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## Legal Insanity: Towards an Understanding of Free Will Through Feeling in Modern Europe

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## Abstract

The degree to which insanity or mental infirmity can be instrumentalized in legal debate is shaped by understandings of what insanity is, the currency of a specific diagnosis, as well as official and unofficial symptomatology, all of which render the law, as a system of knowledge and social practices, porous and permeable in regards to what might be abstractly called »the human mind and heart«. This article explores the changing role of emotions in explaining, demonstrating, and adjudicating insanity during the nineteenth and early twentieth centuries. Over the course of the nineteenth century, the insanity plea became a matter of heated debate in relation to specific trials of capital offenses, which not only brought crime but also the subject of criminal insanity into the public eye. At the same time, the rise of expert scientific testimony and the modern medical sciences – specifically medical psychology and the advent of psychiatry – created different definitions and understandings of mental illness that challenged legal definitions of insanity. This led to interdisciplinary discussion and debate, as physicians sought to provide a serviceable system to the lawyers, and lawyers sought new ways to discover and prove cases. The medicalization and pathologization of emotions not only led to the introduction and interpretation of new kinds of emotional evidence in the courtroom, it also gave emotions a range of different potential meanings, challenging the psychological premises and assumptions of the law as well as the principles and purposes of criminal justice.

Keywords: medical jurisprudence/legal medicine, moral insanity, free will, mania, melancholy



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It is a sudden calamitous visitation, during which the victim commits purposeless deeds; it is a wave of all-powerful emotion which holds captive the mind and impels the victim to extravagant, illogical, and baleful acts. It is intermittent, transitory, and during its prevalence it obliterates all reasoning power, leaving in its train an aftermath of bewilderment and moral unconsciousness.<sup>1</sup>

### 1 Introduction: Emotions, Insanity, and the Law

How does considering emotion a symptom of mental illness affect its role as evidence for criminal responsibility? The epigraph of this article is crime writer HL Adam's 1908 description of a special form of insanity, in which an upsurge of feeling could overtake reason. He explained that the »human enigmas« committing motiveless crimes suffered from a »mysterious« mental disorder. However, this malady bore none of the regular markers of insanity. The law, therefore, had no choice but to treat such offenders as sane, though »sane, in the ordinary acceptation of the term, they most certainly are not«. In practical terms, the »nature« of their disease was emotional. In this »disaffection« that was »far subtler, more sinister, than ordinary insanity«, perpetrators were victim to emotions.<sup>2</sup>

Adam's fantastical description of the emotional disease causing motiveless crime captures the dilemma posed by the changing legal and medical treatment of emotions and insanity. As symptoms of insanity, emotions undermined traditional legal understandings of criminal responsibility. If emotions were symptoms of mental illness, then could they prove that insanity caused a given crime? And if insanity caused a person's criminal actions, could he or she still be held legally responsible? Questions regarding the relationship between emotions, reason and free will were complicated by new medical research that challenged the law's ambiguous approaches to emotions. After all, the law had long allowed emotions to account for diminished criminal responsibility: in crimes of passion, for

example, a man's sudden outburst of rage or anger at his wife or lover could lead to violence, and a court's verdict was usually mitigated by the defendant's emotional state.<sup>3</sup> But unlike crimes of passion, the emotions of insanity allowed jurists to plea for a defendant's diminished responsibility or innocence in cases where criminal actions fell far outside the norms of public morality. If criminals accused of capital offenses could plead innocence by reason of emotion – while maintaining intact will and intellect – then how could courts determine responsibility? What of free will?

The aim of this article is to suggest some of the key processes through which criminal insanity was emotionalized. Emotions intertwined legal and medical debates and, in the process, they redefined mental illness as both symptoms and diagnoses; at the same time, emotions increasingly became the focus in trials where the insanity plea was used to defend those accused of capital offenses. While qualities such as sadness or anger had long been used to characterize mental illness, nineteenth-century medical scientists redefined them as emotions – an all-encompassing psychiatric category of human feeling – which distinguished specialized knowledge of feeling from popular or common-sense understandings. But the way that medical debates entered the legal arena was shaped by intellectual traditions as well as social dynamics. A discipline with early modern roots, legal medicine expanded rapidly throughout the long nineteenth century, applying modern medical theories and technologies to legal concerns. Scientific witnesses introduced legal-medical expertise directly to the court through expert testimony. But where-

1 ADAM (1908) 280.

2 Ibid.

3 FREVERT (2014) 245–255.

as the late eighteenth and early nineteenth centuries were a time of relative cooperation between the legal and medical professions in regard to courtroom adjudication, the nineteenth century brought increasing conflict between scientists and jurists, affecting not only the usage of medicine in legal debates about insanity, but its implications for legal theory as well.

Any attempt to address insanity between law and medicine must contend with a formidable interdisciplinary scholarly literature and an evidentiary corpus that includes legal and medical tracts, courtroom trials, and popular discourse, to which this brief article cannot do justice. But by focusing on emotions in legal-medical literature from the late eighteenth through the early twentieth centuries, this article aims to suggest some of the processes that shaped insanity as an emotional event. An examination of the theories and debates between physicians and jurists in legal medicine demonstrates how emotions could function as evidence in court. This article begins by introducing medical jurisprudence and highlighting relevant trends in nineteenth-century European criminal law. It then proposes three overlapping phases in the changing relationship between crime, insanity, and emotions. In the first phase (eighteenth through early nineteenth century), insanity is largely defined by the passions as either mania or melancholy. However, insanity was more a focus of civil law, and legal medicine discussed how the insane were to be punished or controlled. In the second phase (throughout the nineteenth century), the medical language used to describe emotions as signs of insanity was progressively distinguished from popular and legal descriptions, and new theories of insanity in which the will remained intact challenged courts to determine how emotions related to reason. At the same time, insanity moved from a focus of civil law to one of criminal law. While both legal and medical practitioners advocated for the rights and innocence of the insane, physicians were increasingly accused of meddling with legal processes. In the third phase (from the late nineteenth through the early twentieth century), debates about the place of emotions

in legal-medical discourse became more vociferous, leading to a sharper definition between legal and scientific systems of knowledge and often to the resounding defeat of psychiatric theories of insanity in court. Debates over emotional insanity demonstrate how emotions posed an existential challenge to legal theory, not only threatening to redefine criminal insanity but also criminal law's fundamental tenet: free will.

## 2 Medical Jurisprudence and Crime in the Long Nineteenth Century

Insanity is one subject that falls under the field alternately known as legal medicine, forensic medicine, or medical jurisprudence. While the specific meanings of these three terms have changed over time, they can generally be taken to be »the application of medical knowledge in the broadest sense to help solve legal problems and satisfy legal requirements«. <sup>4</sup> The persons who expanded the field of legal medicine and extended its usage in the courts were medical expert witnesses, figures of extensive scholarly interest. <sup>5</sup> The legal consultation of physicians can be traced back to the origins of law and medicine, <sup>6</sup> and since at least the medieval era, physicians have offered their expertise to lawyers on a range of issues that have included the cause of death, evidence of poisoning, issues related to reproduction and the family, witchcraft, etc. But throughout the nineteenth century, expert witnesses increasingly turned from the crime to the criminal. Interrogating who the accused were as opposed to what they had done, expert witnesses contributed, in Foucault's words, to the »history of the modern soul and of a new power to judge« and the »genealogy of the present scientific-legal complex from which the power to punish derives its bases, justifications and rules«. <sup>7</sup> As culpability became a matter of character, the courts began to arbitrate not only the guilt of the defendant but also the legitimacy of the new biological sciences, which offered a variety of new theories, methods, technologies, and explanations for criminal wrongdoing.

4 CLARK/CRAWFORD (1994b) 2.

5 FRECKELTON (1987); SMITH/WYNNE (1989); JONES (1994); ASH (2004); GOLAN (2004); ENGSTROM/HESS/THOMS (2005); RABIER (2007);

WATSON (2010); REDMAYNE (2001);

TURNER/BUTLER (2014); EIGEN (2016).

6 WECHT (2005) 245–246.

7 FOUCAULT (1975) 23.

Despite their substantially different legal systems, medical jurisprudence throughout both continental Europe and the Anglophone world turned its focus to insanity. On the continent, the discipline of legal medicine was forged between the seventeenth and eighteenth centuries. Judges routinely consulted experts, as defined by their experience with certain »practical endeavor[s]« and their »extensive track record« of having completed these endeavors successfully.<sup>8</sup> In contrast to the continent's traditional mixture of Roman and canon law, which more readily welcomed outside expertise in order to establish facts, the common-law tradition encouraged a more insular development of legal practices.<sup>9</sup> In Anglo-American courts, legal medicine developed in relation to the »Adversarial Revolution«, when defendants were allowed counsel in criminal trials in the early eighteenth century, enabling trial lawyers to »gain control over the production of evidence« and leading to the creation of the expert witness.<sup>10</sup> Unlike the medical practitioners consulted by judges, those who had to face cross-examination risked not only the defeat of their medical opinion but also the loss of reputation. At the same time, this format increased the acknowledgement and allure of expert competence.<sup>11</sup>

Within this more general trend in the growth of legal medicine and medical expertise in the courtroom, two more specific factors contributed to the emotionalization of legal insanity. First, the long nineteenth century witnessed the birth of medical psychology, or psychiatry, and with it »the creation of »the emotions« as a psychological category«.<sup>12</sup> Thomas Dixon has convincingly described how the various religious systems for describing human feelings were slowly replaced by emotions as a »single over-arching category« throughout the nineteenth century, a historical development that created the reason-emotion dualism that contemporary emotions researchers attempt to refute.<sup>13</sup> This article suggests that the law has been similarly affected by psychiatric theories of emotions. Scholars of law and emotions have pointed out that the law is everywhere »pervade[d]« by and »imbued«

with emotions, but that the law presents no systematic or coherent treatment of emotions.<sup>14</sup> Indeed, as Dan Kahan and Martha Nussbaum have argued, »it is virtually inconceivable that any consistent theory of what emotions are and why they mattered could have generated these results.«<sup>15</sup> But despite contemporary law's »well-known insularity and unwillingness to learn from other disciplines«, nineteenth-century jurists showed themselves ready and willing to learn from other fields of study, namely the medical sciences.<sup>16</sup> The emotionalization of legal insanity, therefore, does not imply the creation of emotional experiences or objects out of social or material constructs that had formerly been nonemotional; instead, it refers to the reframing of the characteristics and qualities of the human heart that had always been subject to the law in terms of »emotion«, a medical neologism that entered the courts via scientific expertise.<sup>17</sup>

Second, a series of famous trials forced the courts to clarify the meaning of insanity in the law and how it was to be adjudicated. Throughout the nineteenth century, criminal charges against persons who attempted to assassinate heads of state along with other notorious murder trials brought together the grave offenses of treason, regicide, or parricide with the insanity defense, creating tension between law's function of punishing crime and its responsibility to protect the innocent. The use of the insanity defense allowed jurists to advocate for the potentially insane (who were often politically motivated or whose actions broke strongly with social mores) based on feeling, and the notoriety of such criminals and the popular attention their trials attracted led to a spectacle that increased public awareness not only of such capital offenses but also of the mental disorders that caused them. Again, due to its legal traditions, the history of law and insanity in Britain is very well known. The trials of James Hadfield in 1800, of Daniel M'Naghten in 1843, and of the several attempted assassins of Queen Victoria led to substantive changes in the British legal code with respect to insanity.<sup>18</sup> The continent was not im-

8 ASH (2010) 6.

9 DE RENZI (2007) 316.

10 GOLAN (1999) 10.

11 DE RENZI (2007) 317; GOLAN (2007).

12 DIXON (2003) 1.

13 DIXON (2003) 2.

14 BANDES (2001) 1, 2. See also: KARSTEDT/LOADER/STRANG (2011);

MARONEY (2006).

15 KAHAN/NUSSBAUM (1996) 272.

See also FINKEL/PARROT (2017).

16 BANDES (1999) 7.

17 For one contemporary perspective, see BLIX/WETTERGREN (2015).

18 See, for example: WALKER (1968); SMITH (1981); EIGEN (1999).

mune to such criminal actions, but the trend of political murder was more clearly linked to political movements, such as anarchism, in the second half of the nineteenth century,<sup>19</sup> which triggered extensive discussions regarding mental health, criminality, and responsibility. In both contexts, these highly publicized trials not only demanded that legal experts turn their attention to the criminally insane, they also became fodder for public debate, both nationally and internationally.

These two factors – changes in the medical treatment of feelings as well as the adjudication of insanity in capital cases – led to closer scrutiny of emotions as symptoms of medical insanity as well as the deeper social meaning of emotions as evidence for legal insanity. And it was at this crossroads between the medical evidence for emotions and their social and legal meanings where many heated debates about insanity took place. While modern European nations varied widely in terms of their legal traditions, criminal codes, and courtroom procedures, they were also relatively comparable in their notions of insanity, free will, and legal responsibility. Furthermore, modern European medical science was a cosmopolitan endeavor, and while European nations had their own scientific schools and traditions, scientific theories and findings circulated widely and often quickly. In order to consider both continental and Anglo-American legal traditions, this article draws chiefly upon Anglophone and Italian legal medicine throughout the long nineteenth century.

### 3 Responsibility for the Insane: the Eighteenth and Early Nineteenth Centuries

Prior to the development of the modern medical sciences, insanity was described in terms of feeling by both physicians and laymen. »Furiously insane«, »aggravated by melancholic delirium«, »demented and hysterical«, and »furious maniac« were some of the descriptions used to characterize

the insane in eighteenth-century Italy, when physicians offered their medical expertise to the courts and families would also plead on behalf of their mentally ill relatives.<sup>20</sup> However, the connection between »the science of the body« and the »science of the soul« was not clear.<sup>21</sup> Medical experts did not have any particular authority, nor were they necessarily distinguishable from other court consultants, such as theologian-exorcists. Nevertheless, medical experts began to analyze the pathological manifestations that accompanied possessions, for example, in »organic terms«, and they recognized melancholy as »the most common cause of abnormal thought and behavior«. <sup>22</sup> In Italy, Paolo Zacchia (1584–1659) promoted the usage of medical knowledge in legal verdicts, including cases of mental incapacity, and his multi-volume tome *Quaestiones Medico-Legales* (1621–1651) was republished well into the eighteenth century.<sup>23</sup>

The passions and feelings of the insane, however, were not explicitly connected with criminal wrongdoing. Instead, they were a matter of civil law.<sup>24</sup> The insane could be deprived of property or prevented from entering into contracts, such as marriage, or from writing wills. Early nineteenth-century Italian legal medicine affirmed that civil incapacity could be ascertained when »manifest signs of undeniable insanity are rendered evident from the solemn ruin of the natural economy of the animal functions« in accordance with the varieties of insanity described by Zacchia.<sup>25</sup> Thomas Cooper explained that insanity was only a legal question when (1) a certificate of insanity could lead to a person's internment; (2) when the insane had to be »committed to the care of their friends, for the security of their persons and their property«, (3) when civil contracts were in dispute, or (4) when insanity served as a criminal defense.<sup>26</sup> The legal determination of insanity allowed the courts to take punitive measures against the insane, either through confinement, the confiscation of their estates, or corporal punishment,<sup>27</sup> justifying »the beating of a lunatic, in such a manner as the

19 See DE GRAAF/SCHMID (2015); JENSEN (2015).

20 ROSCIONI (2011) 270.

21 PASTORE (1998) 46.

22 MELLYN (2014) 10.

23 See PASTORE/ROSSI (2008).

24 See MALE (1818) 202–235; PARIS/MARTIN (1823) 289–303.

25 TORTOSA (1831) 71.

26 COOPER (1819b) 355–356.

27 FARR (1788) 66.

*circumstances may require*«. <sup>28</sup> With the aim of »preserv[ing] ... property from waste, for individuals and for families«, civil law's treatment of insanity did not necessarily favor violent over melancholic feelings. <sup>29</sup> Nevertheless, insanity was also used in criminal trials, sometimes to lessen the sentences of persons indicted of petty crimes, but also in more serious cases. As Joel Eigen has shown, feelings of hate and fear had already been used as evidence of insanity in courtroom adjudication in the British Isles. »Uncommon fury, jealousy, and groundless suspicions« were signs of lunacy in the 1760 testimony of Dr. John Monro, for example. <sup>30</sup>

Whereas medical descriptions of feelings functioned as evidence for insanity, the law distinguished insanity through reason. However, in many early modern descriptions, the lack of reason characterizing insanity was regarded as a transitory state. Whether a person was insane at the moment of a criminal act or the instance of a civil dispute had to be determined by the courts. Lunacy was distinguished from idiocy. An idiot was a »fool or madman from his nativity who [had] never had any lucid intervals«. »*Non compos mentis*«, he lacked basic mental capacities and therefore fell under the king's protection. Whether totally or partially insane, a lunatic was »*dementia accidentalis bel adventitia*«: while he may have had »intervals of reason«, »during his frenzy he is entitled to the same indulgence as to his acts, and stands in the same degree with one whose disorder is fixed and permanent«. <sup>31</sup> Reason would later be articulated as the knowledge of right and wrong. While a lunatic might have had some ability to reason, he was defined as such by a »defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing«. Whether a permanent or passing state, an insanity plea's success depended on whether the defendant had a »sufficient degree of reason to know that he was doing an act that was wrong«. <sup>32</sup>

In the medical-jurisprudence texts that appeared in the eighteenth century, lunacy was split into two categories as either mania or melancholy, which were characterized by physiological signs as well as feelings of anger and sadness, respectively. <sup>33</sup> Late eighteenth-century legal medicine directly adopted this division, describing the maniac's »peculiar irascibility of temper«, and the melancholic as »gloomy and superstitious«. <sup>34</sup> The first English-language text on legal medicine maintained the same division, echoing the descriptive language from the continent. Physician Samuel Farr (1741–1795) described the insane as »furious or melancholic; both of which indicate great imbecility of the mental faculties; and which are derived from hereditary constitutions, attention of mind, violent passions, the terrors of a false religion ...«. While the furiously insane were »naturally of angry and violent dispositions« affected by »pride, anger, hatred, and revenge, and very often intemperate lust«, melancholic persons were »abject, fearful, fond of solitude, prone to anger, changeable in their opinions and desires, but fixing their attention upon a single object«. <sup>35</sup> However, mania and melancholy were not distinct diagnoses; in fact, the two »often changed into one another, the one passes into the other«. <sup>36</sup> The language employed here was not one of emotions, which were »different motions and agitations of the soul, according to the different objects that present themselves to the senses«, but passions that functioned within the soul in relation to reason. <sup>37</sup> Passions triggered complex processes within the soul, which included the mind's judgement of an object or its effect on a person, »a new determination of the will towards that object«, the feeling that accompanied that new determination and was followed by physiological reactions, the »sensible emotion of the soul«, culminating in a »different sensation« determined by the »animal spirit« rather than the intellect. <sup>38</sup>

28 PERCIVAL (1803) 68. Medical Ethics was the expansion of a privately circulated book entitled *Medical Jurisprudence*, published in 1794.

29 BOWRING (1893) 632.

30 EIGEN (1994).

31 BACON (1807) 525, 526.

32 This phrase would be repeated time and again. See for example, BLACKSTONE/HARGRAVE/LANSING/WENDELL (1850) ix.

33 See BERRIOS/PORTER (1995); PIETIKÄINEN (2015); EGHIGIAN (2017).

34 DUNCAN (1792) 9–10; JOHNSTONE (1800) 4.

35 FARR (1788) 67, 68.

36 BERRIOS (1988) 298; CORNACCHINI (1758) 24.

37 REES (1819).

38 FARR (1788) 68. See DIXON (2003) 62–97.

#### 4 The Insane as not Responsible: the Mid-Nineteenth Century

After James Hadfield had attempted to assassinate King George III in 1800, defense lawyer Lord Thomas Erskine's successful use of the insanity plea triggered legal, medical, and public debate over the role of insanity in criminal law. Erskine's defense of the »unhappy« prisoner followed the letter of the law: Hadfield had suffered from a head wound when he was a soldier. Impelled by »morbid delusion«, he could not discern between good and evil.<sup>39</sup> Erskine also distinguished the treatment of insanity in civil cases (*non compos mentis* could deprive the lunatic of rights and liberties indiscriminately) and criminal cases (when the criminal act had to be the »immediate, unqualified offspring of the disease«<sup>40</sup>). Hadfield's trial was the first of many during the nineteenth century in which the charge of treason was countered with the insanity defense. Whereas the plea proved successful in England, triggering changes to legal code, it had less success on the continent, where it nevertheless prompted heated debate, particularly in the second half of the nineteenth century.

In the wake of the Hadfield trial, physicians explored the matter of insanity in terms of legal medicine for an »anxious« public.<sup>41</sup> In these texts, descriptions of feelings were symptoms of insanity. Physician John Johnstone (1768–1836) described insanity as a »morbid state of the brain and sensorial powers«. Even if delusion was a defining characteristic of legal insanity, »every human action, or affection, may be the source of the predominant idea of the maniac, or as it is usually termed, his Hallucination«. Love, ambition, jealousy, fear, revenge, and all the »malignant passions« could produce mania.<sup>42</sup> While every person suffering from mania had their own characteristics or obsessions, their insane tendencies were consistently instigated by the »violent and anxious passions of the heart ... as their roots lie deepest in the mind«. <sup>43</sup> Physician John Haslam (1764–1844), in contrast, affirmed that insanity was defined by a »radical perversion of intellect«. <sup>44</sup> Nevertheless, he

also used »violent mental emotion«, »beheld the phantasms with great emotion«, »furious paroxysms«, a »paroxysm of furious madness« to portray insanity.<sup>45</sup> However, the medical hypothesizing of legal madness was not necessarily welcome. After Johnstone published his treatise, lawyers objected to his claims that there was »no high treason against nature« and advised him to »keep, in future, within the precincts of his own profession, and not trespass on the province of the law«. <sup>46</sup>

After Haslam's landmark text on insanity in medical jurisprudence, practitioners increasingly articulated the differences between passions, affects, and emotions that contributed to insanity, which was part of a general trend in modern psychiatry.<sup>47</sup> Whereas Haslam distinguished between sanity, insanity, and idiocy, practitioners of legal medicine embraced modern psychiatric schemata for mental illness proposed by Philippe Pinel (1745–1826) and adopted Étienne Esquirol's (1772–1840) new diagnosis of monomania.<sup>48</sup> But while emotional symptoms became more clearly articulated in the cases of mania, monomania, and melancholy, their relative weight in determining insanity remained unclear. While some cautiously expressed the importance of emotions to insanity, stating that »Personal antipathies and fancied injury are constant subjects of limited insanity; but these ought not to excuse murder; for such a doctrine, by removing the restraints of fear, would constantly convert the passions of hatred and revenge, in themselves limited madness, into absolute insanity«, <sup>49</sup> others clearly denied that emotions could determine insanity: »Can the protection of insanity be allowed to a man who only exhibits violent passions, and malignant resentments, who is impelled by no morbid delusions, but who proceeds upon the ordinary perceptions of the mind? No«. <sup>50</sup>

Attempts to more clearly define mental illness and articulate its symptoms were part of a general movement within law and medicine to treat the insane more humanely. In 1774, Grand Duke of Tuscany Pietro Leopoldo was the first to introduce a law regulating the confinement of the insane to

39 RIDGWAY (1812) 26, 23.

40 RIDGWAY (1812) 11–15, 17. This trial led to the Criminal Lunatics Act of 1800 and the Treason Act of 1800.

41 JOHNSTONE (1800) i.

42 JOHNSTONE (1800) 1, 3.

43 JOHNSTONE (1800) 5.

44 HASLAM (1817) 50.

45 HASLAM (1817) 26, 27, 56, 58.

46 The Anti-Jacobin (1800) 430.

47 ARNOLD (1806) 59; UPHAM (1841)

468.

48 BECK/DUNLOP (1825) 226; CHITTY (1836) 345–367.

49 PARIS/MARTIN (1823) 138; TAYLOR (1853), 552.

50 WILLIAMS (1835) 180.



the control of the state,<sup>51</sup> and around the same time physicians in England who wrote certificates of insanity became required to physically see and examine the said insane person within two weeks of the certificate's signing.<sup>52</sup> Psychiatrists such as Pinel in France, Vincenzo Chiarugi (1759–1820) in Italy, and the Tuke family in England began to limit restraint mechanisms and the use of corporal discipline in insane asylums, instead promoting moral cures.<sup>53</sup> In turn, practitioners of legal medicine stressed the need to »protect« the insane as a matter of importance for »the restoration of the patient, and for the security of the public«. <sup>54</sup> Haslam argued that the main source of the mistreatment of the insane came from the fact that lawyers had no understanding of it. The »great legal authorities« had »no definition of madness«, nor had they »given any directions how to discover it«. <sup>55</sup> Instead, their ideas about mental illness were those »common with the mass of mankind«, who learned about madness from »romances, the literary food of the idle and thoughtless« and »unskilful performers ... prone to strain the loftier impressions of feeling, and distort the energies of passion, into mental derangement«. <sup>56</sup>

Despite their shared emphasis on the humane treatment of the insane, legal and medical debates diverged throughout the nineteenth century. Whereas insanity in legal cases were lost or won on the grounds of reason alone, medical jurisprudence increasingly discussed insanity in terms of passions and emotions. The legal grounds for insanity were reinforced in the trial of Daniel M'Naghten, who attempted to kill Sir Robert Peel in 1843. The trial verdict firmly established that »a defendant could be freed from responsibility for an act if it was proven that he or she could not distinguish right from wrong at the time of the alleged crime or misdemeanor«. <sup>57</sup> At the same time, physicians not only emphasized the role of feelings in mental illness, they tied strong passions to disease. Physician James Cowles Prichard (1786–1848) wrote that »vices, inordinate passions, and the want of mental discipline« increased insanity, and vulnerability to disease-causing passions

could be increased through »irregular mental excitement« and »perturbations, violent passions and agitations«, which were the »frequent precursors and causes for derangement«. It was the well-disciplined mind of »sedate and moderated state of feeling« that was protected from »violent emotion«. <sup>58</sup> New diagnoses, such as monomania, were heavily employed in legal medicine. When in a state of »violent fury«, the insane were subject to the »extraordinary power of controlling thoughts and emotions«, and the »controlling power of the will is lost«. <sup>59</sup> Not only could strong emotions override the will or render a person susceptible to delusions, they could define insanity itself. Insanity of the passions left a person's powers of perception and ideation intact. The »seat of the difficulty« was the passions alone. The victim of this mental disease did not stop to reason, reflect, and compare, but was borne forward to his purpose with a blind and often an irresistible impulse. <sup>60</sup>

##### 5 The Insane as Responsible: from the Late Nineteenth to the Early Twentieth Century

The end of the nineteenth century brought new legislation regarding insanity to both England and Italy. After several trials in which her attempted assassins had been pronounced not guilty by reason of insanity, Queen Victoria requested that the laws be changed. Passed in 1883, the Trial of Lunatics Act enabled those deemed mentally ill to still be found guilty for their criminal actions. <sup>61</sup> In Italy, new regulations were passed to establish norms for placing the accused in asylums for the criminally insane in 1889. <sup>62</sup> At the same time, a wave of political violence often associated with anarchism swept continental Europe and America. During the trials that followed, expert witnesses offered their opinions regarding the perpetrators' soundness of mind, often arguing that the defendants were insane or otherwise mentally impaired. <sup>63</sup> Furthermore, two successful assassinations of American presidents combined political insanity debates typical of the continent with Anglophone

51 TAGLIAVINI (1985) 177.

52 TAYLOR (1843) 18.

53 See CANOSA (1979); DOWBIGGIN (1991); SCULL (1993); BYNUM (1994); SHORTER (1997).

54 HASLAM (1817) iv–v.

55 HASLAM (1817) 8.

56 HASLAM (1817) 9–10.

57 MICALÉ/PORTER (1994) 443; O'REILLY-FLEMING (1992) 167–190.

58 PRICHARD (1837) 177.

59 SWAINE (1853) 553.

60 UPHAM (1841) 469.

61 LOUGHNAN (2012) 95.

62 SCARTABELLATI (2001) 147.

63 See ERICKSON (2008); ROZENBLATT (2017).

legal culture. When Charles Guiteau stood trial for assassinating James Garfield in 1881, his defense lawyers claimed that Guiteau was insane, which could have had many causes: »Epilepsy is a cause of insanity; gout may be; rheumatism may be; impure blood may be; excitement may be; strong emotion may be; love, hate, fear.«<sup>64</sup> Twenty years later, Leon Czolgosz's assassination of William McKinley revived debates about deviant politics and insanity.<sup>65</sup> But in most of these cases, lawyers and witnesses who claimed a defendant was insane were roundly defeated.

Tensions surrounding the legal treatment of insanity were also exacerbated by the increasing divergence between legal and medical knowledge. The spread of Darwinian evolutionism, the rise of modern social and medical sciences, as well as new theories of emotion (William James published *What is an Emotion?* in 1884) complicated the ways in which insanity could be identified, explained, treated, and punished. In Italy and abroad, Cesare Lombroso's school of criminal anthropology strongly influenced expert testimony in the courtroom as well as scientific discussion. In turn, the professional conflicts that Haslam first hinted at in the early 1800s became the subject of a contentious and open debate. Whereas physicians still confidently proclaimed that medicine was »truly ... the handmaid of justice« in the middle of the century,<sup>66</sup> treatises on legal medicine later cautioned experts that »perhaps the most trying position in which a physician ever finds himself placed before courts is in the cases of alleged insanity ... Law, Theology and Medicine are either at times pitted against each other, or not infrequently confronted by ancient superstitions, crude popular conceits and inherited prejudices.«<sup>67</sup>

While notorious criminal trials heightened the social meaning of legal insanity and modern medical theory offered new approaches to it, legal-medical debates centered on ethical or theoretical questions that connected individual feeling to society at large. A case in point is moral or emotional insanity. Diagnoses had been forged a century prior, moral and emotional insanity are

credited to Philippe Pinel, whose *manie sans délire* described a mental derangement in which the insane maintained their understanding and had no delusions, and James Cowles Prichard (1786–1848), who defined moral insanity as a »morbid perversion of the natural feelings, affections, inclinations, temper, habits, moral dispositions, and natural impulses, without any remarkable disorder or defect of the intellect or knowing and reasoning faculties, and particularly without any insane illusion or hallucination.«<sup>68</sup> In mid-nineteenth-century legal medicine, moral insanity was discussed with ambivalence. On the one hand, some practitioners maintained legal standards for insanity, arguing that, regardless of whether a defendant suffered from moral insanity, a »jury should be satisfied that the *mental faculties* have been *perverted*«. <sup>69</sup> On the other, some physicians defended the diagnosis, objecting that »as a test of responsibility, delusion is no better«; »it is not too much to insist, that facts established by men of undoubted competence and good faith, should be rejected for better reasons than the charge of »groundless theory«.<sup>70</sup> Furthermore, others lamented that jurists ignored the complexity of mental illness. No disease was »purely emotional« or intellectual. In fact, it was »impossible to conceive of an emotion without an act of the intelligence, – the two modes of cerebral action are not separable.«<sup>71</sup> Other legal-medical writers took a more pragmatic approach, instructing that what mattered was not the disease itself, but the motives to which it attested, for »if the unsoundness affects the moral feelings rather than the intellect, ... cases of supposed moral insanity, insure ... the motives which may have led to the commission of the act of which the party is accused.«<sup>72</sup>

Moral or emotional insanity posed a problem for both psychiatry and the law: it threatened to overturn the traditional ordering of mental faculties in which emotion came second to intellect,<sup>73</sup> and it undermined the legal tenets of free will and responsibility, demanding that jurists and scientists »rethink the sources and nature of evil behavior.«<sup>74</sup> The scientific contestation of free will was part of

64 ROSENBERG (1968) 125; see HAINES (1995).

65 See FEDERMAN (2010).

66 *The Distinction between Right and Wrong. A Test of Insanity* (1851) 69.

67 ORDRONAU (1869) 158.

68 See AUGSTEIN (1996) 312; RAFTER (2004); JONES (2016).

69 CHITTY (1836).

70 RAY (1838) 49, 50.

71 WHARTON/STILLÉ (1905) 579.

72 GUY (1844) 353.

73 DIXON (2003) 228.

74 See RAFTER (2008) 38; EIGEN (1999).

general trend in late nineteenth-century science: evolution, heredity, and degeneration theory offered biological explanations for human behaviors and human illness, which made the mind a biological and historical legacy of one's ancestors. This debate was particularly heated in Italy, where the organic and biological approach to mental illness was applied to moral insanity.<sup>75</sup> But if sick emotions were inherited and had the power to override volition, then what was free will? For scientists, the myth of free will undermined the law as a social institution altogether. The false assumption that humans were governed by intellect or that will (as opposed to reason) rendered the law impotent in redressing individual deviance and building a healthy society. Criminologist Enrico Ferri's (1856–1929) discussion of moral insanity and responsibility is a case in point:

... to talk of a moral *maniac*, and to want to fully retain free will! I believe that these theories, for which man would have to be an angel, are dictated by the fear of compromising social security, the boogeyman opposed to every innovation. But once adopted by criminal asylums, every reason for danger would cease and it would seem to me impossible to continue to follow the aforementioned doctrine.<sup>76</sup>

By preserving the doctrine of free will that had been scientifically disproved by research that included moral insanity, the law itself prevented the betterment of the nation.

By the end of the nineteenth century and beginning of the twentieth century, moral and emotional insanity were both seriously critiqued. Whereas »alienated affections« continued to be recognized as one of the »first symptoms of many mental illnesses«, moral and emotional insanity »that [had been] formerly used to designate insane states in which homicides were committed ... [were] no longer recognized either in law or medicine«.<sup>77</sup> The diseases suffered several defeats in the court. In America, where moral insanity was roundly rejected as a defense in the case of presidential assassinations, legal medicine began to

instruct against its use. Some described it as a »rare« condition, while others denied it existed altogether.<sup>78</sup> Others conceded that »the accused may be responsible even though some controlling mental disease was, in truth, the acting power within him; even though passion, which he had not through disease sufficient will power to control, prompted the act.«<sup>79</sup> However much a person's will was overwhelmed by »excitement, anger, jealousy or passion«, medical jurisprudence accepted that »*Emotional insanity is not an excuse for criminal responsibility*«.<sup>80</sup>

## 6 Conclusion: Current Perspectives

Insanity, mental health, and mental incapacity in criminal law have been and remain a subject of ongoing interdisciplinary debate, influenced as much by its practical applications as by its theoretical implications. The use of the insanity plea in high-profile criminal cases has led to controversial verdicts that bring into conflict common sense, juridical, and medical notions of insanity, and raises questions as to how mental incapacity diminishes responsibility.<sup>81</sup> Moreover, madness and insanity call into question some of the foundational assumptions and presumptions of criminal law regarding individual free will and responsibility as well as the social righting of a social wrong via traditional punishments, restorative justice, or therapeutic justice. If crime is above all a »*legal* concept« for which »society is the victim along with the »*real*« victim«,<sup>82</sup> then the performance of justice requires crime's double redress as both social deterrent and individual punishment. As an abnegation of responsibility, however, insanity and its bedfellows strain justice by granting mercy to the perpetrator without vindicating the sufferings of both the social and individual victims.

Insanity debates not only demonstrate the tensions between the various principles and purposes of criminal justice, they also highlight the psychological assumptions implicit in the law and, specifically, the ambiguous role of emotions in determining insanity and responsibility. Emotions as symp-

75 See MUSUMECI (2015) 67.

76 FERRI (1878) 495.

77 CLEVENGER/BOWLBY (1898) 96, 40.

78 REESE/LEFFMANN (1903) 328;

CHAPMAN (1904) 235–236.

79 WITTHAUS/BECKER (1909) 448.

80 BROTHERS (1914) 223. Italics in original.

81 See LOUGHAN (2012).

82 FRIEDMAN (1993) 3.

toms and even diagnoses of mental illness implicitly challenged the traditional hierarchy of mental faculties, implying that emotions could be just as powerful in determining human action as the will. This growing emphasis on emotions in medical psychiatry supported the scientific critique of the philosophical principle of free will. But free will – and with it responsibility – not only allowed for the judgment of individual guilt and, therefore, punishment, it was also a pillar for modern law, guarding against »barbarous and inhuman practices of earlier times whose removal counts among the most important advances in these institutions' development«. As John Deigh described it, the perpetrator is »responsible for evil« instead of »actuated by evil«, a perspective that supports »more just and humane policies concerning the prevention and punishment of crime«. Substantiating a person's free will to commit crime, however, requires the determination of motive (the personal reason for committing a crime) or intent (the volition to perform an act), and it also demands certain presumptions as to how the mind works and how its operations can be assessed in terms of time (premeditation or spontaneous action), number (singular or multiplicity of causes), consciousness (awareness of one's actions), and control (ability to hinder or force thoughts or actions). The effect of emotions (presuming they can be distinguished from rational thought to begin with) on such processes has no clear theorization, though they have maintained a place within the law. These psychological ambiguities have allowed various systems of knowledge to assist in the legal determination of individual psychological responsibility and have long included discussions of human feelings in ways that were not necessarily opposed to reason. An investigation into legal-medical theory demonstrates that, not only were feelings essential to understanding and evidencing insanity within the court, insanity became emotionalized throughout the nineteenth century, affecting courtroom debate and the perceptions of a broader public whether or not it could secure a verdict.

This article's aim of outlining some of the historical processes through which legal insanity

became criminal and emotional resonates with contemporary scholarship. While insanity never ceased to play a role in civil law,<sup>83</sup> contemporary legal and medical debates still focus largely on criminal law and the problem of punishing the guilty while defending the innocent.<sup>84</sup> Ongoing scholarship on legal insanity that explores the contradictions of criminal law's assumptions and aims fits into a historical trajectory that guides scholarly attention to certain theoretical topics – however justified – and away from others. This article hypothesizes that both the emotional characterization of the insane criminal as well as the divorce of psychological (emotional) insanity from legal (rational) insanity are the outcomes of this historical process. Furthermore, it suggests that the history of how criminal insanity became emotional may contribute to contemporary debates about what might be called law's »insanity paradox«. Continuing to identify legal contradictions while reinforcing disciplinary boundaries, these discussions risk becoming »at best a source of new and exotic examples of familiar ideas«,<sup>85</sup> or a reason for disciplinary retreat in which it becomes »important to emphasize that even when law rests on demonstrably wrong assumptions, it does not necessarily follow that the law must change«. Susan Bandes echoes this scholarly rift when she explains that »As a practical matter, legal standards – »insanity«, for example – must be crafted with an eye toward values like equal treatment, predictability and fairness, and these values sometimes conflict with the goal of case-by-case psychological accuracy. And as a normative matter, the question of what counts as a mental illness that makes an accused murderer less culpable (or excused from criminal liability entirely) is ultimately a legal question, not a psychological one.«<sup>86</sup>

Perhaps because of these professed discrepancies, insanity has played a lesser role in law-and-emotions scholarship.<sup>87</sup> Since the 1980s, this growing interdisciplinary movement of legal experts, anthropologists, sociologists, ethnologists, and scholars of literature and culture has established the place of emotions within the law. Often researching legal codes and courtroom practices, they argue that not only are emotions everywhere

83 See KERN (1986).

84 EWING (2008); NORRIE (2014); MORATTI (2016).

85 DEIGH (2008) 199.

86 BANDES (2016) 6.

87 An exception would be AHARONI/VINCENT (2016).

within the law, but also that emotions shape the law. A more accurate portrait of legal history, therefore, should feature emotions, and a more apt legal practice should recognize, theorize, and offer normative prescriptions in regards to emotions.<sup>88</sup> Recently, the advent of neurolaw has offered the courtroom a range of technologies that illuminate the brain and its processes while taking seriously the role of emotions in the mind's rational and non-rational processes.<sup>89</sup> Furthermore, scholars in the social sciences and humanities have

drawn upon neuroscientific explanations for emotions. Though the brain-centered model of feeling pervades much of law-and-emotions research, embracing this model comes with its own difficulties.<sup>90</sup> A brief exploration of emotions in legal medicine reminds contemporary researchers to critically consider how applying scientific theories of emotions to legal concerns partakes in a long tradition of interdisciplinary collaboration. ■

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88 BANDES (1999); NUSSBAUM (2004); MARONEY (2006).

89 See JONES/WAGNER/FAIGMAN/RAICHLER (2013) 730–736.

90 For a rigorous consideration of the way the neurosciences of emotion

have been used by other disciplines, see LEYS (2011) 434–472; BANDES/BLUMENTHAL (2012) 163–164.

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