CAMERON KELLY

A History of Legal Insanity: The Insanity Defense Before and After *M'Naghten*

Abstract

Insanity as a defense to criminal acts can be traced back to the ancient civilizations of Greece and Rome. Application of the insanity defense expanded over time; whereas before it encouraged leniency but did not excuse the offender from punishment, it was later recognized within the English legal system as absolving the offender of blame. The first acquittal based on insanity occurred during the early sixteenth century, but it wasn't until after the nineteenth-century M'Naghten *case that criminal insanity became formally integrated into common law jurisdictions including England and the United States. This paper will assess the history of formal and informal legal tests for criminal insanity before and after* M'Naghten *in England to demonstrate that* M'Naghten *was not groundbreaking in theory. Pre-M'Naghten laws, political commentary, and jury verdicts exemplify informal applications of the insanity standard that would eventually come to be known as the M'Naghten rule.* Clark v. Arizona *and* Kahler v. Kansas*, both twenty-first-century cases decided by the United States Supreme Court, will be used to show more recent attitudes which may suggest a shift away from the* M'Naghten *rule.*

For nearly two decades in the late twentieth century, the American public was periodically terrorized by an anonymous disgruntled hermit waging war against industrial society and rapidly advancing technology. By the end of his 17-year-long campaign, Theodore Kaczynski, nicknamed the Unabomber, was responsible for three deaths and dozens of injuries.[1] When Kaczynski was

[1] Mick Grogan, *Unabomber: In His Own Words,* Discovery Channel, 2020.

arrested at his one-room cabin in Montana, he was transported to California where he was to stand trial in federal court. In preparation for trial, the federal public defenders directed that Kaczynski's cabin be transported from Lincoln, Montana to Sacramento, California. The cabin would serve as evidence for Kaczynski's insanity, as his defense team intended to argue that only an insane individual would voluntarily live under such conditions. The attorneys also planned to introduce evidence of psychological experiments Kaczynski underwent while at Harvard University. With this evidence, the defense team planned to convince the jury that Kaczynski was insane, against his wishes. The attorneys' dismissive attitude towards Kaczynski resembled that of doctors performing forced lobotomizations, who felt that "because [patients] were mad, their preferences could be disregarded."[2] Likewise, Kaczynski's defense attorneys adamantly pursued an insanity defense over his objections: "I didn't want to be represented as a lunatic, which is what my attorneys were doing."[3] Robert E. Toone argues in the *North Carolina Law Review* that "…society attaches a stigma to mental health defenses that does not exist with other affirmative defenses,"[4] which could explain Kaczynski's objection to being portrayed as insane; his essay, "Industrial Society and its Future," would be characterized as a madman's manifesto. Yet even if Kaczynski had accepted his attorneys' defense theory, it is uncertain whether it would have actually persuaded a jury given the historical precedent and codified standards for the insanity defense. Kaczynski's unusual lifestyle may have suggested some form of mental illness, but more evidence would likely have been required to demonstrate that he suffers from "a mental defect or disease that makes it impossible for [him] to understand [his] actions, or to understand that [his] actions are wrong."[5]

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[2] Andrew Scull, *Madness in Civilization* (Princeton: Princeton University Press, 2015) 317.
[3] Grogan, *Unabomber: In His Own Words.*
[4] Robert Toone, "The Incoherence of Defendant Autonomy," *North Carolina Law Review* 83, no. 3 (March 2005): 633.
[5] "Insanity Defense," Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/insanity_defense.

Kaczynski ultimately pled guilty after attempting suicide to avoid being portrayed as insane at trial, however, so one can only speculate whether a jury would have found him legally insane.

While Kaczynski's legal fate was resolved without having to present an insanity defense supported by evidence of his primitive and secluded lifestyle, it is clear that Kaczynski's primary objective in moving to rural Montana was to largely sever himself from civilization—which was precisely what supposedly served as evidence for his insanity, or madness. Historians have debated the relationship between civilization and madness for centuries. For some, madness exists entirely outside of civilization as a foreign phenomenon that renders mad individuals alien to civilized society. For others, madness is part of civilization, and an integral part at that.[6] The very definition of insanity has also been debated in many spheres, including public policy, psychiatry and medicine, and law. Governments, responsible for administering justice among their respective constituencies, must create a standard by which individuals are judged to be responsible for a criminal act. The insanity defense—known formally as pleading guilty by reason of insanity—is a staple of the United States legal system as well as many common law jurisdictions in the West. Many state laws impose criteria for insanity defenses under modern criminal codes and statutes derived from the often-cited *M'Naghten* case (sometimes spelled *McNaughten*) in the United Kingdom during the nineteenth century. In fact, the federal insanity rule remains the M'Naghten standard. "Few criminal trials have been referred to as often as that of M'Naghten," as it prompted the first official test for criminal insanity in common law.[7] However, the so-called M'Naghten rule that followed the trial is "but the middle of a story that began centuries ago and which continues to stumble along its way today."[8] In other words, the M'Naghten rule derived from the jury's

[6] Andrew Scull, *Madness in Civilization,* 10.
[7] Jacques M. Quen, "An Historical View of the M'Naghten Trial," *Bulletin of the History of Medicine* 42, no. 1 (January-February 1968): 43.
[8] Ibid.

verdict was merely a continuation of centuries of developing criminal insanity law. In fact, similar verdicts were rendered years before M'Naghten was tried for murder. Therefore, the historical evidence shows that the M'Naghten rule was not revolutionary in the sense that it departed from existing legal theories and practices to invent a new standard for insanity. Rather, it was only the codification of existing theories and practices which had been developing for centuries.

To contextualize the jury's decision and the ensuing formal standards for the insanity defense devised by judges of the Queen's Bench following the *M'Naghten* verdict, it is necessary to understand the application of the insanity defense before the nineteenth century. As Nigel Walker writes, "That madness excuses the action 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."[9] The ancient Greeks and Romans acknowledged mental disorder in the context of law and custom but did not recognize it as an excuse for infringements or violations and therefore did not exempt the perpetrator from penal or social consequences. Instead, they viewed insanity as a punishment itself, inflicted by the gods. During the fourth century B.C., Plato proposed that those who were insane should be watched over by their kinsfolk in order to prevent harm, though he maintained that this did not mean they would be exempt from the usual consequences. Similarly, the Stoics like Seneca the Younger declined to ease penal measures for mad offenders because they believed punishment would prevent, or at least deter, recidivism. While such was the majority view, Aristotle, most notably, dissented in part, arguing that "some misconduct was morally excusable when it was the result of… a mistake of fact."[10] This reasoning somewhat resembles the modern standard of legal insanity, which is generally understood as "a mental defect or disease that makes it impossible for

[9] Nigel Walker, "The Insanity Defense before 1800," *The Annals of the American Academy of Political and Social Science* 477, no. 1 (January 1985): 26.
[10] Walker, "The Insanity Defense before 1800," 26.

a defendant to understand their actions, or to understand that their actions are wrong."[11] Minority sentiments similar to Aristotle's became more prevalent and even mainstream as religious laws came to govern European societies such as England. For example, the tenth-century Laws of Aethelred, believed to have been drafted by an archbishop, "preach leniency for involuntary misdeeds."[12] Similarly, King Henry II of England prescribed that "insane persons and evildoers of a like sort should be guarded and treated with mercy by their parents."[13] In short, many laws in Europe during the Middle Ages favored leniency towards insane individuals who committed crimes or wrongdoings. Lenient consequences included being placed in the care of kinsfolk according to custom, though some were looked after in either ecclesiastical or secular prisons, while others were chained to the pillars of churches as a temporary expedient.[14] In any case, leniency cannot be confused with acquittal, which did not occur until the sixteenth century.

The first account of a verdict that resembles an acquittal based on insanity is found in the Year Books of King Henry VII from 1506: "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. Wherefore it was decided that he should go free. To be noted."[15] For the man to be set free on the grounds that, at the time of the offense, he was of unsound mind indicates an acquittal based on insanity alone. Moreover, that the author concluded the law report with "To be noted" suggests that this was the first time such a rule had been applied. If this is indeed true, then the first acquittal based on insanity in England was handed down at the beginning of the sixteenth century. Even so, it is important to note the distinction between legal blame and moral blame. The sixteenth-century acquittal was the first

[11] Cornell Legal Information Institute, "Insanity Defense."
[12] Walker, "The Insanity Defense before 1800," 27.
[13] Ibid.
[14] Ibid.
[15] Walker, "The Insanity Defense before 1800," 28.

recorded instance of an individual being legally absolved of blame, but records show that insane felons were morally absolved of blame as early as the thirteenth century in England. During this time period, the justification for excusing the insane of crimes was the absence of will. English cleric and jurist Henry de Bracton argued that "a crime is not committed unless the will to harm be present."[16] In other words, a criminal act must be purposeful; and insane individuals who suffer from a mental defect or disease that makes it impossible for them to understand their actions lack purpose in their criminal act. This basic principle of criminal law remains in place in the modern United States, where both the *actus reus* and *mens rea* elements are used to prove a crime.[17] *Actus reus* is the physical element and refers to the criminal act itself. *Mens rea* is the mental element and requires that the defendant had the intent to commit the crime. Legal tests for insanity throughout pre-*M'Naghten* Britain resembled the modern *mens rea* standard, though it is important to make the distinction that *mens rea* falls just short of the modern standard for insanity. *The Country Justice*, written in 1618 in England, argued that it is not a felony if the defendant "[has] not the knowledge of good or evil, nor can have felonious intent, nor a will or mind to do harm."[18] Similarly, in 1724, a jury was instructed that in order for the defendant to benefit from the insanity defense, he must "not know what he is doing, no more than an infant, than a brute or wild beast."[19] Both standards indicate that the absence of a guilty mind should at least partially absolve a defendant of criminal liability for a guilty act. Although "courts and writers are in hopeless disagreement" over the precise meaning attached to *mens rea*, the general mental requisites for

[16] Henry de Bracton, *On the Laws and Customs of England* (New Haven, CT: Yale University Press, 1915-42).
[17] Mark White, *The Insanity Defense*, (Santa Barbara: Praeger, 2017) 76.
[18] Walker, "The Insanity Defense before 1800," 28.
[19] Ibid.

criminality that existed in the thirteenth century have not been significantly altered since, and thus perhaps helped shape the M'Naghten rule.[20]

The eight centuries of criminal law enforcing broad mental requisites in English common law culminated in the famous *M'Naghten* case that would inspire the formal rule written at the House of Lords to formulate the standards for criminal insanity in Britain. On January 20, 1843, Scotsman Daniel M'Naghten approached Edward Drummond, private secretary to the Prime Minister, and fatally shot him in the back. During arraignment the next day, M'Naghten told authorities, "The Tories in my native city have compelled me to do this; they follow and persecute me wherever I go, and have entirely destroyed my peace of mind… I can get no rest from them night or day… They have accused me of crimes of which I am not guilty; and they have [done] everything in their power to harass and persecute me, in fact they wish to murder me. It can be proved by evidence."[21] Indeed, he seemed to exhibit signs and symptoms of psychosis or delusions, and M'Naghten's sanity was the crucial issue of the case. Although he had shot Mr. Drummond, a police inspector testified at trial that M'Naghten had told him that he thought he had shot the prime minister, Sir Robert Peel. Furthermore, medical examiners testifying for the defense reported that M'Naghten had said, "the person at whom he fired gave him as he passed a scowling look. At that moment all the excitings of months and years rushed into his mind, and he thought that he could only obtain peace by shooting him."[22] This type of thinking is common in paranoid schizophrenia. Much of the defense's case, therefore, relied on scientific evidence. Eight physicians testified that M'Naghten was undoubtedly insane, and four testified more specifically that M'Naghten's disease rendered him incapable of controlling his actions. Dr. Hutchinson

[20] Francis Bowes Sayre, "Mens Rea," *Harvard Law Review* 45, no. 6 (April 1932): 974-1026.
[21] Quen, "An Historical View of the M'Naghten Trial," 46.
[22] Quen, "An Historical View of the M'Naghten Trial," 47.

testified that "The act was the consequence of the delusion, which was irresistible."[23] During cross-examination, the prosecution challenged the defense's expert witnesses: "Do you mean to say, Dr. Munro, that you could satisfy yourself as to a person's state of mind by merely going into a cell and putting questions to him?" Dr. Munro responded, "In many instances, I can."[24] After hearing the testimony, the jury acquitted Daniel M'Naghten of the murder, though they were not required to do so by any law in effect at the time.

The *M'Naghten* case is indisputably considered the most momentous event in the history of the insanity defense in criminal law. But *M'Naghten* was not revolutionary in the sense that it departed from existing practices, which in fact provided precedent for such a rule. For example, Edward Oxford was acquitted for the attempted assassination of Queen Victoria three years before *M'Naghten* because his attorney successfully convinced the jury that because he was "under the influence of a diseased mind, and was really unconscious at the time he was committing the act," it was not a crime.[25] Therefore, the *M'Naghten* rule, though it constituted the first official standard for legal insanity, was not at all new; it simply had yet to be formally incorporated into common law. In fact, when the Chancellor of the House of Lords was considering English law's responsibility of the insane, he concluded that the law had been properly carried out in the acquittal of M'Naghten based on the legal precedents from previous trials. What's more, the judge in the *M'Naghten* case instructed jurors that "… if on balancing the evidence in your minds, you think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent and liable to all the penalties the law imposes," yet no law required him to do so.[26] Clearly, legal

[23] Robert Aitken and Marilyn Aitken, "The M'Naghten Case: The Queen Was Not Amused," *Litigation* 36, no. 4 (Summer 2010): 54.
[24] Ibid.
[25] Quen, "An Historical View of the M'Naghten Trial," 46.
[26] Quen, "An Historical View of the M'Naghten Trial," 49.

standards for criminal insanity were known and applied, albeit unincorporated. Accordingly, the M'Naghten standard is unsurprising. The M'Naghten rule defined by the fifteen judges of the Queen's Bench states that "to establish a defence on the ground of insanity, it must be clearly 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."[27] This language is quite similar to the numerous aforementioned theories over the years regarding criminal insanity. Just as the jury's verdict in the *M'Naghten* case was not guilty by reason of insanity, modern American courts of law allow for the same possible verdict. All defendants are presumed sane, however, until they can prove that they were insane at the time of the offense.

American jurisdictions noted the *M'Naghten* verdict, and America's first *M'Naghten* defense was used just three years later in 1846 when New York State tried William Freeman for the murder of several members of the Van Nest family at their home near Auburn.[28] Though perhaps not an ideal example of the *M'Naghten* defense due to the racist sensationalism in the press and confusion over the admissibility of medical testimony on criminal responsibility that tainted the trial, *People v. William Freeman* is significant because, when the New York State Supreme Court reversed the conviction, it also declared the *M'Naghten* rule henceforth the standard in the state. The case involved notable players including New York Attorney General, and son of former U.S. President Martin Van Buren, John Van Buren, former New York Governor and Lincoln Administration Secretary of State William Seward, and star psychiatric defense witness Dr. Amariah Brigham of the Utica Asylum. Mr. Seward served as counsel for the defense, advancing the theory that Freeman was insane at the time he murdered the Van Nest family. The

[27] Quen, "An Historical View of the M'Naghten Trial," 48.
[28] Weiss and Gupta, *America's First M'Naghten Defense and the Origin of the Black Rage Syndrome,* 503.

court agreed to hear arguments on Mr. Freeman's mental state, which was to ultimately be decided by a jury. The trial was bifurcated, as most modern trials involving an insanity plea are—however modern trials are done in reverse order, with the guilt phase adjudicated first. The jury in the *Freeman* trial was first tasked with determining whether Freeman was presently insane, which they determined he was not. He was then tried on the facts to determine criminal responsibility, and the jury convicted him. Notably, the trial judge applied what has come to be known as the moral incapacity test: "The main question… is whether the prisoner knows right from wrong," Judge Whiting instructed the jury.[29] This standard is only one half of the *M'Naghten* rule, which was installed by the New York Supreme Court upon appeal. Many states subsequently adopted the *M'Naghten* rule, as did the national government for federal crimes.

In the United States, about half of the states maintain the *M'Naghten* test, while others have instead implemented different tests including the irresistible impulse test, the Durham Test, and the Model Penal Code test.[30] The *Durham* rule was fashioned by the United States Court of Appeals for the District of Columbia Circuit in 1954 in *Durham v. United States.* The court held that a defendant was not criminally responsible "if his unlawful act was the product of mental disease or mental defect." The Court of Appeals for the Third Circuit refused, as did other courts, to follow the Durham rule because they were "of the opinion that the following formula most nearly fulfills the objectives just discussed: The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to

[29] Kenneth J. Weiss and Neha Gupta, "America's First M'Naghten Defense and the Origin of the Black Rage Syndrome," *Journal of American Academy of Psychiatry and Law* 46, no. 4 (2018): 506-507.
[30] "M'Naghten Rule," Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/m%27naughten_rule.

have violated."[31] However, there was a time during the late nineteenth century after America's first *M'Naghten* defense when insanity acquittals rooted in unwritten law permeated trial courts in the United States, just as insanity acquittals had occurred in England in the absence of written law. The most notable of these trials decided based on unwritten law involved the notion "that an outraged husband, brother, or female victim could justifiably kill the male 'libertine' who had allegedly seduced the husband's wife, brother's sister, or the female herself. In most of these trials, juries acquitted the defendants on the ground of insanity."[32] The most famous example is that of New York Congressman Daniel Sickles, who killed the local federal district attorney, Philip Barton Key, in 1859 for repeatedly sleeping with his wife. The presiding trial judge in this case, as well as those in other cases, entertained the attorneys' discussion of the unwritten law which had no standing in common or statutory law. Nonetheless, the judge instructed the jury only on the established insanity defense.[33] In short, the defendants could rely on the established insanity defense as a basis for their theory, but their attorneys' arguments could exceed that established scope. Consequently, juries in the United States found defendants not guilty by reason of insanity based on justifications beyond established legal standards at the time. Thus, while the *M'Naghten* rule was officially incorporated and practiced in the United States, American jurors did not strictly adhere to its standards for insanity in all cases. Insanity standards are malleable in the sense that juries can theoretically construe the statute to comport with their own definition and fit a desired verdict, and state legislatures may alter the standards themselves, subject to review by the United States Supreme Court.

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[31] Jerome Hall, "The M'Naghten Rules and Proposed Alternatives," *American Bar Association Journal* 49, no. 10 (October 1963): 960.
[32] Robert Ireland, "Insanity and the Unwritten Law," *The American Journal of Legal History* 32, no. 2 (April 1988): 157.
[33] Ireland, "Insanity and the Unwritten Law," 159.

United States Supreme Court case law regarding the insanity defense is quite recent but extremely relevant. While the federal government adopted the *M'Naghten* rule for federal cases, states have always been able to implement their preferred standards for insanity within their jurisdiction. Within the last two decades, the U.S. Supreme Court handed down two particularly important decisions which affirmed the ability of state legislatures—and trial judges—to limit the insanity defense. In *Clark v. Arizona* and *Kahler v. Kansas*, the Supreme Court sided with the respondents in allowing the limitation of expert evidence about a defendant's mental state to the insanity defense and the exclusion of the moral element of the insanity defense, respectively. Clark was charged with first-degree murder in Arizona after killing a police officer in the line of duty, a crime which requires the state to prove that he did so intentionally or knowingly. Clark did not contest that he shot and killed the officer, but he denied specific intent to shoot the officer or knowledge that he was doing so, based on his undisputed paranoid schizophrenia. Accordingly, Clark raised an affirmative defense of insanity, which required him to prove that "at the time of the [crime], [he] did not know the criminal act was wrong."[34] He also attempted to rebut the prosecution's evidence of *mens rea*, that he had acted intentionally or knowingly pursuant to the state statute. However, the trial court denied Clark the opportunity to present "psychiatric testimony to negate specific intent and held that Arizona does not allow evidence of a mental disorder short of insanity to negate the *mens rea* element of a crime."[35] Clark, then, had to prove his insanity according to the state's standard. As this was a bench trial, the judge handed down a verdict of guilty after concluding that Clark "had not established that his schizophrenia distorted his perception of reality so severely that he did not know his actions were wrong."[36] Clark moved

[34] *Clark v. Arizona*, 548 U.S. 735 (2005).
[35] Ibid.
[36] Ibid.

to vacate the judgement and punishment by arguing that Arizona's insanity test and its *Mott* rule—the rule which prevented psychiatric testimony to negate specific intent—violated due process. He claimed that the Arizona Legislature impermissibly narrowed its insanity standard in 1993 when it eliminated the first of the two parts of the *M'Naghten* test, which pertains to the defendant's understanding of the nature and quality of the act. The U.S. Supreme Court ruled in favor of Arizona, holding that the state's insanity test did not violate the Due Process clause of the Fourteenth Amendment. This holding relied in part on the Court's conclusion that the *M'Naghten* test's formula is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[37] Therefore, Arizona was constitutionally permitted to alter its original use of the *M'Naghten* rule to an abbreviated rule, which is known as the moral incapacity test. In short, the Supreme Court ruled that states are not required by the Due Process clause to include both elements of the M'Naghten rule in their insanity standards. The court then reinforced this judgement fifteen years later in *Kahler v. Kansas*. Whereas Arizona had eliminated the first of the two parts of *M'Naghten*, Kansas did the opposite. Electing to adopt the cognitive incapacity test, Kansas focuses on whether a defendant was able understand what he was doing when he committed a crime; not whether he knew it was wrong. Similar to the holding in *Clark*, the court ruled that due process does not require Kansas to adopt an insanity test that considers a defendant's ability to recognize that his crime was morally wrong.[38] Consequently, states may choose to implement one of the *M'Naghten* parts; they need not use both. However, the Court was not unanimous in this consensus. Justice Breyer dissented in *Kahler*, arguing that the state of Kansas had not simply limited the insanity defense, but had "eliminated [its] core."[39] Thus, while it is far too early to

[37] *Patterson v. New York*, 432 U.S. 197 (1977).
[38] Kahler v. Kansas, 589 U.S. (2020).
[39] Kahler v. Kansas, 589 U.S. (2020) (Breyer, J. dissenting opinion).

speculate as to the trajectory of future insanity defense policy, there does appear to be a trend towards narrowing the M'Naghten rule. Furthermore, it is settled law that states may exclude or prohibit expert testimony as to the defendant's specific intent, short of an insanity defense.

The reliability of expert testimony, upon which a jury's verdict may depend in insanity defense cases, has been questioned since the professionalization of psychiatry. In fact, the professionalization of psychiatry is closely-aligned temporally with the codification of the M'Naghten rule in Britain. It seems reasonable, then, that the *M'Naghten* trial involved eight expert witnesses, each of whom testified that M'Naghten was insane at the time of the murder. Today, just as in M'Naghten's trial, expert testimony from psychiatrists is crucial to swaying a jury to find a defendant not guilty by reason of insanity. However, psychiatry has not historically been revered as a scientifically-sound profession, especially in the courtroom. For example, "legal scholars began openly to mock psychiatry's claims to clinical competence" after Stanford social psychologist David Rosenhan published the results of an experiment which used pseudo-patients in 1973.[40] The research subjects were admitted to a local mental hospital after claiming to be hearing voices. Upon being admitted, they behaved perfectly normally. Nevertheless, most were diagnosed as schizophrenic; the psychiatrists failed to see through the sham even as fellow patients could tell the subjects were faking. This experiment was viewed as a black mark for the profession, particularly by lawyers: "One prominent law review article suggested that psychiatric 'expert' testimony was nothing of the sort, but rather was akin to 'flipping coins in the courtroom.'"[41] Such distrust in psychiatric diagnoses for the purposes of legal defenses was not new at that time. Around the time of *M'Naghten*, Lord Justice Clerk Hope in Scotland "believed that ordinary persons 'of common sense' made better judges of a defendant's state of mind 'than either medical

[40] Scull, *Madness in Civilization*, 386.
[41] Ibid.

men or lawyers,' and most trial judges instructed juries that lay witnesses could be just as credible on the subject of insanity as experts."[42] Such a practice by the majority of trial judges at the time clearly indicates a widespread distrust in the reliability of psychiatrists' testimony. Accordingly, lay witnesses have been allowed to testify to a defendant's mental state in the United States. Rule 701 of the Federal Rules of Evidence permits opinion testimony by a lay witness "with no medical background, training, or experience." For example, a lay woman could "testify that in her opinion the defendant was 'very depressed,' so long as the jury is reasonable enough to distinguish the lay use of the adjective from an expert's use of the same word."[43] Opinion testimony such as this must not speculate as to another person's mental state; and it would require expert psychiatric testimony to obtain a not guilty by reason of insanity (NGI) verdict in the modern United States. Thus, while the reliability of psychiatry has historically been doubted—and often for good reason—which has led to debates within the legal community, the credibility of psychiatric testimony is greater now than it historically had been. Thus, M'Naghten still governs most common law jurisdictions, and trial attorneys must ensure the reliability of their side's expert witnesses to convince jurors one way or the other. However, expert testimony has also been doubted on the grounds that it may excuse criminal behavior, as there exists a "fear that the soft, exculpatory sciences of psychiatry and psychology, claiming expertise in almost all areas of behavior, will somehow overwhelm the criminal justice system by thwarting the system's crime control component."[44] In other words, some may doubt expert mental health testimony not because of its potential fraudulent diagnoses, but because it is seen as soft-on-crime, misleading exculpatory evidence that will unjustly free

[42] Ireland, "Insanity and the Unwritten Law," 161.
[43] Adam Santeusanio, "Lay Witness Opinion Testimony on Mental State and Depression: A Call For Reform," *University of Arkansas at Little Rock Law Review* 38, no. 3 (2016): 479. https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1956&context=lawreview
[44] White, *The Insanity Defense*, 4.

criminals. This notion can be traced back as early as the first century when the Stoics refused to ease penal measures for insane criminals because they believed punishment would decrease recidivism and prevent rampant crime, and it continues to this day.

The moral core of the insanity defense remains that insane offenders should not be punished for their actions when they do not know the nature of their actions and/or that their actions are wrong. Despite this contemporary consensus in the legal community that the moral core of the insanity defense should be retained, there were many criticisms of the M'Naghten rule and even proposals by some in the mid-to-late twentieth century to abolish the insanity defense. Those proposals, writes Richard Bonnie in the 1983 edition of the *American Bar Association Journal*, should be rejected in favor of proposals to narrow it and shift the burden of proof to the defendant. According to Bonnie, "the present dissatisfaction with the insanity defense is largely rooted in public concern about the premature release of dangerous persons acquitted by reason of insanity." Bonnie contends that this is not a necessary consequence of the insanity defense, however, and suggests that the "public can be better protected than is now the case in many states by a properly designed dispositional statute that assures that violent offenders acquitted by reason of insanity are committed for long-term treatment."[45] Indeed, such measures have been implemented in numerous jurisdictions. For example, in California, "If a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only the other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time of the offense is alleged to have been committed."[46] Thus, the trial is bifurcated and the burden is on the defendant to prove their insanity should the jury find the

[45] Richard J. Bonnie, "The Moral Basis of the Insanity Defense," *American Bar Association Journal* 69, no. 2 (February, 1983): 194.
[46] California Penal Code §1026 (1872) (Amended 2020).

defendant guilty solely on the facts of the case. "If the verdict or finding is that the defendant was insane at the time the offense was committed, the court, unless it appears to the court that the sanity of the defendant has been recovered fully, shall direct that the defendant be committed to the State Department of State Hospitals for the care and treatment of persons with mental health disorders or any other appropriate public or private treatment facility."[47] In short, defendants who are convicted but deemed insane are not punished in the same way sane convicts are. This upholds the moral core of the insanity defense in a practical sense and in fact is built upon the basic philosophy of leniency espoused by Aristotle more than two millennia ago. It is, however, distinct from full acquittal, which was the case for M'Naghten.

The acquittal of Daniel M'Naghten was a momentous event in the history of psychiatry and law. While it was not revolutionary in the sense that it created a new standard for legal insanity, it was certainly important in the sense that it led to the codification of standards that existed in both theory and practice. When the jury acquitted M'Naghten based on the defense's expert witnesses, it solidified the practice of using psychiatrists to convince lay jurors of a defendant's insanity, which has endured to this day. And while not all states in the U.S. maintain the *M'Naghten* rule, psychiatrists are still needed in order to advance defense theories according to state standards like the moral incapacity test in Arizona or the cognitive incapacity test in Kansas. Such standards adopted by state legislatures may suggest a move away from *M'Naghten*, which the Supreme Court has found does not violate due process of defendants claiming insanity. The Supreme Court has adjudicated that *M'Naghten* is not so deeply rooted in the traditions and conscience of the American people as to be ranked as fundamental. However, the *M'Naghten* rule, which represents a culmination of centuries of legal insanity policies, remains the federal standard

[47] Ibid.

and is still used in half of the states. Insanity has progressed from being viewed as a punishment itself inflicted by the gods in ancient Greece to a sound legal defense in common law jurisdictions ever since *M'Naghten*. Even before *M'Naghten*, judges and juries recognized that insanity could, pursuant to Aristotle's theory, morally excuse "some misconduct… when it was the result of… a mistake of fact."[48] That this principle, first proposed by Aristotle in the fourth century B.C. was applied over a millennia later, and even codified in so many words by the Chancellor of the House of Lords, demonstrates the fundamental nature of this historic principle and others which culminated in *M'Naghten*.

[48] Walker, "The Insanity Defense before 1800," 26.

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