

raising the level of the river necessarily raises that of the tributary at their confluence and as far upstream as the effects of the lifting may go. These facts are equally apparent to both types of owners. We think they should be anticipated by both, and that the one has no more power to obstruct or burden the power of Congress in its control of the river's bed in the interest of navigation than the other."³⁹

Justice Douglas would apply the ordinary high water mark rule to that part of the bed of the nonnavigable tributary that is affected by the raising of the navigable stream to ordinary high water mark and thus allow "change in the natural flow to the extent of lifting the mean level to high water mark without liability for constitutional compensation."⁴⁰

The effect of the *Kansas City* decision is to shift from the individual riparian owners to the government a greater burden of the costs of federal river projects. It is arguable that this greater cost should be spread among all the national taxpayers. On the other hand, it may be that the necessity for increasing Congressional appropriations for such river developments induced Justices Black, Douglas, Minton, and Reed to dissent. They argue that riparian owners on navigable and non-navigable streams should be treated alike since "[n]either has any greater right to have the river flow in its natural state than the other."⁴¹ The present Court appears unwilling to adopt such a view of federal power and restricts the doctrine of federal immunity to the area below the ordinary high water mark on navigable streams.

If the doctrine of immunity against landowners within the bed of the navigable stream was originally justified under the commerce clause,⁴² it would seem that the same reasoning would grant this immunity on the tributaries of the navigable stream. It is difficult to understand why the Court has balked.

LUNACY AND IDIOCY—THE OLD LAW AND ITS INCUBUS

The law pertaining to the insane embodies a most peculiar paradox. On the one hand, it is gradually being realized that our concept of "insanity" should be revised and reworked in accordance with new psychological learning. On the other hand, insanity as a defense in criminal trials, the field where the problem is most acute, is used in a loose and unscientific manner, the test being phrased in terms of "knowledge of right and wrong." This note will attempt to shed some light on the causes of this situation by an examination of the origins and early development of the legal doctrines relating to the insane.

The central distinction employed by the old law was between the "lunatic" and the "idiot." The lunatic was subject to fits of madness, with lucid intervals

³⁹ 339 U.S. 799, 812 (1950).

⁴⁰ *Ibid.*, at 813.

⁴¹ *Ibid.*, at 812.

⁴² Compare *Leovy v. United States*, 177 U.S. 621, 632 (1900).

in between. He was not congenitally insane. The idiot, on the other hand, was born mentally deficient or disturbed. Apparently the idiot was classified more in terms of mental equipment and intelligence than the lunatic, who was violently insane rather than feeble-minded.

It is impossible to fix definitely the point in time when this distinction first became meaningful; a good guess would be the 13th century, although the distinction was not clearly formulated at that time.² At any rate, the classification appears to have "set" by 1324, when the statute *De Praerogativa Regis*² was enacted. Here a clear and simple distinction is made between the lunatic and the idiot, though not in those terms. The statute provided that the custody of the lands of "natural fools" is to be vested in the king; the profits from the land go to the king, except that he is to grant necessities to the "natural fool," and after the fool's death, the land is to be returned to the "right heirs." On the other hand, those "who formerly had memory and intellect but became non compos mentis" are to be treated more gently. The king is to have their custody, but he is not to take the profits for his own use.

Both economic and psychological factors may have entered into the statute. The 14th century was a period of expansion of the royal power. The king demanded military and other modes of feudal service from the lords. The strength of the lords was dangerous to the king, but it was also necessary. When a lord was insane, it was necessary for the lands to be under the protection of someone. If the king did not assume the power of guardianship over these lands, the neighboring lords would take over. There is evidence that before the statute *De Praerogativa Regis* the lords exercised this function. But the lord was quite likely not to return the land to the heirs of the insane lord; thus too much power might be gathered into the hands of one lord. The assumption of this power by the king served the valuable function of consolidating and strengthening his power. In this way, the custody over the lands of the insane is similar to the right of the king over infant heirs ("wardship") and the right to dictate or approve the marriage of female heirs of tenants *in capite*.

On the other hand, the reasons for this distinction between the idiot and the lunatic cannot be readily explained on this basis. It might be suggested that

¹ Texts of the late 13th century exhibit a bewildering multiplicity of terms for the insane. Thus Britton, who wrote in 1290, during the reign of Edward I, speaks of lunatics, frenetics, fools, those who become insane from some illness ("ceux qe deveignent fous par aucune maladie"), madmen ("arragés") sots, and those who are "without sense." Britton *62b, *88b, *90, *167, *217b, *279. The Mirror of Justices, dating from the same period, shows the same tendency. Mirror, Bk. 2, cc. 2, 3, 27, 30, Bk. 4, c. 16.

Despite the confusion and multiplicity of terms, these texts indicate a groping toward the primary dual classification of "idiots" and "lunatics." The distinction is constantly made between "born fools" and "raging madmen." In contrast, the Statute Modus Levandi Fines, 18 Edw. I, stat. 4 (1290), speaks simply of those who are "de bone memorie," as contrasted with those who are not. See also an entry in the Coram Rege Roll, no. 133, m. 22 (Trinity, 1292), using the terms *fatuitas* ("foolishness"); and Y.B. 8 Edw. II, 24 (1314) ("noun seyne memorie").

² 17 Edw. 2, cc. 9, 10 (1324).

the lunatic, by definition one who has "lost his memory and intellect" (and, therefore, might regain it) is to be rendered back his property when he is again able to manage it. The "lunatic" has historically been regarded as responding to therapy, or at least, of being manageable. Thus, though the king may pocket the profits of the lands of the idiot, the land of the lunatic is sacrosanct. The "born fool" is simply lacking in the rudiments of intelligence.

Frances' Case,³ decided in the 16th century, shows how the doctrine has developed.⁴ The statute is quoted and followed, but there is an indication of advance and growth. For example, a clear indication is given of the mechanism of discovering whether a suspected individual is an idiot or a lunatic or sane. In *Frances' Case* it can be noted also that whereas the statute *De Praerogativa Regis* used "fatuus" for "idiot" and a circumlocution for "lunatic," the terms "idiot" and "lunatic" are used quite clearly and explicitly here.

The commissions ("offices") mentioned in *Frances' Case*, which conducted the inquiries into the sanity of individuals, were set into motion by two regular chancery writs, the writ "de lunatico inquirendo" and the writ "de idiota inquirendo et examinando," of which a full and complete report appears in Fitz-Herbert's *Natura Brevium*, from the middle of the 16th century.⁵ Fitz-Herbert also sets forth an interesting though rudimentary symptomatology:

And he who shall be said to be a Sot and Idiot from his birth, is such a Person who cannot account or number twenty Pence, nor can tell who his Father or Mother is, nor how old he is &c, so as it may appear that he hath no Understanding or Reason what shall be for his Profit and what for his Loss: But if he hath such Understanding, that he know and understand his Letters, & do read by Teaching or Information of Another man, then it seemeth he is not a Sot nor a natural Idiot. . . .

Note here that the "idiot" is defined in terms of intelligence.⁶

An excerpt from the Middlesex Sessions Rolls⁷ in the 17th century indicates the use of insanity as a defense in cases at criminal law. The notion appeared

³ Moore 4 (K.B., 1536), reprinted also in 1 And. 22, and Benl. 17.

⁴ Where the early statute read "the king has the custody of the lands of natural fools," it is said in *Frances' Case* that "the King seised himself of the lands and of the body. . . ." This is in line with the psychological position of the king as father-object in the medieval law, since it could never have been more than fiction to suppose that the king actually troubled himself with the guardianship of idiots. It was, of course, farmed out to specific individuals.

⁵ Fitz-Herbert, *Nat. Brev.* *232-233; see also *Darwin's Case*, *Ley* 25, (K.B., 1610).

⁶ When it was desired to distinguish merely between the sane and the insane, and not between the lunatic and the idiot, a generic term covering both was used. In early texts the term "de non sane memorie" was common. Y.B. 8 Edw. II, 24 (1314); *Cross v. Andrews*, Cro. Eliz. 622 (K.B., 1598); see also statutes, 1 Rich. III, c. 7 (1483), and 23 Eliz., c. 3 (1581). Later on the term *non compos mentis* replaced this. We first noted this expression in the statute *De Praerogativa Regis*, c. 10. See the interesting entry in the Middlesex Sessions Rolls, 22 James I, entry of 29th July, 1625: "Anne Muskett late of the said parish spinster killed and murdered Clement Harrison, a girl of the age of 8 years by seizing the said Clement with both hands and throwing her 'in quoddam flumen vocatum the newe River.' Acquitting her of murder, the jury found that she was a lunatic, and whilst 'non compos mentis' had drowned the said Clement Harrison."

⁷ Quoted in note 6 supra.

much earlier in the *Mirror of Justices*.⁸ There is very scant authority on this point during the middle ages and renaissance apparently because the main emphasis in lunacy law was fixed on the lunatic's and idiot's right to property. There is dictum in *Beverley's Case*⁹ that "the law of England is that [the insane] shall not lose his life for felony or murder . . . because . . . the punishment of a man who is deprived of reason and understanding cannot be an example to others. . . . No felony or murder can be committed without a felonious intent or purpose . . . and . . . he cannot have a felonious intent. . . ."¹⁰

In general, the early years of the 17th century represent a turning point in the English law of lunacy. *Beverley's Case*, perhaps the most important case on the subject in Anglo-American jurisprudence, contains an analysis, exposition, and codification of the entire previous law of lunacy. Lord Coke here sets up a fourfold classification of those who are *non compos mentis* (which he uses as a generic term). There are lunatics, idiots, distracted persons (a term formerly included in the concept of the lunatic) and drunkards. The common characteristic of the class is loss of control over the will.

Although the practical bases of Coke's classification began to dissolve very soon,¹¹ in theory Coke's classification remained the law of the land for several

⁸ *Mirror*, Bk. 4, c. 16, where it is stated that "a crime cannot be committed . . . except among [those with] a corrupt will, and corruption of will is impossible where there is no discretion." The author goes on to say that although "frenetics" and "lunatics" can sin feloniously, this is not true of those who are continuously mad ("les continuellement arragez"). However, it hardly need be pointed out that as a legal authority, the *Mirror* is well-nigh the most untrustworthy book ever written.

⁹ 4 Co. *123b (K.B., 1603).

¹⁰ Coke lays down a very interesting exception in the text: "non compos mentis cannot commit petit treason. . . . But in some cases [he] . . . may commit high treason, as if he kills, or offers to kill the King. . . . [The King's] person is so sacred that none can offer them any violence." This doctrine is echoed also in *Sheffield & Ratcliffe's Case*, Godb. 300, 316 (K.B., 1624), reprinted also in 2 *Rolls Rep.* 344. Perhaps the source of this rule is to be found in the statute 33 Hen. VIII, c. 20 (1541), which reads in part:

"Forasmuch as sometimes some persons being accused of high treason . . . have fallen to madness and lunacy whereby the condign punishment of their treasons, were they never so notable and detestable, hath been deferred . . . ; and whether their madness or lunacy by them outwardly shewed were of truth, or false contrived and counterfeited, it is a thing almost impossible, certainly, to try and judge. Be it therefore enacted . . . to avoid all sinister, counterfeit, and false practices and imaginations that may be used for excuse of punishment of high treason . . . if any person commit high treason, when they were in good, whole, and perfect memory, and after their accusation, examination & confession thereof, shall happen to fall into madness or lunacy . . . then the offender . . . shall have such judgment and suffer such pains of death . . . as is commonly limited in cases of high treason and as if such person had been of good and whole memory. . . ."

Of course, Coke's dictum in *Beverley's Case* goes far beyond the statute, which deals only with confessed traitors. Probably the symbolic nature of kingship entered into the question here too. In *Tourson's Case*, 8 Co. *170a (K.B., 1611) it is said that "the King has the custody of an idiot, not in respect of any seigniory, but *jure protectionis suae regis*, because his subject is not able to govern himself, nor the lands or tenements which he has," which is questionable history, but very illuminating.

¹¹ Juries were unwilling to find that persons were idiots (and thus vest absolute power over their estates in the king) and tended always to find them lunatics. See *Prodgers v. Frazier*, 3

centuries.¹² In an interesting little book written in 1700 at London by John Brydall, entitled "Non Compos Mentis, or the Law relating to Natural Fools, Mad-Folks, and Lunatick Persons, Inquisited and Explained for Common Benefit," substantially the same classification is set out. Brydall accepts the term "non compos mentis" as the generic term, and goes on to subdivide it as follows:

Some whereof are become so by a perpetual Infirmity, as *Idiots*, or *Fools Natural*; some, who were once of good and sound memory, but by the Visitation of God are deprived of it, as Persons . . . Distracted; Some that have their lucid intervals . . . as Lunatick Persons: and some who are made so by their own Default; as Persons overcome with drink, who during the time of their Drunkenness are compared to Mad-Folks.

Brydall's book is written as a series of questions and answers relating to the law of non compos mentis. It is interesting to gage the emphasis placed on the various types of legal problems arising in connection with the insane. As might be expected, the book is concerned chiefly with problems involving the property or custody of the insane, and only very secondarily with questions of testamentary and contractual capacity, and criminal responsibility.

The Coke-Brydall fourfold division continued into the next century.¹³ Little, however, was left of the old mechanism of the kingly prerogative. Instead, the custom had long been for the king, by sign manual, at the beginning of his reign, to direct the Chancellor, the Lord Keeper of the Seal of England, to take charge of these matters. And cases invoking lunacy law were regularly treated in the courts of equity.¹⁴

Mod. 43 (K.B., 1684) reported also in 1 Vern. 9, 137, 2 Show. 171, Skin. 4, 138, 177, where the court twisted an inconsistent finding by the jury, obviously meant to convey a finding of lunacy, into a finding of idiocy. In *Ex parte Barnsley*, 3 Atk. 168, 174 (Ch., 1744), Lord Hardwicke remarked that "the reason that Lord Wenman was so long before he could be found [non compos mentis] . . . was the unwillingness the jury had to find him an idiot, because of the consequence, but upon an inquisition of lunacy, they found him a lunatick immediately. . . ." By 1812, Collinson could say in his textbook on the law of lunacy (at p. 100) that "a jury seldom finds a person idiot a nativitate, but only non compos mentis [i.e., lunatic]. . . . It is moreover, observable that of those found idiots, the instances in modern times are very rare, where the crown has claimed that interest in their property to which it is legally entitled."

¹² See, for example, *Foster v. Marchant*, 1 Vern. 262 (Ch., 1684).

¹³ It appears almost verbatim in 2 Lilly's Register 284 (1735); see also the definition of the lunatic and the idiot. *Ibid.*, at 250, 35. Interestingly enough, the crude "twenty-pence" symptomatology set up by Fitz-Herbert nearly two centuries before is still followed: the idiot "knoweth not how to count or number twenty, or cannot name his Father or Mother, or such-like easy and common Matters." *Ibid.*, at 35.

¹⁴ An invaluable collection of these is to be found in 1 Eq. Cas. Abr. 276-79, collecting the Chancery cases for the years 1667 to 1774, inclusive. The allegation found in the statement of facts in *Sheldon v. Aland*, 3 P. Wms. 104-5 (Ch., 1731) is typical:

"King *William* and Queen *Mary*, by virtue of their undoubted prerogative, by their royal sign manual directed to *Sir John Sommers* Knight then Lord Keeper of the great seal of *England*, reciting, that the care of idiots and lunatics doth of right belong to the Crown, did grant to the said *Sir John Somers* full power and authority . . . to give orders and direction

This was, in general, the state of the law of lunacy up to the time of Blackstone, which is a convenient breaking off point. In Blackstone we find almost the last statement of the classical mode of classification:

An idiot or natural fool, is one that hath no understanding from his nativity; and therefore is by law never likely to attain any. . . . [T]he custody of him and of his lands [is] . . . given to the king. . . . A lunatic or *non compos mentis* (sic) is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason. A lunatic is indeed properly one that hath lucid intervals. . . . But under the general name of *non compos mentis* . . . are comprised not only lunatics, but persons under frenzies; or who lose their intellects by disease . . . or such, in short, as are judged by the court of chancery incapable of conducting their own affairs. . . .¹⁵

It is apparent from this brief historical sketch that the old law, unlike some modern psychological systems, defined *non compos mentis* not in terms of an analysis of personality adjustment, but largely in terms of memory and intellect. *Will* was a function of the intellect, not of the "character," the "personality." The insane person was incapable of crime, because crime presupposed corruption of the will, but where there was no intellect, there was also no will; and on this basis is explained incapacity to contract, to make a testamentary disposition, and to marry.¹⁶ Many of these legal disabilities are retained in modern law; often vestiges of the old justifications hang on, as, for example, the recital in modern wills that the testator was of "sound mind" (not, as some might have it, of well-adjusted personality).

This hypothesis may be tested by a look at a largely neglected branch of the law: that relating to the deaf, dumb, and blind, and to various similarly handicapped persons. These physical disabilities per se, of course, do not result in what would today be called strict insanity, but in an age which did not know lip-reading, or in an age in which the mute most likely did not know how to write, and thus could not express himself at all, any distinction between the insane and these physically handicapped individuals was academic, and, as a matter of fact, was not likely to be made.

for preparing of grants for the custody or commitment of the estates or persons of lunatics or idiots."

The 18th century showed an increased interest in the problem of the *commitment* of the insane. Feudal law was not concerned with the problem of the insane man who did not have an estate. The pauper madman was a problem for the church, the lord of the manor, or any other relevant social institution. With the growth of a proletariat, the problem had to be faced. See the statute, 17 Geo. 2, cc. 5 and 29 (1744), and Lunatick Petitions, 2 Atk. 52 (Ch., 1740), apparently referring to an earlier, similar act of Parliament, where it is said that "the act of Parliament that empowers justices of peace to take care of lunaticks, upon complaint made to them of any outrages committed, relates to vagrant lunaticks only . . . and does not extend to persons who are of rank and condition in the world and whose relations can take care of them properly, by applying to this court [Chancery] as is usual in cases of lunacy."

¹⁵ 1 Bl. Comm. *302-4.

¹⁶ Note that a certain type of testament is denoted by that very word: a "will."

As early as Bracton (*ca.* 1260) we find the doctrine expressed that the deaf-mute by birth cannot acquire property.¹⁷ Further disabilities are added by Britton, at the end of the 13th century. Both Bracton and Britton draw a distinction between the man who is *born* deaf and dumb and the man who becomes so from disease or accident.¹⁸ This distinction is analogous to the distinction drawn between the idiot ("a nativitate") and the lunatic. No explanation is given for the rule. A good guess would be that it was suggested by the analogy between the deaf-mute, who cannot express his will, and the insane, who have no will.

The doctrine developed in Bracton and Britton reaches a state of codification in Coke, who states that a man "deafe, dumbe and blind from his nativity" may not enfeoffe, "but if he be deafe, dumbe or blind, so that he hath understanding, and sound memory, albeit he expresse his intention by signes" he may enfeoffe.¹⁹ The distinction drawn is essentially that of Bracton and Britton. However, the addition of the phrase "albeit he expresse his intention by signes," indicates that the doctrine was weakening in the face of an advancement in the communicative powers of the handicapped.²⁰ The rule was coming to be that if the incapacitated man could make a showing that he was not in reality unfit for the management and understanding of his business, he was not automatically disqualified.

Blackstone, some 150 years after Coke, shows an even more decided change: "A man who is born deaf, dumb, and blind, is looked upon by the law as in the same state as an idiot."²¹ The language would seem to indicate that the rule of law was being reduced to the status of a rebuttable presumption.²²

It is clear from all the authorities that the coupling of the idiot and the handicapped cannot be based on notions of personality structure; the terms "memory" and "understanding" constantly reappear. And, when better meth-

¹⁷ Bracton *42ob.

¹⁸ "And so when one is naturally deaf and dumb, he cannot acquire [property], because he cannot consent . . . I say 'naturally,' that is, from birth." ("Naturaliter dico, hoc est a nativitate") Bracton *42ob; Britton *88b, *217b, *279.

¹⁹ Co. Litt. *42.

²⁰ Shepherd, in his *Touchstone of Common Assurances*, written in the same century as Coke's work, says that "a man that is both deaf and dumb, and that is so by nature, cannot make a testament. . . . But a man that is so by accident may, by writing or signs, make a testament."

²¹ 1 Bl. Comm. *304.

²² This process had started much before Blackstone. In *Dickinson v. Blisset*, 1 Dick. 268 (Ch., 1754), we read: "A party born deaf and dumb, attaining twenty-one applies for possession of her real estate, and to have an assignment of her chattel estate; *Lord Hardwicke, C.*, having put questions to the party in writing, and she having given sensible answers thereto in writing, the same was ordered." See Collinson on Lunacy § 7 (1812).

ods of communication, in particular lip-reading and Braille, appear, the doctrine dies.²³ The last case dealing with the subject was decided in 1908.²⁴

To sum up, the older law of lunacy showed two important characteristics that helped shape it: (a) emphasis on questions of property rights rather than capacity and criminal responsibility; and (b) the use of criteria based on notions of "will" and "intellect" rather than on notions of personality. The nineteenth century shows a decisive shift of emphasis to the field of criminal responsibility. The modern learning on this subject owes most to *M'Naghten's Case*,²⁵ which was decided in 1843; and this has been followed by a spate of cases developing the so-called "right-or-wrong" and "irresistible impulse" tests for criminal responsibility. The "right-or-wrong" test, stated in its most simple form, is that a "person is not criminally responsible for an offense if at the time it is committed he is so mentally unsound as to lack: 1. Knowledge that the act is wrong."²⁶ Under the "irresistible impulse" test, a person is not responsible if he lacks "will power enough to resist the impulse to commit it."²⁷ These rules have an archaic ring; they are concerned with "will," with "knowledge," with intellect, in short. The result is that the old common law of insanity, developed to provide a rough norm for deciding questions of the management of feudal estates, still lingers on in the twentieth century to decide questions of life and death in criminal trials. Where the question involved was the ability to manage a feudal estate, the common-sense judgment of the jury as to the "insanity" or "sanity" of the party was as precise and accurate as one might hope to get. To use the same modes of thought and procedure in a modern criminal trial is to undermine the principles underlying criminal responsibility.

²³ The earliest American cases repeat the rule. *Commonwealth v. Timothy Hill*, 14 Mass. 207 (1817); *Brown v. Brown*, 3 Conn. 299 (1820). In the *Hill* case the rule is treated more like a rebuttable presumption. See, to this effect also, Chancellor Kent's opinion in *Brower v. Fisher*, 4 Johns. Ch. (N.Y.) 441 (1820).

Christmas v. Mitchell, 38 N.C. 535, 541 (1845), questions whether the presumption even remains in existence. The judge was much impressed by the "wonders worked in modern time, in giving instruction" to the deaf and dumb. See also, by way of dictum, *Potts v. House*, 6 Ga. 324, 356 (1849), where the existence of the presumption is admitted, but its wisdom challenged. The later cases generally agree that the presumption is a matter of history only. *Barnett v. Barnett*, 54 N.C. 221 (1854). In *Alleged Lunacy of Perrine*, 41 N.J. Eq. 409, 5 Atl. 579 (1886), a deaf mute was held "incapable of managing his own affairs," but the court conceded that a "person born deaf and dumb, but not blind, is not an idiot." There was sufficient evidence of incompetency aside from the physical handicap to support the verdict in the case. In *Collins v. Trotter*, 81 Mo. 275 (1883), it was said that deaf mutes were "*prima facie* incompetent to make any contract," but this doctrine was expressly repudiated in the later case of *State v. Howard*, 118 Mo. 127, 24 S.W. 41 (1893). Accord: *Succession of Mélasie Hébert*, 33 La. Ann. 1099 (1881); *State v. Weldon*, 39 S.C. 318, 17 S.E. 688 (1893); *Alex v. Matzke*, 151 Mich. 36, 115 N.W. 251 (1908).

²⁴ *Alex v. Matzke*, 151 Mich. 36, 115 N.W. 251 (1908).

²⁵ 10 Cl. & Fin. 200 (H.L., 1843).

²⁶ *Weihofen*, *Insanity as a Defense in Criminal Law* 15 (1933).

²⁷ *Ibid.*