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# Insanity as a Defense to Crime

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the same as that of his brother? If so, one of the fundamental principles of criminal jurisprudence must be ignored and set at naught. If my brother seeks out his enemy upon the public highway with a view to slay him, and I, ignorant of his design as well as the cause of the difficulty and how it originated, but seeing him hotly engaged and the fortune of the fight turning against him, and realizing that he is in imminent danger of life or limb, rush to his rescue, and strike down his antagonist in order to save his life, must I, under such circumstances, be adjudged guilty of murder with express malice, merely because my brother would be so adjudged in case he had inflicted the mortal blow? If the law is so written in the books, we have failed to discover it. Nature has written her own law differently in the hearts of men."

Since the "stand in the shoes" rule in defense of third persons is in conflict with the fundamental principle of criminal law that one cannot be guilty of criminal homicide in the absence of criminal intent or negligence, it is submitted that it should yield to the rule that one may kill in the defense of a third person when he has a reasonable belief that the person defended is in imminent peril of death or great bodily harm without fault on his own part.

JAMES DANIEL CORNETTE

#### INSANITY AS A DEFENSE TO CRIME

If one who is subjected to criminal prosecution proves to the satisfaction of the jury that he was insane at the time of the commission of the act, he will stand absolved from all criminal liability. If the crime is one which requires a criminal intent, the defense of insanity negatives the existence of such intent.

In the preponderance of crimes, two elements are essential for conviction—act and intent. Except in "attempts," an act is not susceptible to a great degree of uncertainty: it is there to be seen and needs only to be proved to the jury. The intent or mental element of crime is an entirely different proposition. It can be seen by no one, and the boundaries of mentality or insanity are necessarily susceptible to much uncertainty. That the subjective element of crime is such an elusive thing is probably the reason that insanity is an affirmative defense to crime in about twenty-two states.<sup>1</sup> In the jurisdictions adhering to this majority rule, the defendant has the burden of proof of convincing the jury that he was insane, rather than the lighter burden of going forward with the evidence on insanity. Perhaps the reason behind this rule is that it is a matter of popular and judicial belief that many persons relying on the defense of insanity are perfectly sane, and that if the ultimate burden of proof of sanity were on the prosecution, it would afford an easy avenue of escape to the guilty. However, the doctrine of *mens rea*, which is a fundamental concept in the criminal law, stands unequivocally for the proposition that a mental element is an indispensable component of the majority of crimes. If the doctrine of *mens rea* is as fundamental as it is pur-

<sup>1</sup> Nineteen states and the Federal courts place the burden of proof on the prosecution. WEIHOFFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 151, 158 (1933). MAY, *CRIMINAL LAW* sec. 47 (4th ed. 1933).

<sup>2</sup> *Williamson v. Norris*, 1 Q. B. 7 (1899). 1 BISHOP, *CRIMINAL LAW* sec. 287 (9th ed. 1923). For a complete analysis of the doctrine, see Sayre, *Mens Rea*, 45 *HARV. L. REV.* 974 (1932).

ported to be, should not the prosecution have the ultimate burden of proving sanity before the defendant should be subjected to liability? Is not the presumption that every man is presumed sane until he proves the contrary<sup>3</sup> a violation of the more fundamental presumption that every man is presumed innocent until proven guilty, for it is not disputed that if there be no sanity, there can be no crime? If the doctrine of mens rea is sound in its requirement of a mental element for crime, then it is technically incorrect to place the ultimate burden of proof of insanity upon the defendant, for, in the Anglo-American legal system, the prosecution has the burden of establishing the existence of all the essential elements of crime.

This apparently illogical procedural aspect of the defense of insanity in the majority of American jurisdictions is illustrative of the uncertainty that enshrouds this field of criminal law. The courts themselves do not trust their formula for insanity to the extent of placing the burden of proof on the prosecution. The defendant in the majority of jurisdictions is left to absorb the effects of any weakness in the test. His position is that although he might have been insane, he is nevertheless guilty if he cannot prove it to the jury.

No rule of law of such long standing has been subjected to as much criticism as has the legal test for insanity. The fundamental test was laid down over a hundred years ago in *M'Naghten's Case*<sup>4</sup> when the Judges said:

“ 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 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.”

Most of the current law on insanity in England, Canada and the United States is embodied in this opinion.<sup>5</sup> It is to be observed that the rule is in two parts, either of which is a defense on the ground of insanity.<sup>6</sup> First, it must be determined whether the defendant knew the nature and quality of his act, and, if he did, the second section poses the additional question whether he knew he was doing what was wrong. If either of these questions is answered in the negative, the defense of insanity has been established.

Courts have usually considered the question of knowledge of the nature and quality of the act as a question concerned only with the physical aspects of the

<sup>3</sup> *Davis v. U.S.*, 160 U.S. 469, 486 (1895); *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263 (1893); *Davis v. State*, 44 Fla. 32, 32 S. 822 (1902).

<sup>4</sup> *Clark & Fin.* 200, 210, 8 Eng. Rep. 718, 722 (1843).

<sup>5</sup> *BURDICK, LAW OF CRIME* 277 (1946); *SAYRE'S CASES ON CRIMINAL LAW* 487, n. 1 (1927). *M'Naghten's Case* also provided that if a person commits an offense under an insane delusion as to existing facts, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion existed were real. The majority of the states now deny that there is any separate test for insane delusion. *WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW* 69, 70 (1933); *MAY, CRIMINAL LAW* sec. 45 (4th ed. 1938).

<sup>6</sup> For the leading case to the effect that the rule is in the disjunctive rather than the conjunctive, see *People v. Sherwood*, 271 N. Y. 427, 3 N. E. 2d 581 (1936).

act.<sup>7</sup> The sort of questions that arise are whether the accused knew he was firing a gun, or whether he knew he was wielding a knife. However, some courts have attempted to distinguish the terms "nature" and "quality" by reasoning that quality is concerned with the moral or social character of an act while nature only refers to physical aspects.<sup>8</sup> The issue as to distinguishability of the terms is weighed heavily by authority that they are synonymous. Moreover, the question is of little practical importance since the second section of the rule is concerned with the social characteristics of the act.

In the decision of the question whether the accused knew that he was doing that which was wrong, the word "wrong" is a term of legality as well as morality.<sup>9</sup> In the application of this "right and wrong" test of insanity it was said in *Guiteau's Case*, "If a man is under an insane delusion that another is attempting his life, and kills him in self-defense, he does not know that he is committing an unnecessary homicide. If a man insanely believes that he had a command from the Almighty to kill, it is difficult to understand how such a man *can* know that it is wrong for him to do it. A man may have some other insane delusion which would be quite consistent with a knowledge that such an act is wrong,—such as, that he had received an injury,—and he might kill in revenge for it knowing that it would be wrong,"<sup>10</sup> and, here, he would have no defense under the rule.

These are the types of questions that are for the jury to decide in countless criminal cases where insanity is pleaded as a defense, and the foregoing observations are the result of M'Naghten's rule as it is administered by the courts. This entire matter has been the recipient of numerous attacks, principally from those in the professions of psychology and psychiatry. The assailers are quick to declare that the rule is oblivious to modern science. Professor Hall meets the attackers with the proposition that M'Naghten's rule is a rule scientifically sound, the merit of which has never been disproved, and the superior of which has never been found.<sup>11</sup> However, it is believed that the psychiatric quarrel with the law of insanity is primarily concerned with administration as to methods of proof and final determination of the issue as adopted by the courts rather than with the underlying rules themselves.

The first objection of the psychiatrist with the rule of *M'Naghten's Case* is that it is based upon the overt symptoms of mental disease rather than the disease itself.<sup>12</sup> It is pointed out that the exoneration of the defendant depends upon the severity of these symptoms, and that many serious mental diseases may have very mild, scarcely perceptible symptoms. Jurors are the ones who stand accused of committing this error. Psychiatrists contend that in practice juries decide the question of insanity by examining the symptoms as they appear to them. It cannot be denied that symptoms perceptible to the eye and ear are frequently not indicative of the extent of the fundamental disease involved, and it should not be disputed that an evaluation of symptoms by a student of the mind is of a greater degree of accuracy than one by a layman. However, when it is contended that

<sup>7</sup> *Rex v. Codere*, 12 Crim. App. R. 21, 26-27 (1916).

<sup>8</sup> *Schwartz v. State*, 65 Neb. 196, 91 N.W. 190 (1902) (by implication).

<sup>9</sup> *People v. Schmidt*, 216 N. Y. 324, 110 N.E. 945 (1915); GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 225 (1925); WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 41 (1933).

<sup>10</sup> *Guiteau's Case*, 10 Fed. 161, 182 (1882).

<sup>11</sup> HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 479 et. seq. (1947).

<sup>12</sup> Meredith, *Insanity as a Criminal Defense: A Conflict of Views*, 25 CAN. B. REV. 251, 252 (1947).

the testimony of a psychiatrist is the best evidence on the issue of insanity, many members of the legal profession are quick to impeach such a contention by the assertion that in the past their testimony has been of such a contradictory nature as to be of little value.<sup>13</sup> Doubtless there will be cases where the testimony of the psychiatrist for the defendant and that of the state are in conflict, and the ultimate decision will be the product of the conjecture of the jury. However unfortunate such a situation may be, it is regrettable that such cases should convince the courts and the public that expert testimony in the field of insanity is of little value.<sup>14</sup> It has been correctly observed that the criminal law can do no more than utilize the best psychological knowledge available concerning the relevant fact.<sup>15</sup> Indeed, courts are beginning to realize that the best insight into the human mind is through the eyes of the psychiatrist.<sup>16</sup> A jury that realizes that the testimony of the expert of the mind is the best evidence on the problem of insanity renders great service to the administration of criminal justice. It is the duty of the psychiatric profession to improve its knowledge of the human mind, but it is also the duty of the courts and juries to utilize that knowledge.

Another criticism of the M'Naghten formula popular with psychiatrists is that it treats criminal responsibility as a matter of intelligence and not of the will and emotions. They insist that insanity attacks the will and emotions more frequently than the intellectual powers<sup>17</sup> and that insane persons, although capable of discerning right from wrong, may, nevertheless, be deprived of control over their actions by reason of impulses beyond their limited power to resist.<sup>18</sup> The M'Naghten rule has in many jurisdictions been supplemented by an additional rule which encompasses this situation. This is the rule of *irresistible impulse*.<sup>19</sup> The rule

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<sup>13</sup> " they are forced to conclude either that those [psychiatrists] who disagree are not scientists, or that that about which they disagree is not science. " Michael, *Psychiatry and the Criminal Law*, 21 A. B. A. J. 271, 276 (1935).

<sup>14</sup> For an explanation and repudiation of the so-called popular distrust of psychiatrists, see Overholser, *The Place of Psychiatry in the Criminal Law*, 16 B. U. L. REV. 322, 327 (1936). "The psychiatrist's difficulties with the M'Naghten Rules begin with the administration of the oath. He is sworn to tell the whole truth, but the rules, because of their concern only with the intellectual aspects of mental function, prevent him from telling the whole truth about the accused's mental condition. If he attempts to tell of the disorganized emotional aspects which may have caused the crime, he may be sharply interrupted by the trial judge and ordered to limit his comments to insanity as defined by the M'Naghten Rules. He is in an impossible position—sworn to tell the whole truth and prevented by the court from telling it. No wonder psychiatric evidence at times appears confused and contradictory!" Stevenson, *Insanity as a Criminal Defense*, 25 CAN B. REV. 732 (1947).

<sup>15</sup> HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 486 (1947).

<sup>16</sup> For a case early recognizing the decisive role of science in the law of insanity, see *State v. Jones*, 50 N. H. 369, 395 (1871).

<sup>17</sup> MEREDITH, *op. cit. supra* note 12, at 251.

<sup>18</sup> "That there are such impulses is today established in psychiatry." GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 235, 236 (1925).

<sup>19</sup> Weihofen lists the following states as administering the rule: Alabama, Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Montana, New Mexico, Ohio, Vermont, Virginia, Wyoming. WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 16 (1933). The District of Columbia also has the rule. *Smith v. U.S.* 59 App. D. C. 144, 36 F. 2d 548 (1929). *Irresistible Impulse* is not the law in England, KENNY, *OUTLINES OF CRIMINAL LAW* 56 (12th ed. 1926), nor in Canada, *Rex v. Creighton* 14 C. C. C. 349 (1908). Stephen contended that the M'Naghten rule was sufficiently broad

doesn't require, as the term implies, that there be absolutely no possibility of resistance, but only that the volition of the actor be impaired to such an extent that the impulse is reasonably incapable of being resisted. *Irresistible impulse* is a defense when the actor, although he knows the nature and quality of his act and that it is wrong, is, nevertheless, because of disintegration of his volition, unable to resist the impulse for all practical purposes.<sup>20</sup> Victims of such a disease as kleptomania, an "irresistible impulse" to steal, are exempted from criminal liability under this rule. Many courts have refused to adopt this rule as a result of a belief that there is no such thing as an irresistible impulse.<sup>21</sup> However, the existence of such a mind is recognized by the foremost legal scholars in the field of insanity.<sup>22</sup>

The term "moral insanity" which has frequently been before the courts has had an adverse effect upon the acceptance of the rule of *irresistible impulse*. In rejecting the argument of moral insanity, the courts have said that "If, from evil association and indulgence in vice, his conscience ceases to control or influence his actions, and he is otherwise capable of committing crime, he is responsible."<sup>23</sup> It is unfortunate that some courts have refused to adopt the rule of *irresistible impulse* because of a belief that it would afford a defense to those who seek to escape liability on the ground that continued criminal association has taught them no other way of life than crime.<sup>24</sup> There is no room in any acceptable notion of *irresistible impulse* for such a doctrine. Acts that are said to be the result of environment cannot be said to be irresistible on that basis alone unless there is recognition of an objective philosophy of life which has received little favor in this country. One who has lived in a criminal environment for an extended period of time may fail to resist an impulse, but it should not be thought that environment alone makes an impulse irresistible.

The shadowy line between an irresistible impulse and an "irresisted" impulse has influenced many courts to refuse to adopt the defense because of the practical problem of proof involved.<sup>25</sup> To illustrate the problem, suppose that one who has stolen for years as the result of a criminal environment and habit asserts that he is a kleptomaniac. It would seem that his crimes were the result of an indifference to the laws of society, but it is also entirely possible that his actions were uncontrollable. Indeed, to distinguish between the two is often an intricate problem. It has been suggested that this problem of proof could be simplified by an addition to the rule of a requirement that certain types of factual situations must exist upon which to base an impulse. It is generally thought that habit

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to include the irresistible impulse doctrine. "Knowledge and power are the constituent elements of all voluntary action, and if either is seriously impaired, the other is disabled." 2 STEPHEN, HISTORY OF THE CRIMINAL LAW IN ENGLAND 171 (1883).

<sup>20</sup> *Parsons v. State*, 81 Ala. 577, 2 So. 854, 866 (1886).

<sup>21</sup> "The law says to men who say they are afflicted with irresistible impulses: 'If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes and perhaps that will help.'" Riddell, J., in *Rex v. Creighton*, 14 C.C.C. 349 (1908). See also Note, 34 MICH. L. REV. 569, 570 (1936).

<sup>22</sup> GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 304 *et. seq.* (1925); WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 45 (1933).

<sup>23</sup> *Green v. State*, 64 Ark. 523, 534, 43 S.W. 973, 977 (1898).

<sup>24</sup> See *Cunningham v. State*, 56 Miss. 269, 279 (1879).

<sup>25</sup> "What is this 'irresistible impulse?' How shall we of the Courts and juries know it? Does it exist when manifested in one single instance, or must it be shown to have been habitual, or at least to have evinced itself in more than a single instance?" *State v. Harrison*, 86 W. Va. 729, 751, 15 S.E. 982, 989 (1892).

should not be the basis of a defense unless it is a habit affecting the fundamental functions of the mind such as liquor or dope. Some would suggest that the rule be so phrased as to encompass an irresistible act springing from these habits and to exclude acts caused by such facts as habitual theft for gain. It is believed, however, that such a categorization is undesirable. The existence or non-existence of an irresistible impulse is a question which must be decided in each individual case independent of the likelihood of its existence in persons of the same class. Admittedly, the existence of an irresistible impulse is more likely to be present when the defendant is a dipsomaniac than when he is just an ordinary habitual thief, but it is entirely possible that such an impulse may exist in a habitual thief although his motives appear to be mercenary. The defense should not be arbitrarily closed to anyone merely because the probabilities are that his impulse was only unresisted. In each individual case, it should be decided whether or not the conscious volition of the defendant has been destroyed, and, here again, it cannot be denied that the opinion of the psychiatrist should have the greatest weight.

It is believed that with the addition of the rule of *irresistible impulse* to the rule of *M'Naghten's Case* psychiatrists do not have any fundamental objections to the law of insanity. As has been pointed out, their objections seem to surround the method of proof in the cases. However, their suggestions go to the revision of some of the most fundamental constitutional aspects of the legal system. The most frequent recommendation made is that the question of insanity should be taken from the jury and submitted to some sort of board of experts.<sup>25</sup> The basis for such a recommendation is a belief among psychiatrists that juries are incapable of rendering a correct decision when insanity is an issue. That these experts of the mind are more capable of deciding questions concerning insanity will not be denied. The jury is, however, more than a fact finding body; it is a constitutional bulwark against arbitrary action concerning the question of guilt as predicated on fact. There has always been an inherent resistance against encroachments upon the province of the jury in criminal prosecutions, and this resistance, motivated by fear, is justified. Moreover, the belief in some quarters that juries are incapable of determining the issue is not necessarily true. As in any case where technical questions of fact are involved, the jury cannot and should not decide the issue on the basis of their own knowledge, but they should decide it in accordance with the evidence that has been placed before them. If competent psychiatric testimony is before the jury, the jury should render a verdict of the same quality as the evidence. The place of the expert is on the witness stand. When he is there, it is incumbent upon the judge to realize that in the trying of the issue of insanity, relevance is at its broadest limits. The psychiatrist should have a complete opportunity to present his analysis of the defendant's mental condition to the jury. The ultimate decision, however, as to both guilt and disposition should continue to rest with the jury. The role of the psychologist and the psychiatrist should continue to be that of witnesses stating the facts as they see them to the jury, but they should take care to interpret facts, as nearly as possible, in language that the jury will understand. Their duty is to say whether or not the accused is insane according to the *legal* test of insanity, not according to tests of their own profes-

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<sup>25</sup> Note, 19 CALIF. L. REV. 174, 181 (1931). A poll of leading Canadian psychiatrists revealed that eighty were in favor of submitting the issue of insanity to a board of psychiatrists while only two were opposed. 25 CAN. B. REV. 371 (1947). For argument that to take the issue of insanity from the courts may not require constitutional amendment, see Note, 9 MICH. L. REV. 126 (1910).

sions. However, the courts should always be aware of a duty on their part to examine new tests for insanity which may be offered by the psychological and psychiatric professions and to accept any new rule which is the superior of the old. In the law of insanity, it must be recognized that the psychologists and the psychiatrists are the ones who must point the way.

JAMES DANIEL CORNETTE

### THE HISTORICAL DEVELOPMENT OF SELF-DEFENSE AS EXCUSE FOR HOMICIDE

No concept in the law seems clearer than the right of a man to kill in the necessary defense of his own life. This basic idea seems so fundamental as to admit no room for question. And yet an examination of the history of self defense reveals a startling difference between its present state and its early origin.

From the very beginning of the jurisdiction of the king's courts over criminal cases, homicide was justifiable and consequently without penalty only where committed in execution of the law.<sup>1</sup> Such cases as killings under the king's warrant, or in the pursuit of justice, or the killing of an outlaw, or a thief caught in the act, or other manifest felon who resists capture would seem always to have been justifiable. The penalty for all other cases of homicide was plainly and simply death or mutilation and even as late as the 19th century in England the law provided for forfeiture of goods and payment of fines to the king, although for a long time the rule had not been enforced.<sup>2</sup>

In the case of self defense however, the king might and often did grant pardons<sup>4</sup> notwithstanding the fact that the judges must convict the defendant of felony as the law required.<sup>5</sup> The following is an illustrative case:

"Robert of Herthdale, arrested for having in self defense slain Roger, Swein's son, who had slain five men in a fit of madness, is committed to the sheriff that he may be in custody, as before, for the king must be consulted about this matter."<sup>6</sup>

<sup>1</sup> Beale, *Retreat From a Murderous Assault*, 16 HARV. L. REV. 568 (1903). But see, 2 POLLOCK AND MAITLAND, *HISTORY OF ENGLISH LAW* 478 (2d ed., 1911) where a housebreaker was killed and the slayer was allowed to go free. Even the authors term the defendant here as fortunate.

<sup>2</sup> POLLOCK AND MAITLAND, *supra*, note 1. Sayre, *Mens Rea*, 45 HARV. L. REV. 980 (1931). It would appear that this privilege did not extend to cases where the felon made no resistance. But see *Staffordshire Collections* iv. p. 215, as quoted by POLLOCK AND MAITLAND, *supra*, note 1, at 478, fn. 4, in which one who beheaded a fleeing robber was acquitted.

<sup>3</sup> POLLOCK AND MAITLAND, *supra*, note 1 at 481. For a discussion of the ancient scheme of *wer* and *bloodfeud*, *bot* and *wite*, and its part in the administration of criminal justice see POLLOCK AND MAITLAND, *supra*, note 1, at 449. For an excellent discussion of the primitive concept of indiscriminate liability, see, Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 317 (1893). "The doer of a deed was responsible, whether he acted innocently or inadvertently, because he was the owner, even though the weapon was wielded by a thief."

<sup>4</sup> The king of course might grant pardons for other types of homicide and as his power grew the practice of giving pardons was relied on by the judges. It is to be noted however that these pardons did not come as a matter of right but rather *'de gracia sua et non per iudicium'*. B.N.B., pl. 1216 as quoted in Beale, *supra*, note 1 at 568, fn. 4.

<sup>5</sup> Sayre, *supra*, note 2 at 980; POLLOCK AND MAITLAND, *supra*, note 1 at 479.

<sup>6</sup> SELDEN SOCIETY, 1 SELECT PLEAS OF THE CROWN, No. 70 (1888).