyon nor the attorney-general was familiar enough with Hale to recognize or challenge Erskine’s tactic. Erskine’s goal was to introduce a totally new standard into the law. Recognition of the flexibility of Hale’s definition would not insure acquittal for Hadfield, as would the standard Erskine was about to suggest.

Having weakened the adequacy of prior legal definitions, Erskine went on, “In other cases, reason is not driven from her seat, but distraction sits down upon it along with her. . . .”<sup>24</sup> and so he tells the jury that reason and insanity are not mutually exclusive. “Delusion . . . where there is no frenzy or raving madness, is the true

character of insanity; and where it cannot be predicated of a man standing for life or death of a crime, he ought not, in my opinion to be acquitted. . . . I must convince you, not only that the unhappy prisoner was a lunatic, within my own definition of lunacy, but that the act in question was the immediate offspring of disease. . . ."25

The presiding Chief Justice Kenyon was apparently unaware that he was writing new law when he charged the jury, "If a man is in a deranged state of mind at the time, he is not criminally answerable for his acts." He went on to say that to find Hadfield criminally responsible "his sanity must be made out to the satisfaction of a moral man . . . yet if the scales hang anything like even, throwing in a certain proportion of mercy to the party."<sup>26</sup> This would include all those who, as Hale said, were "felons of themselves" and in a state of partial insanity when they committed crimes. It also established (or should have) that the burden of proof was upon the prosecution to prove the sanity of the defendant once it was brought into question, that, in effect, the legal presumption of sanity doesn't hold in a criminal proceeding once it has been challenged.

Erskine succeeded in getting Hadfield acquitted, but failed in his attempt to clarify and establish legal principle. The Hadfield trial was not even referred to in the next "insanity trial" of major national interest.

On Monday, May 11th, 1812, John Bellingham, a delusional English businessman, shot and killed Sir Spencer Perceval, First Lord of the Exchequer (equivalent to Prime Minister).<sup>27</sup> On Thursday, May 14th, his court-appointed attorneys were informed of their assignment. On Friday, May 15th, the trial began after denial of a motion for postponement to allow time for people from his home town to come to London to testify to his mental condition. That afternoon, Chief Justice Mansfield charged the jury that the test for exculpable insanity was whether Bellingham had enough reason to distinguish right from wrong. No reference was made to any precedent of the Hadfield trial. The verdict of guilty was returned that afternoon and sentence was pronounced. The following Monday, May 19th, Bellingham was hanged and dissected.

In 1840, Edward Oxford, a delusional young Englishman, made an unsuccessful attempt to assassinate Queen Victoria.<sup>28</sup> He was acquitted on grounds of insanity, after Chief Justice Denman made the following charge to the jury: "If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule by which you are to be governed. . . . The question is, whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime."<sup>29</sup> Here is a refinement and elaboration of the legal philosophy expressed in the Hadfield trial.

In 1843, Daniel M'Naghten, a paranoid Glasgow wood-turner, fatally shot Edward Drummond, private Secretary to Robert Peel, Prime Minister of England. Sir Alexander Cockburn, M'Naghten's attorney, based the bulk of his defence on Isaac Ray's *A Treatise on the Medical Jurisprudence of Insanity*.<sup>30</sup> The medical testimony at the trial was unanimous that M'Naghten was insane. The judge's charge to the jury presented the problem as: "If he was not sensible at the time that he committed the act that it was a violation of the law of God or man, undoubtedly he was not responsible . . . or liable to any punishment flowing from that act."<sup>31</sup> No reference was made to delusion, monomania, moral insanity, loss of control over one's actions, diseased will or mental disease. None of the points argued by Cockburn from Isaac Ray, nor those in the medical testimony, beyond the conclusions, were acknowledged by the judge as being of legal import. The public, the Parliament and Queen Victoria were incensed at the verdict, "not guilty, on the ground of insanity." The House of Lords insisted on convening the 15 judges of the Queen's Bench for the purpose of clarifying the law

on criminal insanity. Five questions were put to the judges; they answered two together and returned four answers to the House of Lords. It is these four answers that constitute what are called the M'Naghten Rules.

The pertinent parts of the first three answers are abstracted here. The jury is to be told that "every man is 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. . . .

"To establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act, the accused was labouring 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."

A person under an insane delusion "must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if he supposes another man to be in the act of attempting to take away his life, and he kills that man as he supposes in self-defence, he would be exempt from punishment. If the delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."<sup>32</sup>

Isaac Ray's reaction to this answer is to the point. "This is virtually saying to a man, 'you are allowed to be insane; the disease is a visitation of Providence, and you cannot help it; but have a care how you manifest your insanity; there must be method in your madness. Having once adopted your delusion, all the subsequent steps connected with it must be conformed to the strictest requirements of reason and propriety. If you are caught tripping in your logic; if in the disturbance of your moral and intellectual perceptions you take a step for which a sane man would be punished, insanity will be no bar to your punishment. In short, having become fairly enveloped in the clouds of mental disorder, the law expects you will move as discreetly and circumspectly as if the undimmed light of reason were shining on your path."<sup>33</sup> That Ray was not alone in his reaction is shown by a comment of Chief Justice Ladd of the New Hampshire Supreme Court ". . . it is probable that no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity."<sup>34</sup>

The next major change in this area of Anglo-American law occurred in the United States. The New Hampshire Doctrine was evolved from a series of New Hampshire trials and judicial decisions through 1871. One of the roots of this doctrine was the correspondence and collaboration between Judge Charles Doe and Isaac Ray, on the nature of criminal insanity and the law.<sup>35</sup> In an opinion in *State v. Pike* (1869), Judge Doe said, ". . . if the alleged act of a defendant was the act of a mental disease, it was not, in law, his act, and he is no more responsible for it than if it had been the act of his involuntary intoxication, or of another person using the defendant's hand against his utmost resistance; if the defendant's knowledge is the test of responsibility in these cases, it is the test in all of them. If he does know the act to be wrong, he is equally irresponsible whether his will is overcome, and his hand used, by the irresistible power of his own mental disease, or by the irresistible power of another person. . . . If his mental, moral, and bodily strength are subjugated and pressed to an involuntary service, it is immaterial whether it is done by his disease, or by another man. . . . If a man knowing the difference between right and wrong, but deprived, by either of those agencies, of the power to choose between them, is punished, he is punished for his inability to make the choice—he is punished for his incapacity; and that is the very thing for which the law says he shall not be punished. . . . The whole difficulty is that the courts have undertaken to declare that to be a matter of law which is a matter of fact . . . [The jury should have been told that] all tests of mental disease are purely matters of fact, and that if the homicide was the offspring or product of mental disease in the defendant, he was not guilty by reason of insanity."<sup>36</sup> It should be noted here that "matters of law" are principles of law and legal procedures, the area of judicial

responsibility; while "matters of fact" refers to determinations of fact, reality, or truth, the area of the jury's responsibility.

The New Hampshire Doctrine was not adopted by any other state as an enduring policy. Most American states used variants of the M'Naghten Rules with a supplemental irresistible impulse clause. (This accords criminal irresponsibility if the jury determines that the defendant was overwhelmed by an impulse he could not resist.) Through the years, dissatisfaction continued to mount with the law as expressed in the M'Naghten Rules. This appears to have reached a peak in the 1950's.

In 1953 the British Royal Commission on Capital Punishment vainly recommended that the jury determine "whether at the time of the act the accused was suffering from disease of the mind, or mental deficiency to such a degree that he ought not to be held responsible."<sup>37</sup> In 1954 the Washington, D.C., Federal District Court established the "Durham Rule." "The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire court since 1870. It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect."<sup>38</sup> Close study of the two approaches, however, demonstrates that the New Hampshire Doctrine and the Durham Rule were professional worlds apart; or as one legal scholar said, "The New Hampshire judges were dissatisfied with the M'Naghten rules for legal reasons; the Durham judges for medical reasons."<sup>39</sup> In 1955 the American Law Institute recommended a model penal code that included, in part, "as a result of mental disease or defect [the accused] lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."<sup>40</sup>

These and other recommendations share a dissatisfaction with the M'Naghten Rules, focussing on the inadequacy of the words "know," "nature and quality," "reason" and "wrong." The marked heat of these discussions, the emphasis on the letter and word of the law while almost ignoring the spirit of the legal principle, and the persistence in the same unproductive approach, raise the question of a societal or professional obsessive compulsive mechanism as a significant obstacle to the resolution of the problem.

Historical study can provide relative freedom from emotionality. Historical events can be studied as a "clinical experiment" with outcomes that can be, at least partially, evaluated. Historical study brings into relief the interdependence of the three-way system among society, the individual and the law. It can also highlight the retreat to grossly, if not blindly, punitive approaches to the criminally insane during periods of political turbulence, which repudiate basic principles of law. The cases of Bellingham and M'Naghten provide fertile soil for such study.<sup>41</sup> Besides the background of civil unrest, these two cases also involved actual homicides, whereas the two cases that provided progressive precedents, Hadfield and Oxford, involved harmless attempts.<sup>42</sup>

History can call attention, also, to the role of errors arising from misunderstanding, misreading or not reading precedential authority carefully. One such case is Erskine's or the Hadfield court's seeming ignorance of Mathew Hale's flexible "measure" for criminal insanity. Another example is the belief in modern English courts that "irresistible impulse" is an American invention, although it was clearly interpreted as law by Judge Denman in the case of Oxford, when he said, "If some controlling disease was, in truth, the acting power [author's note: impulse] within him, which he could not resist, then he will not be responsible."

This historical survey also makes clear that there has been an inadequate recognition of research needs in this field. For example, where is the psychologist with a clarification of what is involved in criminal "intentionality," and what in modern terms, is the 14th century concept of "will"? Where are the fruits of decision theory as an alternative to mechanistic psychic determinism? Where is the sociologist evaluating what the organic needs of society are, which must be recognized in any attempt to construct a viable solution to the problem? What changes have taken place in what society was looking

for in the past, and what it is looking for now, that might allow for a restructuring of our goals and our criteria? For example, at one time the penal system used punishment as a deterrent example. The public hangings were not simply county fairs and carefree fun; they demonstrated, vividly, what awaited the transgressor. The withdrawal of criminal punishment from public view should have modified our penal system philosophy. What happened that it didn't?

And where are the historical follow-up studies of those judged criminally irresponsible? What happens to the individual people committing criminal acts but dealt with therapeutically? What are their "recidivism" rates? What is the average length of their "life-time" incarcerations? Is this myth or reality? Criminal responsibility is an area where historians and historical studies can make highly significant contributions to behavioral and social science. What accounts for this not having been done?

These are some of the questions that trouble me as a historian of psychiatry and criminal responsibility. I hope this narrative will stimulate interest and concern on the part of other social and behavioral science historians.

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