

TIMELINE OF DEVELOPMENT OF THE INSANITY DEFENSE

From 6th Century B.C.E. Hebrew scriptures:

Offenses with respect to responsibility were divided into two categories

- Those where fault was or could be imposed and,
- those that occur without fault

Acts committed by children, retarded persons and insane who were likened to children were considered those without fault

12th Century:

Issues of Moral Wrongfulness began to develop in pre-English law

- The concept of "Madness" is raised with respect to Culpability Questions although no insanity defense is available.
- Defendants who are tried and convicted are often pardoned by Lords of state and are sent to mental institutions rather than prison.

13th Century:

Moral Wrongfulness requirement of Christian Law is Blended with English Common Law in criminal responsibility cases to require both:

- Presence of Guilty Act (Actus Rea)
- Presence of Guilty Mind (Mens Rea)

Henry Bracton, a legal scholar, notes that both children and the insane were incapable of forming both intent and will to do harm; they did not have the capacity to form a guilty intent.

15th—17th Centuries:

English Law struggled with issues of criminal responsibility

- Children under 7— are seen to be incapable of criminal acts
- Children between 7 and 13— their incapacity for criminal acts are presumed, but could be challenged (if they are intelligent enough to know right from wrong).

16th—17th Centuries:

Scholars struggle with finding the appropriate test for the "insanity" defense.

- Sir Edward Coke: "idiots" and "madmen" who "wholly loseth their memory and understanding" should be found insane.
- Sir Matthew Hale (Chief Justice of the King's Bench): the best measure for determining insanity was whether the accused had "as great understanding as ordinarily a child of fourteen hath".
- Justice Tracy, refining a five century old concept, held in the Arnold case of 1723, "a man must be totally deprived of his understanding and memory so as not to know what he is doing, no more than an infant, brute or a wild beast."

- Other courts were excusing those who were guilty, but lacked the capacity to distinguish "good from evil" or "right from wrong."

18th Century:

- Thomas Erskine (Hadfield trial) of 1800 offered the "offspring of a delusion" test in which insanity could be seen as being partial, rather than heretofore, total.
- Sir Isaac Ray (@1838) argued that the "insane mind" is often "perfectly rational and displays the exercise of a sound and well-balanced mind". His Treatise on the "Medical Jurisprudence of Insanity" is published, 1838. Ray proposed that the defendant's ability to control his or her acts must also be considered, thus suggesting tests of volition as well as those of cognition.
- 1840 Oxford case (in which Edward Oxford attempted to assassinate Queen Victoria) proposed such a volitional defense and the successful introduction of the "irresistible impulse" defense. This test allowed for acquittal if, because of a mental disorder, one could not resist the impulse to commit the crime. First American case was in 1886 (Parsons v. State) and as of 1990 no state uses it as its sole insanity defense and few states combine it with M'Naghten.
- Well, as you might imagine, the queen was not pleased with the Oxford outcome, feeling that even a mentally ill person who attempted a crime (perhaps - particularly against the Queen of England - this is an important political point in the history of the defense as will be seen in Hinckley 140 years later) should still be held accountable for it. She stated,

....Punishment deters not only sane men but also eccentric men, whose supposed involuntary acts are really produced by a diseased brain capable of being acted upon by external influence.

A knowledge that they would be protected by an acquittal on the grounds of insanity will encourage these men to commit desperate acts, while on the other hand certainty that they will not escape punishment will terrify them into a peaceful attitude towards others.

- M'Naughten Trial of 1843 had all the elements to produce strong public and political emotion and strong sentiment to make a change in law. It was a political case (involved the Prime Minister of England), a serious crime (murder of his private secretary, Edward Drummond, while M'Naughten was perhaps stalking and attempting to kill the Prime Minister), the use of a defense that was controversial (insanity, based on his delusion that the Tory Party of England was persecuting him, to include Sir Robert Peel), was well publicized and the public was outraged,

- and came on the heels of the attempted regicide of the Queen, who was still not happy.
- The following year, Queen Victoria summoned the 15 Law Lords of the House of Lords and asked questions regarding the insanity defense. Their responses to her five questions resulted in the M'Naghten rules/test:

Every man is to be presumed to be sane....To establish a defense on the ground of insanity, it must be 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, that he did not know he was doing what was wrong.

19th Century:

- The Product Test or Durham Rule of 1954, was adopted from the Durham v. United States case (Judge Bazelon) in the District of Columbia Court of Appeals based in part from decisions in State v. Pike and State v. Jones in 1870-71. It stated that, "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect". The rule did not define mental disease nor product and in 1957 when experts began including personality disorders in their testimony of insanity the acquittal rate in Washington, D.C. rose precipitously.
- The McDonald v. United States (Bazelon) case tried to redefine the mental disease concept in 1962 but problems persisted and Durham was overruled in 1972 (Brawner v. U.S.) and the product test was abandoned (except in New Hampshire, where it originated in 1870, and Maine, which later abandoned as well).
- The Model Penal Code, American Law Institute (ALI) Test was formulated in 1955 and was adopted by the District of Columbia Court of Appeals. It attempted to deal with problems associated with the M'Naughten rigidity issues, irresistible impulse formulations, while retaining specific guidelines to the jury. It reads:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.

- Elements are that impairments need only be "substantial" rather than total; knowledge of wrongfulness was changed to "appreciation" of wrongfulness.
- ALI Test was adopted by 1/2 of the states and federal courts prior to Hinckley and was the most influential and widely used test of insanity in the United States.

- Hinckley case, 1980, verdict - not guilty by reason of insanity. This case had the same elements and set off the same type of public outrage that was noted in the M'Naghten case of 1843 and the Guiteau Case ("moral insanity") in the assassination of President Garfield.
- The Comprehensive Crime Control Act of 1984 with the Insanity Defense Reform act embedded in it was enacted. This changed the standards for federal courts and stated the defendant was not responsible for criminal conduct if, "as a result of a severe mental disease or defect, (he) was unable to appreciate the nature and quality or the criminality or wrongfulness of his acts".
- It is a cognitive test without a volitional arm first adopted by the Fifth Circuit in United States v. Lyons. It combines elements of the M'Naghten test and cognitive prong of the Model Penal Code test with the usage of the terms "appreciate" and "awareness of wrongfulness" from ALI and the "nature and quality of conduct" from M'Naghten. These changes were seen to provide some increased clarity in definitions.
- The test requires that mental illness must be "severe" to be exculpatory and infers that non-psychotic behavioral disorders or general neurotic syndromes and personality disorders do not suffice to establish the defense. *

I include in this section some remarkable observations and language from the 5th Court in the U.S. v. Lyons which are quite definitive and enlightening. Remember this preceded the Comprehensive Crime Control Act of 1984. We start with the ALI Test.

The ALI Model Penal Code definition of insanity: that a person is not responsible for criminal conduct and as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Id. At 916

Reexamining the Blake standard today, we conclude that the volitional prong of the insanity defense – a lack of capacity to conform one's conduct to the requirements of the law – does not comport with current medical and scientific knowledge, which has retreated from its earlier, sanguine expectations. Consequently, we now hold that a person is not responsible for criminal conduct on the grounds of insanity only if at the time of that conduct, as a result of mental disease or defect, he is unable to appreciate the wrongfulness of that conduct. [fn9]

* Timeline data produced from: "Practice Guideline, Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense, Journal of the American Academy of Psychiatry and the Law, Vol. 30, No. 2, 11-2-02 and "Psychological Evaluations for the Courts", A Handbook for Mental Health Professionals and Lawyers.

We do so for several reasons. First, as we have mentioned, a majority of psychiatrists now believe that they do not possess sufficient accurate scientific bases for measuring a person's capacity for self-control or for calibrating the impairment of that capacity. Bonnie, *The Moral Basis of the Insanity Defense*, (1983). "The line between an irresistible impulse and an impulse not resisted is probably no sharper than between twilight and dusk." (APA, 1982). Indeed, Professor Bonnie states:

There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment.

In addition, the risks of fabrication and "moral mistakes" in administering the insanity defense are greatest "when the experts and the jury are asked to speculate whether the defendant had the capacity to 'control' himself or whether he could have 'resisted' the criminal impulse." (Bonnie). Moreover, psychiatric testimony about volition is more likely to produce confusion for jurors than is psychiatric testimony concerning a defendant's appreciation of the wrongfulness of his act. (APA statement 1982). It appears, moreover, that there is considerable overlap between a psychotic person's inability to understand and his ability to control his behavior. Most psychotic persons who fail a volitional test would also fail a cognitive test, thus rendering the volitional test superfluous for them. Finally, Supreme Court authority requires that such proof be made by the federal prosecutor beyond a reasonable doubt, an all but impossible task in view of the present murky state of medical knowledge.

One need not disbelieve in the existence of Angels in order to conclude that the present state of our knowledge regarding them is not such as to support confident conclusions about how many can dance on the head of a pin. In like vein, it may be that some day tools will be discovered with which reliable conclusions about human volition can be fashioned. It appears to be all but a certainty, however, that despite earlier hopes they do not lie in our hands today. When and if they do, it will be time to consider again to what degree the law should adopt the sort of conclusions that they produce. But until then, we see no prudent course for the law to follow but to treat all criminal impulses – including those not resisted – as resistible. To do otherwise in the present state of medical knowledge would be to cast the insanity defense adrift upon a sea of unfounded scientific speculation, with the palm awarded case by case to the most convincing advocate of that which is presently unknown – and may remain so, because unknowable.