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Author(s): Nigel Walker
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The Insanity Defense before 1800

By NIGEL WALKER

ABSTRACT: The earliest context in which madness is treated as an excuse for crime is Justinian's Digest. The Christian church brought this feature of Roman law to pre-Norman England. Madmen were probably not regarded as triable by ordeal, but were simply left to be guarded by their kinsfolk. When trial by ordeal was abandoned, and juries had to determine guilt, juries were at first expected to find madmen guilty but refer their cases to the king for pardon. It was not until about 1500 that juries seem to have begun to acquit on grounds of insanity. The reasoning varied: madmen were "punished enough by their madness"; they "lacked the will to harm"; they could not "tell good from evil." How strictly the tests of insanity were applied depended on the crime. The rejections of the defense that figured in the State Trials series were not typical, but gave historians the impression that the defense hardly ever succeeded before Hadfield's trial in 1800. In fact, as the Old Bailey Sessions Papers show, it often succeeded in the eighteenth century. Nor was this the result of empire building by the medical professions. Laymen's evidence was often accepted without any testimony by mad-doctors.

Nigel Walker was the Wolfson Professor of Criminology and a professorial fellow of King's College, Cambridge, from 1973 through 1984. From 1973 until 1980 he was also director of the Cambridge University Institute of Criminology. Among his 10 books are A Short History of Psychotherapy and the two volumes of Crime and Insanity in England, which included the first historical study of the medieval English way of dealing with insane offenders. He was a member of Lord Butler's committee, which made recommendations for improving the insanity defense.
That madness excuses the actions it explains is a notion that can be traced far back in European history, although its origin is hidden in the mists of the Bosporus. The classical Greeks and Romans recognized mental disorder—or rather some spectacular forms of it—as accounting for conduct that infringed law or custom; but they did not usually exempt the sufferer from the penal or social consequences. Insanity was sometimes interpreted as a punishment inflicted by the justice of the gods, but not as a substitute for human justice.

When the elderly Plato recommended in his Laws¹ that "if anyone be insane, let him not be seen openly in the town, but let his kinsfolk watch over him as best they may, under penalty of a fine," he was probably reflecting the customs of Greek city-states in the fourth century B.C. A similar rule seems to have been followed in southern England before the Norman Conquest and was probably the common way of dealing with the problem among people who had never heard of Plato. Such a rule, however, does not imply that mad people who do serious harm—or their kin—were exempt from the usual consequences, whatever they might be; it was an attempt to prevent harm.

The Stoics, too, were disinclined to discriminate in favor of the insane. Seneca the Younger saw madness in several kinds of aberration—rage and cruelty, for example—but he did not regard that as a reason for eschewing or mitigating penal measures. Anything that would prevent a repetition of misconduct—the death penalty included—was justified by his extreme utilitarianism.²

One Greek academic seems to have been ahead of his time. Aristotle pointed out that some misconduct was morally excusable when it was the result of what lawyers would nowadays call a mistake of fact; and that the insane as well as the sane could be mistaken in this way. Mistakes about rules of conduct, on the other hand, did not excuse, nor did perverted inclinations such as the enjoyment of cruelty.³ It is unlikely that he had any influence on Roman thinking, at least in this respect. As we have seen, there is no hint of such an argument in Seneca's moral essays.

When we eventually do find insanity treated as an excuse by a Roman lawyer, some five centuries later, the reasoning seems quite different from Aristotle's. According to Justinian's Digest,⁴ Modestinus—writing about A.D. 230—argued that "if a madman commit homicide he is not covered by the Cornelian Law [which laid down the legal consequences] because he is excused by the misfortune of his fate."⁵ Later the same argument appears as "he is punished enough by his madness." The underlying idea may have been the classical one—that madness was divine punishment—but that is speculation. Modestinus's reasoning was sometimes cited by medieval lawyers, even when another doctrine had superseded it.

For elsewhere the Digest reasoned that the madman "has no will"; and it was the sufferer's state of mind at the time of his crime that became the crucial issue, although the precise criterion is seldom clear in early English authorities. The Christian church in England seems

4. The Emperor Justinian's Digest (circa 533 A.D.), in which by his order the doctrines of Roman jurists were collected and annotated.
5. See the Digest 821.11.

2. Lucius Annaeus Seneca On Anger (circa 42 A.D.); see also his moral essay On Mercy (55 or 56 A.D.).
to have enjoined forbearance toward the insane long before the Norman Conquest imported Roman laws. A manuscript attributed to Egbert, the eighth-century archbishop of York, urges that if a man fall out of his senses and . . . kill someone, let his kinsmen pay for the victim and preserve the slayer against aught else of that kind. If anyone kill him before it is made known whether his friends are willing to intercede for him, those who kill him must pay for him to his kin.6

The tenth-century Laws of Aethelred, also believed to have been drafted by an archbishop, preach leniency for involuntary misdeeds.7 The Laws of Henry II, in all probability reflecting pre-Norman rules and customs, lay down that “insane persons and evildoers of a like sort should be guarded and treated with mercy by their parents.”8 The underlying reasoning is not there, but the leniency clearly is.

Even after the Norman Conquest, it seems likely that the hundredors did not put forward for trial by ordeal suspects whom they regarded as insane, just as they probably did not put forward children under 14 years of age. Being local men, they knew—or thought they knew—who was born when and who was a lunatic or an idiot. This would explain why Glanville’s twelfth-century treatise on English law9 makes no mention of the trial of children or madmen. Probably the priests who had to make sure that the ordeal had divine approval would have objected if a madman had been put to it.10 It seems that it was not until the ordeal had been abandoned—chiefly because of ecclesiastical objections—that juries had to deal with the insane.

Even then they could not at first acquit them. The thirteenth-century jury decided what the facts were: for instance, that the madman “did as afore-said [he had hanged his daughter] and not feloniously or through malice aforethought.”11 It was for the justices to report the case to the king so that he could decide what was to be done with the madman and his property—which, by the way, was not to be forfeit as a felon’s would have been, but was to be managed without waste, and the madman allowed sustenance from it. We are not told how insane offenders were looked after. Some were no doubt in the charge of kinsfolk, according to custom. Some lay in prisons, ecclesiastical or secular. Some were chained to the pillars of churches, although probably as a temporary expedient. Repeated killings by the insane are not mentioned in the medieval Year Books. They cannot have lived very long.

Not until the beginning of the sixteenth century have I found what reads like an acquittal instead of a reference to the king. In the Year Books of Henry VII:

A man was accused of the murder of an infant. It was found that at the time of the murder the felon was of unsound mind [de non saine memoire]. Wherefore it was de-

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11. From the plea rolls in the Public Record Office, London.
cided that he should go free [qu'il ira quite]. To be noted ... 12

The felonies of the insane were usually homicides. There is recorded, though, a thirteenth-century case in which the king had to be consulted about an idiot—stultus—who was in prison "because in his witlessness he confessed that he is a thief, although he is not to blame."13 What the record probably means is that it was decided not to believe his confession.

THE WILL AND
THE RIGHT-WRONG TEST

Officially the justification for excusing the insane still seems to have been absence of will. As Bracton put it in the thirteenth century, "a crime is not committed unless the will to harm [voluntas nocendi] be present."14 Yet not every case seems quite to fit this doctrine. A man who hangs his daughter must have been acting in a way that we would call purposeful: he must have willed to hang her—if not to kill her. The explanation of the discrepancy may be that in order to be recognized as mad in those days, behavior had to be spectacularly frenzied, to an extent that made it difficult to regard the actor as motivated in a human way. The "furious" man, said Bracton,15 was totally lacking in discernment, "not much above the beasts, who lack reason." It was an unfortunate comparison, for it led on occasion to the application of what has been called the wild-beast test. As late as 1724, the jury who tried Arnold for wounding one of George II's courtiers with a gun were told that in order to benefit from the insanity defense a man must "not know what he is doing, no more than an infant, than a brute or wild beast."16 Naturally they rejected Arnold's defense.

It is a mistake, however, to infer—as is often done—that the wild-beast test was always, or indeed usually, interpreted as insisting on conduct of a spectacularly frenzied kind. A whole century before Arnold's trial Dalton's Courtray Justice explains that if an "idiot" kills a man it is no felony "for they have not knowledge of good or evil, nor can have a felonious intent, nor a will or mind to do harm."17 Idiots do not behave like wild beasts.

Dalton's remark is doubly informative. It tells us that not only lack of will to harm but also knowledge of good and evil was regarded as relevant. It seems possible that this came about as the result of a change in legal attitudes to the criminal responsibility of children. In pre-Norman England the earliest age at which a child could be tried—or, if tried, found guilty—differed in different kingdoms, but seems to have been higher than it was when Roman law came to be applied. The child had to be of an age—it might be 12 or even 14—at which he could count the value of money or measure a yard of cloth. An almost adult knowledge of worldly matters seems to have been the criterion.

Norman judges had a different approach. By Edward II's reign a relevant question in the trial of a child for a

12. Y. B. Mich. 21 Hen. 7, pl. 16 (1506); "to be noted" suggests that this was an innovation.
15. Ibid.
felony was whether he knew the difference between good and evil.18 Almost certainly this was the doing of the Church, which admitted children to confession at the age of seven, a crucial age in Roman law. Now children as young as that could be tried and, if found to have known that they were doing wrong, found guilty. Since idiots are often childlike in talk and conduct, it would seem natural to apply the right-wrong test to them as well. But this is no more than another speculation of mine.

If the jury accepted the insanity defense, they often simply acquitted the defendant. They could, however, "find the matter specially," as Hale's seventeenth-century textbook put it.19 That is, they could find that the defendant had done the killing—and it was usually a killing—but was out of his or her senses at the time. In cases of homicide the cause of death had to be determined either by inquest or by trial, and a special finding by a trial jury made an inquest unnecessary.

Hale, by the way, wrote as if the insanity defense was confined to capital crimes: treasons and felonies. This is unlikely to have been mere carelessness on his part. The Act of 1800 "for the safe custody of insane persons charged with offences"20 was drafted so that the section dealing with acquittals applied only to insane persons charged with treason, murder, or felonies generally. The omission of misdemeanors here was almost certainly deliberate; the next section, dealing with persons found insane on arraignment—that is, unfit for trial—was expressed so as to apply to any sort of offense. It is still a moot point in England whether the common-law defense of insanity is one that can be offered in a summary court. If it can, the verdict would not be covered by legislation, and the common-law result would be a plain acquittal.

A RARE DEFENSE?

However that may be, it used to be said that until Hadfield's trial in 1800 the insanity defense was hardly ever successful because of the strictness of the test. This myth was popularized by authors who had looked only at the published transcripts in the State Trials series,21 but those were not ordinary trials. The state was the prosecutor and had special reasons for making sure of a conviction. The defendants were Arnold, a would-be assassin of a member of George II's court; Bradshaw, an officer who had taken the wrong side in the 1745 rebellion; Naylor, a soi-disant Christ who shocked the Puritan government; and Earl Ferrers, a peer of the realm who had shot an employee with evidence of preméditation and whom the House of Lords did not want to appear to be favoring.

By way of contrast, my search of the Old Bailey Sessions Papers22 revealed more than 100 cases in which the insanity defense was offered during the 60 years before Hadfield, and over 50 cases in which it succeeded. In the Old Bailey

20. 40 Geo. 3, c. 94.
21. See fn. 17.
at least, its success rate in the second half of the eighteenth century was as high as it was in the nineteenth century. If one is hunting for milestones, the place to search is not the end of the eighteenth century but the middle, when there does seem to have been an increase in the frequency with which the defense was attempted. Why has never been explained.

It certainly was not the result of medical empire-building. The superficiality of this interpretation has been demonstrated by Professor Eigen’s analysis of the nature of the evidence in those Old Bailey trials. Usually it was not medical evidence but the testimony of relatives, friends, or spectators that persuaded the court that the defendant had been mad at the time of his crime. If medical testimony was available, it was associated with a higher probability of a favorable verdict—but only a little higher. What seems to have been crucial was not the intervention of a physician or mad-doctor but the judge’s attitude. His questions or comments on the evidence could ensure that the jury accepted or rejected the defense. Then, as now, English courts thought more of common sense than of psychiatry.

If the jury were trying an ordinary theft or case of violence—not a Jacobite or a terrorist—the important question for them was whether the defendant was really insane. If so, it was not hard to convince them that the defendant satisfied the right-wrong test. The jury were not bothered by the twentieth-century distinction between legal and moral wrongness, since for them the laws of God and men—or at least Englishmen—were very much the same. As for the alternative to the right-wrong test, by the second half of the eighteenth century, and very likely earlier, the question “Did he lack the will to harm?” seems to have become “Could he distinguish the nature of his actions?” This was how it was put by the solicitor general who prosecuted Earl Ferrers. It was a more generous test, since it did not insist that the action must have been without purpose. Aristotle’s insane mistakes had at last found recognition.

There are still intriguing questions to be answered, although the answers are buried fairly deep. Where did Modestinus get his doctrine and his reasoning? What was the origin of the notion that the mad lack will? Why was Glanville silent on the subject of infancy and madness when Bracton was not? When did knowledge of good and evil become relevant, and why? Who replaced “lack of will” with Aristotle’s “insane mistake”? What social or procedural change in the middle of the eighteenth century led to an increase in the frequency of the insanity defense at the Old Bailey? Was the defense really confined, in theory or practice, to felonies or worse?