

2005

Right Feeling and Knowing Right: Insanity in Testators and Criminals in Nineteenth Century American Law

Robert Mensel

St Thomas University School of Law, Miami, rmensel@stu.edu

Follow this and additional works at: <http://digitalcommons.law.ou.edu/olr>

 Part of the [Criminal Law Commons](#), [Law and Society Commons](#), and the [Legal History Commons](#)

Recommended Citation

Robert Mensel, *Right Feeling and Knowing Right: Insanity in Testators and Criminals in Nineteenth Century American Law*, 58 OKLA. L. REV. 397 (2005), <http://digitalcommons.law.ou.edu/olr/vol58/iss3/2>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

RIGHT FEELING AND KNOWING RIGHT: INSANITY IN TESTATORS AND CRIMINALS IN NINETEENTH CENTURY AMERICAN LAW

ROBERT E. MENSEL*

I. Introduction

In cases decided seven years apart, in 1866 and 1873, courts in New York applied two distinct legal definitions of sanity to two different types of cases. According to one, “the test of responsibility for criminal acts, where unsoundness of mind is interposed as a defence, is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of the inquiry.”¹ According to the other, the sound and disposing mind of a testator “is a mind and memory which has the capacity of recollecting, discerning, and feeling the relations, connections, and obligations of family and blood.”²

One of these definitions required only soundness of the intellect in order to constitute a sane and responsible person. The other required also soundness of the sentiments. By their terms, these definitions allowed for the determination that the same person at the same moment was fully competent and responsible in the eyes of the criminal law, but less than fully competent and responsible to execute a will. These two different definitions of sanity, or insanity, reflected the general development of the common law in the United States up to that time.

How could the same individual at the same time be both sane and insane, competent and incompetent, a person and less than a person, in the eyes of the law? Why did the definition of the sane and responsible person differ in different areas of law, and for different purposes within the law? Physician and attorney John Ordronaux, after his appointment as the first New York State Commissioner in Lunacy, recognized in 1878 that “[w]hat constitutes mental capacity at law is a question to be ultimately determined as much by

* Associate Professor of Law, Charleston School of Law, South Carolina. B.A., Wesleyan University; M.A., Rutgers University; J.D., University of Pennsylvania; Ph.D., Rutgers University. The author is grateful to Paul Clemens, Ann Fabian, Jackson Lears, James Livingston, Michael Murtaugh, Loren Prescott, and Cecile Zitelli for their generous assistance.

1. *Flanagan v. People*, 52 N.Y. 467, 469 (1873).
2. *Christy v. Clarke*, 45 Barb. 529, 545 (N.Y. App. Div. 1866) (citation omitted). Variations on the term “sound and disposing mind” were treated by courts throughout the country as “equivalent to the term ‘sanity.’” *Yoe v. McCord*, 74 Ill. 33, 40-41 (1874). This was consistent with English law and usage since the time of Coke. *Id.*

the character of the act as by the state of mind of the actor.”³ It was clear, too, that legally competent personhood was not the same as normative personhood. One could be an eccentric, a monomaniac, or an imbecile and still be sufficiently a person to be fully competent in the eyes of the law to perform some acts of legal significance. On the other hand, one might merely suffer from misdirected affections and so be disabled from executing a will. Indeed, as Ordronaux noted, “wills have been found void where the testator would not, if living, have been found insane.”⁴

This article examines the meanings of insanity in two areas of nineteenth century American law: homicide prosecutions and will contests. These represent the most extreme ends of the continuum of insanity law. Insanity was most difficult to establish in homicide prosecutions, in part because of the narrow definition of insanity applied in such cases.⁵ On the other hand, insanity was relatively easy to establish in will contests.⁶ In that context insanity included, as a practical matter, any unsoundness of mind that affected the testator’s sentiments concerning the natural objects of his or her bounty.⁷ It surely included many persons who, if prosecuted for homicide during their lifetimes, would have had no hope of acquittal on grounds of insanity.⁸

This article first summarizes the historiography of nineteenth century thought concerning insanity.⁹ It then reviews the forward-looking opinions of Charles Doe, Chief Justice of the Supreme Court of New Hampshire, on the issue of insanity in the law. While these found little contemporary following,¹⁰ they link the two primary topics of this article, and provide a conceptual counterweight to the opinions of other common law courts. The article then explains the importance of faculty psychology in nineteenth century legal and cultural understandings of the nature of the human mind.¹¹ It then describes the traditional common law rule applied in cases of criminal responsibility, reforms of that rule proposed by Isaac Ray and others, their rejection in the famous *M’Naghten* case, and their mixed reception in American state courts in cases of criminal insanity.¹² The standard of insanity in will contests is then

3. JOHN ORDRONAU, COMMENTARIES ON THE LUNACY LAWS OF NEW YORK, AND ON THE JUDICIAL ASPECTS OF INSANITY AT COMMON LAW AND IN EQUITY, INCLUDING PROCEDURE, AS EXPUNDED IN ENGLAND AND THE UNITED STATES 356 (Albany, John D. Parsons, Jr. 1878).

4. *Id.* at 360; *see also In re Dunham*, 27 Conn. 192, 206 (1858).

5. *See infra* Part II.A.

6. *See, e.g., In re Dunham*, 27 Conn. 192.

7. *See infra* Part II.C.

8. *See, e.g., In re Dunham*, 27 Conn. 192; *see also* ORDRONAU, *supra* note 3, at 360.

9. *See infra* Part II.A.

10. *See infra* Part II.B.

11. *See infra* Part II.C.

12. *See infra* Part III.

discussed,¹³ and the significance of the phrase “natural objects of [the testator’s] bounty,” and its shifting meanings over time, is discussed.¹⁴ The article concludes with a summary of the causes and significance of the difference in the legal standards of insanity applied by the courts in criminal cases and in cases of testamentary capacity.

II. Legal Definitions of Insanity in Nineteenth Century America

A. The Historiography of Insanity in Nineteenth Century American Law

The historiography of insanity is divided broadly into three categories. There is the history of the asylum in America,¹⁵ the history of the psychiatric profession,¹⁶ and the social history of insanity.¹⁷ These bodies of literature

13. See *infra* Part IV.

14. See *infra* Parts IV.A-B.

15. Led by Gerald N. Grob, these authors have documented a story of decline from the optimism of the antebellum asylum movement to the dreary and sometimes abusive custodialism of the later century. See generally NORMAN DAIN, *CONCEPTS OF INSANITY IN THE UNITED STATES, 1789-1865* (1964); ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES* (2d ed. 1949); GERALD N. GROB, *MENTAL ILLNESS AND AMERICAN SOCIETY 1875-1940* (1983); GERALD N. GROB, *MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875* (1973); CONSTANCE M. MCGOVERN, *MASTERS OF MADNESS: SOCIAL ORIGINS OF THE AMERICAN PSYCHIATRIC PROFESSION* (1985); ANDREW SCULL, *MADHOUSE: A TRAGIC TALE OF MEGALOMANIA AND MODERN MEDICINE* (2005). For a history of the asylum movement in Great Britain, see ANDREW SCULL, *THE MOST SOLITARY AFFLICTIONS: MADNESS AND SOCIETY IN BRITAIN, 1700-1900* (1993).

16. This literature generally recounts a series of salutary developments by which cultural authority over mental illness shifted from ministers and theologians to phrenologists, and then to neurologists, and finally, at century’s end, to psychoanalysts. This coincided with the evolution of conceptions of the causes of mental illness, from early superstitions concerning demonic possession, to the more forgiving but still essentially theological idea of insanity as otherwise inexplicable “duress of heaven,” to the early organicist theories based upon a sort of geography of the brain, to the neurasthenic model of nervous exhaustion, and finally to the redemptive, if difficult, truths of psychoanalysis. See JOHN C. BURNHAM, *PSYCHOANALYSIS AND AMERICAN MEDICINE: 1918-1984* (1967); HENRI ELLENBERGER, *THE DISCOVERY OF THE UNCONSCIOUS: THE HISTORY AND EVOLUTION OF DYNAMIC PSYCHIATRY* (1970); F.G. GOSLING, *BEFORE FREUD: NEURASTHENIA AND THE AMERICAN MEDICAL COMMUNITY, 1870-1910* (1987); NATHAN G. HALE, JR., *FREUD AND THE AMERICANS: THE BEGINNINGS OF PSYCHOANALYSIS IN THE UNITED STATES, 1876-1917* (1971); BARBARA SICHERMAN, *THE QUEST FOR MENTAL HEALTH IN AMERICA, 1880-1917* (1980); John Chynoweth Burnham, “*Psychiatry, Psychology and the Progressive Movement*,” 12 *AM. Q.* 457 (1960) [hereinafter Burnham, *Progressive Movement*]; Jaques M. Quen, *Asylum Psychiatry, Neurology, Social Work and Mental Hygiene: An Exploratory Study in Interprofessional History*, 29 *J. HIST. BEHAV. SCI.* 93 (1974). The relatively recent success of Prozac and other psychopharmaceutical bromides has inspired a postscript to this tale, in which the empirical science underlying such biological therapies

deal only superficially, if at all, with insanity as a legal problem. Most of the scholarly literature addressing insanity and the law has been limited specifically to the relationship between insanity and the criminal law, which has received considerable attention from medical and legal scholars.¹⁸ Their

vanquishes the psychoanalytic superstition and its wizard practitioners. EDWARD SHORTER, *A HISTORY OF PSYCHIATRY: FROM THE ERA OF THE ASYLUM TO THE AGE OF PROZAC* (1997).

17. Authors in this tradition have capitalized on the fact that, at the margins, insanity is often difficult to define. They then typically make heroes of the insane, whom they characterize as wise challengers of hegemonic views of truth and reality. The inevitable conclusion is that the means by which insanity is defined and treated is little more than a thinly veiled effort at social control. The leading contemporary proponents of this view are Thomas Szasz and Michel Foucault, but its roots lie in Henry Maudsley's work in the 1870s. See HENRY MAUDSLEY, *RESPONSIBILITY IN MENTAL DISEASE* (authorized ed. 1900). There is a simple-minded subversiveness in the literature of this school of thought, and its occasional hagiography of the insane is unfortunate and unrealistic. Nevertheless, the conclusion that the definition of insanity is, at least in part, a matter of social control, certainly resonates with the nineteenth century medical jurisprudence discussed herein. While it sheds little light on the problem of the truly mad and dangerous, the social control theory explains a great deal about the management of persons at the margin of sanity in nineteenth century America. See MICHEL FOUCAULT, *MADNESS AND CIVILIZATION* (Michael Howard trans., 1967); ERVING GOFFMAN, *ASYLUMS* (1961); ROY PORTER, *A SOCIAL HISTORY OF MADNESS: THE WORLD THROUGH THE EYES OF THE INSANE* (1987); THOMAS S. SZASZ, *LAW, LIBERTY AND PSYCHIATRY* (1963); THOMAS S. SZASZ, *THE MANUFACTURE OF MADNESS* (1970); THOMAS S. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961).

18. See generally JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960); JAMES C. MOHR, *DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH CENTURY AMERICA* (1993); DANIEL N. ROBINSON, *WILD BEASTS AND IDLE HUMORS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT* (1996); CHARLES ROSENBERG, *THE TRIAL OF THE ASSASSIN GUILTEAU* (1968); HENRY WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* (1954); Joel R. Cornwell, *The Confusion of Causes and Reasons in Forensic Psychology: Deconstructing Mens Rea and Other Mental Events*, 33 U. RICH. L. REV. 107 (1999); Christopher Hawthorne, *'Deific Decree': The Short, Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755 (2000); Herbert Hovenkamp, *Insanity and Criminal Responsibility in Progressive America*, 57 N.D. L. REV. 541 (1981); Edwin R. Keedy, *Insanity and Criminal Responsibility, Part 2*, 30 HARV. L. REV. 724 (1917); Richard H. Kuh, *The Insanity Defense — An Effort to Combine Law and Reason*, 110 U. PA. L. REV. 771 (1962); Bailey H. Kuklin, *The Asymmetrical Conditions of Legal Responsibility in the Market Place*, 44 U. MIAMI L. REV. 893 (1990); John K. McHenry, *The Judicial Evolution of Ohio's Insanity Defense*, 13 U. DAYTON L. REV. 49 (1987); Richard Lowell Nygaard, *On Responsibility: Or, The Insanity of Mental Defenses and Punishment*, 41 VILL. L. REV. 951 (1996); Anthony Platt & Bernard L. Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CAL. L. REV. 1227 (1966); Roscoe Pound, *Insanity & Criminal Responsibility*, 2 J. CRIM. L. & CRIMINOLOGY 521, 544 (1911); Allen D. Spiegel & Peter B. Suskind, *A Paroxysmal Insanity Plea in an 1865 Murder Trial*, 16 J. LEGAL MED. 585 (1995); Janet Ann Tighe, *A Question of Responsibility: The Development of American Forensic Psychiatry, 1838-1930* (1983) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file at the University of Pennsylvania Library).

work has yielded important insights concerning the significance of insanity as a legal phenomenon in the nineteenth century.

As this article demonstrates, the insanity defense in homicide cases is inherently too narrow to be representative of broadly held notions of insanity. The different standards applied to prosecutions and will contests prove at least that much. Thus, the existing literature is incomplete. It pays too little attention to the role of insanity in civil legal proceedings arising from the conduct of those to whom George L. Harrison, the President of the Board of Public Charities in Pennsylvania, referred as the “defective classes of the commonwealth.”¹⁹ This article is intended to open a broader discussion of the role insanity played in nineteenth century American law, and to begin to shed light on notions of personhood implicit in the various legal definitions of insanity, starting with these two very different areas of law.²⁰

B. Issues of Fact, Issues of Law: The Opinions of Charles Doe

It might seem odd that insanity should be defined at all in legal literature. If insanity were considered a medical condition in the nineteenth century, why would the courts not defer to medical authorities? Why would they not permit juries to apply then-current medical definitions of insanity to particular defendants in criminal cases, and to testators in will contests? Charles Doe, the Chief Justice of the Supreme Court of New Hampshire, tried to impose just such a rule.²¹ Doe’s work provides a link between the two areas of law discussed in this article. He wrote two of the most discussed and least followed opinions in all of insanity jurisprudence; a dissent in *Boardman v. Woodman*²² in 1866, and the court’s opinion in *State v. Pike*²³ in 1870. The former was a will contest,²⁴ the latter a homicide prosecution.²⁵

19. GEORGE L. HARRISON, LEGISLATION ON INSANITY 3 (Philadelphia, privately printed 1884).

20. One article in which the sanity of testators was expressly considered is James C. Mohr, *The Paradoxical Advance and Embattled Retreat of the “Unsound Mind”: Evidence of Insanity and the Adjudication of Wills in Nineteenth-Century America*, 24 HIST. REFLECTIONS 415 (1998).

21. *State v. Pike*, 49 N.H. 399, 441-42 (1870); *Boardman v. Woodman*, 47 N.H. 120, 147-48 (1886) (Doe, J., dissenting). For a comprehensive discussion of Doe’s life and career, see JOHN PHILLIP REID, CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE (1967). Doe’s ideas about insanity are discussed in chapter 8. *Id.* at 117-19.

22. 47 N.H. 120, 147-48 (Doe, J., dissenting).

23. 49 N.H. 399, 441-42.

24. *See Boardman*, 47 N.H. at 120-25 (majority opinion). Doe’s dissent in this case was adopted by his own court a few years later in *Pike*, but no other state court followed its lead.

25. *Pike*, 49 N.H. at 408, set forth the same rule of insanity as Doe had favored in *Boardman*, and applied it in a criminal context.

Doe preferred to take the jurisprudence out of the medical jurisprudence of insanity, and leave the issue entirely in the hands of physicians.²⁶ He ruled that the standard of insanity should never be a legal standard, but must always be a factual, and hence a medical, standard.²⁷ “The whole difficulty is, that courts have undertaken to declare that to be law which is a matter of fact.”²⁸ He insisted “[t]hat cannot be a fact in law, which is not a fact in science; that cannot be health in law, which is disease in fact.”²⁹ He proposed to make the issue of insanity a straightforward, if not simple, question of fact:

A product of healthy, infantile immaturity, or of disease of the mind, is not a contract, a crime, or a will. The question whether [the testatrix] had a mental disease was a question of fact for the jury, and not a question of law for the court. . . . Insanity, other than the healthy absence of development in infants, is the result of a certain pathological condition of the brain — a condition in which the intellectual faculties, or the moral sentiments, or the animal propensities, have their free action destroyed by disease whether congenital or acquired; and the tests and symptoms of this disease are no more matters of law than are the tests or symptoms of any other disease in animal or vegetable life.³⁰

Doe was aware that the medical definition of insanity was both hotly contested and evolving rapidly. On the other hand, the common law, constrained by the doctrine of *stare decisis*, evolved slowly. By adopting as legal rules psychological standards current at the time of a particular judicial decision, courts bound later courts. Consequently, when later trials were held and newer psychological theories presented, “the precedents require[d] the jury to be instructed in the new medical theories by experts, and in the old medical theories by the judge.”³¹

No other state followed the New Hampshire rule in the nineteenth century. In the other states, the courts were simply unwilling to defer such fundamental issues of competency, responsibility, and personhood to a rival profession.³² They agreed unanimously that the question of insanity was a question of law. Their insistence that it was the role of the courts to define insanity was one cause of the conflicts described in this article.

26. *Id.* at 442.

27. *Id.*

28. *Id.*

29. *Boardman*, 47 N.H. at 150 (Doe, J., dissenting).

30. *Id.* at 147-48.

31. *Pike*, 49 N.H. at 439.

32. *See infra* notes 159-60 and accompanying text.

C. Intellect, Will, and Sentiment

Nineteenth century American thought about the structure of the human mind was dominated by the paradigm now known as faculty psychology. From phrenologists to judges, virtually everyone divided the mind into the intellect, the will, and the sentiments. The intellect was thought to be the seat of reason. It was the faculty which most distinguished human beings from animals, and thus was thought during the early century to define personhood. Will, or volition, was the faculty that actualized the work of the intellect. Sentiments were emotions or feelings. They were despised in certain contexts for their effusiveness and effeminacy, and valued in others for their refinement.³³

Based on the work of the historians Ann Douglas and Richard Rabinowitz, it seems clear that in religious doctrine and practice, in middle class domestic practices and beliefs, and in the literature representing “the cult of domesticity,” the predominance of the intellect had ended by the 1840s. The other two faculties dominated in those areas of culture throughout the remainder of the century.³⁴ The predominance of will and sentiment is addressed together herein under the general rubric of sentimentalism, without

33. JAMES MARK BALDWIN, *HANDBOOK OF PSYCHOLOGY* (1889); BURNHAM, *PSYCHOANALYSIS*, *supra* note 16; ELLENBERGER, *supra* note 16; THOMAS HILL GREEN, *PROLEGOMENA TO ETHICS* (4th ed. 1899); WILLIAM A. GUY, *THE FACTORS OF THE UNSOUND MIND* (1881); REUBEN POST HALLECK, *PSYCHOLOGY AND PSYCHIC CULTURE* 49-51 (1895); MARK HOPKINS, *LECTURES ON MORAL SCIENCE* (1865); NOAH PORTER, *THE ELEMENTS OF MORAL SCIENCE* (1895); RICHARD RABINOWITZ, *THE SPIRITUAL SELF IN EVERYDAY LIFE: THE TRANSFORMATION OF PERSONAL RELIGIOUS EXPERIENCE IN NINETEENTH-CENTURY NEW ENGLAND* xxix-xxxi (1989); SICHERMAN, *supra* note 16; Burnham, *Progressive Movement*, *supra* note 16. Other commentators divided the mind into more specific parts, but stayed within the prevailing paradigm. *See, e.g.*, *People v. Kleim*, 1 Edm. Sel. Cas. 13 (N.Y. Sup. Ct. 1845); *Banks v. Goodfellow*, (1870) 5 L.R.Q.B. 549 (U.K.).

34. ANN DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* 4-13 (1977); RABINOWITZ, *supra* note 33, at chs. 2, 7, & 13. Rabinowitz is careful to point out that the intellectual, volitional, and emotional paradigms each persisted throughout the century. His argument is simply that, at different times, one predominated over the others. Douglas's work has caused considerable discussion of the importance of domesticity, which is beyond the scope of this article. For a representative sample of the historiography of domesticity, see ELIZABETH BARNES, *STATES OF SYMPATHY* (1997); MARY KELLEY, *PRIVATE WOMAN, PUBLIC STAGE: LITERARY DOMESTICITY IN NINETEENTH-CENTURY AMERICA* (2d ed. 2002); GLENNA MATTHEWS, *JUST A HOUSEWIFE: THE RISE AND FALL OF DOMESTICITY IN AMERICA* (1987); LORA ROMERO, *HOME FRONTS: DOMESTICITY AND ITS CRITICS IN THE ANTEBELLUM UNITED STATES* (1997); KATHRYN KISH SKLAR, *CATHARINE BEECHER: A STUDY IN AMERICAN DOMESTICITY* (1973); KATHRYN KISH SKLAR, *FLORENCE KELLEY AND THE NATION'S WORK* (1995); MADELEINE B. STERN, *LOUISA MAY ALCOTT: FROM BLOOD & THUNDER TO HEARTH & HOME* (1998).

delving into the subtle distinctions between them. There is broad agreement that the rise of sentimentalism, the cult of domesticity, and the modern, emotionally supportive, middle-class family coincided.³⁵ These were characterized, in part, by the erection and maintenance of clear boundaries between the family and the community.³⁶ The family was defined as the nuclear or conjugal family, or some approximation of that institution which served a similar role in the emotions or sentiments of the family member.³⁷ The importance of this development in the law of will contests is discussed later herein.³⁸

While sentimentalism triumphed among the clergy and among middle-class women, the struggle among the mental faculties for predominance in the law had a more ambiguous outcome. The legal historian Peter Karsten characterizes the development of law in this period as a metaphorical conflict between the jurisprudence of the “head,” unquestionably dominant in the early century, and the jurisprudence of the “heart,” which influenced the law to some extent as the century progressed.³⁹ As Karsten describes it, the marginal successes of the jurisprudence of the heart resulted, at least in part, from religious imperatives felt by some members of the judiciary, and to that extent are related to the rise of sentimentalism described by Douglas and Rabinowitz.⁴⁰

Taken together, the work of all these historians leaves little doubt that the struggle between the rigorous intellectualism of the early century and the later forces of reform and sentimentalism took place in the law, as it had in theology and in the broader culture. But the outcomes were quite different. Judges and legal scholars cleaved more tightly to reason and resisted the use of sentiment as a dispositive or guiding principle. As the contrast between the criminal and

35. See generally MARY P. RYAN, *CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865* (1981).

36. *Id.*

37. *Id.* at 146-50, 185.

38. See *infra* Part IV.

39. PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA* (1997); see also Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161 (1999). Karsten complicates Perry Miller's suggestion that there was a difference between legal reasoning and theological reasoning. He identifies a conflict within the legal profession itself, pitting the reform-oriented jurisprudence of the heart against the intellectually and logically sound jurisprudence of the head. See PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA FROM REVOLUTION THROUGH THE CIVIL WAR* (1965). Karsten's greatest contribution is to remind us that there was more to nineteenth century law than the simple economic instrumentalism offered as the universal explanatory solvent by the Horwitz school. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

40. KARSTEN, *supra* note 39, at 312-24.

civil laws of insanity illustrates, judges admitted sentimental standards only at the margins of legal doctrine and practice. Douglas would not be surprised to learn that sentiment became a strong influence on the law only in contexts in which legal doctrine impacted directly upon normative notions of domesticity — the same interests served by sentimental theology.⁴¹ Even so, for the most part the heart won the battle among the clergy, but the head won the battle among the jurists.

The reason for the law's failure to follow the path of theology appears to be that lawyers and judges rejected the sentimentalizing influences that guided the development of religious and popular literature in the nineteenth century. The other learned professions of the period, law and medicine, marginalized those factions within their own ranks that pushed in the direction of incorporating sentimental standards into various legal and medical measures, dismissing them as mere "sentimental philosophers."⁴² The effect was to create a greater distance between legal and medical "culture" and popular culture, and also to harden the dominant tendencies in both professions with respect to the insane. As religious and popular literature increasingly adopted a sentimental posture,⁴³ legal and medical writers reacted not only by rejecting sentimentalism,⁴⁴ but by rejecting the volitional standards around which moral reform was centered. They clung to the same strict intellectualism which had characterized the literature of all the learned professions in the early century. This was reflected in the intellectual standard of insanity applied in homicide cases.⁴⁵

The clearest exception to this reaction arose in the manner in which insanity was adjudicated in cases involving will contests. In that limited realm, medical jurisprudence adopted a standard of insanity which incorporated and enforced sentimental notions of domesticity. "Unnatural" sentiments were, under certain circumstances, classified as a form of insanity in challenges to wills.⁴⁶ This was accomplished by incorporating in the legal measure of sanity

41. DOUGLAS, *supra* note 34, 4-13, 88-97. The historian Michael Grossberg has documented this trend inasmuch as it characterized the law of domestic relations — those laws that governed relations between spouses and between parents and children. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985). The developments Grossberg describes are consistent with the trends described by Douglas, and with the particular developments noted herein.

42. *See State v. Pike*, 49 N.H. 399, 438 (1870); *see also* ROSENBERG, *supra* note 18; *United States v. Guiteau*, 12 D.C. (1 Mackey) 498, 546-50 (D.C. 1882); *Guiteau's Case*, 10 F. 161 (S.D.N.Y. 1882).

43. *See supra* notes 33-41 and accompanying text.

44. *See infra* Parts III.B-C.

45. *See infra* Part III.C.

46. *See infra* Part IV.A.

the testator's ability to recognize and provide for the natural objects of his or her bounty.⁴⁷ In that context, the phrase "natural objects" presumptively included the members of one's conjugal family or, in the alternative, the family group that provided for that testator the emotional support expected from a proper conjugal family.⁴⁸ This was reflected in the sentimental standard of insanity applied in will contests.⁴⁹

III. *Insanity and Responsibility in Homicide Cases*

A. *The Traditional Standard of Insanity*

The history of the insanity defense in nineteenth century homicide cases is one of reform and successful counter-reform. After much analysis and hand-wringing, the century ended with a majority rule similar to the rule it began with, a rule imposing responsibility on all except those suffering from a disorder of the intellect.

In the legal literature of the eighteenth and early nineteenth centuries, one lacking this faculty was insane, and incompetent to perform any act of legal significance. As early as 1700 the English courts had applied an intellectual standard of legal responsibility, holding that the loss of reason or understanding would excuse a crime and void an otherwise lawful act.⁵⁰ The same rule prevailed in the United States, where the intellectual standard of insanity was explained to juries in a manner so simple as to reflect a broad acceptance. The assumptions underlying this standard were the same as those underlying religious views of the nature of the human mind.⁵¹ In 1800 the Connecticut minister Charles Backus wrote: "All men, whether good or bad, are capable of distinguishing between holiness and sin, and of knowing their duty. This faculty is called *The Understanding*."⁵² One who lacked this faculty was therefore considered less than a man and less than a person.

This assumption was so widely shared that it rarely received detailed and precise explanation. Even in jury charges, little explanation was thought necessary. An example is found in *United States v. Clarke*,⁵³ in which Chief

47. See *infra* Part IV.A.

48. See *infra* Part IV.A.

49. See *infra* Part IV.A.

50. A. HIGHMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 1-5, 128-39, 205-21 (photo. reprint 1979) (1807); JOHN BRYDALL, NON COMPOS MENTIS 33-34, 74-86, 107, 113-15 (photo. reprint 1979) (1700).

51. CHARLES BACKUS, THE SCRIPTURE DOCTRINE OF REGENERATION CONSIDERED, IN SIX DISCOURSES 17 (1800), quoted in RABINOWITZ, *supra* note 33, at 21.

52. *Id.*

53. 25 F. Cas. 454 (C.C.D.D.C. 1818) (No. 14,811).

Judge William Cranch instructed the jury that the defendant was not responsible if he “was in such a state of mental insanity, not produced by the immediate effects of intoxicating drink, as not to have been conscious of the moral turpitude of the act.”⁵⁴ Other jurists offered more or less precise definitions of insanity as it related to criminal responsibility. As early as 1806 an insane criminal defendant was described, in language that echoed Backus, as “a person whose understanding is lost.”⁵⁵ Likewise, in an admiralty case Mr. Justice Story acquitted a ship’s captain of murder on the grounds of insanity, and explained his decision as follows:

In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason, which includes responsibility. . . . [H]uman tribunals are generally restricted from punishing [such acts], since they are not the acts of a reasonable being. . . . [S]uch insanity has always been deemed a sufficient excuse for any crime done under its influence.⁵⁶

Because of the judicial consensus on the meaning of insanity, there was simply no need to have a more detailed definition of insanity during the first third of the nineteenth century.

Even in the case of Richard Lawrence, who attempted to assassinate President Andrew Jackson, there was no dispute as to the meaning of insanity.⁵⁷ Perhaps this was because Lawrence was so obviously insane, and there was no indication that he was feigning his illness. Lawrence believed himself to be the King of England, and was offended by the United States’ independence and Jackson’s pretensions to authority.⁵⁸ On January 30, 1835 he attempted to shoot Jackson at close range with two pistols, both of which misfired.⁵⁹ In one of the many legal proceedings arising from this incident, Chief Judge Cranch observed that, “[i]t is a very nice point to decide what degree of insanity will render a person irresponsible for his acts; and it is the peculiar province of the jury to say whether the prisoner’s insanity is of that degree.”⁶⁰ Apparently, Cranch thought that the jury needed no further instruction to decide the case. Lawrence was acquitted.⁶¹

54. *Id.* at 454.

55. *State v. Doherty*, 2 Tenn. (2 Overt.) 79, 83 (1806).

56. *United States v. Drew*, 25 F. Cas. 913, 913-14 (C.C.D. Mass. 1828) (No. 14,993).

57. *See United States v. Lawrence*, 26 F. Cas. 886 (C.C.D.D.C. 1835) (No. 15,576).

58. *United States v. Lawrence*, 26 F. Cas. 887, 891 (C.C.D.D.C. 1835) (No. 15,577).

59. *Id.* at 887.

60. *Id.* at 891.

61. *Id.*

Jurists in the early nineteenth century were comfortable with a standard of insanity based upon the intellect. This understanding fit perfectly with the prevailing view that the common law was reason itself. Judges fancied an identity, or at least a relationship of genus and species, between reason and the common law. They routinely echoed Lord Coke when they proclaimed the common law “the perfection of human reason.”⁶² The idea excited judges to dizzying heights of bombast, as when the Supreme Court of the Republic of Texas gushed that the common law is a “science, which has been justly called the perfection of ‘human reason,’ and the maxims and rules of which constitute the most stupendous fabric of intellectual grandeur ever reared by the mind of man.”⁶³

The common law, based on reason, assumed a standard of legal responsibility based on reason. The judges were quite comfortable assuming that their understanding of insanity as the absence of reason was so widely shared that no explicit legal definition was required. This assumption was further reflected in legal rules that permitted the jury to decide the issue based upon the observations and opinions of ordinary persons without medical training.⁶⁴ Lay witnesses were permitted to testify, and jurors were permitted to draw their own conclusions from the witnesses’ observations, and from the jurors’ own.⁶⁵ The instructions judges gave to juries sometimes illustrated both of these points. For example, in *Bennett v. State*⁶⁶ the Tennessee Supreme Court approved the following instruction, which the trial court had given to the jury:

[U]pon the subject of derangement, such was the structure of the human mind, that philosophers might forever speculate upon the subject, but could not define in what it consists; but that if a hundred men should look at a drunken man, they would agree in saying he was drunk; and if a hundred men were to look at a deranged man, they would agree in saying he was deranged.⁶⁷

This standard of common understanding was explained in greater detail by the appellate court.

62. *McCartee v. Teller*, 8 Wend. 268, 324 (N.Y. 1831); *see also* *Neal v. Haygood*, 1 Ga. 514 (1846); *Thornton v. Appleton*, 29 Me. 298 (1849); *Ross v. Vertner*, 6 Miss. (5 Howard) 305 (1840); *Eckart v. Wilson*, 10 Serg. & Rawle 44 (Pa. 1823).

63. *McKinney v. Bradbury*, Dallam 441, 443 (Tex. 1841).

64. *Vance v. Commonwealth*, 4 Va. (2 Va. Cas.) 132, 132 (1818).

65. *Id.*

66. 8 Tenn. (1 Mart. & Yer.) 133 (1827).

67. *Id.* at 135.

We take the charge to import that there is an intuitive principle in our nature which, when combined with our experience, qualifies men to judge what is drunkenness and what insanity, although the reasons why the mind is insane can not be defined in theory. That if a man was [sic] solely deranged, or solely drunk, a hundred men would all agree his mind was affected in the one way or the other, and that this judgment formed upon observation would be the better test of the fact.⁶⁸

Strict and clear definitions were not needed, because the idea was widely shared and required little elaboration. The historical record establishes quite clearly that, in the early nineteenth century, there was broad agreement as to the definition of insanity, and the standard was one of intellectual impairment.

B. The Roots of Reform

It was only later, when the reform movement created alternatives, that judges felt compelled to articulate their doctrinal positions explicitly in all cases. Beginning in the 1820s, signs of change began to appear in religious as well as legal literature. The evangelist and theologian Lyman Beecher understood human responsibility in the terms of faculty psychology, but added a new ingredient to Backus's strictly intellectual concept. Like the other reformers, Beecher combined perception and understanding under the rubric of the intellectual faculty. But he added another requirement before an individual could be held responsible:

To accountability in the subjects are requisite, understanding to perceive the rule of action; conscience to feel moral obligation; and the faculty of choice in the view of motives. Understanding to perceive the rule of action does not constitute accountable agency. Choice without the capacity of feeling obligation, does not constitute accountable agency. But the faculty of understanding, and conscience, and choice, united, do constitute an accountable agent. The laws of God and man recognise these properties of mind, as the foundation of accountability.⁶⁹

68. *Id.* at 136.

69. LYMAN BEECHER, THE BIBLE A CODE OF LAWS, A SERMON, DELIVERED IN PARK STREET CHURCH, BOSTON, SEPT. 3, 1817, AT THE ORDINATION OF MR. SERENO EDWARDS DWIGHT, AS PASTOR OF THAT CHURCH, AND OF MESSRS. ELISHA P. SWIFT, ALLEN GRAVES, JOHN NICHOLS, LEVI PARSONS, AND DANIEL BUTTRICK, AS MISSIONARIES TO THE HEATHEN 4 (Andover, Mass., Flagg & Gould 1818).

Beecher was clearly wrong with respect to the “laws of man.” But his incorporation of volition, which he called choice, into the concept of responsibility, which he called accountability,⁷⁰ distinguished his definition of the fully competent and responsible person from Backus’s definition. Opinions such as Beecher’s reflected a changing viewpoint that also appeared in legal literature. Its place in the law, however, would not be resolved in New York and most of the other states until the last quarter of the century.

Reform efforts specifically directed toward legal rules began with the publication in 1838 of Isaac Ray’s treatise on the subject,⁷¹ which had considerable influence among American as well as English judges.⁷² Ray believed firmly in the organic origin of mental disease. “[M]adness,” he wrote, “is the result of a certain pathological condition of the brain.”⁷³ He believed that the pathology of any faculty could be characterized as insanity, for legal purposes, because all such pathologies arose from organic disease over which the victim had no control. He confidently maintained that:

[i]t is an undoubted truth that the manifestations of the intellect, and those of the sentiments, propensities, and passions, or generally of the intellectual and affective powers are connected with and dependent upon the brain. It follows, then, as a corollary, that abnormal conditions of these powers are equally connected with abnormal conditions of the brain.⁷⁴

An understanding of the difference between right and wrong, in Ray’s view, was simply not enough to establish sanity and legal responsibility for crime.

70. This term was used to express the same meaning during the debates in Parliament concerning the *M’Naghten* Rule. 67 HANSARD’S PARL. DEB. (3d ser.) (1843) 738 (Comments of Lord Cottenham) (“Such a man [lacking the ability to judge between right and wrong] had not that within him which formed the foundation of accountability, either in a moral or legal point of view.”).

71. ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY (Winfred Overholser ed., 1962). Ray was a man of immense learning in foreign languages, medicine, and law. Winfred Overholser, *Editor’s Introduction to ISAAC RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* vii (Winfred Overholser ed., 1962) (1838). He was a trained physician with aspirations to scholarship that quickly burst the bounds of his medical practice in the very small town of Eastport, Maine. *Id.* at viii. At first he planned to translate a leading European treatise on the jurisprudence of insanity, but decided that the voluminous annotations necessary to relate the discussion to American law would render a confusing text. RAY, *supra*, at 8. Thus, at the age of thirty-one he produced “the first systematic treatise in the English language on the relations of law and mental derangement.” Overholser, *supra*, at vii.

72. Overholser, *supra* note 71, at vii.

73. RAY, *supra* note 71, at 46.

74. *Id.* at 58.

Ray's observations of the insane led to his conclusion that they frequently displayed a subtle understanding of matters of logic and morals.

In no school of logic, in no assembly of the just, can we listen to closer and shrewder argumentation, to warmer exhortations to duty, to more glowing descriptions of the beauty of virtue, or more indignant denunciations of evil-doing, than in the hospitals and asylums for the insane. . . . The *particular* criminal act, however, becomes divorced in their minds from its relations to crime in the *abstract*.⁷⁵

Thus, in Ray's view, many insane persons in fact had a heightened ability to distinguish right from wrong in general, but virtually no ability to apply the distinction to their own conduct. Therein lay the proof of their insanity.

Ray rejected the legal definition of insanity with open contempt:

It is a fact, not calculated to increase our faith in the march of intellect, that the very trait peculiarly characteristic of insanity has been seized upon as conclusive proof of sanity in doubtful cases; and thus the infirmity that entitles one to protection is tortured into a good and sufficient reason for completing his ruin.⁷⁶

Some judges and legal commentators harbored a reciprocal contempt for Ray. They ridiculed him and those who agreed with him as "visionary theorists and sentimental philosophers."⁷⁷ Even so, many judges and physicians, influenced by Ray and by the many moral reform movements of the era, began to believe that defects in the volitional faculty might be as disabling, both medically and legally, as defects in the intellectual faculty.⁷⁸

C. M'Naghten: *The Rejection of Reform*

In 1842 Daniel M'Naghten's⁷⁹ paranoid delusions overcame him and led

75. *Id.* at 33.

76. *Id.*

77. *State v. Pike*, 49 N.H. 399, 438 (1870). For similarly dismissive views of progressive positions such as Ray's in the context of will contests, see Mohr, *supra* note 20, at 417-23.

78. *See, e.g., Pike*, 49 N.H. at 438; *Boardman v. Woodman*, 47 N.H. 120, 147-48 (1886) (Doe, J., dissenting); *People v. Kleim*, 1 Edm. Sel. Cas. 13 (N.Y. Sup. Ct. 1845); *People v. Divine*, 1 Edm. Sel. Cas. 594 (N.Y. 1848).

79. There have been many different spellings of M'Naghten's name. I have used the spelling from the report in *M'Naghten's Case*, (1842) 8 Eng. Rep. 718 (H.L.) in the text. Where a different spelling appears in a caption, I have used that spelling in citing that source, as in the report of the trial proceedings in *The Queen v. M'Naughton*, (1843) 4 Reports of State Trials 847 (Central Crim. Ct.), where the name is spelled M'Naughton. The differences in spelling have no particular significance.

him to attempt to assassinate the Prime Minister of Great Britain, Sir Robert Peel.⁸⁰ M’Naghten mistakenly killed Peel’s private secretary, Edward Drummond. There was no dispute that M’Naghten committed the act; the sole issue was his sanity.⁸¹ His trial in January of 1843 was initially framed as a contest between the intellectual and volitional standards of insanity. In his opening statement, the Solicitor General defined insanity in terms of the intellect: whether M’Naghten “was incapable of distinguishing between right and wrong.”⁸² He asserted:

To excuse him it will not be sufficient that he laboured under partial insanity upon some subjects — that he had a morbid delusion of mind upon some subjects, which could not exist in a wholly sane person; that is not enough, if he had that degree of intellect which enabled him to know and distinguish between right and wrong⁸³

The barristers who defended him relied heavily on Ray’s treatise, even reading a portion of it into the trial record.⁸⁴ Their strategy, as revealed in Mr. Cockburn’s opening statement, was clearly to persuade the jury that M’Naghten was insane by virtue of a volitional, rather than an intellectual, defect.⁸⁵ Cockburn explained the role of the will in human nature: “by will, with reference to human action, must be understood the necessary moral sense that guides and directs the volition.”⁸⁶ He referred repeatedly to the will or volitional faculty as a determinant of sanity.⁸⁷ M’Naghten’s counsel offered

80. *M’Naghten’s Case*, 8 Eng. Rep. at 718; ROBINSON, *supra* note 18, at 163-71. There was evidence that M’Naghten had been involved in Chartist and Socialist politics, and that his act might have been politically, rather than pathologically motivated. ROBINSON, *supra* note 18, at 163-71. See the opinion of Mr. Justice Maule, in *M’Naghten’s Case*, in which he frames the issue thus:

What is the law respecting the alleged crime, when at the time of the commission of it, the accused knew he was acting contrary to the law, but did the act with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

M’Naghten’s Case, 8 Eng. Rep. at 720.

81. *M’Naghten’s Case*, 8 Eng. Rep. 718 *passim*.

82. *M’Naughton*, 4 Reports of State Trials at 854.

83. *Id.*

84. *Id.* at 878.

85. *Id.* at 889.

86. *Id.* at 886.

87. *Id.* at 887 (“uncontrollable impulses”); *id.* at 888 (“divested of all self-government and control of the passions”); *id.* at 889 (“the impulse of the delusion which he could not control”); *id.* at 891-92 (“one who, all barriers of self-control being broken down, is driven by frenzied impulse into crime”).

the testimony of Dr. E. R. Monro, who testified that M’Naghten was insane: “The act with which he is charged, coupled with the history of his past life, leaves not the remotest doubt on [sic] my mind of the presence of insanity sufficient to deprive the prisoner of all self-control.”⁸⁸ Two other physicians agreed,⁸⁹ and the Solicitor General stated to the court that he had no contrary evidence to offer.⁹⁰ Chief Justice Tindal, with the consent of the other two judges, “stop[ped] the case.”⁹¹

For the court to do so, without objection by the Solicitor General, was tantamount to an expansion of the legal definition of insanity to include the volitional standard. As John Singleton, the Lord Chancellor, noted in a debate in the House of Lords, this “created a deep sensation amongst your Lordships, and also in the public mind.”⁹² The Lords’ debates over *M’Naghten* reveal their concern not only about the acquittal, but also about the rule of law effectively applied in the case.⁹³

Lord Brougham suggested that legislation might be needed to address the issue.⁹⁴ A similar suggestion was made on the floor of the House of Commons.⁹⁵ Another Member requested a change in House rules to permit him to propose a bill for expedited consideration, under which the insanity defense would be abolished, “except where it can be proved that the person accused was publicly known and reputed to be a maniac.”⁹⁶

The Lords were careful not to criticize the outcome or the procedure, but decided to summon the judges of common pleas before them to explain in detailed and precise language the law of insanity in criminal cases.⁹⁷ It concerned Lord Brougham in particular that judges had not used the same language to describe the test in all cases, but had used, at various times, four different phrases to describe the standard.⁹⁸ He observed that “[e]very one of

88. *Id.* at 919.

89. *Id.* at 922-23 (Sir A. Morriison and Forbes Wilson).

90. *Id.* at 924.

91. *Id.* Stopping the case was the approximate equivalent of directing the verdict in modern practice.

92. 67 HANSARD’S PARL. DEB., *supra* note 70, at 714.

93. *Id.*

94. *Id.* at 289.

95. *Id.* at 353.

96. *Id.* at 424.

97. *See Regina v. Higginson*, (1843) 174 Eng. Rep. 743, 744 note (a) (P.C.) (setting forth the Lords’ questions and the judges’ answers).

98. 67 HANSARD’S PARL. DEB., *supra* note 70, at 729. The four phrases used were: (1) “capable of knowing right from wrong,” (2) “capable of distinguishing good from evil,” (3) “[c]apable of knowing what was proper,” and (4) “[capable of knowing] what was wicked.” *Id.*

them [was] more vague, more uncertain, less easily acted upon than the original one of right and wrong.”⁹⁹ Throughout their discussion of the various standards, however, they never endorsed a volitional standard of insanity. With the threat of legislation hanging over the justices’ heads, it is hardly surprising that the standard they announced was limited to intellectual defects, and included no language that might be taken for a volitional standard.¹⁰⁰ Thus, what has come to be known as the *M’Naghten* rule ought more properly be called the rule to prevent the *M’Naghten* result. It was the first, and clearly the most successful and enduring, backlash against the reform of criminal insanity rules.

The *M’Naghten* rule was strictly limited to intellectual insanity. It contemplated relief from criminal responsibility in the event of certain impairments of the intellectual faculty, but not the volitional or emotional faculties. Lord Chief Justice Tindal stated the rule as follows:

[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.¹⁰¹

Thus the *M’Naghten* rule represented the rejection of an American reform by an English court. It was a return to an earlier rule. This fact has eluded many leading historians, including the enormously influential Lawrence Friedman, who wrote:

The most important legal definition of insanity was the so-called right-or-wrong test. It was formulated by an English Court in 1843. . . . This famous formulation, quite obviously, stressed cognition, the act of *knowing*. . . . [I]t became standard in the United States as well.¹⁰²

In fact, as discussed earlier herein, the essential features of the test predated *M’Naghten*, and were already in effect in the American states, as well as in England prior to *M’Naghten*.¹⁰³ The opinion of the English justices rejected

99. *Id.* at 729-30.

100. *M’Naghten’s Case*, (1843) 8 Eng. Rep. 718, 722 (H.L.); SHELDON GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 164-66 (1927).

101. *M’Naghten’s Case*, 8 Eng. Rep. at 722.

102. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 143-44 (1993).

103. HIGHMORE, *supra* note 50, at 1-5, 128-29, 205-21; BRYDALL, *supra* note 50, at 33-34,

reform of the English rule. It remained to be seen whether the reforms advocated by Ray and others would be adopted in the American states. That would not be settled for several decades.

D. The M'Naghten Rule in American Law

The *M'Naghten* opinion itself was first discussed in the American jurisprudence in *Commonwealth v. Rogers*,¹⁰⁴ which was tried before Chief Justice Lemuel Shaw, two associate justices of the Supreme Judicial Court of Massachusetts, and a jury, in March Term of 1844.¹⁰⁵ Chief Justice Shaw included the language of the *M'Naghten* rule in his instructions to the jury,¹⁰⁶ and cited the answers given by the judges of Common Pleas to the questions posed by the House of Lords.¹⁰⁷ But, being the reformer he often was,¹⁰⁸ he complicated the intellectual standard endorsed by the English court with a clearly volitional standard.¹⁰⁹ Chief Justice Shaw cited no authority for this addition to the rule, but by its terms it showed clear signs of Ray's influence.¹¹⁰

Chief Justice Shaw wrote as follows:

In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are *either* so deficient that he has no will, no conscience or controlling mental power, *or* if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. But these are extremes easily distinguished, and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning and judging, or so perverted by insane delusion, as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from

74-86, 107, 113-15.

104. 48 Mass. (7 Met.) 500 (1844).

105. At that time capital cases were tried before a panel of the Supreme Judicial Court and a jury, to ensure both proper trial procedures and finality of capital judgments. LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 211-12 (1957).

106. *Rogers*, 48 Mass. (7 Met.) at 503.

107. *Id.* at 502 note * (citing *Regina v. Higginson*, (1843) 174 Eng. Rep. 743, 744 note (a) (P.C.) (setting forth the questions that the Lords posed to the judges in the *M'Naghten* case and the judges' answers)).

108. See LEVY, *supra* note 105, at ch. 16.

109. *Id.* at 212.

110. *Id.* at 212-13.

responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, *as to the particular act he is then doing*; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment.¹¹¹

By his carefully chosen language, Chief Justice Shaw appears to have created two discrete rules.¹¹² The first applied to persons whose intellects or wills were “obliterated” by insanity.¹¹³ Those persons would be relieved of legal responsibility under either an intellectual or a volitional test.¹¹⁴ Perhaps, in Chief Justice Shaw’s view, there was little sense in scrutinizing the matter too closely when the subject was obviously and severely insane.

Where insanity was only partial, and thus less severe and obvious, the second rule applied.¹¹⁵ Such persons would be relieved of legal responsibility only under an intellectual test.¹¹⁶ But even the intellectual test was somewhat modified, reflecting Ray’s thinking. Chief Justice Shaw’s definition of insanity required not merely an abstract understanding of the wrongfulness of a crime of the sort at issue, but a specific understanding that the defendant’s own act had been wrongful.¹¹⁷ Despite the confusing duality of Chief Justice Shaw’s rule, there is no question that Chief Justice Shaw rejected the traditional intellectual test reinstated by the English court and instead, adopted a volitional standard.¹¹⁸ This is consistent with Ray’s work, and is also

111. *Rogers*, 48 Mass. (7 Met.) at 501-02 (1844) (emphasis added) (citations omitted). The italicized language reflected Ray’s concerns that the insane lacked the capacity to apply standards of right and wrong, of which they were fully aware, to their own conduct in the case for which they faced trial.

112. *Id.*

113. *Id.* at 501.

114. *Id.* at 503.

115. *Id.* at 501.

116. *Id.* at 502.

117. *Id.*

118. Historians and legal scholars have argued over whether Chief Justice Shaw actually incorporated a volitional standard in the jury charge in *Rogers*. Leonard Levy insisted that Chief Justice Shaw did so. LEVY, *supra* note 105, at 212-16. Edwin R. Keedy agreed. Keedy, *supra* note 18, at 729. Roscoe Pound and Jerome Hall took precisely the opposite position, insisting that the *Rogers* case incorporated only the *M’Naghten* test of insanity. HALL, *supra* note 18, at 490; Pound, *supra* note 18, at 544-45. The resolution lies in Chief Justice Shaw’s distinction between the rule for total insanity and the rule for partial insanity. The first clearly imports a volitional test. The second equally clearly does not. None of the scholars cited above have discussed this distinction, and it is possible that they have failed to recognize it as a possible resolution of their dispute. In any event, it is perhaps enough to note that the courts nearly unanimously read *Rogers* as incorporating a volitional standard, and Chief Justice Shaw never gave any indication to the contrary. The case, with its volitional standard, remains good law in Massachusetts to this day. See *Commonwealth v. McLaughlin*, 729 N.E.2d 252, 255-56

consistent, both in its import and its timing, with the reform-oriented and volition-oriented theology of the day.¹¹⁹

The next year, in 1845, the New York Supreme Court of Judicature applied a definition of insanity in a homicide case that included both an intellectual test and a volitional test.¹²⁰ On December 22, 1844, Andrew Kleim locked young Catharine Hanlin in a shack with her two children, and set the shack on fire.¹²¹ When the three tried to escape Kleim drove them back inside by stabbing the mother.¹²² Neighbors finally rescued the three victims, but the mother died the following day.¹²³

Justice John W. Edmonds's charge to the jury reflected his careful thinking on insanity. He noted that insanity was once defined in the law as only "an overthrow of the intellect."¹²⁴ In that backward era, according to Justice Edmonds, the insanity defense protected only those who suffered from intellectual insanity.¹²⁵ But now, according to this thoughtful jurist,

[a]s science and the knowledge of the disease [of insanity] progressed . . . the rule has been extended in modern times until it begins to comprehend within its saving influences most of those who by the visitation of disease are deprived of the power of self-government. Yet the law, in its slow and cautious progress, still lags far behind the advance of true knowledge.¹²⁶

Borrowing language liberally from the *M'Naghten* and *Rogers* cases, both of which he cited, Justice Edmonds announced a legal test of insanity that relieved criminal defendants of responsibility based upon either an intellectual or a volitional defect.¹²⁷ Andrew Kleim was acquitted on the grounds of insanity, and Justice Edmonds ordered him committed to a state lunatic asylum.¹²⁸

In a postscript to his opinion, written after 1866, Justice Edmonds noted that Kleim "remained a few years in the asylum, and died there, his disease having

(Mass. 2000).

119. *See infra* Part II.C.

120. *People v. Kleim*, 1 Edm. Sel. Cas. 13 (N.Y. Sup. Ct. 1845).

121. *Id.* at 17-18.

122. *Id.* at 18.

123. *Id.*

124. *Id.* at 25.

125. *Id.* at 26-27.

126. *Id.* at 25.

127. *Id.* at 25-26.

128. *Id.* at 27.

steadily grown worse until he became a mere driveling idiot.”¹²⁹ In the same postscript, Justice Edmonds set forth his theory of sanity:

A sane man is one — 1. Whose senses bear truthful evidence. 2. Whose understanding is capable of receiving that evidence. 3. Whose reason can draw proper conclusions from the truthful evidence thus received. 4. Whose will can guide the thought thus obtained. 5. Whose moral sense can tell the right and wrong of any act growing out of that thought. 6. And whose act can, at his own pleasure, be in conformity with the action of all these qualities. All these things unite to make sanity. The absence of any one of them makes insanity.¹³⁰

This apparently more elaborate test can be reduced to a simple test of intellect and volition. The first, second, third, and fifth factors set forth what were at that time considered aspects of the intellect. The fourth and sixth factors are aspects of the will. Under Justice Edmonds’s view, even a partial defect in either faculty would be sufficient to absolve one of criminal responsibility. Implicitly, a partial defect in either faculty would also render the sufferer less than a person, at least in a legal sense. In the estimation of so thoughtful a contemporary observer as Justice John Edmonds, personhood was inherently fractured and extraordinarily fragile.

With the *Kleim* case it appeared that New York, a leading state in the development of the common law in the United States, had adopted Ray’s reforms. In fact, it was only the beginning of a long battle in the New York state courts over the volitional test for insanity.¹³¹ The very next year Justice

129. *Id.*

130. *Id.* at 35 (quotation omitted). Compare Chief Judge Cockburn’s opinion in *Banks v. Goodfellow*:

[W]hatever may be [the human mind’s] essence, everyone must be conscious that the faculties and [f]unctions of the mind are various and distinct, as are the powers and functions of our physical organisation. The instincts, the affections, the passions, the moral sense, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while on the one hand all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed.

(1870) 5 L.R.Q.B. 549 (U.K.). Cockburn had been the lead defense attorney in *M’Naghten*. *The Queen v. M’Naughton*, (1843) 4 Reports of State Trials 847, 849 (Central. Cr. Ct.).

131. The next reported case, in chronological order, was important more for the cast of characters involved than for the rule of law applied. *Freeman v. People*, 4 Denio 9 (N.Y. Sup. Ct. 1847) arose in 1847 when a free black man was accused of murdering a prominent white

Edmonds was again faced with a brutal murder and an insane defendant.¹³² Joel Divine was a strange man, with a history of controversy and odd behavior.¹³³ He owned a large farm in the Poughkeepsie area, and had a longstanding dispute with his neighbor, one Mr. Newcomb, concerning an easement Divine claimed over a portion of Newcomb's farm.¹³⁴ On May 25, 1848, Divine found Richard Wall, Newcomb's hired laborer, erecting a fence across the disputed easement, and shot Wall in the head.¹³⁵

Justice Edmonds had refined and developed his views somewhat since his decision in *Kleim*. His instruction to the jury on the insanity standard began with a direct quote from *M'Naghten* setting forth the intellectual test.¹³⁶ But Edmonds's standard was broader. It was based on his notion of "dispossession of the free and natural agency of the human mind," and this fundamental "mind" included the will.¹³⁷ Edmonds's meaning was quite clear when he wrote the following: "If some controlling disease was in truth the acting power within him [the defendant] which he could not resist, or if he had not a sufficient use of his reason to control the passions which prompted the act, he is not responsible."¹³⁸ The jury could not agree on a verdict, and Justice Edmonds declared a mistrial.¹³⁹ Before a new trial could be held, Divine committed suicide.¹⁴⁰

After the *Divine* case, the New York courts did not publish an opinion on the insanity defense in a criminal case for several years. Then, late in 1862, William Willis, a discharged Union Army veteran, returned to his home in rural Ulster County to find his fiancé married to another man.¹⁴¹ Willis's

merchant and his family in rural Cayuga County. EARL CONRAD, MR. SEWARD FOR THE DEFENSE 31-42 (1956). At the time, there was little doubt that Freeman had committed the killings, and the historical record gives no reason to doubt his guilt. *Id.* William H. Seward defended the accused. *Id.* at 100. Seward was unable to persuade the jury that Freeman was insane when he committed the crimes, and he was sentenced to hang. *Id.* at 285-89. On appeal Seward persuaded the state Supreme Court that Freeman had been insane at the time of trial, and therefore incapable of assisting in his own defense. *Freeman*, 4 Denio at 41. The court reversed the conviction without reaching the issue of Freeman's sanity at the time of the crime. For a painstakingly literal recounting of the story, based primarily upon the transcript of the trial, see CONRAD, *supra*.

132. *People v. Divine*, 1 Edm. Sel. Cas. 594 (N.Y. 1848).

133. *Id.* at 594-95.

134. *Id.* at 594.

135. *Id.* at 594-95.

136. *Id.* at 606; *see also* *M'Naghten's Case*, (1843) 8 Eng. Rep. 718, 722 (H.L.).

137. *Divine*, 1 Edm. Sel. Cas. at 606.

138. *Id.*

139. *Id.* at 611.

140. *Id.*

141. *Willis v. People*, 32 N.Y. 715, 715 (1865).

fiancé apparently broke her engagement to Willis after learning of his drinking problem.¹⁴² On April 9 of the next year he stabbed his former betrothed to death in her home.¹⁴³ Covered with her blood, and still holding the knife, Willis then walked to her husband's shop and accused him of the murder.¹⁴⁴ Ultimately he admitted he had done it, but pleaded insanity as a defense.¹⁴⁵ Willis was convicted in the Ulster County Court of Oyer and Terminer, and the judgment was affirmed in the New York Supreme Court.¹⁴⁶ On further appeal, the Court of Appeals went to some pains to note that Willis had "an average amount of sense and intelligence, but a somewhat conceited and eccentric disposition."¹⁴⁷ His "irritable temper and excitable disposition," however, were not evidence of insanity.¹⁴⁸

Then, in another homicide case decided the same year, the New York Court of Appeals appeared to apply both the intellectual and the volitional standard. In *Kenny v. People*¹⁴⁹ the court ruled that the defendant had failed to prove that he "was not capable of reasoning, or competent to control his will."¹⁵⁰ The statement was not strictly necessary to the court's decision, but it must have contributed to the confusion in the lower courts over the applicability of the volitional standard of insanity in criminal cases.

The issue reappeared in an Albany trial court in 1868.¹⁵¹ General George W. Cole had done "honorable service" in the Union Army, and had "received a severe and crushing injury, followed by other injuries thereafter, from the effects of which he ha[d] not yet fully recovered" by the time of his trial.¹⁵² Early in June of 1867 he discovered that his wife was having an affair with L. Harris Hiscock, encountered Hiscock in public, and shot him dead.¹⁵³ At trial, the judge applied both the intellectual standard and a volitional standard:

Was he moved to the commission of this act by the sudden access [to the victim] and irresistible pressure of excited and overwhelming passion, roused by the sudden and unexpected sight of the destroyer of his domestic peace, or him whom he supposed

142. *Id.*

143. *Id.* at 715-16.

144. *Id.* at 716.

145. *Id.*

146. *Id.* at 715.

147. *Id.* at 716.

148. *Id.* at 715.

149. 31 N.Y. 330 (1865).

150. *Id.* at 337.

151. Cole's Trial, 7 Abb. Pr. (n.s.) 321 (Albany Oyer and Terminer, 1868).

152. *Id.* at 331.

153. *Id.* at 326-27.

to be such — the defiler of his marriage bed — the seducer of the dearest object of his affections — dethroning his reason, and pressing him on to the commission of this act, under the influence of an ungovernable frenzy, unsettling for the time his faculties, and enthroning insanity in their place?¹⁵⁴

It is hardly surprising that the jury returned a verdict of not guilty, and there is no indication that Cole was committed to an asylum after the verdict.¹⁵⁵

The rule in New York was finally settled in 1873, in *Flanagan v. The People*,¹⁵⁶ in which the Court of Appeals took up the issue of the volitional standard of insanity directly. Remarkably, the court characterized the law as settled and the defense arguments as novel:

[I]t must be regarded as the settled law of this State, that the test of responsibility for criminal acts, where unsoundness of mind is interposed as a defense, is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of the inquiry.

We are asked in this case to introduce a new element into the rule of criminal responsibility in cases of alleged insanity, and to hold that the power of choosing right from wrong is as essential to legal responsibility as the capacity of distinguishing between them; and that the absence of the former is consistent with the presence of the latter. The argument proceeds upon the theory that there is a form of insanity in which the faculties are so disordered and deranged that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates but cannot avoid.

Whatever medical or scientific authority [sic] there may be for this view, it has not been accepted by courts of law.¹⁵⁷

154. *Id.* at 329.

155. *Id.* at 347. The historian Robert M. Ireland has argued that the *Cole* verdict was an example of the application of what he calls an “unwritten law” reflecting a high Victorian notion that a murdered scoundrel such as Hiscock got what he deserved, and that the killing was justified. Robert M. Ireland, *Insanity and the Unwritten Law*, 32 AM. J. LEGAL HIST. 157 (1988). He explains in this manner a number of incidents in which cuckolded husbands or the brothers of dishonored women were acquitted of murdering the scoundrels involved, generally on the grounds of temporary insanity. *Id.*

156. 52 N.Y. 467 (1873).

157. *Id.* at 469-70. This rule persisted into the next century. *See, e.g.,* *People v. Schmidt*, 329 110 N.E. 945 (N.Y. 1915).

While the court had the final word as a matter of New York law, it was surely wrong as a matter of history. As we have seen, the volitional standard of insanity had in fact been applied in the lower courts in New York and by the high court in Massachusetts.¹⁵⁸ But regardless of what had come before, *Flanagan* was the authoritative rejection of the volitional standard in New York.¹⁵⁹ The backlash against reform which had begun with *M'Naghten* had finally triumphed in New York.

The debates within the New York judiciary reflected the debates within and among courts in other states. The same ambivalence toward the volitional test for insanity appears throughout American jurisprudence. The majority of states adhered to the intellectual test, and framed it in the terms set forth in *M'Naghten*. This was done throughout the nineteenth century in the federal courts and in California, the District of Columbia, Florida, Georgia, Maine, Maryland, Missouri, New Jersey, North Carolina, Ohio, South Carolina, Texas, and West Virginia.¹⁶⁰ Other state courts adopted the volitional test, then reverted to the *M'Naghten* test. The volitional test controlled in Delaware until 1990.¹⁶¹ Alabama initially adhered to the intellectual test, then adopted the volitional test, and finally reverted to the *M'Naghten* test late in the century.¹⁶² Other states that adopted the volitional test for a time in the nineteenth century included Illinois, Indiana, Iowa, Kansas, Kentucky, and

158. *E.g.*, *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500 (1844); *People v. Divine*, 1 Edm. Sel. Cas. 594 (N.Y. 1848); *People v. Kleim*, 1 Edm. Sel. Cas. 13 (N.Y. Sup. Ct. 1845); *Cole's Trial*, 7 Abb. Pr. (n.s.) 321 (Albany Oyer and Terminer, 1868).

159. *Flanagan*, 52 N.Y. at 469-70.

160. *See* *United States v. McGlue*, 26 F. Cas. 1093, 1095 (C.C.D. Mass. 1851) (No. 15, 679); *United States v. Clarke*, 25 F. Cas. 454, 454 (C.C.D.D.C. 1818) (No. 14,811); *People v. Hoin*, 62 Cal. 120 (1882); *United States v. Guiteau*, 12 D.C. (1 Mackey) 498, 546-50 (D.C. 1882), *aff'g en banc*, 10 F. 161 (D.C. 1882); *Copeland v. State*, 26 So. 319 (Fla. 1899); *Humphreys v. State*, 45 Ga. 190, 192 (1872); *Choice v. State*, 31 Ga. 424, 472-78 (1860); *State v. Lawrence*, 57 Me. 574, 576-77 (1870); *Spencer v. State*, 13 A. 809, 813-14 (Md. 1888); *State v. Pagels*, 4 S.W. 931, 936-37 (Mo. 1887); *State v. Spencer*, 21 N.J.L. 196, 201-04 (N.J. Sup. Ct. 1846); *State v. Brandon*, 53 N.C. (8 Jones) 463, 467-68 (1862); *State v. Thompson*, 1 Wright 617, 621-22 (Ohio 1834); *State v. Alexander*, 8 S.E. 440, 441 (S.C. 1889); *State v. Bundy*, 24 S.C. 439, 444-45 (1886); *Carter v. State*, 12 Tex. 500, 505 (1854); *Leache v. State*, 3 S.W. 539, 542 (Tex. Ct. App. 1886) (citing *Carter*, 12 Tex. at 500); *State v. Harrison*, 15 S.E. 982, 986-90 (W. Va. 1892). Although the Ohio Supreme Court did not cite *M'Naghten* in its *Thompson* decision, it clearly adopted a test limited to intellectual insanity. *See* John K. McHenry, *The Judicial Evolution of Ohio's Insanity Defense*, 13 U. DAYTON L. REV. 49 (1987).

161. *Sanders v. State*, 585 A.2d 117, 124 (Del. 1990); *State v. Cole*, 45 A. 391, 393-94 (Del. 1899); *State v. Windsor*, 5 Del. (5 Harr.) 512, 538-39 (1854).

162. *Boswell v. State*, 63 Ala. 307, 316-22 (1879) (using the intellectual test); *Parsons v. State*, 2 So. 854, 866-67 (Ala. 1887) (using both the intellectual and volitional tests).

Pennsylvania.¹⁶³ The volitional test announced in *Rogers* remains good law in Massachusetts some 160 years after it was first articulated by Chief Justice Shaw.¹⁶⁴

IV. Insanity and Will Contests

The transfer of property by last will and testament has not received scholarly attention in proportion to its cultural and economic importance.¹⁶⁵ A comprehensive history of inheritance remains to be written. The purpose of this part is not to examine inheritance itself, but to examine insanity in the context of will contests. It is worth noting briefly that the terms of inheritance changed little in this period. The preference for testamentary transfers to the spouse and children changed only in the abolition of entail and the shift from primogeniture to partible inheritance.¹⁶⁶ These were early developments in the colonies that reflected the abundance of land and the decline of feudal habits of thought.¹⁶⁷

Every American jurisdiction had rules to govern the descent of property owned by a decedent who died intestate, or whose will was declared invalid. Whether common law or statutory, these rules provided for the descent of property to spouses, children, parents, siblings, and siblings' issue, generally in that order of preference, and sometimes with some overlap.¹⁶⁸ Such persons were referred to as a class as the "heirs-at-law."¹⁶⁹ Typically the law allowed even distant cousins to inherit, if closer relatives had not survived.¹⁷⁰

163. See *Fisher v. State*, 23 Ill. 283 (1859); *Sawyer v. State*, 35 Ind. 80, 86-87 (1871); *State v. Felter*, 25 Iowa 67, 83-84 (1868); *State v. Crawford*, 11 Kan. 32, 39 (1873); *Scott v. Commonwealth*, 61 Ky. (4 Met.) 227, 228-31 (1863); *Commonwealth v. Mosler*, 4 Pa. 264, 266 (1846).

164. *Commonwealth v. McLaughlin*, 729 N.E.2d 252, 255-56 (Mass. 2000).

165. The amount of property transferred annually by this means has not been measured empirically, but is obviously enormous, and was so in the nineteenth century. To date, there is no comprehensive survey of inheritance in America. The most ambitious effort to date is CAROLE SHAMMAS, MARYLYNN SALMON & MICHEL DAHLIN, *INHERITANCE IN AMERICA: FROM COLONIAL TIMES TO THE PRESENT* (1987). See also Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1 (1977); Mohr, *supra* note 20.

166. Katz, *supra* note 165, at 11.

167. *Id.* (citing LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955)).

168. See SHAMMAS ET AL., *supra* note 165, at 32-34.

169. See *People v. Fulton Fire Ins. Co.*, 25 Wend. 205, 213-16 (N.Y. 1840).

170. *Id.* at 216 ("Everybody must of necessity, have collateral relatives, unless the line of his descent from Noah, or that of all his relatives who might otherwise have inherited, has been broken by alienage or attainder, or crossed by a bar sinister.").

If a will were voided on the grounds of insanity, the estate would be distributed according to the rules of intestacy.¹⁷¹ These rules continued the traditional preference that property should remain within the conjugal family.¹⁷² As a consequence of these general rules of law, most will contests occurred when the heirs-at-law discovered that the terms of the will disinherited them, or conferred upon them less than the shares they could expect under the statute of descent.¹⁷³

A. The "Natural" Objects of the Sane Testator's Bounty

The legal standard of insanity did change, however, during the first half of the nineteenth century. It shifted from the earlier intellectual standard to a hybrid standard which incorporated both intellectual and sentimental elements. A testator entirely bereft of reason could not execute a valid will.¹⁷⁴ That was not new. But in the early nineteenth century a new rule arose, under which a testator could be found incompetent on the basis of nothing more than derangement of the sentiments or feelings.¹⁷⁵ Derangement in this context was defined in counterpoint to the idealization of the family underlying the cult of domesticity and characterizing the middle class.¹⁷⁶ Thus in cases in which the dispositions of property in a will reflected a derangement of the feelings for the "natural" objects of the testator's bounty, the courts were far more likely to hold the testator insane and the will void. More importantly, in certain circumstances, the new meanings associated with the conjugal family were extended to protect persons who formed, for the testator, the emotional equivalent of a family. Thus as the sentimental ideal insinuated itself into the common law, the "objects" of the bounty of a testator came to be considered "natural" because of the emotional relationships they shared, or were presumed to share with the testator.¹⁷⁷

By mid-century this standard was commonly and successfully deployed to defend the economic interests of the conjugal family, or in some cases, the relationships which provided the testator or testatrix the emotional support that was assumed to characterize the conjugal family.¹⁷⁸ The language the courts

171. Mohr, *supra* note 20, at 425.

172. *Id.* at 426; Katz, *supra* note 165, at 10.

173. Mohr, *supra* note 20, at 425. One important exception is *Delafield v. Parish*, 25 N.Y. 9 (1862).

174. *Parish*, 25 N.Y. at 100.

175. *See, e.g.*, *Foster v. Foster*, 7 Paige Ch. 48 (N.Y. Ch. 1838); *In re Dunham*, 27 Conn. 192, 204, 208 (1858); *American Seaman's Friend Soc'y v. Hopper*, 43 Barb. 625, 625 (N.Y. Gen. Term 1864), *aff'd*, 33 N.Y. (6 Tiffany) 619 (1865); *Boyd v. Boyd*, 66 Pa. 283, 291 (1871).

176. *Id.* Compare RYAN, *supra* note 35, at 146-50, 185.

177. *See supra* notes 168-69 and accompanying text.

178. *See infra* Part IV.B. At common law, most adults of "sound and disposing mind and

used to describe the protected family group in such cases was the phrase “the natural objects of [the testator’s] bounty.”¹⁷⁹

That term first appeared in the reported cases in 1823, in *Daly’s Lessee v. James*, an opinion by the United States Supreme Court.¹⁸⁰ Its first appearance in New York jurisprudence was in 1830, in *Betts v. Jackson*.¹⁸¹ The Court of Errors and Appeals announced that

Wherever a doubt is raised by the evidence as to the mental capacity of the testator, . . . the reasonableness of the will, in relation to those who are the natural objects of the testator’s bounty, is a proper subject for the consideration of the court or jury, in determining whether it was made by him while in the full possession of his mental faculties, as a free and voluntary act¹⁸²

This contradicted the English rule announced by Lord Kenyon in the leading case of *Greenwood v. Greenwood*.¹⁸³ The term “natural objects of bounty” was defined only by example in *Betts*, but other cases made it clear that it applied to spouses, children, and, in circumstances discussed below, to other relatives.¹⁸⁴

memory” could dispose of property by will. *Harrison v. Rowan*, 11 F. Cas. 658, 660 (C.C.D.N.J. 1820) (No. 6141). This was a privilege created by statute, rather than a natural right. It was conferred on persons of limited legal competency under nineteenth century law. The standard of legal competency to make a valid will was lower than the standard of competency to enter into a contract, *Turner v. Cheesman*, 15 N.J. Eq. 243, 257 (N.J. Prerog. Ct. 1857); ORDRONAU, *supra* note 3, at 354, or to commit a crime. See *In re Dunham*, 27 Conn. 192, 204, 208 (1858). Even so, there were many instances in the official law reports, and no doubt many more unreported instances, of challenges to wills on the grounds that the testator was incompetent to make a will due to insanity or mental infirmity. See *Harrison*, 11 F. Cas. at 660-61; *Clark v. Fisher*, 1 Paige Ch. 171 (N.Y. Ch. 1828); Amos Dean, *Unsolved Problems of the Law, as Embraced in Mental Alienation*, 10 AM. L. REG. 513, 517-18 (1862); ORDRONAU, *supra* note 3, at 354-70.

179. 21 U.S. (8 Wheat.) 495, 504 (1823).

180. *Id.*

181. 6 Wend. 173 (N.Y. 1830).

182. *Id.* at 175-76.

183. (1790) 163 Eng. Rep. 930, 943 (K.B.). Lord Kenyon instructed the jury to consider the testator’s sanity apart from the terms of his will: “You are to consider whether his mind was entire to make the disposition — not whether the disposition was whimsical, cruel; what none of you retiring to your own bosoms and collecting your own feelings would have made” *Id.* The testator in that case disinherited a brother in favor of a cousin. *Id.* at 930. The will was held valid after protracted proceedings. *Id.* at 943.

184. See *Bitner v. Bitner*, 65 Pa. 347, 359 (1870) (“Wife and children are the natural objects of a man’s affection and regard, and when they are overlooked in the disposition of the estate, the reason for doing so may . . . be inquired into.”); *Stewart’s Ex’r v. Lisenard*, 26 Wend. 255,

The use of the adjective “natural” to modify the phrase “objects of bounty,” was significant. Beginning in the 1830s the meaning of the phrase shifted from being primarily descriptive¹⁸⁵ to primarily normative.¹⁸⁶ One of the ways in which this notion of domesticity was enforced, in the context of the laws governing the probate of wills, was to define sanity to include, at least presumptively, assent to this notion.¹⁸⁷ That trend began with *Betts* and continued throughout the century.¹⁸⁸

B. “Natural Objects” Redefined and Expanded

As the social historian Mary Ryan has demonstrated, the conjugal family of the nineteenth century served more than merely conjugal functions.¹⁸⁹ In many ways, the family was built around emotional relationships and functions which have, in turn, come to characterize it.¹⁹⁰ As the cases discussed herein illustrate, emotional relationships became as important as relationships of consanguinity in defining family relationships. Where a will was contested, and the family was disordered or the relationships ambiguous, the matter of discerning the natural objects of the testator’s bounty became entangled, in the courts’ opinions, with the issue of insanity, and sometimes with the reconstruction of idealized notions of family.

In the leading reported cases presenting such problems the appellate courts sometimes created a “family” of beneficiaries that matched the structure of the conjugal family.¹⁹¹ Where members of the conjugal family, or the nearest relatives, had behaved “unnaturally” the courts plumbed the record for a “family” that served the emotional role of a conjugal family, and identified the natural objects of bounty accordingly.¹⁹² The strength of this impulse is

275 (N.Y. 1841) (applying the term to the testator's brother-in-law, in whose household she lived happily until her death); *Delafield v. Parish*, 25 N.Y. 9, 58-63 (1862) (applying the term to the testator’s brothers).

185. *See Church v. Crocker*, 3 Mass. (2 Tyng) 17, 22 (1807); *see also* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 *passim* (1819); *Bailey v. Lewis*, 3 Day 450, 460, 464 (Conn. 1809); *Chew’s Lessee v. Weems*, 1 H & McH. 463, 501 (Md. 1772); *Clute v. Robison*, 2 Johns. 595, 609 (N.Y. 1807); *Grasser v. Eckart*, 1 Binn. 575, 585 (Pa. 1809); *Lewis v. Fisher*, 2 Yeates 196, 198 (Pa. 1797); *Dill v. Dill*, 1 S.C. Eq. (1 Des. Eq.) 237, 239, 242 (S.C. Ch. 1791); *Selden v. King*, 6 Va. (2 Call) 72, 89-90 (1799).

186. *See* cases cited *supra* note 184.

187. *See* cases cited *supra* note 184.

188. *See Yoe v. McCord*, 74 Ill. 33, 39 (1874); *American Seaman’s Friend Soc’y v. Hopper*, 43 Barb. 625, 625 (N.Y. Gen. Term 1864), *aff’d*, 33 N.Y. (6 Tiffany) 619 (1865); *Bitner*, 65 Pa. at 351, 355, 359. These cases use the phrase in its normative sense.

189. RYAN, *supra* note 35, at 154.

190. *Id.* at 153-79.

191. *See, e.g., Christy v. Clarke*, 45 Barb. 529, 530 (N.Y. App. Div. 1866).

192. *See, e.g., Stewart’s Ex’r v. Lispenard*, 26 Wend. 255, 256-59 (N.Y. 1841), discussed

reflected in the lengths the courts went to in order to impose the image of the emotionally supportive conjugal family on disordered and confused relationships.

It is hard to imagine a task more imposing than to find order in the family of Edwin P. Christy, an early promoter of the blackface minstrel shows popular in the 1840s and 1850s. The music historian Dale Cockrell has described Christy as one of the original “demons of disorder,” who made “blackface minstrelsy” popular in the 1840s and 1850s.¹⁹³ Not a performer himself, Christy managed and promoted minstrel shows, and eventually formed his own troupe in New York City.¹⁹⁴ After his death in 1862, the disputes over his substantial estate exposed the disorder in his emotional and conjugal life, which the courts were then required to resolve.

Christy was the son of affluent Philadelphia parents.¹⁹⁵ In 1835 he married Harriet Brooks, who had a son named George Harrington.¹⁹⁶ The couple established a home, bought a pew in a church, and had four children together.¹⁹⁷ In the early 1840s, Christy took George Harrington to New York City, “where he started in business as an Ethiopian or minstrel performer,” with George as “the principal attraction.”¹⁹⁸ For years Christy led a dual life, maintaining a middle class home in Buffalo and a “meretricious” relationship in New York City, where he ran his very profitable minstrel show.¹⁹⁹ Harriet moved to New York with the children in 1849.²⁰⁰ Edwin moved in with Harriet, bought a house for his paramour, Mary Miller, and introduced her to his children as “Aunt Mary.”²⁰¹

Harriet’s son quit the show in 1850, took the surname Christy, and established a competing minstrel troupe. This created the final rift in the family. Edwin refused to support Harriet thereafter, and moved in with Mary.²⁰² He continued to prosper, and by 1859 owned property exceeding two hundred thousand dollars in value.²⁰³ In 1862, in an apparent suicide attempt,

infra.

193. DALE COCKRELL, DEMONS OF DISORDER: EARLY BLACKFACE MINSTRELS AND THEIR WORLD 144 (1997); *see also* INSIDE THE MINSTREL MASK: READINGS IN NINETEENTH-CENTURY BLACKFACE MINSTRELSY (Annemarie Bean, James V. Hatch & Brooks McNamara eds., 1996).

194. *Christy*, 45 Barb. at 530.

195. COCKRELL, *supra* note 193.

196. *Christy*, 45 Barb. at 530-31.

197. *Id.* at 530.

198. *Id.* at 530-31.

199. *Id.*

200. *Id.* at 530.

201. *Id.* at 531.

202. *Id.*

203. *Id.*

he “precipitated himself out a window, landing on his head,” and rendering himself quadriplegic.²⁰⁴ Christy died a few days later, but not before Mary found a lawyer to draw a will, under which he left everything to her.²⁰⁵ Harriet was disinherited, as were Edwin’s surviving children.²⁰⁶ Harriet sued, claiming the will was invalid as a result of Edwin’s insanity.²⁰⁷ Mary defended on the grounds that Harriet had never been divorced from her first husband, Harrington, who was still alive.²⁰⁸ There was some plausible evidence that this was true.²⁰⁹ Had it been, it would have strengthened Mary’s claim. Harriet’s marriage to Edwin would have been void, and Mary would have been Christy’s widow. This question and the question of Christy’s sanity were the critical issues in the case.

The court decided both issues. It determined that Harriet was the lawful widow, and that the will was invalid due to Christy’s insanity. The court defined sanity in this context as follows: “A disposing mind and memory is a mind and memory which has the capacity of recollecting, discerning, and *feeling* the relations, connections, and obligations of family and blood.”²¹⁰ With no apparent sense of irony, the court asked a question intended to have been rhetorical: “What does he [the testator] mean when he refers to his family and thinks of buying a house for them? Is it bastard children and a lewd woman?”²¹¹ The family was Harriet and their children. The “blood” relations were the children. The image of domesticity established years before in Buffalo was the status quo the court would protect, regardless of its sorry subsequent history.

The appellate courts announced this rule repeatedly, and refined it over time. Thus, in *American Seaman’s Friend Society v. Hopper*,²¹² Charles Hopper’s will left his wife a legacy, but gave the bulk of his estate of \$100,000 to two charities.²¹³ The court expressed concern that the widow’s inheritance, while not insubstantial, was “less than we should look for, considering the

204. *Id.* at 531.

205. *Id.* at 532-33.

206. *Id.* at 533.

207. *Id.* at 530.

208. *Id.* at 538.

209. *Id.* at 538-41.

210. *Id.* at 545.

211. *Id.* at 537.

212. 43 Barb. 625 (N.Y. Gen. Term 1864), *aff’d*, 33 N.Y. (6 Tiffany) 619 (1865).

213. The two charities were the American Seaman’s Friend Society and the Ladies’ Union Aid Society of the Methodist Episcopal Church of the City of New York. *Hopper*, 33 N.Y. (6 Tiffany) at 620.

amount of his property and that he left no descendants.”²¹⁴ The court invalidated the will on the grounds of insanity, stating:

Had the testator made a *natural or usual disposition* of his property, his mental capacity would not have been questioned. But the will in this case, disregarding external facts and circumstances narrated by the witnesses, was *unnatural* . . . His mind was sufficient for the purpose of making a will, unless it was warped or deluded in respect to the *natural objects of his bounty*.²¹⁵

Similar rules prevailed in other states. In *Bitner v. Bitner*²¹⁶ the Supreme Court of Pennsylvania, relying on *Hopper*, held that a testamentary disposition “which outrages common feeling, and displays a want of ordinary natural affection” is evidence of insanity. It affirmed a lower court judgment voiding a will that had disinherited five of the testator’s eight children.²¹⁷ New Jersey and Illinois both extended further protection to the conjugal family by adopting the rule that “to destroy the capacity of a person to make a will on account of failure of memory, the failure must be total or extend to his immediate family.”²¹⁸

Where a testator had no conjugal family, the court found sanity in a disposition of property to those persons who had served the emotional role of a conjugal family in that particular testator’s life. This is the best explanation of the result in *Stewart’s Executor v. Lisperard*,²¹⁹ a case that has confused the one medical historian who has written about it.²²⁰

214. *Id.* at 633.

215. *Id.* at 626 (emphasis added). A similar pattern is evident in other states. For example, in *Boyd v. Boyd*, 66 Pa. 283, 291 (1871), the Supreme Court of Pennsylvania affirmed a determination that the testator was one “of those unfortunate beings upon whom the hand of Providence has been sorely laid,” and a victim of “wandering and delusive fancies.” The court voided his will and thereby allowed his entire and substantial estate to pass by the intestacy laws to his wife and daughter. *See also* *Roe v. Taylor*, 1867 WL 5315, at *3 (Ill. Sept. 1867) (applying rule of law that proper regard for the natural objects of one’s bounty was evidence of testamentary capacity); *Yardley v. Cuthbertson*, 108 Pa. 395, 457 (1885) (applying same rule applied in *Boyd*).

216. 65 Pa. 347 (1870).

217. *Id.* at 362. The court applied the same rule in *Boyd*, 66 Pa. at 291.

218. *Turner v. Cheesman*, 15 N.J. Eq. 243, 256 (N.J. Prerog. Ct. 1857); *Yoe v. McCord*, 74 Ill. 33, 39 (1874) (citing *Turner*, 15 N.J. Eq. at 256).

219. 26 Wend. 255 (N.Y. 1841).

220. *See* Mohr, *supra* note 20. Professor Mohr relies on contemporary secondary sources, and not on the opinions of the courts in the cases he discusses. Consequently, his article is burdened with factual errors, many of which appear in his discussion of the *Lisperard* case. For example, Mohr mistakes Stewart for Lisperard’s brother, when in fact he was her brother-in-law. *Compare id.* at 423 with *Lisperard*, 26 Wend. at 223. This is significant in an area of law

Alice Lispernard lived the early part of her life in misery. Thought from her birth in 1781 to have been an imbecile, Alice was hidden from her father's guests, overfed, left uneducated, and permitted from a young age to drink quantities of strong beer and brandy considered excessive even at that time.²²¹ In his will, Anthony Lispernard wrote "it has pleased Almighty God that my daughter, Alice, should have such imbecility of mind as to render her incapable of managing . . . property" and left her with a substantial annuity for her care.²²² In addition, as a result of the intestate death of an unmarried brother, who left no issue, she inherited in fee an additional share of the family's vast wealth.²²³

After her father's death, Alice lived with strangers who treated her as her father had.²²⁴ In 1827 her sister, Sarah, and brother-in-law, Alexander L. Stewart, took her into their home.²²⁵ Sarah's inheritance had been greater than Alice's, and Stewart was wealthy in his own right.²²⁶ They treated her with kindness unprecedented in her life.²²⁷ She progressively abandoned many of the behaviors held out as evidence of her imbecility.²²⁸ When her sister died, her brother-in-law kept her in his household on the same kind terms as before.²²⁹ By the end of her life she had assumed a role of some small responsibility, and considerable affection, in the Stewart household.²³⁰ The

based substantially upon family relationships. Mohr states that Stewart "contact[ed] his powerful political friends" at the same time he appealed to the Court for the Correction of Errors, when in fact Stewart had died almost five years before the case reached that court. Compare Mohr, *supra* note 20, at 424, with *Lispernard*, 26 Wend. at 261. That is why the case bears the title "Stewart's Executor." Mohr's description of the composition of the Court of Errors is imprecise. He writes that the court was composed of the Senate, "guided by" members of the Supreme Court. Mohr, *supra* note 20, at 424. In fact, it was composed of the members of the Senate, who sat as judges, but retained the title "Senator." When matters of equity were before the court, the judges of the Supreme Court joined the court as full voting members, but the Chancellor did not. When matters of law were before the court, the Chancellor joined the court as a full voting member, but the judges of the Supreme Court did not. The court was abolished by constitutional amendment in 1846. See *Thompson v. Thompson*, 21 Barb. 107 (N.Y. Sup. Ct. 1855). Mohr's article is useful as a description of some popular contemporary opinions concerning the role of insanity in will contests, but it does not address directly the opinions or reasoning of the courts in the cases he mentions.

221. *Lispernard*, 26 Wend. at 257-58.

222. *Id.* at 256.

223. *Id.*

224. *Id.* at 255-56.

225. *Id.* at 256.

226. Mohr, *supra* note 20, at 423-24.

227. *Lispernard*, 26 Wend. at 255-57.

228. *Id.*

229. *Id.*

230. *Id.*

terms of her will made clear her deep love for her brother-in-law, to whom she left her entire estate.²³¹

Two nieces, the daughters of another deceased brother who had lost his fortune in speculation, challenged Alice's will as the product of an incompetent imbecile.²³² They presented testimony from persons who had known Alice during her early life.²³³ Stewart died before trial, but his executor presented testimony from persons who had known Alice during her life in the Stewart household.²³⁴ James Campbell, the Surrogate, found Alice incompetent.²³⁵ He clearly believed her imbecility was inflicted by God, stating that "her Creator for inscrutable ends had withheld, an understanding capable of receiving instruction."²³⁶ Imbecility, being a divinely inflicted condition, was not subject to cure, in the opinion of Surrogate Campbell. The Circuit Judge affirmed on appeal, and the Chancellor affirmed the Circuit Judge.²³⁷

The New York Court for the Correction of Errors reversed.²³⁸ The Senators were clearly impressed by the change in Alice from her early to her final days. Nevertheless, the court acknowledged that Alice, even toward the end, lacked average intelligence, and could probably be characterized as weak-minded.²³⁹ The court also noted "the natural and legitimate affections of gratitude and attachment to those with whom she had long lived, and who had deserved it by long and persevering care and kindness."²⁴⁰ Reliance on such "evidence of affection" was "usual and proper" in cases in which testamentary capacity might otherwise be questioned.²⁴¹ This was sufficient in the court's opinion to support its finding that Alice had a mind sufficiently "sound and disposing" to know the natural objects of her bounty, and to make a legally valid will.²⁴² The court ordered the will admitted to probate.²⁴³ Alice's fortune went to those persons who had provided her with the emotional support denied her by her nearer relatives. The Stewarts had, in an emotional sense, become Alice's only family. By its implicit definition of sanity, the *Lispenard* case illustrates the

231. *Id.* at 256-59.

232. *Id.* at 263.

233. *Id.* at 257-58.

234. *Id.* at 258-62.

235. *Id.* at 290.

236. *Id.* at 269.

237. *Id.* at 293.

238. *Id.* at 323.

239. *Id.* at 308.

240. *Id.* at 312.

241. *Id.*

242. *Id.* at 307.

243. *Id.* at 323.

influence of the sentimental and domestic ideals on the medical jurisprudence of the era.

The sentimental standard of insanity more commonly led to the invalidating of wills that surely would have been admitted to probate under Lord Kenyon's rule in *Greenwood v. Greenwood*.²⁴⁴ But that does not mean that the American courts intended to abolish, in effect, the right of free testamentary disposition. As one New York judge noted in 1869, in an opinion upholding the disinheritance of an abusive husband by his wealthy wife, "[a] wife may fear and hate her husband excessively, without being crazy."²⁴⁵ Disinheritance was most likely to be upheld when the natural objects themselves had behaved unnaturally toward the testator. Thus, in *Foster v. Foster*,²⁴⁶ the court upheld the disinheritance of the testator's daughters.²⁴⁷ The testator had left everything to his wife, who was not the daughters' mother. The record indicated that the daughters and their husbands had interfered in the testator's domestic affairs and generally treated him badly, in a manner the court denounced as unnatural.²⁴⁸ In *In re Dunham*,²⁴⁹ the disinherited sisters of Lucy Kelsey, who were her heirs-at-law, challenged her will and requested that the trial court instruct the jury as follows:

That if the testatrix harbored an unreasonable antipathy to her sisters, not justly caused by any acts of unkindness or improper conduct on their part, and had no reasonable evidence of such unkindness or improper conduct, this would be a delusion and would constitute unsoundness of mind; and her will, made during the existence of such delusion, would be void.²⁵⁰

The Supreme Court of Errors of Connecticut explicitly approved this as an accurate statement of law.²⁵¹ Yet in the same case the court disapproved an instruction that the same delusion would render the testatrix insane for every purpose.²⁵² It is entirely clear that, whatever her testamentary capacity, Lucy

244. (1790) 163 Eng. Rep. 930, 943 (K.B.).

245. *In re Forman's Will*, 54 Barb. 274, 295 (N.Y. Gen. Term 1869) (upholding the will of Anna Maria Forman). The childless Forman disinherited her husband and left her estate of \$150,000 to cousins. *Id.* at 277. The record in that case indicated that Mrs. Forman hated and feared her husband, that he was beneath her in class, education, and industry, that he treated her monstrously, and that her hatred for him was not the result of insane delusion. *Id.* at 290-94.

246. 7 Paige Ch. 48 (N.Y. Ch. 1838).

247. *Id.* at 52.

248. *Id.*

249. 27 Conn. 192 (1858).

250. *Id.* at 194.

251. *Id.*

252. *Id.*

Kelsey could not have been found insane for purposes of the criminal law. In her case, the jury found that she had reason for her antipathy toward her sisters, that “her sisters had treated her with continued neglect and unkindness, and so had their husbands and family connexions, and that she had received many wrongs and injuries at their hands.”²⁵³ The judges reaffirmed the rule that anyone who deviated too far from the “natural” pattern of testamentary giving, by that very deviation gave evidence of mental defect, and risked having his or her will voided on the grounds of insanity.²⁵⁴ Kelsey’s sisters’ conduct removed them from the category of natural objects of her bounty. The court found Kelsey sane, and approved the will that disinherited the sisters.²⁵⁵

Testamentary favoritism toward one or more of the natural objects of bounty was upheld in cases in which the others were not wholly disinherited, particularly where evidence indicated disproportionate *inter vivos* gifts to the disadvantaged heirs.²⁵⁶ Large testamentary gifts to non-relatives, or more distant relatives, were not necessarily problematic in the eyes of the law. A gift to a non-relative was upheld in *Marx v. McGlynn*.²⁵⁷ The court examined the terms of the will, including the non-family gift, and found them reasonable. “[T]he will is not unnatural or unjust, fair provision being made for those who would naturally be the heirs.”²⁵⁸

There is little by way of a historiography of insanity in will contests. The only article dealing directly with the topic is by the historian James C. Mohr.²⁵⁹ Mohr uses *Lispenard*²⁶⁰ and *Delafield v. Parish*,²⁶¹ another high-profile New York case, to illustrate the abrogation and reinstatement of a rule which he implies was an intellectual standard.²⁶² Unfortunately, Professor Mohr relies exclusively upon contemporary secondary sources, and does not even cite the courts’ opinions in the cases he discusses. As discussed at length herein, *Lispenard* illustrates the means by which the law supported normative notions of middle class family structure and domesticity in will contests. The other case, *Parish*, presented a fairly obvious case of fraud by the wife in an attempt to disinherit the testator’s brothers.²⁶³ It is otherwise consistent with the explanation of testamentary insanity rules offered here.

253. *In re Dunham*, 27 Conn. at 196-97.

254. *Id.* at 196.

255. *Id.*; see also *In re Forman’s Will*, 54 Barb. 274, 295 (N.Y. Gen. Term 1869).

256. *Turner v. Cheesman*, 15 N.J. Eq. 243 (N.J. Prerog. Ct. 1857).

257. 88 N.Y. 357 (1882).

258. *Marx v. McGlynn*, 88 N.Y. 357, 358 (1882).

259. Mohr, *supra* note 20.

260. *Stewart’s Ex’r v. Lispenard*, 26 Wend. 255 (N.Y. 1841).

261. 25 N.Y. 9 (1862).

262. Mohr, *supra* note 20, at 422.

263. *Parish*, 25 N.Y. at 11.

“Henry Parish . . . was a wealthy and respectable New York merchant, of competent education and high intelligence.”²⁶⁴ Childless at his death in 1856, he left an estate of well over \$1,100,000.²⁶⁵ He had executed a will in 1842, which provided handsomely for his wife, provided substantial gifts to his brothers, sisters, and a cousin, and named one of his brothers executor.²⁶⁶ A number of his wife’s relatives were to receive specific legacies, as were a number of Parish’s more distant relatives.²⁶⁷

In 1849 Parish suffered a severe stroke, which paralyzed his right side.²⁶⁸ He never regained the ability to move his right side, speak, read, or write.²⁶⁹ Forty days after his stroke, a codicil was attached to his will.²⁷⁰ Two others were added over the next five years.²⁷¹ These were all dictated by his wife to an attorney other than the one who had prepared Parish’s will of 1842.²⁷² The overall effect of these was, first, to make specific bequests to his wife of property that had been left in the will to his brothers, and to revoke the one brother’s executorship.²⁷³ The major issue in the case was whether Parish was legally competent to execute the codicils.²⁷⁴ If he was not, then the will of 1842 would remain in effect.²⁷⁵ In that sense the case was atypical, because the challenge was intended to restore the will by voiding the codicils.

The standard the court applied had an intellectual as well as a sentimental element:

[A] disposing mind and memory is a mind and memory which has the capacity of recollecting, discerning, and feeling the relations, connections, and obligations of family and blood We have held that it is essential that the testator has [sic] sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will.²⁷⁶

264. *Id.*

265. *Id.* at 17, 19-20.

266. *Id.* at 16-18.

267. *Id.* at 18.

268. *Id.* at 13.

269. *Id.*

270. *Id.* at 14.

271. *Id.* at 15.

272. *Id.* at 35.

273. *Id.*

274. *Id.* at 9.

275. *Id.*

276. *Id.* at 25-29.

Thus the rule applied was the same rule in effect for thirty years, which was also applied in *Lispenard* and *Christy*.²⁷⁷

The *Parish* court observed that, under the will of 1842, nearly two-thirds of Parish's enormous estate went to his wife and other members of her family.²⁷⁸ This amounted to over \$700,000 in 1862.²⁷⁹ Of this the court observed:

His solicitude, in the first place, to make ample provision for his wife, is clearly apparent from the testimony of [the attorney who prepared the 1842 will]. He was not only desirous of securing her such a portion of his estate as would enable her to maintain her established position in society, and supply to her all the wants and luxuries to which she had been accustomed, but he was also anxious that the provision should be so ample that a carping and fault-finding world should so esteem it.²⁸⁰

A substantial portion of the remaining third of the estate was to go to his brothers under the 1842 will.²⁸¹ Of these gifts the court observed: "Their portion of his estate, he must have seen, would be munificent, and such as brothers in these circumstances would naturally expect from a wealthy brother, dying without issue, after making ample provision for his widow."²⁸² Clearly, the enormous size of the estate gave rise to a different set of expectations and an expanded set of "natural" objects of his bounty, including his brothers. That was the standard against which Henry Parish's will, and the contested codicils, were measured.²⁸³ For those reasons, the case is consistent with an expanded domestic ideal, including siblings. To that extent it is not perfectly representative of broader trends in the adjudication of will contests, but it surely does not contradict them.

Perhaps more importantly in this case, the court's opinion betrays serious concerns that Parish's wife had simply worked a fraud to disinherit her husband's brothers. The court commented that the codicils were exclusively for Mrs. Parish's benefit, that "they were drawn up at her suggestion, upon her procurement, and by counsel employed by her."²⁸⁴ Such circumstances "ought

277. *Christy v. Clarke*, 45 Barb. 529 (N.Y. Gen. Term 1866); *Stewart's Ex'r v. Lispenard*, 26 Wend. 255 (N.Y. 1841).

278. *Parish*, 25 N.Y. at 18.

279. *Id.* at 17.

280. *Id.* at 18.

281. *Id.*

282. *Id.* at 19.

283. *Id.*

284. *Id.* at 35.

generally to excite the suspicion of the court.”²⁸⁵ The court noted that, under the civil law in effect in Europe, such a codicil would have been void as a matter of law, without further inquiry, “and it may be well doubted whether we have acted wisely in departing from [the civil law’s] just and rational provisions in this respect.”²⁸⁶ The *Parish* case must be seen as atypical because the size of the estate created unusual expectations and expanded the class of natural objects of Parish’s bounty. Perhaps more importantly, it was a case of clear, if not simple fraud, and for both reasons lacks the historical significance Professor Mohr has placed upon it.

Common law courts in the United States had a clear agenda to protect families, or their emotional equivalents, from being disinherited during the nineteenth century, whether by unnatural wills or by challenges brought by undeserving heirs-at-law. Where necessary, the courts did not hesitate to create a conjugal family out of a chaotic group of relationships, as illustrated by the *Christy* case.²⁸⁷ Where no conjugal family could be located, the courts protected the nearest equivalent of the conjugal family by protecting that constellation of relationships which had provided the testator with the same emotional support expected from an ideal conjugal family, as in the *Lispenard* case. Where a testator’s treatment of his or her family during life was unnatural, and the unnatural treatment continued in the terms of the will, the courts did not hesitate to protect the family. And finally, where the family had treated the testator unnaturally, the courts permitted the testator to disinherit that family, or portions of it. In those circumstances, sanity did not require recognition of family obligations.

V. Conclusion

The contrast between judicial treatment of insanity in criminal prosecutions on the one hand and will contests on the other illustrates the law’s resistance, and partial yielding, to the sentimentalizing trend in nineteenth century American culture. To the extent that ideas about personhood were implicit in the jurisprudence of insanity, it appears that personhood was fragmented and contested. The fact that the debate was consistently framed in the terms of faculty psychology suggests that fragmentation was thought to be a fundamental characteristic of mind and therefore of personhood. This assumption was widely accepted in the legal literature throughout the century.

285. *Id.* at 36.

286. *Id.*

287. *Christy v. Clarke*, 45 Barb. 529 (N.Y. Gen. Term 1866).

Persons were assembled of discrete parts, any one of which could be defective, or could malfunction temporarily.²⁸⁸

In the particular context of the criminal law, most judges and physicians held tightly to the older, intellectual standard of insanity. The reform movement, expressed specifically in this context in the work of Isaac Ray, Charles Doe, John Edmonds, and Lemuel Shaw, made a strong challenge at mid-century. But its adherents were dismissed as “visionary theorists and sentimental philosophers,”²⁸⁹ and their position was ultimately rejected by century’s end. It remained thereafter a small minority view.

When insanity was raised to attack the testamentary capacity of a decedent who had disinherited the natural objects of his or her bounty, the courts took a very different approach, based on a different faculty of mind. They incorporated in the standard of sanity the ability to feel the obligations of family. This standard relied upon the notion that there was a proper configuration of feelings, the absence of which could render a person insane, or invalidate the will of a person otherwise sane. Persons who were clearly sane for purposes of the criminal law might be insane under this standard. The natural objects could be disinherited if they had behaved toward the testator in a manner deemed unnatural. This typically involved conduct that violated the obligations of affection and kindness that also characterized the emotional function of the middle class family. In such circumstances, where the natural objects had violated the domestic ideal of the family, the testator’s action appeared justifiable, and therefore sane.

Sentimentalism, the cult of domesticity, the jurisprudence of the heart, whatever one might call the cultural imperative underlying the law of insanity in wills, triumphed in this area of nineteenth century law. But its triumph was incomplete, and the law remained divided over the role of sentiment and emotion in the configuration of legal rights and responsibilities, and the definition of full and competent legal personhood.

288. *See supra* Part II.C.

289. *State v. Pike*, 49 N.H. 399, 438 (1870).