

# THE DEFAULT LEGAL PERSON

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*This Article explores the conceptions of responsible agency that informed legal analysis in nineteenth-century America. Standing behind the “reasonable man” famously drawn by Oliver Wendell Holmes, Jr., there was a second figure, which I call the “default legal person,” who personified mental attributes an individual needed to possess—at a minimum—in order to be deemed a legally accountable agent. This default legal person, I argue, was first articulated in the post-Revolutionary period by jurists drawing on new “enlightened” forms of Protestantism, and particularly on the Scottish Common Sense philosophy in which they were schooled, in order to delineate the mental prerequisites of legal responsibility. The figure they constructed was, in essence, a creature of Common Sense, one divinely endowed with intellect, free will, and moral sense.*

*Turning to the law reports published over the course of the century, and focusing more particularly on the little-studied civil side of the docket, we find that judges tended to deploy the default legal person in the same fashion across cases and time. In any instance in which a plea of incapacity was made, this legal figure served to set the threshold of mental competence—to illustrate how much “mind” a person needed for a particular civil act or wrong to be attributed to him. Yet this is not to say that the threshold of capacity was set at the same level in every doctrinal field. To the contrary, judges altered the character of the default legal person as they transposed it from one field of law to the next, suggesting as they did that the specific mental attributes one needed to be a competent legal actor differed, depending upon the nature of the act involved—whether it was a will, contract, deed, or tort. Across all doctrinal fields, however, judges faced a similar and perplexing problem: How could they determine whether a given individual actually lacked the capacity to act with feeling, intelligence, prudence, or malice? Was it sufficient to show that the act itself was eccentric, or was it necessary to demonstrate that the party in question suffered from some sort of mental disease, as defined by medical men?*

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In contending with this problem over the course of the century, American judges took a variety of tacks, with more than a few lapsing into incoherence or simply evading the difficulties that litigants presented. However, upon closer scrutiny, it is possible to detect certain patterns to these rulings, and to see judges working to refine their characterizations of the default legal person, in part by varying the standard of mental capacity from one field of private law to the next. As they deployed this legal model in everyday adjudication, I argue, their judicial opinions helped to constitute a conception of responsible agency that was serviceable in the courtroom and beyond. Thus, I conclude that the default legal person may best be seen as a pragmatic means by which judges endeavored to monitor the borderlands of legal competency as they struggled to reconcile competing commitments to natural justice, market efficiency, and social welfare. In deciding cases by reference to this mental threshold, judges in this era demarcated the limits of rationality and responsibility in ways that were culturally contingent, politically consequential, and eminently contestable, ultimately reflecting basic ambiguities and tensions in the liberal legal construction of the moral agent.

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## INTRODUCTION

"Fools and Madmen are tacitly excepted out of all Laws whatsoever."<sup>1</sup>

"In a proper sense," Oliver Wendell Holmes wrote in 1894, "the state of a man's consciousness always is material to his liability."<sup>2</sup> This might have sounded a discordant note, coming as it did from the author of

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1. 15 CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 138 (Aldershot, W. Lee et al. 1742).

2. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 5 (1894).

*The Common Law*,<sup>3</sup> an 1881 work that famously chronicled (and generally lauded) the evolution of Anglo-American law from subjective to objective standards of liability. Indeed, the man of “ordinary intelligence and reasonable prudence”<sup>4</sup> was the hero of Holmes’s story, signifying the movement of American legal culture from “barbarism to civilization.”<sup>5</sup> In the courtrooms of his day, Holmes observed with approval, judges did not presume to be able to “see men as God sees them.”<sup>6</sup> Recognizing the limits of their own minds, they determined civil and criminal liability by reference to what was blameworthy in the “average man,”<sup>7</sup> without attempting to adjust for differences in individual ability or otherwise attending to the “infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men.”<sup>8</sup>

And yet, even the Holmes of 1881 would admit that there were certain exceptions to this rule, epitomized by the blind man, the infant, and the madman.<sup>9</sup> The first was “not required to see at his peril,”<sup>10</sup> nor was the second obliged to exercise the discretion of an adult—he could only be expected to “get as near as he can to the best conduct possible for him.”<sup>11</sup> When it came to the subject of madness, however, the jurist equivocated, finding it difficult to state any general rule, because many insane persons remained “perfectly capable”<sup>12</sup> of exercising ordinary prudence in their daily affairs. He nonetheless seemed to contemplate the existence of a threshold of mental ability, implying that those who fell below it were not legally bound to act the part of the reasonable man.<sup>13</sup> But there the matter

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3. O.W. HOLMES, JR., *THE COMMON LAW* (Boston, Little, Brown & Co. 1881).

4. *Id.* at 51.

5. *Id.* at 5.

6. *Id.* at 108.

7. *Id.* at 51.

8. *Id.* at 108.

9. *Id.* at 109.

10. *Id.*

11. *Id.* at 50.

12. *Id.* at 109.

13. *Id.* at 61 (“The law is made to govern men through their motives, and it must, therefore, take their mental constitution into account.”). In several places, Holmes suggests that the visibility of the mental defect is an important factor in determining the existence or the extent of liability. See *id.* at 109 (“When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them.”); *id.* at 110 (“[T]he law presumes or requires a man to possess ordinary capacity to avoid harming his neighbors, unless a clear and manifest incapacity be shown . . .”).

was left in *The Common Law*, which remained centrally concerned with the actions rather than the attributes of its central character.<sup>14</sup>

In the everyday legal culture lying just outside the jurist's imagination, however, these exceptional persons were not so marginal. For even as Holmes wrote, American courtrooms were regularly confronted with capacity litigation. It is worth recalling that 1881 was the year of the sensational insanity trial of the assassin Charles Guiteau—an event that divided legal, scientific, and public opinion regarding the basis of criminal responsibility.<sup>15</sup> But no less remarkable were the capacity suits initiated by civil litigants. These litigants were, in fact, often all too eager to assert their own incompetence in order to escape tort liability and contractual obligation. A still greater proportion brought incapacity claims with respect to others—typically grantors and testators, who had made eccentric dispositions of their wealth (at least from the perspective of the heirs-at-law). The proceedings that ensued often rivaled criminal insanity trials in their length and notoriety, generating voluminous transcripts and commanding front-page coverage, particularly when a large estate was involved. Moreover, even in the common civil cases, each side entered the courtroom flanked by medical men and an army of lay witnesses, who offered diametrically opposed portraits of the alleged incompetent. Such courtroom displays illustrated how easy it was to disagree about what constituted an accountable agent, and how difficult it was to identify any objective, unambiguous signs differentiating the mentally sound from the unsound.

This Article reverses the emphasis of *The Common Law* and trains attention on those who were said to fall below the threshold of legal competency. Standing behind Holmes's reasonable man, there was a second figure, which I call the "default legal person," who personified mental attributes an individual needed to possess—at a minimum—in order to be deemed a legally accountable agent. This default legal person, I argue, was first articulated in the post-Revolutionary period, when jurists were consumed with the project of developing a distinctly American jurisprudence—one in which legal capacity was to be determined primarily by mental competency rather than social rank, as had been the case under the traditional English law of persons. As they undertook these reforms,

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14. Beyond the three categorical exceptions noted above, *The Common Law* also acknowledged two circumstances in which a person's acts might not be regarded as his own: A servant was sometimes regarded as the instrument of his master, and an epileptic's "unconscious spasm" was likened to a bolt of lightning. *Id.* at 95.

15. See generally CHARLES E. ROSENBERG, *THE TRIAL OF THE ASSASSIN GUITEAU* (1968).

early republican jurists generally reflected the optimistic temper of the times, with some expressing remarkable confidence in the intellectual and moral capacities of “man, as an individual.”<sup>16</sup> Their conceptions of human nature were shaped by the “enlightened” forms of Protestantism that had come to predominate by the turn of the nineteenth century; these forms affirmed the innate goodness of man and the freedom of his will.<sup>17</sup> Jurists of the period were particularly drawn to the liberal Enlightenment philosophers within the Scottish Common Sense tradition who codified much of this optimism about the human condition in their treatises and tracts on the so-called “laws of the mind.” With these philosophical works as background, American jurists proceeded to delineate the mental prerequisites of legal responsibility, in the form of the default legal person. The figure they constructed was, in line with the teachings of Common Sense, endowed with the intellectual, moral, and volitional power to understand and conform his actions to the laws of God and man.

The jurists’ model of the accountable agent thus posited a certain relationship between mental capacity and legal responsibility. But they devoted little attention to variations in intellectual and moral ability, leaving it unclear whether such individual differences had any bearing on matters of liability. Was it fair to presume that all those who deviated from divine and human laws did so by choice? Or was there reason to think that irrational and immoral behavior were signs of mental incapacity? These questions would be more squarely addressed by a pioneering class of medical men, who specialized in the diagnosis and treatment of “mental alienation.” In and through their clinical work, these “alienists” became convinced that mental disease lay behind many forms of deviant behavior, conventionally ascribed to sin or mere eccentricity. They published their findings in works of medical jurisprudence, which were primarily intended to convince an audience of legislators and lawyers of the need to reform the traditional common law definitions and doctrines pertaining to persons *non compos mentis*. Most imperatively, the alienists called for an expansion of the legal definition of insanity to include circumscribed disorders called “monomanias,” which related to a single idea or faculty of the mind.

By the middle decades of nineteenth century, the new medical psychology had made significant inroads into American legal culture.

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16. See, e.g., James Wilson, *Of Man, as an Individual*, reprinted in 1 THE WORKS OF JAMES WILSON 197 (Robert Green McCloskey ed., Harvard Univ. Press 1967) (1804).

17. See generally E. BROOKS HOLIFIELD, *THEOLOGY IN AMERICA: CHRISTIAN THOUGHT FROM THE AGE OF THE PURITANS TO THE CIVIL WAR* 159–394 (2003); MARK A. NOLL, *AMERICA’S GOD: FROM JONATHAN EDWARDS TO ABRAHAM LINCOLN* 93–113 (2002).

In civil as well as criminal cases, lawyers regularly invoked the authority of medical jurists and also began to call alienists to the stand as expert witnesses. However, it was left to members of the bench to determine the relevance of this body of scientific learning; it was theirs to decide whether any revision of the default legal person was warranted in light of this medical testimony about diseases of the mind. Turning to the law reports published over the course of the century, we will see that judges were indeed prompted to alter their characterizations of the accountable agent, although the changes they elected to make were not always in conformity with the doctors' prescriptions. Even as they recognized the existence of monomania as a potential excuse from liability, judges did not simply defer to the judgments of medical experts. Given the doctors' proclivity to disagree in individual cases, this was often not an option, and from the perspective of the bench, more was at stake than scientific accuracy in any event. For judges were ever mindful of the distributional consequences of differing formulations of the standard of legal competence, and of the ways in which their rulings operated to delimit the "parental" authority of the state. To establish and maintain a threshold of capacity, they realized, was to assume a regulatory role over all manner of commercial and domestic relations. In such a position, they would be required to determine who was to bear the burdens associated with mental disability.

With this complex of scientific, practical, and political considerations in view, judges offered their own renderings of the default legal person, which varied to some degree with doctrinal context. In effecting these transpositions, they suggested that the mental attributes one needed to be a competent legal actor depended upon the nature of the act involved—whether it was a will, contract, or tort. So, in the law of wills it was deemed to be essential that the default legal person had the cognitive and emotional capacity to remember and feel the family ties that bound him as he disposed of his estate, while in the law of contracts it was more important that he possessed the ability to make intelligent judgments on the basis of his own self-interest. Within the law of torts, however, he would assume several distinct forms. In some instances, he had to be able to form a malicious intent, but in others, he needed only to be capable of exercising prudence and foresight; in still others it was enough if he had the capacity to harm. Yet wherever he stood in nineteenth-century American common law, the default legal person embodied a mental threshold, serving to illustrate the preconditions of responsibility, so far as the law was concerned.

Though this legal figure will remain at the center of this Article, it will be helpful to keep in view several ways in which he differed from the reasonable man that Holmes valorized in the last decades of the nineteenth century. While both figures constituted legal norms, they were operationalized by judges in distinct and yet interrelated ways in everyday adjudication. Four points of distinction are worth highlighting.

First, the default legal person was not primarily intended to regulate conduct, as was the reasonable man. Instead, he stood at the borderlands of legal capacity, identifying those who were rightly excepted from the rules of law that were applicable to everyone else. Second, judges tended to treat deviations from each of these two norms in nearly opposite ways. The failure to behave like the reasonable man usually supplied grounds for imposing liability, while the inability to function like the default legal person tended to result in a suspension of liability. Still, there was a division of labor between these two norms, which points toward the third distinction to be drawn. The default legal person worked primarily at the descriptive level, defining the preconditions of liability. In doing so, he effectively delimited the universe of capable individuals who could be made subject to the prescriptive authority of the reasonable man. The rules that were formulated and applied by the reasonable man were derived by thinking from the objective standpoint he provided—by contemplating what this man of ordinary intelligence and prudence would have done had he been in the situation of the actor whose liability was in question. Herein lies the final and most subtle sense in which the reasonable man differed from the default legal person, for this latter character had no particular point of view of his own. He was, in the end, but a bare-bones sketch of almost anyone, which enabled him to move in a chameleon-like fashion from case to case, assuming the perspective and personal characteristics of the party whose competence was in question. In other words, the default legal person provided a heuristic device that courts could use to determine whether an alleged incompetent was in his own right mind when he performed the act at issue.

Given their contrasting roles, it becomes easier to see why the reasonable man has attracted so much attention, leaving his less remarkable co-worker to labor in relative obscurity. By design, the default legal person remained at the margins of the common law, defining an “anthropological minimum”<sup>18</sup> rather than constituting a positive norm

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18. Here, I borrow a phrase from Uday Mehta's insightful work on the liberal subject. Uday S. Mehta, *Liberal Strategies of Exclusion*, 18 POL. & SOC'Y 427, 431 (1990).

of conduct. His role was minimized by nineteenth-century judges, who formally presumed capacity as an initial matter, taking for granted that most individuals were at least as competent as the default legal person, unless and until evidence to the contrary was presented. Nonetheless, litigants retained the prerogative to enter pleas of incapacity in most fields of private law throughout the century, and a substantial number of Americans appeared prepared to do just that, trying the patience of the judges who had to preside over the protracted legal spectacles that so often ensued. Their attempts to resolve these disputes raised profound problems at the time, and leave intriguing puzzles for scholars now. For it was one thing to articulate a threshold of capacity, and yet quite another to decide what counted as proof that someone had fallen below it. How did nineteenth-century judges determine whether a given individual actually lacked the requisite capacity to act with feeling, intelligence, prudence, or malice? Was it sufficient to show that the act itself was eccentric—that it departed from conventional norms of rationality and morality? Or was it necessary to demonstrate that the party in question suffered from some sort of mental disease, as defined by medical men? And how were courts to determine whether or when a mental disease was to be deemed legally disabling?

In the face of such thorny evidentiary issues, judges may have been tempted to dispense with the issue of capacity altogether, conclusively presuming it as a matter of law. But however attractive, this was not the approach taken in nineteenth-century American courtrooms. Time and again, litigants were permitted to plead incapacity, and both parties to these disputes were allowed to introduce reams of lay and expert testimony to establish their respective claims. Even as judges groused about the “voluminous” transcripts thus generated, liberal rules of admissibility remained in place in most jurisdictions. Witnesses were allowed to testify at great length about the acts and conduct of the party in question, contributing evidence from all periods of his “mental history,”<sup>19</sup> so that many trials devolved into exercises of “competitive biography.”<sup>20</sup> Often dragging on for months or even years at a time, these courtroom performances were unsettling affairs, conjuring up vivid images of mental dysfunction and degeneration—of deluded minds, overborne wills, and moral insensibility. It is, of course, quite likely that these mental maladies

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19. 1 S.V. CLEVENGER, *MEDICAL JURISPRUDENCE OF INSANITY OF FORENSIC PSYCHIATRY* 523 (Rochester, Lawyer's Co-Operative Publ'g Co. 1898).

20. ROSENBERG, *supra* note 15, at 67.



were strategically exaggerated by at least some trial participants. But this only complicated the problem before the court: that of determining how far disparities in mental ability were to be redressed by means of judicial intervention—by setting aside a will, contract, or deed, or by releasing an individual from liability for his harmful act.

To place the mind “in issue,” then, was to call upon members of the bench to pass judgment on a wide variety of domestic and commercial transactions and altercations. American judges would assume this position with a certain degree of ambivalence, amply registered in the decisional law. At the outset of their opinions, this Article shows, judges were inclined to speak in rather forbidding language, declaring that the law did not undertake to measure the minds of men. But such statements were immediately qualified so as to apply only to those who were *compos mentis*, a term of art that took on new significance as judges absorbed the alienists’ teachings about mental diseases, particularly those that took the partial (and often recondite) form of monomanias. Moreover, judges continued to admit the possibility that mental aberrations and impairments falling outside the legal definition of insanity might also have a bearing on matters of civil liability, if and when they were shown to render a party susceptible to undue influence, fraud, or duress.

The boundaries of these timeworn legal concepts were subject to renegotiation over the course of the nineteenth century, as judges endeavored to distinguish them from the modes of persuasion and sharp dealing that might be deemed legitimate in the home or marketplace. Accordingly, and despite all protestations to the contrary, judges committed themselves to making the kinds of measurements of mental strength and ability that they had seemingly sworn off.<sup>21</sup> On such occasions, the default legal person was pressed into service to assist judges in deciding whether the alleged incompetent possessed sufficient “mind” to be held legally accountable for the act in question.

As will be seen on the pages that follow, judicial assessments of competency were often made with a sense of unease. It was, after all, impossible to “dive into the mind of another,”<sup>22</sup> and so courts were forced to rely, by and large, on behavioral signs, which were susceptible to multiple, sometimes contradictory, readings. Quite apart from this basic uncertainty,

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21. This might be said to be reminiscent of the sort of “acoustic separation” Meir Dan-Cohen finds in the context of criminal law. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

22. FORBES WINSLOW, *LETTSOMIAN LECTURES ON INSANITY* 92 (London, John Churchill 1854) (emphasis omitted) (quoting Lord Denham).

the judges' discomfort was compounded as they contemplated the broader implications of a decision in either direction. To enter a judgment of incapacity, they feared, might well set a dangerous precedent, opening the door to baseless lawsuits, threatening the stability of economic transactions, and forcing individuals to conform to conventional behavioral norms. The slippery slope these judges nervously imagined terminated with half the nation consigned to "straight waistcoats." And yet, to dismiss the plea was often just as uncomfortable a decision. For judges were often quite moved by the equities of the case and clearly invested in an underlying vision of what it was to be a "rational and moral civil agent,"<sup>23</sup> which could be quite difficult to square with the evidentiary record. In observing the judges' tendency to vacillate between these two positions, it becomes clear that their opinions concerned more than the discrete issue of legal capacity—implicating broader questions about the nature of personal identity, the bounds of individual freedom, and the very basis of moral desert.

In focusing attention on these vexing trials, this Article seeks to complicate conventional stories about the path of the law and the rise of the reasonable person in nineteenth-century America. It calls for reconsideration not only of Holmes's account, but also of the versions told by subsequent generations of legal scholars and historians, who have largely sustained his developmental thesis. Indeed, it is fair to say that the standard narrative—from Roscoe Pound, to James Willard Hurst, to Morton Horwitz—conceives of the post-Revolutionary American legal system as partaking of the general liberalizing movement from status to contract. This narrative chronicles the rise and fall of a subjective, "metaphysical theory of justice" over the course of the nineteenth century, as judges strove to base all rights and duties on the freely willed choices of individuals.<sup>24</sup> This storyline has been largely cast in functionalist terms, with great emphasis placed upon the instrumental role of this "will theory" of law in facilitating the "release of creative human energy," primarily in the interests of economic development.<sup>25</sup>

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23. *Thompson v. Farr*, 28 S.C.L. 88, 100, 1 Spears 93, 106 (1842).

24. Roscoe Pound, *The Role of the Will in Law*, 68 HARV. L. REV. 1, 7 (1954).

25. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 5 (1956); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 180–88 (1977) [hereinafter HORWITZ, *TRANSFORMATION I*]; see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 11 (1992) [hereinafter HORWITZ, *TRANSFORMATION II*]; HURST, *supra*, at 22; WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 157–60 (1975); Pound, *supra*

At the center of this story of legal transformation are a cadre of formalist judges and jurists, who are credited with cleanly demarcating the separate spheres of public and private law, cordoning off a “noncoercive” private law of tort, contract, property, and commercial law from a “coercive” law, comprised primarily of criminal and regulatory statutes.<sup>26</sup> Their motivations for undertaking this massive project are chiefly understood to have been socioeconomic in nature. Apprehensions about the “dangers of state interference and redistribution”<sup>27</sup> led these judges to deploy increasingly abstract, objective concepts of “will,” “intent,” and “fault,” appealing to the “average,” “ordinary,” or “reasonable person” rather than the actual consciousness of any particular individual. In Horwitz’s account, the internal flaws of this legal edifice gradually became apparent in the turbulent economic and social environment of the 1890s, though he finds that it was only in the twentieth century that Progressive and Realist thinkers fully exposed the “will theory” as a legal fiction, and finally came to see the reasonable person for what he was: an objective cover for public policy judgments that were essentially coercive in character.<sup>28</sup>

To be sure, this dominant narrative has not remained critically unscathed over the years. Recent scholarship in the field of cultural history has challenged the instrumentalist paradigm in several key respects. As a methodological matter, a number of revisionists have maintained that legal change cannot be viewed as a simple reflection of the material and political interests of a capitalist class. Moreover, they have gone on to introduce other (noneconomic) explanatory variables—such as race, religion, and gender—into legal historiography. In pursuing these new lines of inquiry, such scholars tend to regard the law itself as a historical factor, not only mirroring social reality, but also helping to constitute it. Their works seek to illuminate the dynamic between law and culture, and to illustrate the ways that personal identities and social meanings are shaped and reshaped through legal processes. This cultural turn in legal history has generated new insights at the substantive level as well, provoking reassessment of the nature and extent of the “transformation of American

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note 24. But see James Gordley, *Contract, Property, and the Will—The Civil Law and Common Law Tradition*, in *THE STATE AND FREEDOM OF CONTRACT* 66, 77 (Harry N. Scheiber ed., 1998) (disputing the claim that “will theories arose to remove obstacles to social or economic change presented by the law in force”).

26. HORWITZ, *TRANSFORMATION* II, *supra* note 25, at 10–11.

27. *Id.* at 11.

28. *Id.* at 47–50.

law” over the course of the nineteenth century. Recent studies underscore the incomplete movement from “status to contract” in this period, documenting the persistence of traditional hierarchies by showing, for example, how the subordination of blacks, women, and wage laborers was both rationalized and contested within a liberal world view.<sup>29</sup>

The conventional story has been further qualified by several historians of English law, who have traced the rise and fall of the “will theory” of law to deeper cultural anxieties about human “will power.” They remind us that Victorian policymakers and judges harbored “deep-seated apprehensions about the maintenance of public order once individuals were freed from tradition, community, and social hierarchy.”<sup>30</sup> Moreover, they go on to show how legal rules were crafted to educate and discipline rather than merely effectuate individual will.<sup>31</sup> Yet, they observe that this character-building enterprise was gradually abandoned in the last decades of the century, as “[s]cientific and social change” undermined faith in human rationality, autonomy, and efficacy, generating a “diminished image of the ordinary man and woman.”<sup>32</sup> Historians of Progressive America have shown that these were transatlantic trends, as judges and lawyers in both countries to reformulate standards of civil and criminal liability to take greater account of individual debilities and differences, particularly those based on gender, race, age, and ethnicity.<sup>33</sup> Thus, the revisionists’ “reasonable man” appears as a complex symbol of legal modernization—not only

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29. For a representative sampling of some of the most recent work, see generally HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* (2000); WALTER JOHNSON, *SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET* (1999); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998); CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* (1993); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *YALE L.J.* 109 (1998); Arthur F. McEvoy, *The Triangle Shirtwaist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Common-Sense Causality*, 20 *LAW & SOC. INQUIRY* 621 (1995); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 *YALE L.J.* 1073 (1994).

30. JOEL PETER EIGEN, *WITNESSING INSANITY: MADNESS AND MAD-DOCTORS IN THE ENGLISH COURT* 79 (1995).

31. See MARTIN J. WIENER, *RECONSTRUCTING THE CRIMINAL: CULTURE, LAW, AND POLICY IN ENGLAND, 1830-1914*, at 46-91 (1990). See generally Martin J. Wiener, *Market Culture, Reckless Passion, and the Victorian Reconstruction of Punishment*, in *THE CULTURE OF THE MARKET* 136 (Thomas L. Haskell & Richard F. Teichgraeber III eds., 1996).

32. WIENER, *supra* note 31, at 159, 173.

33. See, e.g., BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920* (2001); MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003).

registering the expansion of market capitalism and state power, but also serving as a barometer of (declining) legal expectations of human nature.

Although these critiques have cast serious doubt on the “master narrative,”<sup>34</sup> a new one has not emerged in its place. In fact, revisionists have tended to resist monolithic causal sequences and to avoid the language of hegemony, emphasizing the contingency of “lived experience”<sup>35</sup> to such a degree as to make it difficult to draw any generalizations about nineteenth-century law, except, perhaps, that it was in a state of “complete confusion.”<sup>36</sup> In keeping with the revisionists’ commitment to examining the continual and reciprocal dialogue between law and other areas of social practice, this Article views the adjudication of civil capacity and liability in this period as a complex cultural process, with each trial providing a new occasion for judges, lawyers, litigants, and witnesses to renegotiate the basic constitution of the accountable agent. While capacity contests ostensibly concerned a discrete legal matter—the validity of a will or a contract, or the alleged commission of a tort—the parties presented courts with more fundamental issues of causal attribution as well, going to the very essence of personhood. They sought a legal determination of whether a given act—a testament, a promise, or some sort of harm—was attributable to a particular individual or to external forces beyond his control. In every contest, then, nineteenth-century American courts were confronted with the unenviable task of “allocating causation between the self and the circumstances that impinge upon it.”<sup>37</sup>

At the same time, however, I find more order and coherence in “the everyday life of the law”<sup>38</sup> than many cultural historians have allowed. Focusing on the phenomenon of capacity litigation in this period, I argue that it is possible to tell a story (but emphatically not *the* story) of legal development across the nineteenth century. In this account, the courtroom figures as an important cultural arena in which Americans contested social meanings of freedom, rationality, and sanity, all the while airing insecurities about the boundaries of the self. But I emphasize that it was also a space where final judgments were ultimately rendered, so that there was a form of closure in each individual case. The opinions

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34. Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 682 (2001).

35. *Id.* at 649.

36. Walter Johnson, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery*, 22 LAW & SOC. INQUIRY 405, 430 (1997) (review of scholarship).

37. Thomas L. Haskell, *Persons as Uncaused Causes: John Stuart Mill, the Spirit of Capitalism, and the “Invention” of Formalism*, in THE CULTURE OF THE MARKET, *supra* note 31, at 441, 444.

38. Johnson, *supra* note 36, at 419.

issued over the course of this period record the efforts of common law judges to develop practical mechanisms for resolving the capacity disputes that came before them, if not the deeper epistemological and metaphysical problems they presented.

The story this Article tells is thus about the constructive role that judges attempted to play in nineteenth-century American society, helping their countrymen make sense of the liberty they had wrested from the English crown. It regards civil capacity contests as important cultural sites where meanings of freedom and self-government were tested and retested over time. To demonstrate the significance of these suits, this Article proceeds in four parts. Part I traces the emergence of the default legal person from the remains of the traditional English law of persons. This legal model of the self reflected the influence of liberal Enlightenment philosophy on early republican jurists. Part II then illustrates the challenge posed by antebellum alienists in their pointed critiques of the “jurisprudence of insanity,” which operated to blur the line between depravity and disease. This ambiguity provided an opening for litigants and their lawyers, who pushed the boundaries of legal insanity in midcentury courtrooms. Part III chronicles the efforts of judges to manage the unwieldy trials that ensued through the elaboration of rules of procedure and evidence that were more or less transsubstantive. The strengths and limitations of these rules are revealed in Part IV, which reconstructs a series of illustrative cases, selectively drawn from the main fields of private law in which the issue of capacity was litigated.<sup>39</sup>

This doctrinal survey begins with guardianship and commitment cases, which are used to show how the jurisdiction of the courts expanded along

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39. A few words are in order here about the process by which cases were selected. In each of the areas of doctrine treated, I first consulted the main American treatises and law journals published over the course of the century, which identified the “leading cases” of the day and surveyed the majority and minority rules on key doctrinal issues. Of course, not all commentators identified the same decisions, nor were their interpretations of them uniform. Nevertheless, the cases found in the text and notes of these works provided a starting point from which I worked to collect others. Using various search mechanisms on Westlaw and LexisNexis, I traced the influence of the cases most often cited in treatises and also performed a number of keyword searches to capture significant decisions within individual jurisdictions that had not received the attention of jurists. In total, this study is based upon over five hundred published opinions, the bulk of which were rendered by state appellate courts. This approach has enabled me to chart the main lines of doctrinal analysis across jurisdictions, though I should emphasize that I use the term “illustrative” advisedly in speaking of the cases that will be featured in the pages that follow. While some of these cases were indeed representative of wider judicial tendencies (which will be indicated where true), most have been selected because they provide the clearest renderings of the various challenges American judges encountered as they worked to resolve capacity contests across doctrinal fields and over time.

with the legal definition of persons *non compos mentis*. Although these cases established a certain baseline of civil capacity, identifying those who were generally incapable of governing themselves and their affairs, a judicial finding to this effect did not fix an individual's civil status for all intents and purposes. Persons under guardianship were not necessarily debarred from making wills, and confinement in an asylum was rarely considered a sufficient reason, in and of itself, for restraining the inmates' freedom to dispose of their property as they willed. Cases concerning discrete civil acts—wills, contracts, and deeds—are then considered as a group, as their structural similarities bring into sharper relief the extent to which the threshold of competence varied with the type of instrument involved. What emerges most clearly from this analysis is that judges tended to apply a more demanding standard of capacity to marketplace transactions than those that took place within the family circle, generally holding that more “mind” was needed to make a valid contract than a will. However, judges were hesitant to set aside contractual arrangements in which the sane party proceeded in good faith, ignorant of the insanity of the other party. This dilemma of “two innocents” was more starkly presented within the field of tort law, which constitutes a sort of limiting case. For it was, in fact, an open question to the end of the century whether mental incapacity even constituted a defense to tort liability. In most jurisdictions, the claim of incapacity was admitted in cases involving intentional torts, but there was considerably more ambiguity in the context of negligence suits, though at least a few judges proved willing to make allowances for those who appeared to be constitutionally incapable of exercising “ordinary” prudence or foresight.

So the default legal person remained standing at the borderlands of capacity as the century drew to a close, marking an important mental threshold in private law adjudication—one that courts continued to observe even in the supposed heyday of “objectivism.” To be sure, the default legal person was a shifty character, fading into the background of many judicial opinions and appearing in different guises as he moved across doctrinal fields. The outlines of this figure also seemed to change over time, reflecting the influence of scientific developments beyond the courtroom, particularly in the emergent disciplines of psychiatry, psychology, and neurology. But all the while, and arguably to the present day, the default legal person has served the same basic function: establishing the relationship between mental capacity and legal responsibility in any given case. In and through this figure, American judges have expressed their

abiding concern with comprehending subjective and objective points of view within a single standard. Indeed, it would seem that long before Holmes changed his mind on the matter, other members of the bench had already come to see that it was neither desirable or possible to “think away consciousness.”<sup>40</sup>

## I. THE AMERICAN LAW OF PERSONS

The American colonists who took up the “cause of liberty” arrayed themselves against the “unnatural and absurd” hierarchies of traditional English society, averring that the “slavish subordinations”<sup>41</sup> of the common law were wholly “inconsistent with the constitution of human nature.”<sup>42</sup> In the heat of the controversy, John Adams categorically stated that “[t]here are but two sorts of men in the world, freemen and slaves.”<sup>43</sup> These were portentous words, expressing at once the radicalism of the revolutionaries and the uncertain bounds of their egalitarian vision. Though they repudiated the privileged orders of monarchical society, most American statesmen conceded that some degree of social stratification was unavoidable and perhaps justifiable. Thus we find Adams moderating his rhetoric on the eve of the Philadelphia Convention in 1787: “Was there, or will there ever be, a nation, whose individuals were all equal, in natural and acquired qualities, in virtues, talents, and riches? The answer of all mankind must be in the negative.”<sup>44</sup> This was a perspective clearly shared by the framers of the federal Constitution, who unabashedly promoted the rule of a “natural aristocracy” or “the better sort of people.”<sup>45</sup>

40. Letter from Oliver Wendell Holmes, Jr., to Morris R. Cohen (July 21, 1920), reprinted in LEONORA COHEN ROSENFELD, *PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS* 325 (1962).

41. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 171, 181 (1992).

42. John Adams, *A Dissertation on the Canon and Feudal Law* (1765), reprinted in *THE PORTABLE JOHN ADAMS* 209, 216 (John Patrick Diggins ed., 2004).

43. John Adams, *Novanglus* (1775), reprinted in 4 *THE WORKS OF JOHN ADAMS* 11, 28 (Boston, Charles Francis Adams ed., Charles C. Little & James Brown 1851).

44. John Adams, *A Defence of the Constitutions of Government of the United States of America* (1787), reprinted in 4 *THE WORKS OF JOHN ADAMS*, *supra* note 43, at 271, 392.

45. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 495–96 (1969). For general discussions of the place of “natural aristocracy” in late eighteenth-century American culture, see EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 239–62 (1988); Gary J. Kornblith & John M. Murrin, *The Making and Unmaking of an American Ruling Class*, in *BEYOND THE AMERICAN REVOLUTION: EXPLORATIONS IN THE HISTORY OF AMERICAN RADICALISM* 27 (Alfred F. Young ed., 1993); Alan Taylor, *From Fathers to Friends of the People: Political Personas in the Early Republic*, 11 *J. EARLY REPUBLIC* 465 (1991).



And even those who spoke out against the proposed government accepted the fact of natural inequality, with few among them doubting the importance of selecting political leaders on the basis of “wisdom and virtue.”<sup>46</sup> They simply contended that such qualities were as likely to be found in the hearts and minds of “the common people” as in those of their supposed superiors.<sup>47</sup>

The ratification debates illustrate the peculiar salience of mental ability in a polity that explicitly defined itself against a feudal past. Although few of the participants in this constitutional struggle could imagine a society completely shorn of status distinctions, most gravitated toward the language of virtue, intelligence, and talents as they projected visions of republican government.<sup>48</sup> In the new nation, this language continued to frame public debates about social ordering, as radical reformers joined more conservative thinkers in conceiving of merit in mental terms, exhibiting an almost obsessive concern with the processes of character formation.<sup>49</sup> The new premium placed upon virtue and intelligence in American society was duly noted by the foreign observer Alexis de Tocqueville. Writing in 1840, he readily perceived the logic of this cultural development:

When hereditary wealth, the privileges of rank, and the prerogatives of birth have ceased to be, and when every man derives his strength from himself alone, it becomes evident that the chief cause of disparity between the fortunes of men is the mind. Whatever tends to invigorate, to extend, or to adorn the mind, instantly rises to a high value.<sup>50</sup>

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46. SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 73–74 (1999); *see also* DAVID WALDSTREICHER, *IN THE MIDST OF PERPETUAL FETES: THE MAKING OF AMERICAN NATIONALISM, 1776–1820*, at 67–107 (1997).

47. *See* CORNELL, *supra* note 46, at 68–80.

48. For a wide-ranging exploration of the ways in which Enlightenment philosophy was used to argue for both equality and hierarchy, *see* JOHN CARSON, *THE MEASURE OF MERIT: TALENTS, INTELLIGENCE, AND INEQUALITY IN THE FRENCH AND AMERICAN REPUBLICS, 1750–1940* (2007).

49. *See generally* DANIEL WALKER HOWE, *MAKING THE AMERICAN SELF: JONATHAN EDWARDS TO ABRAHAM LINCOLN* (1997). For other useful discussions of the concern with character formation in nineteenth-century American culture, *see* THOMAS AUGST, *THE CLERK'S TALE: YOUNG MEN AND MORAL LIFE IN NINETEENTH-CENTURY AMERICA* (2003); *see also* KAREN HALTTUNEN, *CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA, 1830–1870* (1982); JUDY HILKEY, *CHARACTER IS CAPITAL: SUCCESS MANUALS AND MANHOOD IN GILDED AGE AMERICA* (1997).

50. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 45 (Henry Reeves trans., Cambridge, Sever & Francis 3d ed. 1863) (1840).

This way of thinking about human difference and inequality was, to an important degree, institutionalized by leading lawyers of the early national period. Capitalizing on their native talents and specialized learning, they cast themselves as the “natural guardians” of “the constitutions and liberties of the country,” assuming the status of an intellectual aristocracy.<sup>51</sup> From this elevated position, they undertook to elaborate a distinctly American jurisprudence—one that was more in accordance with “first principles” of the Enlightenment “science of man” than the traditional English law of persons.<sup>52</sup>

The prominent framer James Wilson exemplified these tendencies in a set of law lectures, presented to an audience of distinguished ladies, gentlemen, and law students at the College of Philadelphia in 1790–1791.<sup>53</sup> In them, he connected the legal institutions of the United States to the venerable common law tradition, which was truly based in consent,<sup>54</sup> while accentuating the errors of eminent English jurists, especially William Blackstone.<sup>55</sup> For the “learned Author of the Commentaries”<sup>56</sup> wrongly supposed that human laws necessarily implied the existence of a superior and inferiors, failing to trace the “source of sovereignty” back to its “ultimate and genuine source . . . in the free and independent man.”<sup>57</sup> This figure stood at the center of Wilson’s educational enterprise, for he believed that “unless we study and know our nature,” there was no way to

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51. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 25 (1984) (quoting James Kent).

52. Although American jurists worked in concert toward this end, they had varying estimates as to the degree of independence thought desirable. See, e.g., Nathaniel Chipman, *Sketches of the Principles of Government* (1793), reprinted in *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 19, 29–30 (Perry Miller ed., 1962); Charles Jared Ingersoll, *A Discourse Concerning the Influence of America on the Mind* (1823), reprinted in *THE LEGAL MIND IN AMERICA*, *supra*, at 76, 78–82; Jesse Root, *The Origin of Government and Laws in Connecticut* (1798), reprinted in *THE LEGAL MIND IN AMERICA*, *supra*, at 31, 32–40; Joseph Story, *Address Delivered Before the Members of the Suffolk Bar* (1821), reprinted in *THE LEGAL MIND IN AMERICA*, *supra*, at 63, 67–75.

53. *THE WORKS OF JAMES WILSON*, *supra* note 16.

54. See James Wilson, *Of Municipal Law*, reprinted in 1 *THE WORKS OF JAMES WILSON*, *supra* note 16, at 168, 184 (“The common law is founded on long and general custom. On what can long and general custom be founded? Unquestionably, on nothing else, but free and voluntary consent.”).

55. See *id.* at 185; see also James Wilson, *Of the Study of the Law in the United States*, reprinted in 1 *THE WORKS OF JAMES WILSON*, *supra* note 16, at 69, 78–80 [hereinafter Wilson, *Of the Study of the Law in the United States*] (distancing himself from William Blackstone and other “political writers of the Transatlantic world”).

56. Wilson, *Of the Study of the Law in the United States*, *supra* note 55, at 78.

57. *Id.* at 81 (“The dread and redoubtable sovereign, when traced to his ultimate and genuine source, has been found, as he ought to have been found, in the free and independent man.”).

“make laws fit for it, and calculated to improve it.”<sup>58</sup> In approaching this subject, he considered a broad array of philosophical perspectives, both ancient and modern. However, Wilson appeared to be especially drawn to the Common Sense philosophers of the Scottish Enlightenment, and to its chief exponent, Thomas Reid, in particular. In fact, the jurist’s lectures contained lengthy restatements of Reid’s philosophy, often repeated word for word.<sup>59</sup>

Quite literally taking a page from Reid’s work,<sup>60</sup> Wilson affirmed the existence of a benevolent Creator, who governed the universe with “infallible correctness” and equipped human beings with the capacity for “perfection and happiness.”<sup>61</sup> The truth of this proposition could be perceived by looking inward. For it was self-evident that man was endowed with an interconnected set of “intellectual” and “active” powers enabling him to gain accurate knowledge of the world, coexist peaceably with his fellows, and realize the will of God.<sup>62</sup> In marking this division, Wilson appeared to be following the convention of Reid and his followers, who typically conceived of the “intellectual” powers as including those of judgment, perception, reflection, attention, memory, and imagination, and the “active” powers as encompassing the will as well as the emotions,

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58. Wilson, *supra* note 16, at 199.

59. James Wilson preferred Thomas Reid over John Locke, *see id.* at 216–17, maintaining that the latter’s “artful use of ‘ideas’ in metaphysicks” would no less “destroy all true liberty” than the “artful use of ‘superiority’ in politicks,” *id.* at 221–22. He was careful to acknowledge that Blackstone himself was no “votary of despotick power,” nor was Locke “a friend to infidelity,” but he insisted that their ideas had a life of their own. James Wilson, *Of the General Principles of Law and Obligation*, reprinted in 1 THE WORKS OF JAMES WILSON, *supra* note 16, at 97, 104 [hereinafter Wilson, *Of the General Principles of Law and Obligation*]. On Wilson’s association of philosophical skepticism with undemocratic rule, see Shannon C. Stimson, ‘A Jury of the Country’: Common Sense Philosophy and the Jurisprudence of James Wilson, in SCOTLAND AND AMERICA IN THE AGE OF THE ENLIGHTENMENT 193, 199 (Richard B. Sher & Jeffrey R. Smitten eds., 1990) (stating that from Wilson’s perspective, “scepticism underpins the view that there can be no law without a ‘superior’” (quoting Wilson, *Of the General Principles of Law and Obligation*, *supra*, at 103)). On Wilson’s appropriations of Common Sense philosophy more generally, see in addition to Stimson, *supra*, HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA 348–49 (1976); Stephen A. Conrad, *Polite Foundation: Citizenship and Common Sense in James Wilson’s Republican Theory*, 1984 SUP. CT. REV. 359; Robert Green McCloskey, *Introduction to 1 THE WORKS OF JAMES WILSON*, *supra* note 16, at 1, 15.

60. See Stimson, *supra* note 59, at 198.

61. Wilson, *supra* note 16, at 199; *see also* James Wilson, *Of Man, as a Member of Society*, reprinted in 1 THE WORKS OF JAMES WILSON, *supra* note 16, at 227, 241–42 [hereinafter Wilson, *Of Man, as a Member of Society*] (“Nature has . . . furnished [man] with a natural impulse to exercise his powers for his own happiness, and the happiness of those, for whom he entertains such tender affections.”).

62. James Wilson, *Of Man, as a Member of Society*, *supra* note 61, at 241–42.

passions, and appetites.<sup>63</sup> Over and above these mental divisions was the “moral sense” or “conscience,” through which man perceived the difference between right and wrong and his obligation to choose the former over the latter.<sup>64</sup> “Without this controlling faculty,” he observed, “we should appear a fabrick destitute of order: but possessed of it, all our powers may be harmonious and consistent . . . .”<sup>65</sup> The jurist made a point of noting that this mental balance could only be maintained through conscious human effort—through culture and exercise.<sup>66</sup> However, it was the sheer existence of this configuration of faculties within our minds that rendered us “moral and accountable beings”—a designation that Wilson appeared willing to extend to “any of the human species above the condition of an idiot.”<sup>67</sup>

Aside from this passing reference, the jurist had little to say about the matter of mental deficiency, tending to view differences in intellectual and moral ability as positive rather than problematic elements of the universe, easily integrated into his egalitarian worldview. “When we say, that all men are equal,” he explained, “we mean not to apply this equality to their virtues, their talents, their dispositions, or their acquirements. In all these respects, there is, and it is fit for the great purposes of society that there should be, great inequality among men.”<sup>68</sup> For this aspect of human nature induced “different persons to choose different professions and employments in life,” thereby rendering “mankind mutually beneficial to each other” and preventing “too violent oppositions of interest in the same pursuit.”<sup>69</sup> The sense in which men were nonetheless equal was in their rights and obligations under “the laws of God and nature.”<sup>70</sup> This meant that “the weak and artless” were as entitled to their “small acquisitions” as “the strong and artful” to their “great possessions.”<sup>71</sup> And yet these laws also imposed limits on “the wisest and most powerful,” restraining them from “inflicting misery on the meanest and most ignorant.”<sup>72</sup> It was to better

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63. For the fullest statement of Wilson’s philosophy of mind, see Wilson, *supra* note 16. Here Wilson was drawing on a distinction Reid and his followers made. See HOWE, *supra* note 49, at 65.

64. James Wilson, *Of the Law of Nature*, reprinted in 1 THE WORKS OF JAMES WILSON, *supra* note 16, at 126, 132–33.

65. *Id.* at 136.

66. *Id.*

67. *Id.*

68. Wilson, *Of Man, as a Member of Society*, *supra* note 61, at 240.

69. *Id.* at 241.

70. *Id.*

71. *Id.*

72. *Id.*

protect the natural rights of individuals and the ends of social life that the constitutional government of the United States was formed. Within this political system, Wilson maintained, citizens were free to make the most of their mental endowments, which would ultimately redound to the benefit of all.<sup>73</sup>

The project of bringing the science of man and the common law into greater alignment would be carried forward by the rising generation of American lawyers who formed Wilson's primary audience, with mixed results. Many would, in fact, cling even more tenaciously to the certainty and universality of Enlightenment thought as they struggled to maintain the framers' precarious balance between liberty and order amidst rapid commercialization and democratization.<sup>74</sup> While more discriminating in their appropriations of Common Sense philosophy than Wilson, early nineteenth-century jurists likewise regarded this body of work as foundational knowledge.<sup>75</sup> Albeit without attribution, they adopted a model of mind and a way of thinking about human agency and accountability that were generally consonant with the Scottish philosophy. In the treatises and tracts of the era, it is possible to trace the emergence of a generic model of the legal subject—one whose legal capacity and responsibility rested upon the possession of a certain set of intellectual and moral powers.<sup>76</sup>

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73. *Id.* at 240–41.

74. See generally PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR 156–64* (1965).

75. See DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 32–38, 58 (Baltimore, Coale & Maxwell 1817). Hoffman placed the subject of “[m]oral and [p]olitical [p]hilosophy” first on his general syllabus, and specifically listed works by John Beattie, William Paley, John Locke, Adam Smith, and Thomas Reid, with only the Bible, Cicero, Seneca, Xenophon, and Aristotle earning higher billing. *Id.* at 32, 34–35. In notations thereafter, Hoffman put essays by Reid “and his disciple [Dugald] Stewart” in the same category as Locke’s, describing them to be of a value “inestimable to the student,” and pronouncing the three writers to be “master workmen” in the field of metaphysics. *Id.* at 58. Significantly, the philosophical works of David Hume did not appear on this list, though his historical writings were recommended in another part of the syllabus. See *id.* at 77–78. On the influence of this study guide in legal culture of the period, see generally FERGUSON, *supra* note 51, at 29 (describing the volume as the “standard manual of its kind well into the 1830s”). For general discussions of the influence of the Scottish Common Sense philosophy in antebellum legal culture, see Susanna Blumenthal, *The Mind of the Moral Agent: Scottish Common Sense and the Problem of Responsibility in Nineteenth-Century American Law*, 25 *LAW & HIST. REV.* (forthcoming 2007) (manuscript at 25–28, on file with author); Howard Schweber, *The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 *LAW & HIST. REV.* 421 (1999).

76. See, e.g., NATHANIEL CHIPMAN, *PRINCIPLES OF GOVERNMENT* 9–55 (Burlington, Edward Smith 1833); 1 DAVID HOFFMAN, *LEGAL OUTLINES* 19, 28–29, 53–54, 61–65 (Baltimore, Edward J. Coale 1829); HENRY ST. GEORGE TUCKER, *A FEW LECTURES ON NATURAL LAW* 6–8, 15 (Charlottesville, James Alexander 1844); Daniel Mayes, *An Address to the Students of Law in Transylvania University* (1834), in *THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES* 145, 148–49 (Michael H. Hoeflich ed., 1988).

However, this is not to say that the traditional English law of persons was entirely displaced. To the contrary, American jurists continued to speak in terms of status relations, though many attempted to rationalize them on new grounds, suggesting their retention was compatible with founding principles of the republic.

In this regard, Timothy Walker's 1837 *Introduction to American Law* provides an illuminating example.<sup>77</sup> His discussion of the law of persons began by calling readers' attention to "the fundamental difference there is between personal relations in this country and in England, in consequence of our entire abolition of privileged orders."<sup>78</sup> A simpler scheme prevailed in the United States, Walker proceeded to note: "With us, in theory at least, all men start equally; they are born with equal rights; and their distinctions in after-life, are mainly made by themselves."<sup>79</sup> Thus, it was possible to describe the primary divisions of persons "in half the space" required in Blackstone's *Commentaries*.<sup>80</sup> Walker illustrated his point by reducing the matter to a single paragraph:

1. Persons are either natural or artificial. 2. They are either public or private. 3. They are either citizens or aliens. 4. They are either males or females. 5. They are either infants or adults. 6. They are either sane or insane. 7. They are either freemen or slaves, masters or servants, principals or agents. 8. Indians sustain relations different from any other persons. 9. The death of persons creates the relations of ancestors and heirs, devisors and devisees, and executors or administrators.<sup>81</sup>

Similar distinctions were drawn by other American jurists, more or less apologetically, depending upon the extent to which they perceived the surviving status relations to be in tension with republican principles.<sup>82</sup>

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77. TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* (Philadelphia, P.H. Nicklin & T. Johnson 1837).

78. *Id.* at 202.

79. *Id.*

80. *Id.* at 203.

81. *Id.*

82. See, e.g., FRANCIS HILLIARD, *THE ELEMENTS OF LAW: BEING A COMPREHENSIVE SUMMARY OF AMERICAN CIVIL JURISPRUDENCE* 9-39 (Boston, Hilliard, Gray & Co. 1835) (covering the "[a]bsolute [r]ights of [p]ersons" as well as the "[r]elative [r]ights of [p]ersons," with the latter including subparts regarding husband and wife, parent and child, guardian and ward, infants, master and servant, and corporations; remaining neutral on the subject of slavery, simply noting that "[t]he history, justice expediency, and prospects of slavery though topics of deep interest and importance, are foreign from the objects of the present work"); 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW*, at pt. 4 (N.Y., O. Halsted 2d ed. 1832) (setting out the "absolute rights of persons" followed by discussions of the law relating to: aliens and natives, marriage and divorce, husband and wife, parent and child, guardian and ward, infants, master and servant (with subsections addressing slaves, hired servants, and apprentices), and

But one common law division remained critically unscathed: the one distinguishing the sane from the insane. At a minimum, that is to say, American jurists generally seemed to regard mental soundness as a perfectly legitimate means of discriminating between theoretically equal individuals for all sorts of legal purposes.

So unexceptionable was this mental division that it received relatively little attention in discussions “of persons” in the treatise literature published in the early decades of the nineteenth century. To the extent that the matter was considered in any detail, jurists tended to simply recite long-standing definitions and rules drawn from such old English authorities as Edward Coke, Matthew Hale, and Blackstone, most of whom reserved the designation of insanity for those suffering from “a total deprivation of reason.”<sup>83</sup> Thus, there was something of a gap between the jurists’ positive renderings of the accountable agent and their negative characterizations of what it was to be of unsound mind. It was nonetheless a gap that they did not much notice in their formal writings. Although this might be read as mere inadvertence on the jurists’ part, it is perhaps better understood as an expression of the jurists’ faith in the liberal Enlightenment vision of human ability. With the Common Sense philosophers they shared a belief in the innate capacity of most—if not all—human beings to master their passions and act in accordance with higher dictates of reason. Though individual efforts to realize this ideal might be frustrated by defects in

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corporations); 1 HENRY ST. GEORGE TUCKER, COMMENTARIES ON THE LAWS OF VIRGINIA 33–162 (Winchester 1831) (comparing and contrasting Blackstone’s rendering of the English law of persons with that in force in Virginia; writing apologetically with respect to the law of slavery, justifying its existence on the grounds of “sad necessity” alone, *id.* at 74; and suggesting that a father’s authority over his children was more limited in Virginia and more in conformity with natural law than was true in England); WALKER, *supra* note 77, at 163, 394–96 (straining to show that most civil restraints arose “either from *actual destitution* of reason, or from such *constraint*, as prevents its free action,” but acknowledging that some were grounded upon “public policy” and conceding that the institution of slavery could be justified only upon the principle of “uncontrollable necessity”). For the leading antebellum American treatise defending the institution of slavery, see THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA, at ccxiii–ccxxi (Phila., T. & J.W. Johnson & Co. 1858).

83. A. HIGHMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 102 (Exeter, George Lamson 1822); see, e.g., *id.* at 1–14. The definition cited with the greatest regularity was originally formulated by Lord Coke, who held that persons *non compos mentis* were reducible to “four sorts”: (1) one who was an idiot from birth “by a perpetual infirmity”; (2) “[h]e that by sickness, grief, or other accident, wholly loses his memory and understanding”; (3) “[o]ne who hath lucid intervals, and is therefore *non compos* so long as he has not understanding”; (4) “[o]ne who, by his own intemperance, for a time deprives himself of his memory and understanding, as he that is drunken.” *Id.* at 1–2 (citing Coke’s decision in *Beverley’s Case*, (1603) 4 Coke Rep. 123b, 76 Eng. Rep. 1118).

education and environment, such unfortunate circumstances would not, as a rule, be accepted as excusing conditions as a matter of law. Indeed, the jurists of this era tended to view the law as a socializing agent in its own right, expecting that the imposition of liability would serve a character-building function, teaching deficient individuals how to become responsible subjects.<sup>84</sup>

Thus, as they stood amidst the remains of the English law of persons, early republican jurists offered up a republican replacement—a scheme in which mental ability rather than social status would constitute the primary determinant of legal capacity and responsibility. At the center of this scheme there was a singular legal subject, a presumptive model of what it was to be an accountable agent, which I call the default legal person. It was, to be sure, a model rather sketchily drawn, though this may well have been the jurists' intention. In any case, the durability of their construction would soon be tested by a new professional class of scientists, claiming expertise in the diagnosis and treatment of mental alienation.

## II. THE CHALLENGE OF MEDICAL JURISPRUDENCE

Despite their appeals to Common Sense, the jurists' default legal person did not remain uncontested in nineteenth-century America. To the contrary, this legal model of the self came under the critical gaze of those medical specialists who focused their attention on the general phenomenon of mental alienation. These self-styled "alienists" effected dramatic changes in the conceptualization and treatment of madness in the early decades of the nineteenth century.<sup>85</sup> They emphasized the natural as opposed to the supernatural agencies involved in the production of mental disease; they regarded it as an affliction of the brain or the nervous system, rather than the soul or mind, and attributed its onset to an array of physical, hereditary, environmental, and "moral" causes, including mental

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84. MICHAEL MERANZE, *LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835*, at 253–92 (1996); Wiener, *supra* note 31, at 146–49.

85. See generally NORMAN DAIN, *CONCEPTS OF INSANITY IN THE UNITED STATES, 1789–1865*, at pt. 2 (1964); MARY ANN JIMENEZ, *CHANGING FACES OF MADNESS: EARLY AMERICAN ATTITUDES AND TREATMENT OF THE INSANE* 28–30, 65–89 (1987); CONSTANCE M. MCGOVERN, *MASTERS OF MADNESS: SOCIAL ORIGINS OF THE AMERICAN PSYCHIATRIC PROFESSION* 19–20, 37–43 (1985); JAMES C. MOHR, *DOCTORS AND THE LAW: MEDICAL JURISPRUDENCE IN NINETEENTH-CENTURY AMERICA* 57–65 (1993); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 109–29 (rev. ed. 1990).



overexertion and unregulated passion.<sup>86</sup> This medical perspective on mental illness carried with it the implication that man had “power over himself to prevent or control insanity” (with more than a little help from his physician).<sup>87</sup> As they spread this new gospel about the “curability of insanity,” alienists expressed a certain optimism of their own about human nature. However, they also sounded a more sobering note in further observing that the number of afflicted Americans appeared to be on the rise. This disturbing trend they linked to the excitement of the late Revolution, suggesting that the “trials of unrestricted freedom” were more than some citizens could bear.<sup>88</sup> They were especially likely to attribute the growing incidence of mental disease to the fluidity of political and social structures in the new nation, and to the endless striving engendered by the new democratic spirit that permeated the culture.<sup>89</sup> In airing these concerns, alienists spoke from their experiences as superintendents of insane asylums, which were an increasingly familiar feature of the antebellum landscape.<sup>90</sup>

As they proceeded with their professional work, many took it to be a part of their civic duty to point out deficiencies in the legal treatment of insane persons; indeed, to demonstrate how far the courts were out of step with the fast-developing science of the mind.<sup>91</sup> Their critiques of the common law of capacity gradually came to form part of a new genre of literature—medical jurisprudence—and were intended to promote the modernization of the “law of insanity.”<sup>92</sup> Drawing upon their own clinical experiences as well as those recorded by other alienists (both American and European), they insisted that existing definitions of *non compos mentis* were radically underinclusive. Accordingly, they offered alternative ways of classifying mental disorder. The most common such scheme, drawn from French medical texts, identified four distinct types: dementia, idiocy, mania,

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86. See sources cited *supra* note 85.

87. John Barlow, *On Man's Power Over Himself to Prevent or Control Insanity*, 1 AM. J. INSANITY 289, 289 (1845) (English minister's sermon republished with approval by editor, who was a leading alienist and asylum superintendent).

88. Isaac Ray, *Confinement of the Insane*, 3 AM. L. REV. 193, 207 (1869).

89. See ROTHMAN, *supra* note 85, at 109–29.

90. *Id.*

91. Isaac Ray, *Criminal Law of Insanity*, 14 AM. JURIST & L. MAG. 253, 253–54 (1835).

92. Among the most prominent early works on the subject in circulation in America were 1 THEODRIC ROMEYN BECK, *ELEMENTS OF MEDICAL JURISPRUDENCE* (Albany, Websters & Skidders 1823); JOHN CONOLLY, *AN INQUIRY CONCERNING THE INDICATIONS OF INSANITY* (London, John Taylor 1830); THOMAS COOPER, *TRACTS ON MEDICAL JURISPRUDENCE* (Phila., James Webster 1819); I. RAY, *A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* (Boston, Charles C. Little & James Brown 1838).

and monomania. Among them, the last type represented the alienists' most significant innovation. By monomania, they meant to refer to any one of a number of circumscribed forms of derangement, either with respect to a single "topic" or faculty of the mind.<sup>93</sup> *Intellectual* monomania, in their accounts, primarily afflicted the reflective rather than the sensory faculties, so that the sufferer might correctly perceive an object in the external world and yet harbor erroneous notions as to its properties or powers, as with the patient who labored under the delusion that his leg was made of glass, or the one who believed he was the Second Coming.<sup>94</sup> By contrast, *moral* monomania was characterized as a morbid perversion of the emotions, will, or moral sense, without any discernible cognitive disturbance.<sup>95</sup> Although the alienists presumed both forms of monomania were rooted in physical pathologies, they admitted that these linkages had not yet been established, which meant they had to rely on behavioral irregularities as the primary indicators of the disease—irregularities that were easily mistaken by the untrained eye for depravity or mere eccentricity.<sup>96</sup> For precisely this reason, medical writers insisted that justice would best be served by according greater deference to those who had made mental disease a "special object of study."<sup>97</sup>

The most outspoken and unrelenting of these medical reformers was Isaac Ray, an asylum superintendent who would become one of the leading forensic psychiatrists in the Anglo-American world. He offered the fullest expression of his views in a groundbreaking 1838 work, *A Treatise on the Medical Jurisprudence of Insanity*,<sup>98</sup> which went through five subsequent editions from 1839 through 1871<sup>99</sup> and enjoyed transatlantic renown. Ray's treatise was at once a practical manual and a searing diatribe in which contemporary judges were (somewhat unfairly) portrayed as benighted

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93. See DAIN, *supra* note 85, at 72; EIGEN, *supra* note 30, at 60.

94. See EIGEN, *supra* note 30, at 60, 64–65; ROGER SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 38 (1981).

95. See DAIN, *supra* note 85, at 73–77; EIGEN, *supra* note 30, at 60; SMITH, *supra* note 94, at 38–39.

96. See DAIN, *supra* note 85, at 76, 79, 84–86; EIGEN, *supra* note 30, at 58, 79; SMITH, *supra* note 94, at 35, 40–49, 54–61; cf. DAIN, *supra* note 85, at 78 (describing the similarities between insane behavior and criminal behavior); SMITH, *supra* note 94, at 39 (same).

97. WINSLOW, *supra* note 22, at 87. See generally MOHR, *supra* note 85, at 57–65; Blumenthal, *supra* note 75.

98. RAY, *supra* note 92. See generally JOHN STARRETT HUGHES, IN THE LAW'S DARKNESS: ISAAC RAY AND THE MEDICAL JURISPRUDENCE OF INSANITY IN NINETEENTH-CENTURY AMERICA (1986).

99. Subsequent editions were published in 1839, 1844, 1853, 1860, and 1871.

traditionalists who obstinately perpetuated “metaphysical dogmas”<sup>100</sup> encrusted in the common law, even where they so obviously clashed with the “dictates of true science.”<sup>101</sup> The doctor’s critique centered on the “looseness, inconsistency, and incorrectness”<sup>102</sup> of the traditional common law rules applied in civil and criminal cases.<sup>103</sup> He provided a systematic analysis of the “legal consequences” under existing laws of a range of mental impairments, including idiocy, imbecility, mania, dementia, delirium, and drunkenness,<sup>104</sup> lamenting the extent to which judges and jurists continued to cling to statutes and principles of law framed long before physicians had obtained any “accurate notions” respecting insanity.<sup>105</sup> Ray’s abiding purpose was to promote fuller recognition of partial and nonintellectual forms of mental disease, insisting that judges require more than a mere glimmering of reason as proof of a sound mind. In general, he found that the civil law was somewhat more attentive to “[t]hose nice shades of the disease”<sup>106</sup> short of total derangement than to the criminal law, which remained wedded to “antiquated maxims”<sup>107</sup> and frequently allowed prejudice and passion to condemn the insane prisoner.<sup>108</sup> In view of the relative ease with which insanity was established in civil trials, Ray was inclined to concur with French psychiatrist E.J. Georget’s (adverse) judgment of the common law, finding that it tended, all too often, to take “more account of property than life.”<sup>109</sup>

Ray was soon joined by many of his fellow asylum superintendents, who were in the process of forming the core of the emergent profession of psychiatry. They compared notes with one another through *The American Journal of Insanity* (which began publication in 1844), collectively moving toward a new understanding of the very nature of mental illness. Whereas the essence of insanity in the eighteenth century had been “intellectual

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100. RAY, *supra* note 92, at 256.

101. *Id.* at 234.

102. *Id.* at 237.

103. *Id.* at 236–37. The targets of his critiques responded in kind, suggesting in no uncertain terms that the doctor’s doctrines—especially that of moral monomania—verged upon an atheistic materialism. This was, however, even further from the truth than Ray’s critical barbs. For not only was the doctor a confirmed dualist, but his medical psychology rather directly flowed from liberal Enlightenment assumptions about the constitution of the healthy mind. For a discussion of this point, see Blumenthal, *supra* note 75.

104. RAY, *supra* note 92, at 452–76.

105. *Id.* at 1.

106. *Id.* at 16.

107. *Id.* at 14.

108. *See id.* at 184.

109. *Id.* at 20 (quoting E.J. Georget).

incoherence," early nineteenth-century alienists tended to speak in terms of a "will out of control."<sup>110</sup> Their version was also a more "democratic" ailment, insofar as it was now conceived as a state of mind in which "anyone could find themselves, and from which they could return."<sup>111</sup> The most threatening revelation of the alienists, however, was the idea of a "lesion of the will"—that the will itself might be susceptible to disease.<sup>112</sup> In presenting such a diagnosis, they were indicating that lack of self-control was not always a moral failing, and thus, that not all individuals were susceptible to the shaping influences of the law or advice literature. As these medical men pointed to such physical determinants of human behavior, they presented a serious threat to the antebellum legal system. For they had taken the law's basic metaphysical criterion for assigning responsibility—a free will—and rendered it into a physical entity capable of infection.<sup>113</sup>

This medical critique would be reinforced and extended in the decades to come by other practicing alienists on both sides of the Atlantic. Although doctors would increasingly be heard to disagree among themselves, particularly as some began to have second thoughts about the idea of moral insanity, they more or less united in thinking that courts ought to privilege their expert opinions in cases where the mind was placed "in issue."<sup>114</sup> Judges and jurists at first displayed a basic receptivity to their offers of assistance, with some going so far as to pronounce this medical science to be "part of the common law of the land."<sup>115</sup> Yet more than a few would live to regret the issuance of this general invitation, particularly as the phenomenon of dueling experts came to be a regular feature of insanity trials.

Some indication of the shifting fortunes of the new medical psychology can be gleaned from the treatises on the jurisprudence of

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110. EIGEN, *supra* note 30, at 79–80.

111. ALISON WINTER, *MESMERIZED: POWERS OF MIND IN VICTORIAN BRITAIN* 46 (1998); see also ROTHMAN, *supra* note 85, at 123–24.

112. See Joel Peter Eigen, *Lesion of the Will: Medical Resolve and Criminal Responsibility in Victorian Insanity Trials*, 33 *LAW & SOC'Y REV.* 425, 425 (1999).

113. SMITH, *supra* note 94, at 40.

114. For an overview of this burgeoning and increasingly discordant professional literature, see MOHR, *supra* note 85, at 147–50.

115. FRANCIS WHARTON & MORETON STILLÉ, *A TREATISE ON MEDICAL JURISPRUDENCE* 71 (Phila., Kay & Bro. 1855). Although this treatise was a professedly interdisciplinary project, Wharton being a lawyer and Stillé a doctor, the quoted passage came from a portion of the text written by the former. *Id.* at iii–iv.

insanity produced by and for lawyers.<sup>116</sup> The earliest such commentaries, penned in the middle decades of the century, tended to accept the medical conceptualization of the field, with some works appearing to be essentially derivative of the doctors' works. However, by the 1860s, a more critical tone could be discerned, with some legal writers using the pages of their treatises to trade petty insults with alienists, who took to responding in kind.<sup>117</sup>

Perhaps an even more telling indicator of the growing strains between the two professions can be found by comparing the first and second editions of Timothy Walker's *Introduction to American Law*. For they provide a means of tracing the fortunes of the new psychological medicine as it was received by members of the antebellum legal profession who did not take a special interest in the subject. The first edition, published in 1837, referenced several recent works on medical jurisprudence of insanity (albeit not Ray's),<sup>118</sup> and recognized as insane those who were "totally or partially deprived of reason."<sup>119</sup> However, by the time Walker published his 1846 edition,<sup>120</sup> he had arrived at a somewhat different position. His footnotes credited a broader array of medico-legal writers (now including Ray), reflecting how crowded the field was becoming,

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116. See, e.g., J. CHITTY, A PRACTICAL TREATISE ON MEDICAL JURISPRUDENCE (Phila., Carey, Lea & Blanchard 2d Am. ed. 1836); 1 GEORGE DALE COLLINSON, A TREATISE ON THE LAW CONCERNING IDIOTS, LUNATICS, AND OTHER PERSONS NON COMPOTES MENTIS (London, W. Reed 1812); AMOS DEAN, PRINCIPLES OF MEDICAL JURISPRUDENCE (Albany, Gould, Banks & Gould 1850); JOHN J. ELWELL, A MEDICO-LEGAL TREATISE ON MALPRACTICE AND MEDICAL EVIDENCE (N.Y., John S. Voorhies 1860); HIGHMORE, *supra* note 83; LEONARD SHELFORD, A PRACTICAL TREATISE ON THE LAW CONCERNING LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND (Phila., J.S. Littell 1833); JOHN SHAPLAND STOCK, A PRACTICAL TREATISE ON THE LAW OF NON COMPOTES MENTIS (Phila., John S. Littell 1839); ROBERT B. WARDEN, A FAMILIAR FORENSIC VIEW OF MAN AND LAW (Columbus, Follett, Foster & Co. 1860); STEPHEN W. WILLIAMS, A CATECHISM OF MEDICAL JURISPRUDENCE (Northampton, J.H. Butler 1835); see also COOPER, *supra* note 92, preface (collecting and reprinting the "most approved" treatises by British physicians on the subject, along with a digest of the common law relating to insanity, prepared by the editor, who was a trained lawyer as well as medical man).

117. See ISAAC F. REDFIELD, THE LAW OF WILLS 103–04, 154–55 (Boston, Little, Brown & Co. 1864) [hereinafter REDFIELD I] (complaining about medical mercenaries); I. Ray, *Review of Redfield's Law of Wills*, 21 AM. J. INSANITY 511, 523 (1865) (responding to Redfield by complaining about lawyers' intolerance as well as their greed); 1 ISAAC F. REDFIELD, THE LAW OF WILLS 71, 89–92 (Boston, Little, Brown & Co. 3d ed. 1869) [hereinafter REDFIELD II] (responding to Ray and reasserting the "inutility of the testimony of medical experts on questions of insanity.").

118. WALKER, *supra* note 77, at 239.

119. *Id.* at 62 (emphasis added).

120. TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW (Cincinnati, Derby, Bradley & Co. 2d ed. 1846).

and he also supplied citations to a considerable number of American and English cases on the subject of insanity, implying the existence of many more.<sup>121</sup> In addition, the second edition provided a more fulsome description of “luna[cy],” essentially paraphrasing the leading judicial decisions of the day:

There need not be frenzy or raving madness, such as to require confinement, but only a derangement, greater or less, of the reasoning faculties. And here the true criterion is *delusion*, which consists in believing without evidence, acting without motive, reasoning without premises, and treating fancies as realities. It is not enough that the delusion have an insufficient basis. It must have no basis at all; and it must so thoroughly possess the mind as to become a fixed idea, out of which the subject cannot be reasoned. This kind of insanity may be either total or partial. There may be a general delusion upon all subjects, or only upon one or more subjects. The latter kind is called *monomania*. Here reason is not wholly dethroned, but delusion sits beside her. The mind is not wholly darkened, but only some of its apartments. The monomaniac may be perfectly sane on all subjects but one, and perfectly wild on that.<sup>122</sup>

It was chiefly with respect to this last kind of insanity, Walker observed, “that difficulties arise in jurisprudence.”<sup>123</sup> But he was quick to add that it was “now settled, that monomania is no excuse, unless the delusion be directly connected with, and the cause of crime.”<sup>124</sup> He further held it to be “the better opinion” that monomania provided no basis for invalidating civil acts, “unless it be so directly connected with them, as either to have wholly produced, or essentially modified them.”<sup>125</sup> Most significant of all, however, were his remarks with respect to “another kind of insanity, called *moral* by medical writers, which exists when there is no intellectual delusion, but only a perversion of the moral sentiments and affections.”<sup>126</sup> This, Walker flatly declared, “has never been recognized in jurisprudence, and I trust never will be; because it would not only furnish an universal apology for crime, but introduce the utmost uncertainty into civil transactions.”<sup>127</sup>

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121. *Id.* at 238 n.(b).

122. *Id.* at 238–39.

123. *Id.* at 239.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

The jurist was wrong as a descriptive matter, as we will see in the pages that follow, but his apprehensions about following doctors' advice were far from baseless. For as judges moved haltingly toward a more scientific jurisprudence of insanity over the course of the antebellum period, they found it difficult to contain the effects of the new medical psychology, which seemed to underwrite capacity contests of every imaginable variety. Although the alienists who wrote and testified on the subject of mental disease were far from denying a distinction between insanity and "mere" depravity, eccentricity, or mental weakness, their classification schemes ultimately did at least as much to confuse as to clarify this matter. Indeed, they emphasized that many insane persons were quite capable of acting rationally outside the scope of their peculiar derangements and further advised that "moral degeneracy," "egotism," and "pride"<sup>128</sup> could be "premonitory signs" of actual insanity.<sup>129</sup>

As these sorts of borderline cases came to be a regular part of state court dockets, judges were presented with a fundamental question: Could they continue to uphold their model of the accountable agent without also admitting the possibility that deviations from this norm constituted evidence of legal incapacity? If the default legal person was one who had the capacity for rational and moral action, how could judges be sure that those who behaved in irrational and immoral ways were not suffering from some form of mental unsoundness, rendering them less than fully responsible for their conduct? It was as they faced these unsettling implications of the new medical psychology that nineteenth-century judges proceeded to elaborate the rules of evidence and procedure to which we now turn.

### III. PLACING THE MIND IN ISSUE

If the petitions filed by civil litigants are to be fully credited, a good many nineteenth-century Americans suffered from disabling mental maladies that compromised their capacity for self-government to varying degrees. Some were said to be so far deprived of reason as to be wholly incapable of managing their affairs, thus presenting a threat to property,

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128. 1 CLEVENGER, *supra* note 19, at 37, 40.

129. 1. RAY, *A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* 361 (Boston, Little, Brown & Co. 4th ed. 1860); BENJAMIN RUSH, *MEDICAL INQUIRIES AND OBSERVATIONS UPON THE DISEASES OF THE MIND* 142–43 (Phila., Kimber & Richardson 1812); *see also* 1 THEODRIC ROMEYN BECK & JOHN B. BECK, *ELEMENTS OF MEDICAL JURISPRUDENCE* 726–27 (Phila., J.B. Lippincott & Co. 12th ed. 1863).

and perhaps to life as well. Many more were portrayed as victims of “controlling” delusions that impelled them to perform unintended civil acts, whether it be the making of a will, a contract, or a deed, or the commission of a tort. Claims of mental weakness were also commonly made, often in the alternative, and most typically in support of an independent charge of fraud, undue influence, or duress.

In bringing such suits, the litigants operated within a common law framework that had existed for centuries. And yet, their petitions bore the more particular imprints of nineteenth-century American culture, registering the fluidity of the era’s social relations and the accompanying uncertainty about the operative norms of behavior in both the household and the marketplace. The portraits of mental competence painted for the benefit of the court also clearly displayed the influence of the new medical psychology, as litigants deployed novel disease entities such as monomania and moral insanity to great effect. The alienists who had first elaborated these concepts would often be blamed by members of the bench for the troublesome character of capacity litigation. Their complaints were, however, somewhat misdirected. For these lawsuits were at least as much a product of the Enlightenment philosophy that judges generally held in common with the medical men. As we have seen, the default legal person was cast in liberal humanist terms, as one who possessed the rational faculties of intelligence, moral sense, and free will. In thus projecting this model of responsible agency, the jurists might be said to have opened the door to litigation about those who deviated from this norm, arguably bringing the dreaded capacity suits upon themselves.

So it was that in an age when confidence in human ability was strong, American courts were ironically besieged with claims of mental incompetence across the fields of civil as well as criminal law. In the trials that ensued, judges were faced with daunting evidentiary issues and a deeper paradox as well. For their model of the default legal person encouraged the identification of competence with rationality and morality, pushing them toward the uncomfortable (and unworkable) conclusion that the only fully accountable individuals were those who would never deviate from conventional behavioral norms. Petitioners eagerly followed out this logic in case after case, attributing seemingly irrational and immoral acts to some sort of mental defect or monomania rooted in the actor’s physical condition and the surrounding environment. Their claims were zealously refuted by opposing counsel, who used the very same philosophical and scientific constructs to sustain the validity of the act in question, insisting upon a



broadier conception of what it was to be rational, moral, or, at the very least, competent. To make matters worse, each side was able to summon a large cast of respectable laymen and medical experts, who mainly succeeded in demonstrating the extent to which rationality and morality depended upon individual standpoint. In the end, presiding judges were left with the unwieldy transcripts and the dilemma of decision, fully appreciating that no one could actually see the entity about which they were all contending. How, then, were they to arrive at a just result?

The initial response from the bench was characteristically conservative, as American judges tended to hold fast to the common law presumption of sanity. Since "our ordinary experience teaches us that the majority of men are sane," courts took for granted that "every man had the right use of his reason until the contrary appeared."<sup>130</sup> This rule carried with it the corollary that insanity once proved was presumed to continue absent evidence of a "lucid interval"—if not a permanent recovery—at the time of the act in question.<sup>131</sup> However, the mental threshold implied by these rules had at least two meanings in the existing treatise literature. As we have seen, the strict common law definition of "insanity" as a total deprivation of reason was reconceived in more expansive terms by medical jurists in the first half of the nineteenth century, so as to include new partial forms of insanity known as monomanias. In most antebellum jurisdictions, judges would follow suit, with some of them going so far as to declare that delusion was "the true criterion, the true test of the absence of presence of insanity."<sup>132</sup> This was

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130. J.H. BALFOUR BROWNE, *THE MEDICAL JURISPRUDENCE OF INSANITY* 651 (S.F., Sumner Whitney & Co. 2d ed. 1875); see also HENRY F. BUSWELL, *THE LAW OF INSANITY* 180–83 (Boston, Little, Brown & Co. 1885). See generally 1 CLEVENGER, *supra* note 19, at 449–52 (citing cases).

131. BUSWELL, *supra* note 130, at 209–15 (citing cases); 1 CLEVENGER, *supra* note 19, at 477–79. It was not necessary to prove a "perfect restoration," however; all that needed to be shown was sufficient capacity to "know the effect of the act he is about to perform, and to be capable of carrying that act into effect." BUSWELL, *supra* note 130, at 212–13. There was considerable confusion as to the operation of those rules in testamentary and criminal cases. In the former context, this was because will statutes required affirmative proof of a testator's mental soundness, while in the latter context, the complicating factor was the presumption of innocence. See generally *id.* at 183–209; 1 CLEVENGER, *supra* note 19, at 455–64.

132. *Gass' Heirs v. Gass' Ex'rs*, 22 Tenn. (3 Hum.) 278, 283 (1842) (citing SHELFORD, *supra* note 116, at 40); see also *Johnson v. Moore's Heirs*, 11 Ky. (1 Litt.) 372, 386 (1822); *Boyd v. Eby*, 8 Watts 66, 72–73 (Pa. 1839); *Lee's Heirs v. Lee's Ex'r*, 15 S.C.L. (4 McCord) 183, 193–96 (1827); *Cornwell v. State*, 8 Tenn. (1 Mart. & Yer.) 147, 156–58 (1827); *Gwatkin v. Commonwealth*, 36 Va. (9 Leigh) 678, 682 (1839). On the general reception of the doctrine of monomania within the legal culture of the period, see, for example, FRANCIS WHARTON & MORETON STILLÉ, *A TREATISE ON MEDICAL JURISPRUDENCE* 17–28 (Phila., Kay & Bro. 2d rev. ed. 1860) (noting the weight of authority in this direction). See also Amos Dean, *Unsolved*

not to say that the confirmed monomaniac was to be presumed incapable of performing any valid civil act. In fact, judges were quite undecided about how to set the default rules in such instances, wavering on the question of whether the mere presence of delusion ought to trigger the presumption of insanity, thereby shifting the burden of proof to the party affirming the competence of the actor at the moment the act was executed. Although few judges were prepared to adopt the doctrine “[i]nsane on one point, insane on all,”<sup>133</sup> even as a presumptive rule, many were willing to raise a presumption of insanity where the partial derangement was shown to be “habitual,” and at least arguably connected to the act in question.<sup>134</sup> In so ruling, they effectively widened the disputable borderland between sanity and insanity.

This territory was rendered all the more indistinct in this period as courts entertained claims of fraud, undue influence, and duress in tandem with pleas of partial insanity, allowing evidence of deception, coercion, and force to tip the scales against liability where there was otherwise insufficient proof of mental unsoundness.<sup>135</sup> Judges were especially inclined in this direction where the parties were involved in relations of trust and confidence.<sup>136</sup> Where this was demonstrably true, a presumption was raised against the justice and equity of the transaction, and the party taking the benefit had to prove that it was not procured through unfair means—that the other party participated in the transaction with

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*Problems of the Law, as Embraced in Mental Alienation*, 10 AM. L. REG. 513, 521–24 (1862) (noting general acceptance of the idea of partial insanity); Edmund Wetmore, *Mental Unsoundness as Affecting Testamentary Capacity*, 12 AM. L. REG. 1 (1863) (comparing and contrasting medical and judicial doctrines of partial and general insanity, focusing on the law of wills).

133. WHARTON & STILLÉ, *supra* note 115, at 27 (quoting Lord Brougham’s opinion in the English case of *Waring v. Waring* and criticizing the doctrine); Dean, *supra* note 132, at 521 (stating that “[n]o court in this country” had adopted the *Waring* doctrine).

134. See, e.g., *Appeal of Dunham*, 27 Conn. 192, 201 (1858); *Corbit v. Smith*, 7 Clarke 60, 65–66 (Iowa 1858); *Staples v. Wellington*, 58 Me. 453, 459–60 (1870); *Thornton v. Appleton*, 29 Me. 298, 299–300 (1849); *Hix v. Whittemore*, 45 Mass. (4 Met.) 545, 547 (1842). See generally BUSWELL, *supra* note 130, at 213–15 (citing cases).

135. See, e.g., *Corbit*, 7 Clarke at 64 (holding that “a very modified degree of incapacity will be sufficient to invalidate, if the transaction is accompanied with fraud, imposition, or any over-exercise of authority”). See generally 1 FRANCIS WHARTON & MORETON STILLÉ, *MEDICAL JURISPRUDENCE* 72–78 (Phila., Kay & Bro. 4th ed. 1882) (stating this was generally the rule across American jurisdictions and suggesting it was especially likely to be invoked in cases involving elderly testators).

136. See, e.g., *Jacox v. Jacox*, 40 Mich. 473, 480 (1879); *Cadwallader v. West*, 48 Mo. 483, 483 (1871); *Haydock v. Haydock*, 34 N.J. Eq. 570, 574 (1881). See generally 1 CLEVINGER, *supra* note 19, at 452; 1 WHARTON & STILLÉ, *supra* note 135, at 82.

all due knowledge and freedom.<sup>137</sup> There was, to be sure, nothing new about these rules in and of themselves. They had long been applied under the common law to a limited set of “confidential relations,”<sup>138</sup> traditionally understood to include those between parent and child, husband and wife, guardian and ward, attorney and client, doctor and patient, and priest and penitent. However, nineteenth-century judges did not treat this as an exhaustive list. Reasoning by analogy, some opined that adulterous affairs and other “unnatural” connections ought to be scrutinized as well, and many others suggested that a presumption of fraud, undue influence, or duress might be raised in *any* case in which one party was dependent upon and subject to the control, judgment, or opinion of another.<sup>139</sup> With such pronouncements, the courts of the day assumed jurisdiction over a remarkably wide array of domestic and business relations, standing ready to intercede on behalf of the weaker party, even when he was not *non compos mentis* in the legal sense, nor insane as a matter of medical science. However, many judges were at pains to add that no presumption of insanity would arise “from the mere fact, that a testator has not disposed of his or her property, as a jury might suppose it should have been disposed of, or that a different disposition was made of it, than made by the law, in cases of intestacy.”<sup>140</sup>

However hard judges worked at the procedural level to bring a measure of order to these unruly suits, they were sooner or later forced to confront the nettlesome question of what constituted proof of incapacity. The difficulties inhering in this enterprise were frankly admitted at the outset of many a jury charge. “It is true,” one judge began, “you can not, in the nature of the things, look in upon the human mind, and see its operations and true condition, or behold its thoughts or intentions in the processes of their birth and development. It is invisible to the bodily eye in natural light.”<sup>141</sup> As a result, jurors were forced to rely upon indirect means of knowing another’s mind: “You are compelled, therefore, to look to the external acts, or other outward visible manifestations of the party, as indicating his inward mental condition, or *status*.”<sup>142</sup>

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137. See *Jacox*, 40 Mich. at 480; *Haydock*, 34 N.J. Eq. at 574. See generally 1 CLEVENGER, *supra* note 19, at 452.

138. 1 WHARTON & STILLÉ, *supra* note 135, at 80.

139. See *Jacox*, 40 Mich. at 480; 1 WHARTON & STILLÉ, *supra* note 135, at 73–74.

140. *Henry v. Hall*, 106 Ala. 84, 99 (1894). See generally, 1 CLEVENGER, *supra* note 19, at 452.

141. *Doe v. Beeson*, 7 Del. (2 Houst.) 246, 262 (1860).

142. *Id.*

Of these behavioral signs, the act itself—the will, contract, deed, or tort that was in dispute—was at once the most revealing and problematic indicator of the actor's status, in the mental sense. By and large, judges tended to hold that “a rational act rationally done”<sup>143</sup> constituted strong (if not conclusive) evidence of the competence of the actor.<sup>144</sup> However, they proved far less willing to infer the incapacity of the actor from the irrationality of the disputed act.<sup>145</sup> Some part of their hesitancy may have stemmed from worries about the implications of this way of thinking on the criminal side of the docket, where the sheer atrocity of a crime might, on this reasoning, supply grounds for excuse from responsibility.<sup>146</sup> But judges also found cause for concern as they sat in judgment in civil contests, where irrationality so often appeared to be in the eye of the beholder.<sup>147</sup> To allow civil acts to be set aside on this ground alone would give those with mercenary motives all the more

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143. This language, repeated often in American decisional law, was first enunciated in the English case of *Cartwright v. Cartwright*, (1793) 1 Phill. Ecc. 90, 100.

144. For cases conclusively drawing this inference, see, for example, *Beller v. Jones*, 22 Ark. 92, 99 (1860); *Overton's Heirs v. Overton's Ex'rs*, 57 Ky. (18 B. Mon.) 61, 64 (1857); *George Weir's Will*, 39 Ky. (9 Dana) 434, 441 (1840); *Brock v. Luckett's Ex'rs*, 5 Miss. (4 How.) 459, 482–83 (1840). For those taking a more qualified view, see, for example, *Hall v. Unger*, 11 F. Cas. 261, 264–65 (C.C.D. Cal. 1867) (No. 5,949); *Couch v. Couch*, 7 Ala. 519, 524 (1845); *Duffield v. Robeson*, 2 Del. (2 Harr.) 375 (1838); *Corbit v. Smith*, 7 Clarke 60, 66 (Iowa 1858); *Clark v. Fisher*, 1 Paige Ch. 171, 173 (N.Y. Ch. 1828).

145. For a leading example of this tendency, see *Patterson v. Patterson*, 6 Serg. & Rawle 55, 56 (Pa. 1820) (Gibson, J.) (“To justify a jury in invalidating a will, from its intrinsic evidence only, would require an extreme case, perhaps such as never can occur; but the disposition of the property may be so utterly absurd or unjust, as to induce a reasonable belief, that no man in his senses, and uncontrolled by an improper influence, would make it; and there may be cases, where this internal evidence, added to other proof, which would, of itself, leave the question doubtful, ought to turn the scale.”).

146. Thus, the same judge who decided *Patterson* would later charge a jury in a criminal case as follows: “To the eye of reason, every murderer may seem a madman; but in the eye of the law he is still responsible.” *Commonwealth v. Mosler*, 4 Pa. 264, 268 (1846) (Gibson, C.J.). For other judges expressing similar views, see, for example, *State v. Spencer*, 21 N.J.L. 196, 207 (1846) (recognizing that, “in one sense, [the criminal] is a madman,” but insisting that the sheer fact of his offense could not serve as an excuse from criminal liability); *State v. Stark*, 32 S.C.L. (1 Strob.) 479, 511 (1847) (expressing concern that “no man can ever be convicted of the murder of his family, if no more can be proved but the homicide itself, for the more unnatural and brutal the crime, the stronger would become the ground of defence”); *People v. Pine*, 2 Barb. 566, 575 (N.Y. Gen. Term 1848) (“The act itself cannot be taken as evidence [of insanity]; it must be proven otherwise.”) (emphasis omitted). Cf. *Laros v. Commonwealth*, 84 Pa. 200, 210 (1877) (finding that the lower court “did not mean to say that when proof of insanity is given the horrid and unnatural character of the crime will lend no weight to the proof; but meant only that the terrible nature of the crime will not stand as the proof itself, or an element in the proof of the fact of insanity”).

147. See, e.g., *Baldwin v. Dunton*, 40 Ill. 188, 192 (1866); *Boylan v. Meeker*, 28 N.J.L. 274, 277–78 (1860).

reason to try their luck in court, undermining the security of economic transactions and potentially serving as a disincentive to individual industry and ingenuity.<sup>148</sup> Accordingly, jury charges commonly contained mixed messages about evidence of irrationality; jurors were told not to jump to the conclusion of incapacity and yet, reminded that unreasonable behavior was known to be “one of the results of derangement—one of the indicia by which it manifests itself.”<sup>149</sup>

The testimony of medical specialists might have been expected to shed light on this critical issue, and, indeed, their viewpoints were quite freely admitted and prominently featured in instructions to the jury, though not always in the most favorable of terms. Unlike laymen, who were only allowed to offer their opinions regarding a party’s mental condition when derived from personal observation, medical men were generally permitted to do so even when based entirely upon the testimony of other witnesses.<sup>150</sup> A few jurisdictions recognized the peculiar expertise of practicing alienists—of those “who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons.”<sup>151</sup> But most courts were less discriminating in this regard, leaving it to jurors to decide whose judgment to trust.<sup>152</sup>

Still, there was something of a skeptical undercurrent on the bench, and those with misgivings seemed to grow more outspoken with the passage of time, warning jurors that mad doctors might well be deluded in their own way, as they tended to “rely upon mere conjectures for their inductions, which inductions are often warped, or fitted to pet theories or prejudices.”<sup>153</sup> This was not the only way that judges sought to insulate

148. For an especially strong statement to this effect, see the ruling in *La Bau v. Vanderbilt*, 3 Redf. Sur. Ct. 384, 416–17 (N.Y. Sur. Ct. 1879).

149. *Florey's Ex'rs v. Florey*, 24 Ala. 241, 249 (1854) (emphasis omitted).

150. See generally BUSWELL, *supra* note 130, at 253–59 (citing cases); 1 CLEVENGER, *supra* note 19, at 536–42 (same).

151. *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 505 (1844); see also *Coryell v. Stone*, 62 Ind. 307, 311 (1878); *Davis v. State*, 35 Ind. 496, 497 (1871); *Baxter v. Abbott*, 73 Mass. (7 Gray) 71, 80–81 (1856). See generally 1 CLEVENGER, *supra* note 19, at 546–49.

152. See, e.g., *State v. Reddick*, 7 Kan. 143, 150 (1871); *Hastings v. Rider*, 99 Mass. 622, 627 (1868); *Bitner v. Bitner*, 65 Pa. 347, 362 (1870); *Hathaway's Adm'r v. Nat'l Life Ins. Co.*, 48 Vt. 351, 355 (1875); *Fairchild v. Bascomb*, 35 Vt. 398, 416 (1862).

153. BUSWELL, *supra* note 130, at 263; see also *Watson v. Anderson*, 13 Ala. 202, 204 (1848); *Stackhouse v. Horton*, 15 N.J. Eq. 202, 208–09 (N.J. Prerog. Ct. 1854). Appellate judges also registered disquiet in their opinions; complaints about expert witnesses were especially pointed in homicide cases, see, e.g., *People v. Finley*, 38 Mich. 482, 483 (1878) (“Unfortunately for the administration of justice persons are sometimes found who with small experience and large conceit have succeeded in formulating theories under which, if properly applied, there would be hardly enough sane persons found to sit upon juries or attend to business.”), but were

court proceedings from the undue influence of medical men. In most jurisdictions, various procedural rules were instituted in the latter half of the century to prevent testifying physicians from invading the province of the jury as they weighed in on the issue of capacity; in the questions put to these putative experts, counsel were required to speak in hypothetical terms, rather than asking such witnesses about the facts in the case at bar.<sup>154</sup> Moreover, the relative value of medical as distinct from lay testimony was called into question, with some judges suggesting that the opinions of relatives and neighbors might be of greater value than putative experts.<sup>155</sup> To the end of the century, however, American courts would remain remarkably undecided as to whether the issue of mental soundness was primarily a matter of fact, law, or medical science.<sup>156</sup>

This uncertainty was most clearly manifest in the tests of (in)sanity contained in the concluding portions of jury instructions. These tests were composed of old and new elements, drawn from common law authorities as well as the works of mental philosophers and medical jurists, which were adjusted to meet the exigencies of nineteenth-century civil capacity contests. Of these, three deserve special notice, not only on account of the frequency of their use, but also because they reflected the varying degrees to which the new sciences of the mind were incorporated into legal standards of mental competence. The most traditional of the three was the knowledge test, which was intended to gauge the party's general cognitive ability to "know and understand"<sup>157</sup> the "nature and consequences of his act"<sup>158</sup> and to "form some rational judgment"<sup>159</sup> in

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also commonly aired in civil trials, *see, e.g.*, *Rush v. Megee*, 36 Ind. 69, 74 (1871) (noting the declining estimation and patience of judges for medical experts, who could seemingly "be found to testify to any theory" (internal quotation marks omitted)); *Riley v. Sherwood*, 45 S.W. 1077, 1080 (Mo. 1898) ("The medical profession sometimes complain that the courts do not keep pace with the scientific advance in the knowledge of insanity, and it may be that they do not always; but certainly courts they are not unreasonable when they reject the conclusions of those who claim to be experts, when they pronounce a person insane, without hesitation, upon such a meager hypothesis as that presented to them . . . in this case.").

154. See BUSWELL, *supra* note 130, at 270–72; 1 CLEVENGER, *supra* note 19, at 542–46.

155. See, *e.g.*, *Burley v. McGough*, 115 Ill. 11, 14–15 (1885); *Rutherford v. Morris*, 77 Ill. 397, 404–05 (1875); *Beaubien v. Cicotte*, 12 Mich. 459, 490–91 (1864); *Andrew's Case*, 33 N.J. Eq. 514, 516–17 (1881). See generally 1 CLEVENGER, *supra* note 19, at 590–600.

156. See BUSWELL, *supra* note 130, at 174–79; 1 CLEVENGER, *supra* note 19, at 550–67, 583–88.

157. *Stevens v. Vancleve*, 23 F. Cas. 35, 38 (C.C.D.N.J. 1822) (No. 13,412).

158. *Deveraux v. Hubbard*, 117 Mich. 119, 122 (1898); *see also In re Flansburgh's Will*, 31 N.Y.S. 177, 178 (Gen. Term 1894).

159. *Delafield v. Parish*, 25 N.Y. 9, 26 (1862).

relation to them.<sup>160</sup> Nineteenth-century judges sometimes added an affective or volitional prong as well, implying that one needed to *feel* the effects of one's actions in order to fully comprehend them, and to possess enough willpower to enact "a fixed purpose of his own."<sup>161</sup> These additions were cast in terms of the mental and moral philosophy of the day, while the second test, that of delusion, incorporated insights drawn from the new medical psychology. Under the terms of this test, a person was considered a monomaniac in the legal sense if he persistently adhered to false ideas that no "rational" or "sane" person would believe.<sup>162</sup> This was not, however, the test most preferred by practicing alienists, for they maintained that the most reliable sign of insanity was, in fact, a "change of character,"<sup>163</sup> defined as "a prolonged departure, without an adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health."<sup>164</sup> This behavioral test was typically added to others in jury instructions,<sup>165</sup> though it could have the ironic effect of demoting expert opinions in the scheme of things, as judges suggested that neighbors and relatives were in a better position to assess whether such a personality transformation had occurred.<sup>166</sup>

Judicial tests of capacity were commonly stated as if rationality and sanity had settled meanings in antebellum American culture, even though the testimony before courts seemed quite often to suggest otherwise. Rather than reckoning with this problem in any substantial way, presiding judges simply tempered their charges with a few cautionary

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160. See, e.g., *id.* at 83–84; *Dicken v. Johnson*, 7 Ga. 484, 487 (1849); *Chapline v. Stone*, 77 Mo. App. 523, 527 (Ct. App. 1898); *Concord v. Rumney*, 45 N.H. 423, 427 (1864).

161. *Newcomb's Ex'rs v. Newcomb*, 27 S.W. 997, 998 (Ky. 1894); see, e.g., *Life Ins. Co. v. Terry*, 82 U.S. (15 Wall.) 580, 584–85 (1872); *Moore v. Conn. Mut. Life Ins. Co.*, 17 F. Cas. 672, 674 (1874); *St. Louis Mut. Life Ins. Co. v. Graves*, 69 Ky. (6 Bush) 268, 269–79 (Ky. 1869); *Harvey v. Heirs of Sullens*, 56 Mo. 372, 378 (1874); *Merritt v. Johnson*, 2 N.J.L. 454, 527 (1819); *Kaufman v. Caughman*, 27 S.E. 16, 20 (S.C. 1896).

162. See *Am. Seamen's Friend Soc'y v. Hopper*, 33 N.Y. 619, 639 (1865) (Brown, J., concurring); see also *Middleditch v. Williams*, 45 N.J. Eq. 726, 733 (1889); *In re M'Elroy's Case*, 6 Watts & Serg. 451, 461–62 (Pa. 1843); cf. *Wright v. Wright*, 139 Mass. 177, 182–83 (1885) (observing that some judges sanction the test of delusion but further noting increasing judicial tendency to regard this essentially as a matter of fact, and to avoid laying down "sweeping rules").

163. BECK & BECK, *supra* note 129, at 817; RAY, *supra* note 92, at 142; see also 1 CLEVENGER, *supra* note 19, at 347–49.

164. BECK & BECK, *supra* note 129, at 774; RAY, *supra* note 92, at 144 (emphasis omitted); WINSLOW, *supra* note 22, at 154 (emphasis omitted) (quoting Dr. Combe); see also 1 CLEVENGER, *supra* note 19, at 347–49.

165. See, e.g., *Denson v. Beazley*, 34 Tex. 191, 217 (1870) (Evans, P.J., concurring).

166. See, e.g., *Burley v. McGough*, 115 Ill. 11 (1885); *Rutherford v. Morris*, 77 Ill. 397, 404–05 (1875); *Beaubien v. Cicotte*, 12 Mich. 459, 476 (1864); *Andrew's Case*, 33 N.J. Eq. 514, 516 (1881).

words, apparently intended to maintain the appearances of a determinate "law of insanity." In considering the evidence, jurors were warned not to confuse mental unsoundness with mere mental weakness or moral perversion, though they were nonetheless permitted to draw inferences as to the existence of the former from evidence of the latter.<sup>167</sup> And yet, these jurors were also very pointedly instructed not to impose their own judgments about what the party ought to have done, or what they themselves would have done, in the circumstances of the case. Instead, they were advised that the question before them was whether the act in issue had been freely performed by *this* party while he was in his own "right mind."<sup>168</sup> Litigants on the losing side of the issue were all too eager to try their luck on appeal, forcing reviewing judges to wade through a mass of conflicting evidence, mostly clearly going to show that the study of mental disease had not yet been entirely "reduced to a science."<sup>169</sup>

As these sorts of cases became increasingly common in American courtrooms, judges might have been expected to respond by closing off this avenue of litigation altogether by effectively declaring the presumption of sanity to be conclusive in most, if not all, civil cases. However, as we shall see in the pages that follow, this was not the path generally taken by members of the bench. But for a few isolated pockets of tort and contract law, we will see that mental soundness remained a contestable issue to the century's end. This is not to say the "jurisprudence of insanity" was an indeterminate body of doctrine, subject to endless manipulation by interested parties. To the contrary, judges did succeed, over time, in clarifying the meaning of legal competence, thereby bringing the features

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167. *Florey's Ex'rs v. Florey*, 24 Ala. 241, 249 (1854) ("Common observation and daily experience have fully demonstrated, that an irrational belief more frequently results from eccentricity, ignorance or association, than from insanity. Still, however, as irrationality is one of the results of derangement—one of the indicia by which it manifests itself—it follows, that either acts or opinions, which are in themselves irrational, are proper to be submitted to the jury, and are entitled to more or less weight according to circumstances." (emphasis omitted)); cf. *Dennett v. Dennett*, 44 N.H. 531, 538 (1863) (stating that weakness of mind can be so great as to render one mentally unsound).

168. See *Den d. Trumbull v. Gibbons*, 22 N.J.L. 117, 141 (Sup. Ct. 1849) ("The question for your decision is not, is this a fair will, a just will, an equitable will, the will of a right thinking man and a kind hearted father, but is it [defendant's] will? If it is, your verdict should be for the defendant. Nor need I say to you, that this is not the place nor the occasion for the indulgence of our sympathy with misfortune, or our indignation against vice, much less are you here to rebuke sin. We are here in the discharge of a high and sacred duty, which is to be performed with a single eye to the law and the testimony, irrespective of our feelings and our sympathies."); see also *Boardman v. Woodman*, 47 N.H. 120, 138 (1865) (following *Trumbull*); *Smith v. Smith*, 48 N.J. Eq. 566, 591 (Prerog. Ct. 1891) (same).

169. See, e.g., *Meeker v. Meeker*, 75 Ill. 260, 263 (1874).



of the default legal person into sharper focus as they moved from one field of law to the next. Their judicial opinions could appear rather ad hoc at first blush, as they tended to emphasize the difficulties of generalization and the extent to which capacity determinations turned on the “peculiar circumstances” of the case.<sup>170</sup> And yet, upon closer scrutiny, certain patterns and tendencies can be discerned across cases and time.

Perhaps the most striking feature of this body of decisional law is the resistance on the part of appellate judges to any simple equation of legal capacity with “reasonableness”—in either the objective or subjective sense of the word. To be sure, one needed to have the *capacity* to reason to be deemed a responsible person in the eye of the law, and it certainly remained the case that *acting* reasonably might constitute some evidence to this effect. But judges were quite adamant in stressing that the apparent rationality of the actor was neither a necessary nor a sufficient indicator of his legal capacity, which essentially turned upon whether they were the product of *his* conscious choice. In other words, the default legal person they had in mind was capable of understanding the nature and consequences of his actions, and freely determining how to proceed on the basis of this knowledge. An individual shown to be in possession of these basic mental attributes would be held accountable for his actions, regardless of whether or not he ultimately elected to conform to what the rest of the world called sane.<sup>171</sup>

Although this way of framing the issue of capacity left considerable space for eccentricity within the model of the legally competent person, we will see that conventional notions of rationality invariably—and perhaps unavoidably—inflected doctrinal reasoning, even as judges endeavored to transcend their own biases. However, this is hardly meant to suggest that they were the self-deluded metaphysicians that Realist writers and more recent historians have often made them out to be. For as we will see below, the judges themselves were often acutely aware that they were reasoning in circles, and it was this realization that gradually moved them to formulate a pragmatic rationale for what they were doing, in which they expressed far more realism in their opinions than later generations have allowed.

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170. See, e.g., *Appeal of Dunham*, 27 Conn. 192, 199 (1858); *Duffield v. Robeson*, 2 Del. (2 Harr.) 375, 378–79 (1838); *Trish v. Newell*, 62 Ill. 196, 201 (1871); *Wood v. Sawyer*, 61 N.C. (Phil.) 251, 275 (1867).

171. *Reynolds v. Root*, 62 Barb. 250, 252 (N.Y. Gen. Term 1862).

## IV. CHARACTERIZING LEGAL COMPETENCY

In the crucible of the nineteenth-century courtroom, common law judges reasoned from Enlightenment premises, characterizing the threshold of legal competency in terms of the default legal person, who possessed the basic capacity for rational and moral action. As judges deployed this figure across doctrinal fields, however, his personality was altered in subtle but significant ways, showing that the constitution of the accountable agent was, in many respects, contingent upon legal context as well as the circumstances of the individual case. The shifting attributes of the default legal person are explored in the Subparts below, which present a series of illustrative cases drawn from selected areas of private law. In these cases, judges were repeatedly faced with a set of conflicting policy imperatives, which forced them to balance concerns about the welfare of the alleged incompetent and his dependents against the need to maintain the security of economic transactions. Nonetheless, it will become apparent in what follows that their decisionmaking process cannot be simply reduced to a matter of balancing between these two concerns, as scholars from the Legal Realists forward have suggested in their retrospective surveys of the “operative effect of mental incompetency” in private law adjudication.<sup>172</sup> Without denying the extent to which considerations of fairness and efficiency shaped judicial reasoning over the course of the nineteenth century, I argue that courts in this period were at least as concerned with maintaining a certain correspondence between the actual state of a man’s consciousness and the extent of his liability for his civil acts and wrongs. That is to say, the articulate standards invoked in the decisional law cannot so easily be dismissed as metaphysical survivals or mere covers, masking the fact that courts were actually passing judgment on “the transaction, and not the individual.”<sup>173</sup> For the law reports from the period reveal that the judges’ conceptions of justice and expediency were themselves inextricably bound up with a substantive vision of what it was to be a moral and rational civil agent—one that arguably continues to underwrite our present-day ways of thinking about civil as well as criminal responsibility.

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172. See Milton D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 306–11 (1944) [hereinafter Green, *Proof of Mental Incompetency*]; Milton D. Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 TEX. L. REV. 554, 554 (1943); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 249–55 (1996); Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 612–24 (1997).

173. Green, *Proof of Mental Incompetency*, *supra* note 172, at 275.

The analysis begins with the laws governing guardianship and civil commitment, which were intended to provide for those who were not *sui juris*—who wanted the capacity to govern themselves and their affairs. In the early part of the century, the paternal authority of the law was extended to cover a broader class of mental incompetents than had long been the case in England. Most significantly, American courts assumed jurisdiction over sufferers of mental disease who did not present any immediate threat to life or property, but nonetheless appeared likely to benefit from medical attention in one of the nation's insane asylums. This extension of the law would frequently put judges in the uncomfortable position of deciding whether such treatment was required, sometimes before it was imposed, but other times after the fact, when false imprisonment claims were filed. All the while, judges faced a steady stream of cases contesting the imposition of guardianships, which were especially excruciating when they pitted family members against the alleged incompetent. While judges were at first inclined to defer to the wishes of close relatives and asylum superintendents, the potential for abuse of court processes soon became apparent. No less disturbing were the periodic reports of horrific violence perpetrated by lunatics allowed to remain wholly unrestrained. Seemingly torn between conflicting impulses to raise or lower the threshold of capacity in order to address these social concerns, judges tended to figure the default legal person in substantially the same way across the century, casting him as one with the basic capacity for "rational self-control."<sup>174</sup>

However judges characterized the default in such cases, it was with the knowledge that neither interdiction nor commitment was wholly determinative of a party's legal status. Those who lived under such constraints were not entirely debarred from performing civil acts, nor were they necessarily immune from liability for civil wrongs. Although a judicial finding of insanity at one moment in time might be taken as *prima facie* evidence of a party's incapacity, at others, it was far from all determining. Since the legal definition of insanity had expanded to include so many "degrees and varieties of mental derangement," judges were, in fact, quite open to the possibility that a confirmed lunatic remained perfectly capable of managing at least some of his affairs.<sup>175</sup> Accordingly, they took a practical, contextual approach to the question of mental competency, redrawing the default legal person as they moved from one doctrinal field to the next, recognizing that "[d]ifferent kinds of business require different

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174. See, e.g., *Van Deusen v. Newcomer*, 40 Mich. 90, 141 (1879).

175. *Inhabitants of St. George v. City of Biddeford*, 76 Me. 593, 595–96 (1885).

degrees of mental ability to enable a person to do them understandingly.”<sup>176</sup> Though judges strenuously maintained that legal competency was not necessarily established by conformity to conventional norms, they tended to accord heightened scrutiny to “unnatural” wills and “improvident” contracts, regularly admitting testimony concerning “the act itself” as evidence of incapacity, undue influence, or fraud.

In both contracts and testamentary cases, instrumental considerations inflected legal determinations of capacity quite clearly. If wills were too readily set aside, judges worried, a testator might have less motivation to accumulate wealth during the prime of his life, and little leverage over his family members in his declining years, when he needed their support and care the most. Moreover, they feared that raising the threshold of contractual capacity too high would have an unsettling effect on marketplace relations, rendering titles to property dangerously insecure. As they weighed these considerations, judges certainly saw the appeal of objective standards of liability, but they rarely adopted them as a general solution to the problem of capacity litigation. Instead, the law reports illustrate the relentless tendency of nineteenth-century judges to individuate and particularize, to base civil responsibility upon an Enlightenment conception of moral agency, and then to mine the factual record for behavioral signs of the “capacity to reason.” The only exceptions to this general rule were where innocent third parties might be harmed by a finding of incapacity. This could not easily be said of the parties to a will contest, nor in many capacity suits involving contracts and deeds, where only the original parties were involved. But in those cases in which one party could plausibly and fairly claim not to have had notice of the other’s incapacity, courts tended to refuse to set aside the contract unless the consideration could be restored.

The same basic concern about innocent third parties animated suits brought in the field of tort law, where the capacity to harm was frequently taken as a sufficient basis for finding liability. Indeed, the standard set by the default legal person sometimes appeared so undemanding as to be almost indistinguishable from a conclusive presumption of capacity. All the same, we shall see that even here objectivism did not totally win the day. For the claim of incapacity might still be raised in cases involving intentional torts, and even in those involving negligence, judges were sometimes inclined to take an individual’s “personal equation”<sup>177</sup> into

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176. *Burnham v. Mitchell*, 34 Wis. 117, 121 (1874) (quoting jury charge).

177. For an example of those using this phrase, see HOLMES, *supra* note 3, at 108.

account, making certain adjustments for those who were not mentally capable of exercising what the law objectively defined as due diligence.

Thus the state of a man's consciousness was adjudged material to his liability across most areas of nineteenth-century American private law. But no matter how hard judges worked to refine their characterizations of the competent person, they kept bumping up against the same basic attributive dilemma in every field of law. So long as judges articulated legal standards of competence in Enlightenment terms—conditioning legal competence upon the capacity to reason—there was some basis for questioning the sanity and freedom of those who deviated from conventional standards of rationality and morality. And yet, judges also had to admit that external behavioral signs were, at best, imperfect indicators of internal mental states—that the apparent reasonableness of the act could never be taken as conclusive proof of the competence of the actor. Nor did it escape their notice that what was rational was largely a matter of degree and perspective, proving to be eminently contestable in and of itself. How, then, were judges to draw any determinate lines? If there was no settled consensus about such matters, among either doctors or laymen, on what basis was a court to rule in any given case?

In view of their predicament, we might expect to find American judges running headlong into the arms of the reasonable man in the last decades of the nineteenth century, just as Holmes had predicted, and just as many legal historians have contended they in fact did. However, as we shall see below, the law reports provide a different picture of the period, revealing that American judges continued to entertain capacity contests, summoning the default legal person in case after case. However perplexing and time consuming these trials proved to be, judges continued to hear them with a fair degree of regularity to the end of the century. Indeed, they were quite vigilant in policing the borderlands of legal competency, taking it to be their professional responsibility to ensure that those in possession of civil rights and liberties had the mental ability to exercise them “in a rational manner” that was ultimately expressive of their own “fixed purposes.”<sup>178</sup>

#### A. Sanity and Self-government

The most fundamental threshold the default legal person marked was that between individuals who were *sui juris* and those who were not. The latter category was substantially enlarged in the early decades of the

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178. See, e.g., *Newcomb's Ex'rs v. Newcomb*, 27 S.W. 997 (Ky. 1894).

nineteenth century, as American courts assumed jurisdiction over a broader class of mentally disabled persons than had traditionally been exercised by the king, as *parens patriae* under English law.<sup>179</sup> In the several states, the protective shield of the law was extended beyond idiots and lunatics, in the strict sense, to cover a more nebulous grouping of "persons of unsound mind."<sup>180</sup> Judges tended to place a liberal construction on this language, reading it to apply to "every person who, in consequence of old age, disease, or any other cause is in such a state of mental imbecility as to be incapable of conducting his affairs with common prudence, and . . . liable to become the victim of his own folly or the fraud of others."<sup>181</sup> In most jurisdictions, this protective rule even encompassed "habitual drunkards."<sup>182</sup>

179. WILLIAM BLACKSTONE, 1 COMMENTARIES \*292–96. The right of the king to assume the care and custody of his insane subjects was delegated to the lord chancellor. *Id.* at \*294; SHELFORD, *supra* note 116, at 6. After the Revolution, this authority was relocated in the courts of the several states. See BUSWELL, *supra* note 130, at 42–46; J.G. WOERNER, A TREATISE ON THE AMERICAN LAW OF GUARDIANSHIP OF MINORS AND PERSONS OF UNSOUND MIND 384–86 (Boston, Little, Brown & Co. 1897). Historical scholarship on the law of guardianship is surprisingly thin. For general overviews of this subject, see Lawrence M. Friedman et al., *Guardians: A Research Note*, 40 AM. J. LEGAL HIST. 146–65 (1996); Sallyanne Payton, *The Concept of the Person in the Parens Patriae Jurisdiction Over Previously Competent Persons*, 17 J. MED. & PHIL. 605, 617–39 (1992).

180. In some jurisdictions, "lunatic" or "insane persons" was instead adopted as the generic term for all "species" of mental derangement. See WOERNER, *supra* note 179, at 378–79. For evidence of the confusion engendered by this term, among both legal and medical writers, see 1 THEODRIC ROMEYN BECK & JOHN B. BECK, ELEMENTS OF MEDICAL JURISPRUDENCE 743–48 (Albany, Little & Co. 10th ed. 1850–51).

181. See *Nailor's Children v. Nailor*, 34 Ky. 229, 231, 4 Dana 340, 343 (1836) (acknowledging pre-Revolutionary decisions that limited the jurisdiction of chancery courts to cases of lunacy and idiocy but declaring that "the whole current of authorities since, with a sounder and more rational view of the subject . . . have settled it otherwise"). In so ruling, American judges proceeded in line with recent trends in English law. See, e.g., *In re Barker*, 2 Johns. Ch. 232, 237 (N.Y. Ch. 1816) (taking judicial notice of recent English cases and declaring it "would be a blemish in the jurisprudence of the country" not to follow suit). See generally 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 595 (Boston, Hilliard, Gray & Co. 1836). In some jurisdictions, this change was effected by statute. For example, in Pennsylvania, the traditional English doctrine was applied. See, e.g., *In re Beaumont*, 1 Whart. 52 (Pa. 1836). However, this common law rule was formally altered by statute in 1836. See Act of June 13, 1836, No. 171, § 67, 1700–1836 Pa. Laws 605 ("The word 'lunatic' in this act, shall be construed to mean and include every person of unsound mind, whether he may have been such from his nativity, as idiots, or have become such from any cause whatever."); cf. *M'Elroy's Case*, 6 Watts & Serg. 451, 465 (Pa. 1843) (suggesting that a "total loss of reason" was not necessarily required under traditional English law, but insisting, in any event, that courts of law ought to be illumined by the "the lights of science and experience," which had established the existence and debilitating effects of "partial insanity"). See generally BUSWELL, *supra* note 130, at 1–4; JOHN ORDRONAU, THE PROPER LEGAL STATUS OF THE INSANE & FEEBLE-MINDED 13 (N.Y., McDivitt, Campbell & Co. 1875); WOERNER, *supra* note 179, at 375–81. But see *In re Vanauken*, 10 N.J. Eq. 186, 195 (1854) (continuing to follow older English authorities in requiring proof of a total deprivation of sense).

182. BUSWELL, *supra* note 130, at 53–54 (listing states).

Although such individuals were in some sense to blame for their unfortunate condition, they were nonetheless appropriate candidates for the guardianship of the law, almost by definition. "It is indeed impossible that a man can be an habitual drunkard without waste or mismanagement," one judge observed, for this was true of "the very act of drunkenness."<sup>183</sup>

As they assumed this expansive jurisdiction, American judges tended to blur a distinction that was originally drawn between idiots and lunatics at common law, reflecting a basic difference in the nature of the underlying mental defect in each case. Whereas the idiot was conceived as one who "hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any,"<sup>184</sup> the lunatic was defined as one who had "lost the use of his reason," with the implication that he might recover it in the future.<sup>185</sup> In view of the idiot's original deprivation, he was treated like a perpetual infant, one who might not develop interests of his own, beyond the most elemental level of subsistence. Accordingly, the king took custody of his lands and the profits accruing to them, subject only to the duty to provide his ward with "necessaries."<sup>186</sup> The prerogatives of the Crown were not as extensive in the case of the lunatic; the king was to act solely as a trustee of the lunatic, who was to be treated as one who might yet recover his reason.<sup>187</sup> The existence of these legal rules appeared to condition the behavior of jurors, as they seldom found a man "an idiot *a nativitate*," tending instead to pronounce the party *non compos mentis* from a particular point in time, thereby placing limits on royal authority.<sup>188</sup> Still, the formal distinction between idiots and lunatics was maintained for centuries, even finding its way into nineteenth-century American statutes and decisional law, though it no longer seemed to carry much practical significance. In most jurisdictions, the same basic custodial arrangements were provided for idiots, lunatics, and persons of unsound mind.<sup>189</sup> Yet as the rules relating to all types of mental incompetents grew more uniform, however, there remained some ambiguity as to whether guardians were to treat those who had previously been competent in the same fashion as those who had not. Were guardians now expected to

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183. *Ludwick v. Commonwealth*, 18 Pa. 172, 175 (1851).

184. BLACKSTONE, *supra* note 179, at \*292.

185. *Id.* at \*294. See generally Payton, *supra* note 179, at 621–22.

186. BLACKSTONE, *supra* note 179, at \*293. After the death of the ward, the lands descended to his heirs. *Id.* See generally Payton, *supra* note 179, at 622, 633.

187. BLACKSTONE, *supra* note 179, at \*294. After the death of the ward, the property went to his executor or administrator. *Id.* See generally Payton, *supra* note 179, at 622.

188. BLACKSTONE, *supra* note 179, at \*293; see also 1 COLLINSON, *supra* note 116, at 100.

189. WOERNER, *supra* note 179, at 375–78.

assume a parental role, on the model of infancy, or to instead proceed in the manner of a trusted friend, who could imagine what the ward might have done, had he been “capable of acting with sense and discretion”?<sup>190</sup>

Questions about the protective powers of the state only multiplied with advances in the diagnosis and treatment of mental illness in antebellum America. This era saw the rise of a “cult of curability,” and, with it, the construction of public and private hospitals and asylums for the insane.<sup>191</sup> This set of developments prompted legislatures and courts to reconsider the rules governing the civil confinement.<sup>192</sup> It had long been held that “dangerous” lunatics could be placed under emergency restraints—by justices of the peace or private parties—in order to prevent imminent harm to the lunatic or others.<sup>193</sup> A lunatic could not be held indefinitely, however, as it was expected that formal guardianship proceedings would be initiated within a “reasonable time,” with the purpose of appointing “responsible protectors”; individuals so designated were entrusted with the custody and care of the lunatic and made directly accountable to the court “for the propriety of their conduct.”<sup>194</sup> Whether the guardian was thereby authorized to place his ward in confinement indefinitely was far from clear, though it was not uncommon to find lunatics so secured

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190. *In re Willoughby*, 11 Paige Ch. 257, 260 (N.Y. Ch. 1844).

191. See ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 132–45* (1937). On the rise of the asylum movement in America, see generally THOMAS J. BROWN, *DOROTHEA DIX: NEW ENGLAND REFORMER* (1998); DAVID GOLLAHER, *VOICE FOR THE MAD: THE LIFE OF DOROTHEA DIX* (1995); GERALD N. GROB, *MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875* (1973); ROTHMAN, *supra* note 85. On the cult of curability in particular, see generally Abraham S. Luchins, *The Cult of Curability and the Doctrine of Perfectibility: Social Context of the Nineteenth-Century American Asylum Movement*, 3 HIST. PSYCHIATRY 203 (1992). For case studies treating individual asylums, see NORMAN DAIN, *DISORDERED MINDS: THE FIRST CENTURY OF EASTERN STATE HOSPITAL IN WILLIAMSBURG, VIRGINIA, 1766–1866* (1971); ELLEN DWYER, *HOMES FOR THE MAD: LIFE INSIDE TWO NINETEENTH-CENTURY ASYLUMS* (1987); RICHARD W. FOX, *SO FAR DISORDERED IN MIND: INSANITY IN CALIFORNIA, 1870–1930* (1978); LAWRENCE B. GOODHEART, *MAD YANKEES: THE HARTFORD RETREAT FOR THE INSANE AND NINETEENTH-CENTURY PSYCHIATRY* (2003); GERALD N. GROB, *THE STATE AND THE MENTALLY ILL: A HISTORY OF WORCESTER STATE HOSPITAL IN MASSACHUSETTS, 1830–1920* (1966); PETER MCCANDLESS, *MOONLIGHT, MAGNOLIAS, & MADNESS: INSANITY IN SOUTH CAROLINA FROM THE COLONIAL PERIOD TO THE PROGRESSIVE ERA* (1996); NANCY TOMES, *A GENEROUS CONFIDENCE: THOMAS STORY KIRKBRIDE AND THE ART OF ASYLUM KEEPING, 1840–1883* (1984).

192. See Alan Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law, Part II: The American Experience*, 43 U. CIN. L. REV. 781, 804, 806–9 (1974); Ellen Dwyer, *Civil Commitment Laws in Nineteenth-Century New York*, 6 BEHAV. SCI. & L. 79, 82–83 (1987).

193. Dershowitz, *supra* note 192, at 809–10.

194. *Id.* at 791–93 (quoting and discussing *Colby v. Jackson*, 12 N.H. 526 (1842), as a representative case, reflecting the state of the common law from the eighteenth century forward).



in private homes or almshouses in the pre-asylum era.<sup>195</sup> As the new therapeutic orientation took hold, state legislatures were persuaded to appropriate funds for the creation and support of hospitals for the insane, moved as they were by an “economics of compassion,” which gave them reason to believe that “such institutions would return to the market place disturbed men and women who otherwise were likely to sink into lifelong dementia or dependency.”<sup>196</sup> The statutes enacted typically provided little by way of guidance as to the criteria for commitment, largely leaving questions of admission and discharge to the discretion of families, local officials, and asylum superintendents, with recourse to the courts contemplated as a last resort.<sup>197</sup>

The liberality of those rules even gave some alienists pause. In fact, it was Isaac Ray who issued one of the earliest calls for greater safeguards to protect the civil rights of those charged with mental incompetence. In his 1838 treatise, he warned that the statutes, as written, made it far too easy for interdiction to be procured on “slight grounds,” serving only “to promote the selfish views of relatives and friends.”<sup>198</sup> Moreover, he shuddered to think how many supposed lunatics might be unjustly consigned to “perpetual imprisonment”<sup>199</sup> solely because “other persons who would be benefited by such a step, say that he is mad.”<sup>200</sup> Accordingly, the doctor called for more narrowly drawn legal standards; he urged that the criteria for interdiction be more clearly distinguished from that for commitment and also recommended that asylums be subject to legislative oversight on an ongoing basis.<sup>201</sup> Without such mechanisms, Ray warned, the miscarriages of justice that had become all too common in England would become an American problem as well. For sadly, the doctor concluded, “it is not in human nature, that such power should escape frequent and flagrant abuses.”<sup>202</sup>

Allegations along these lines soon formed the basis for litigation, and it was in these contested cases that judges most fully elaborated what it was to be a self-governing person, so far as the law was concerned. The outlines

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195. *Id.* at 793; see also ROTHMAN, *supra* note 85, at 43–44; JIMENEZ, *supra* note 85, at 50–51.

196. Dwyer, *supra* note 192, at 82–83 (internal quotation marks omitted).

197. Dershowitz, *supra* note 192, at 808–09; see also Dwyer, *supra* note 192, at 83 (referencing a New York statute that required a medical examination as a precondition for commitment but noting that this rule was not observed in the case of pauper and private patients).

198. RAY, *supra* note 92, at 458.

199. *Id.* at 475.

200. *Id.* at 472.

201. See *id.* at 471–76.

202. *Id.* at 476.

of this figure can be discerned in a series of leading antebellum decisions handed down in guardianship and commitment proceedings, which served to clarify the circumstances warranting the interposition of the “paternal care of the court.”<sup>203</sup> While the earliest decisions tended to manifest a treatment mindset, validating the imposition of civil restraints even where the party’s mental disease was still in its incipency, it was not long before both judges and legislators came to appreciate the potential for abuse inhering in the existing arrangements. Indeed, the problems turned out to be far more extensive than Ray had envisioned, as asylum superintendents, patients, and their supposed friends became embroiled in high-profile lawsuits, trading insults and accusations that were embarrassing to all parties involved—including the judges themselves, who would find it exceedingly difficult to distinguish valid claims from those that were the offspring of deluded minds.

The initial therapeutic orientation implied a relatively high standard of legal competence, as can be seen in *M’Elroy’s Case*,<sup>204</sup> a frequently cited decision handed down by the Pennsylvania Supreme Court in 1843. The subject of this suit was also its traverser, a church-going businessman by the name of Samuel M’Elroy. After being found “of unsound mind and incapable of managing his own affairs” by a court-appointed commission, he availed himself of his right to a jury trial.<sup>205</sup> The evidence presented at trial suggested that M’Elroy was “perfectly independent in his circumstances,” appearing to be in good condition, both in terms of his physical health and his finances.<sup>206</sup> It further emerged that he had lived piously and peaceably with his wife and son for many years, only lately undergoing a change in character. All at once, M’Elroy seemed—at least to petitioners and their witnesses—to be consumed with unfounded suspicions and irrational hatreds, leading him to cruelly attack “long tried” friends and loving relatives, as well as those he hardly knew.<sup>207</sup> Especially arresting were the baseless accusations that he publicly lodged against his wife, alleging that she engaged in “habitual prostitution” with the “most moral and respectable” of townspeople, and was also guilty of incest with their own son.<sup>208</sup> His delusions impelled him to physically assault this “virtuous and good woman,” driving her, “beaten and bleeding, from under the roof

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203. *In re Mason*, 1 Barb. 436, 440 (N.Y. Gen. Term 1847).

204. 6 Watts & Serg. 451 (Pa. 1843).

205. *Id.* at 453.

206. *Id.* at 458.

207. *Id.*

208. *Id.*

that should be her shelter.”<sup>209</sup> In his own defense, M’Elroy only succeeded in providing further evidence of the need for civil restraint, for he spent much of his time on the stand attempting to persuade the court that his own witnesses were “whore-masters” who were conspiring against him.<sup>210</sup>

At the close of the evidence, M’Elroy requested that the jurors be told to find in his favor unless they found him to be “wholly void of memory and understanding” and “entirely unfit for the management of his estate and the care of his person.”<sup>211</sup> The presiding judge declined to do so, explaining that the governing statute used “lunatic” in the modern, generic sense of the word, embracing all forms of mental unsoundness, “from raving madness down to the slightest species of monomania.”<sup>212</sup> Though adding the usual provisos about the importance of distinguishing insanity from mere depravity, eccentricity or imbecility, the judge nonetheless portrayed the condition of mental soundness in rather exclusive terms in his charge to the jury. “A sound mind,” as he defined it, was one that was “free from all delusion, when the intellectual faculties exist in the usual and proper degree of harmony and vigour, and when the passions, affections and propensities are under the subordination of the judgment and the will.”<sup>213</sup> A single delusion—so long as it was “fixed and permanent”—sufficed to establish unsoundness of mind as a matter of law. However circumscribed the derangement, it was cast as a threatening contagion, “latently undermining the reason and spreading disorganization through the faculties of the mind.”<sup>214</sup>

The existence of mental unsoundness was not, however, a sufficient warrant for imposing the guardianship of the law. For it still remained for the jurors to determine whether M’Elroy’s mental malady disabled him from competently managing his affairs, which encompassed not only “his property, his estate, and business transactions,” but also his domestic relations—his obligations “to protect and provide for his wife and children.”<sup>215</sup> In addressing this issue, the charging judge focused jurors on the practical consequences of allowing this man to retain control of his property. “A man may act with the utmost rationality and prudence for a time in regard to his estate, and yet be a proper subject for a commission

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209. *Id.*

210. *Id.* at 457.

211. *Id.* at 454 (internal quotation marks omitted).

212. *Id.*

213. *Id.* at 455.

214. *Id.*

215. *Id.* at 457.

of lunacy,”<sup>216</sup> the judge advised, especially in a case such as the present, where the traverser was likely to be made the target of multiple slander suits. All but directing the verdict, the judge encouraged the jurors to think prospectively about the threat M’Elroy posed to the physical, economic, and psychical well-being of those around him; if they harbored any doubts as to his ability to fulfill his duties to himself, his family, and his neighbors in the years to come, the jurors were to vote for interdiction.<sup>217</sup> This they did, and the ruling was affirmed by the Pennsylvania Supreme Court in a decision that essentially validated the idea that it was better to err on the side of caution. Taking judicial notice of the recent outpouring of learned treatises on “the nature and cause and cure of insanity,” the court drew one central insight, that insanity was a recondite disease that all too often escaped the notice of even the most practiced observers.<sup>218</sup> Experience confirmed the truth of this proposition, as the court’s opinion was replete with anecdotes about friends and colleagues whose mental abnormalities had gone untreated, with tragic consequences for the afflicted and their families.<sup>219</sup>

This preventative mindset approach to insanity was also exhibited in early commitment cases, and here, too, judicial decisions expressed a particular concern about the preservation of family property. One of the most prominent such decisions was rendered by Chief Justice Shaw of the Massachusetts Supreme Judicial Court in the case *In re Oakes*,<sup>220</sup> denying Oakes’s petition to be discharged from Boston’s McLean Hospital.<sup>221</sup> Oakes, a sixty-seven year old wharf builder, had been involuntarily hospitalized by his sons in October of the previous year, shortly after the death of his wife.<sup>222</sup> The son’s action was immediately prompted by their father’s unseemly infatuation with a young woman of ill repute, to whom he proposed marriage just days after becoming a widower.<sup>223</sup> In his defense, Oakes summoned a large number of witnesses—including a few medical men—who affirmed that he was “a man of much industry and

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216. *Id.* at 459.

217. *Id.* at 459–60.

218. *Id.* at 463.

219. *Id.* at 462, 464.

220. 8 Mass. L. Rep. 122 (1845).

221. *Id.* at 129.

222. *Id.* at 123, 126–27. They also initiated guardianship proceedings about ten days before procuring Oakes’s commitment to McLean Hospital; a guardian was duly appointed after Oakes’s habeas petition was denied. *Hallett v. Oakes*, 55 Mass. (1 Cush.) 296 (1848) (suit to recover professional fees incurred by Oakes’s counsel in connection with the habeas petition).

223. *In re Oakes*, 8 Mass. L. Rep. at 123 n.1, 126.

shrewdness" and saw no reason to draw the inference of insanity from his admittedly unfortunate conduct during his wife's last illness.<sup>224</sup> This testimony was flatly contradicted by Oakes's children and their witnesses, who recounted the old man's abrupt change in character. Without provocation or warning, this quintessential "domestic man"<sup>225</sup> became an abusive husband and an absentee father, newly given to engaging in "extravagant" business ventures that were almost as inadvisable as his romantic exploit.<sup>226</sup> These were the actions of an insane person, according to Oakes's keeper, Dr. Fox, who implied his detention was conducive to a cure when called to the stand, though he equivocated on the question of whether it was actually dangerous to allow Oakes to remain at large.<sup>227</sup>

As he weighed the conflicting evidence, Chief Justice Shaw had little difficulty reaching the conclusion that Oakes was insane and at least potentially dangerous.<sup>228</sup> In so ruling, the judge was careful to note that neither the desire to marry a younger woman nor the ambition to get rich quick were, of themselves, evidence of mental disease. What tipped the scales in this direction, he went on to explain, was the fact that Oakes so often seemed to act "without any motive sufficient to actuate people of ordinary sense,"<sup>229</sup> seemingly bereft of any sense of the impropriety of his conduct. Whether this justified the petitioner's summary commitment to the McLean Hospital, however, was a harder issue for the judge to resolve. The laws on the books authorized courts to commit the "furiously mad," if and when they were shown to be "manifestly dangerous to the peace and safety of the community."<sup>230</sup> Commitment was also authorized in the case of any idiot, lunatic, or insane person who was *not* furiously mad, though in such instances a jury trial could be requested by

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224. *Id.* at 123. However, a few did suggest "that his faculties might have been affected by age." *Id.*

225. *Id.* at 126.

226. *Id.* at 128–29.

227. Compare *id.* at 127 (suggesting that the doctor testified that he thought it "dangerous for Mr. Oakes to be at large"), with *id.* at 129 (noting that the doctor "does not say positively that he considers his being at large as dangerous to others"). It may be that the doctor thought Oakes dangerous only to himself if left unsupervised. The only other evidence of dangerousness mentioned in the opinion was provided by Oakes's daughters, who testified that "if he carried weapons, they should be afraid of him." *Id.*

228. *Id.* Here, the chief justice appeared to be offering his own diagnosis in observing that the "species of insanity" with which Oakes was afflicted was marked by "ebullitions of passion" during which "dangerous acts are likely to be committed." *Id.* If Oakes had committed any such act while so affected, he proceeded to note, "he would be excused from punishment on the ground of insanity." *Id.*

229. *Id.* at 129.

230. MASS. REV. STAT. § 48-6 (1836).

"the person complained against."<sup>231</sup> Since Oakes's madness was not exactly of the furious sort, and his confinement was effected without any formal judicial process (let alone a jury trial), its legality was, at best, questionable.<sup>232</sup> And yet, Chief Justice Shaw registered little of this uncertainty in his opinion. Without even referencing this statutory framework, the judge forcefully invoked a higher authority: "the great law of necessity and humanity."<sup>233</sup> Ingeniously melding considerations of principle and practicality, he maintained that the state had a duty to care for the mentally ill, which was most effectively discharged by deferring to those with "skill and experience in the treatment of insanity."<sup>234</sup> He further observed that this had been the practice within the state since the founding of the republic, implying that it was both unwise and unworkable to revisit the judgments made by asylum doctors.<sup>235</sup> Any lingering doubts about the legality of this institutional arrangement—whether as a matter of constitutional or common law—might be dispelled by consideration of the fact that confinement was not really involuntary in cases like that of Oakes because it was "a principle of law that an insane person has no will of his own."<sup>236</sup> For all these reasons, the chief justice remanded the petitioner

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231. MASS. REV. STAT. § 73-1 (Supp. 1838). Such commitment could be ordered by any "two justices of the peace." *Id.* Whether these provisions applied to private patients admitted to facilities other than the state hospital is not entirely clear. As a matter of common law, one of the leading cases on the subject suggested that insanity alone was not enough to justify commitment, and held that even dangerous lunatics could not be held for more than a "reasonable" amount of time without formal adjudication of the necessity of continued commitment. See *Colby v. Jackson*, 12 N.H. 526, 532 (1842) (surmising that without such formalities, "[a]ny citizen could confine his neighbor, provided only he were insane," and speculating that "if the confinement were to continue as long as the insanity, both would probably end only with the life of the patient"). See generally Dershowitz, *supra* note 192, at 813–15.

232. It is worth noting, though the Chief Justice does not, that Oakes was served with notice of the application made by his sons to have a guardian appointed. However, no formal proceedings were had on this issue before he was hospitalized. See *Hallett v. Oakes*, 55 Mass. (1 Cush.) 296, 297 (1848). It appears that Oakes procured an attorney in connection with these events, but there is no indication in court records that either he or his counsel ever requested a jury trial, either with respect to imposition of a guardian or confinement at the McLean Hospital. *Id.* See generally Dershowitz, *supra* note 192, at 813.

233. *In re Oakes*, 8 Mass. L. Rep. at 124.

234. *Id.* at 127.

235. *Id.* ("If we cannot rely upon the opinion of those who have the charge of the institution, and there is no law to restrain the persons confined, we must set all the insane at large who are confined in the McLean Asylum.").

236. *Id.* at 125.

to the McLean Asylum, with the hope and expectation that he would soon be rendered fit to be liberated from its confines.<sup>237</sup>

With that, the Massachusetts court effectively validated the informal means by which Oakes was committed.<sup>238</sup> The *Oakes* decision did not immediately spark much public controversy, as state legislatures remained focused, well into the 1850s, on “fiscal rather than libertarian concerns.”<sup>239</sup> Indeed, policymakers tended to regard asylum admission “as a privilege which needed to be protected, not restricted,” aiming to allocate spaces on the basis of the potential for recovery or the ability to pay.<sup>240</sup> That recipients of such treatment did not always agree with the assessments of their keepers should occasion no surprise. Although their petitions for habeas corpus did not often meet with success, those who eventually managed to regain their freedom—whether by escape or formal discharge—went on to pursue other forms of redress. Some publicized their experiences in the form of exposés, vividly recounting the “horrid atrocities” they endured and witnessed within the walls of supposedly humane institutions.<sup>241</sup> Through such works, the writers pursued ends that were at once personal and political; they sought to defend their reputations against the imputation of mental disease and to enlighten their readers as to the

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237. *Id.* at 125–29. Several days after this judgment, a guardian was duly appointed for Oakes, “as an insane person.” See *Hallett v. Oakes*, 55 Mass. (1 Cush.) 296, 297 (1848). Oakes remained under guardianship until 1850, when it was revoked by the court after a jury trial. Dershowitz, *supra* note 192, at 813 n.125. Two years before this came to pass, the guardian appeared on Oakes’s behalf to (unsuccessfully) defend against a suit for the recovery of attorneys’ fees, in connection with the habeas petition. *Id.* The jury could not reach a verdict on the question of whether Oakes was insane at the time the petition was made, but Chief Justice Shaw sustained its finding that the attorney acted in good faith and further affirmed that Oakes was liable to pay for his services even though he may have lacked the mental capacity to consent, insofar as the services constituted “necessaries” within the meaning of the law. *Id.* at 299. For a discussion of this point of contract law, see *infra* note 427 and accompanying text.

238. Medico-legal writers helped to concretize this rule. See, e.g., WHARTON & STILLÉ, *supra* note 115, at 34 (suggesting American judicial opinion supports the general proposition “that confinement is justifiable, if either the safety of the patient . . . require it, or it is necessary for his restoration to health”).

239. Dwyer, *supra* note 192, at 84.

240. *Id.* at 85; see also ROTHMAN, *supra* note 85, at 143–44; Paul S. Appelbaum & Kathleen N. Kemp, *The Evolution of Commitment Law in the Nineteenth Century: A Reinterpretation*, 6 LAW & HUM. BEHAV. 343, 346–47 (1982).

241. The character of these publications is well-illustrated by their title pages. See, e.g., ROBERT FULLER, AN ACCOUNT OF THE IMPRISONMENT AND SUFFERINGS OF ROBERT FULLER OF CAMBRIDGE (Boston, 1833); ISAAC H. HUNT, ASTOUNDING DISCLOSURES!: THREE YEARS IN A MAD-HOUSE (n.p., 2d ed. 1852). For a general discussion of these and other like works, see DAIN, *supra* note 85, at 195–97.

need for legislative reforms.<sup>242</sup> Thus, the newly emancipated Isaac Hunt concluded his self-defense with an appeal to his readership to assist him in “purifying or crushing all insane hospitals in our beloved country,” so as to put an end to the “cruel inquisition” being perpetrated by the imperious medical men who had the charge of them.<sup>243</sup>

Others who felt aggrieved sought more limited and lucrative remedies by filing false imprisonment suits. Among the earliest and most notorious such suits was that brought by a financially strapped farmer by the name of Morgan Hinchman. This unfortunate man was forcibly committed to a Philadelphia asylum in January of 1847 by a confederation of relatives and purported friends, including his own mother and several of his wife’s kinsmen, allegedly with the aim of gaining control of his property.<sup>244</sup> To achieve this end, they first procured the requisite doctor’s certificate,<sup>245</sup> facilitating his smooth admittance to the asylum, and then seized and disposed of his property, taking the proceeds before initiating formal lunacy proceedings, which resulted in the appointment of a guardian.<sup>246</sup> After several months of struggle, Hinchman managed to extricate himself from the asylum (with the help of a paternal uncle) and proceeded to the court of common pleas, where he secured an order setting aside the prior finding of incapacity.<sup>247</sup> Although the court’s ruling was primarily based upon procedural grounds,<sup>248</sup> the judge strongly suggested that civil commitment was wholly unwarranted in this case, as Hinchman displayed only the “infirmities of a nervous constitution,” which did not substantially interfere with his ability to be a “good housekeeper and farmer, as well as an intelligent citizen,” and which were best remedied by “an affectionate or discreet deference to his opinions” on the part his family and friends.<sup>249</sup>

Seeking further vindication and money damages, Hinchman filed a tort suit charging his relatives, local magistrates, and hospital physicians with an elaborate conspiracy to impoverish him under the guise of providing medical care.<sup>250</sup> Conflicting evidence was presented both on the

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242. See, e.g., FULLER, *supra* note 241, at 28 (stating the purpose of the pamphlet to be “for the vindication of my own character, and for the promotion of the public good”).

243. HUNT, *supra* note 241, at 79.

244. Hinchman v. Richie, 1 Brightly 143, 147–50 (Pa. 1849).

245. *Id.*

246. *Id.* at 149–50.

247. *Id.* at 180 n.\* (reproducing the sum and substance of the opinion of the court of common pleas).

248. The court’s ruling was based on the want of “due notice” to Hinchman’s “near relations” as was required under the governing statute. *Id.* at 153, 180 n.\*.

249. *Id.* at 182–83.

250. *Id.* at 144–47.



question of Hinchman's mental condition and the intentions of those who sought to restrain him. When it came time to charge the jury, the judge expressed a marked solicitude for the asylum movement and the doctors tangled up in this particular case, announcing it to be "the first instance of alleged oppression in any of these humane or meritorious institutions."<sup>251</sup> With respect to the threshold question of whether Hinchman was, in fact, insane at the time he was committed, the judge admonished the jurors not to "fall into the vulgar error" of thinking insanity only existed where there was "wildness" in a man's everyday conduct.<sup>252</sup> For it was now

well established, by the investigations of learned men, and the light of science, that a person may show shrewdness in his business, and intelligence and cunning in his arguments, and still be decidedly insane on some one or more subjects; and if confinement or restraint, with medical treatment, are necessary for the restoration of such a person to a perfectly sound mind, they are the best friends of the party who enforce it.<sup>253</sup>

Invoking the *Oakes* decision and the "great law of humanity"<sup>254</sup> for which it stood, the judge went on to delimit the bounds of liability for wrongful commitment so as to exclude those who "acted from pure motives"<sup>255</sup> and "under circumstances such as would have induced a man of ordinary intelligence to believe the plaintiff insane, and requiring medical treatment in an asylum."<sup>256</sup> So instructed, the jurors acquitted the plaintiff's mother as well as all the asylum officials and medical men, save the one who had signed the certificate of insanity. The remaining defendants were found guilty as charged, with damages assessed in the amount of \$10,000.<sup>257</sup>

The ruling in *Hinchman* garnered a fair amount of attention, not only among medico-legal writers, but also in the popular press as well. Headlines dramatically publicized this story of "A SANE MAN CONFINED AS A LUNATIC," helping to ignite a national debate about commitment

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251. *Id.* at 161.

252. *Id.*

253. *Id.*

254. *Id.* at 160 (quoting Chief Justice Shaw).

255. *Id.* at 179.

256. *Id.* at 168.

257. *Id.* at 180. The jury also acquitted a juror who voted for interdiction in Hinchman's case, as well as a neighbor who was apparently not directly involved in the commitment or interdiction processes. *Id.* Norman Dain suggests that the charging judge's sympathetic treatment of the asylum physicians was intended to counter the vituperative attacks against them in the local press. DAIN, *supra* note 85, at 197.

law and asylum governance more broadly.<sup>258</sup> In the face of this onslaught of negative publicity, an agitated Isaac Ray rose in defense of his profession, devoting greater attention to the abuses perpetuated by insane patients than he had a decade before, as he attempted to elicit popular sympathy for the embattled asylum superintendents and the true friends of the insane, who sought out their own expertise in cases like that of Morgan Hinchman.<sup>259</sup> This class of patients proved to be peculiarly troublesome because they commonly remained delusional “on the subject of their infirmity” even after they were otherwise cured and released.<sup>260</sup> “They are unwilling to admit that their intellect has been obscured for a moment,” Ray explained, “and this kind of pride, joined with a certain moral obliquity attributable to disease, makes them burn with hate and hostility towards every one who had any agency in effecting their seclusion.”<sup>261</sup> As the late proceedings in Pennsylvania so clearly illustrated, the feelings of these erstwhile patients had only to be “artfully stimulated and managed by mischievous acquaintances to find vent in law-suits and

258. DAIN, *supra* note 85, at 196–97; *see also* Dwyer, *supra* note 192, at 81 (noting the “widespread newspaper attention” the *Hinchman* case received and reading it as an indicator of “the increasing political sensitivity of commitment laws, as the capacity of the state to institutionalize its citizens greatly expanded”). The politicization of commitment law was by no means a uniquely American phenomenon. Victorian England was also periodically susceptible to “lunacy panics”; indeed, there was an especially virulent outbreak in 1849, touched off by the notorious case of *Nottidge v. Ripley*, contesting the confinement of a wealthy spinster whose mental health was called into question after she joined a millenarian sect. *See* Peter McCandless, *Dangerous to Themselves and Others: The Victorian Debate Over the Prevention of Wrongful Confinement*, 23 J. BRIT. STUD. 84, 92–94 (1983).

259. I. Ray, *The Hinchman Case*, MONTHLY L. REP., Aug. 1849, reprinted in I. RAY, CONTRIBUTIONS TO MENTAL PATHOLOGY 294, 301 (Boston, Little, Brown & Co. 1873) [hereinafter Ray, *The Hinchman Case*] (insisting that the evidence presented at trial was sufficient “to satisfy any unprejudiced mind that Hinchman was unequivocally insane; and that his friends were perfectly justified by the kind and degree of his malady in placing him in any asylum, whether for curative or merely custodial purposes”). This article first appeared in the August 1849 edition of *The Monthly Law Reporter* and was republished in Ray’s edited 1873 collection of writings, along with a new preface, presenting the case as an illustration of “the fearful amount of injustice that may be committed under the forms of a judicial process,” as “the law gives [the patient] whatever he asks for; [and] the case goes forth to the world as another ‘unparalleled outrage,’ and is made the text of many a diatribe against physicians guilty of the presumption of signing a certificate of insanity.” *Id.* at 294, 296. Ray made similar remarks about the significance of *Hinchman* in revised editions of his *Treatise on the Medical Jurisprudence of Insanity* from 1853 forward. *See, e.g.,* I. RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 331 (Boston, Little, Brown & Co. 3d ed. 1853). A point-by-point defense of the actions taken by the *Hinchman* defendants is found in Isaac Ray, “A Modern *Lettre de Cachet*” *Reviewed*, 22 ATLANTIC MONTHLY 227 (1868), which responded to a diatribe against doctors penned by a prominent journalist in a previous issue of the periodical. *See* L. Clarke Davis, *A Modern Lettre de Cachet*, 21 ATLANTIC MONTHLY 588 (1868).

260. Ray, *The Hinchman Case*, *supra* note 259, at 309.

261. *Id.* at 310.

criminal prosecutions.”<sup>262</sup> The tales of wrongful abduction and abuse recounted in open court had a powerful impact on their audience, playing on the worst fears of the public and even gulling the *Hinchman* judge. Exaggerated worries about “improper motives” distorted this judge’s reasoning, “frightening him from every position that common sense and common justice invite[d] him to take.”<sup>263</sup> But most troubling of all, Ray submitted, was the deterrent effect “this doctrine of court” was likely to have on relatives of the afflicted, discouraging them from seeking medical attention in the earliest stages of illness when it was least obvious to those outside the immediate family circle and most likely to yield a cure.<sup>264</sup>

Yet it was precisely those cases that held out the greatest potential for recovery, from the alienists’ perspective, that were often the most contestable—before, during, and after medical treatment was imposed. In the competition for column inches in midcentury newspapers, the pleas of doctors like Ray proved to be no match against the lurid revelations of “modern persecution” communicated by former asylum inmates.<sup>265</sup> No one was more compelling in this regard than Elizabeth Packard, an Illinois woman who won widespread notoriety after she was released from confinement, as she proceeded to launch a one-woman campaign for the passage of “personal liberty” laws to protect free thinkers like herself from being confined for their beliefs.<sup>266</sup> Nor was this the only sort of challenge faced by exponents of the cult of curability. By the 1860s, many of the asylums were simply swelling with poor, indigent, and chronically insane patients, an increasing proportion of whom were foreign-born.<sup>267</sup> While superintendents bemoaned these developments, they found their circumstances were little relieved by legislators, and so they were gradually moved to compromise their original visions of asylum care,

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262. *Id.*

263. *Id.* at 312.

264. *Id.*

265. See ELIZABETH PACKARD, *MODERN PERSECUTION OF INSANE ASYLUMS UNVEILED* (Hartford, Elizabeth Packard 1873) (volumes 1 and 2). The author was an Illinois woman who was committed by her husband under a statute that gave him unreviewable authority to do so. After her release, “Mrs. Packard” (as she deliberately called herself, as part of a studied mode of self-presentation designed to appeal to the sympathy of her male “protectors”) was quite effective in seeking the reform of the commitment laws of her home state, and others as well. See generally Hendrik Hartog, *Mrs. Packard on Dependency*, 1 *YALE J.L. & HUMAN.* 79 (1988).

266. 2 ELIZABETH PACKARD, *MODERN PERSECUTION, OR MARRIED WOMAN’S LIABILITIES* 99–100 (Hartford, Elizabeth Packard 1875). See generally Hartog, *supra* note 265, at 82–83.

267. See DAIN, *supra* note 85, at 125–26; GROB, *supra* note 191, at 231–40; Dwyer, *supra* note 192, at 86; see also ROTHMAN, *supra* note 85, at 272, 286 (suggesting that even Ray came to see the asylum more and more as a custodial institution).

reluctantly shifting from an earlier emphasis on individuated "moral treatment" to a regimen of custodial care.<sup>268</sup>

This, of course, only provided asylum critics with additional grounds for their dissatisfaction, and ultimately forced medical superintendents to revise earlier studies regarding the "curability of insanity."<sup>269</sup> As Pliny Earle acknowledged in a widely noticed 1877 study, few patients were permanently restored to their right mind, though they might look forward to protracted periods of lucidity.<sup>270</sup> This rearguard effort only invited more public scrutiny of asylum administration and modes of patient care. Perhaps the most damaging assessments came from a rising generation of medical men, trained in the new and putatively more scientific discipline of neurology.<sup>271</sup> They portrayed asylum superintendents as unsophisticated political functionaries and founded a rival organization, the National Association for the Protection of the Insane and the Prevention of Insanity.<sup>272</sup> As the name implied, members of this organization sought to improve the provisions for the "multitudes of insane men and women in the United States," who were subjected to outmoded forms of treatment, unnecessary restraints, or utter neglect.<sup>273</sup>

The question of who belonged in the nation's hospitals for the insane pressed urgently upon state legislatures in this charged political environment, making it necessary for them to reassess the rules and regulations governing asylum commitment in the last quarter of the nineteenth century. Yet given the extent of popular and professional agitation, it is rather striking to find that legislative reforms effected fairly modest changes of existing practices.<sup>274</sup> By the 1880s, all states had

268. See ROTHMAN, *supra* note 85, at 137–54, 265–87.

269. For the earliest published study, see Pliny Earle, *The Curability of Insanity*, 33 AM. J. INSANITY 483 (1877). A book-length version was published a decade later. See PLINY EARLE, *THE CURABILITY OF INSANITY* (Phila., J.B. Lippincott Co. 1887). See generally ROTHMAN, *supra* note 85, at 268–69.

270. Earle, *supra* note 269, at 533.

271. See generally Bonnie Ellen Blustein, "A Hollow Square of Psychological Science?": *American Neurologists and Psychiatrists in Conflict*, in *MADHOUSES, MAD-DOCTORS, AND MAD MEN* 241 (Andrew Scull ed., 1981).

272. See ROTHMAN, *supra* note 85, at 362 n.9, 268–69; Dwyer, *supra* note 192, at 87.

273. See Nat'l Ass'n for the Protection of the Insane and the Prevention of Insanity, *Constitution, By-Laws, Statement of the New York Committee and Papers by Doctors G.M. Beard, J.C. Shaw, and E.C. Seguin* (Boston, 1880), reprinted in *THE NATIONAL ASSOCIATION FOR THE PROTECTION OF THE INSANE AND THE PREVENTION OF INSANITY* 3 (Gerald N. Grob ed., 1980).

274. For a comprehensive state-by-state rendering of relevant legislation on the books by the last decades of the century, see GEORGE L. HARRISON, *LEGISLATION ON INSANITY: A COLLECTION OF ALL THE LUNACY LAWS OF THE STATES AND TERRITORIES OF THE UNITED*

enacted formal provisions for identifying and admitting various classes of patients, with most providing some mechanism of judicial oversight of public and private asylums, however nominal.<sup>275</sup> The nature and the extent of such oversight were, however, far from uniform. In some jurisdictions, a lone justice of the peace or a select group of judges was empowered to decide matters of commitment, while a formal jury trial was required in others, with at least one medical man included on the panel.<sup>276</sup> Still others emulated the English in delegating the task to a court-appointed commissioner or board of examiners, the latter typically composed of a “respectable” mix of attorneys, judges, and doctors.<sup>277</sup> This last professional group was often invested with considerably more discretion in cases involving private patients with the ability to pay; in such instances, hospitalization might be authorized upon a certificate signed by one or more “reputable” physicians, whose qualifications were typically judged by years in practice within the state rather than area of expertise.<sup>278</sup> The role the patient was to play in the decisionmaking process was not always specified, though a fair number of states did expressly accord him the right to be notified and heard on the issue of commitment.<sup>279</sup>

For all the ink that had been spilled on the signs and symptoms of insanity, state lunacy laws remained remarkably terse and vague when it came to describing the mental criteria for commitment. In many jurisdictions,

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STATES (Phila. 1884) (annotated compendium of statutes produced by the former president of the Board of Public Charities in Pennsylvania, charged with oversight of insane hospitals throughout the state). For other overviews conducted in subsequent years, reflecting little further change, see JOHN KOREN, NAT'L COMM. FOR MENTAL HYGIENE, SUMMARIES OF LAWS RELATING TO THE COMMITMENT AND CARE OF THE INSANE IN THE UNITED STATES (1912) (noting the persistence of inconsistencies across jurisdictions and other systemic problems), and Stephen Smith, *Unification of the Laws of the States Relating to the Commitment of the Insane*, 49 AM. J. INSANITY 157 (1892) (prepared by New York doctor-lawyer at the request of the National Conference of Charities, emphasizing the need for greater consistency across state lines).

275. See generally HARRISON, *supra* note 274 (detailing provisions in all territories and states up to and including 1883).

276. See, e.g., COLO. GEN. STAT. § 2231 (1883) (requiring six jurors to ascertain whether person is sane); DEL. REV. STAT. § 49-1 (1874) (court of chancery to issue writ to inquire by jury as to sanity of individual); 2 N.C. CODE § 2256 (1883) (inquiry by at least two justices of the peace with the help of a physician as to the sanity of the individual); UTAH REV. STAT. § 2171 (1898) (commitment of insane person by district court judge); VA. CODE § 82-14 (1873) (inquiry by three justices with the help of a physician as to the sanity of the individual); W. VA. CODE § 58-9 (1899) (inquiry by a justice with the help of a physician as to the sanity of the individual); Smith, *supra* note 274, at 160–69 (discussing selected state laws).

277. E.g., IOWA ANN. CODE §§ 2261, 2265 (1897); NEB. COMP. STAT. § 40-17 (1887); Smith, *supra* note 274, at 169–72.

278. E.g., GA. CODE § 2573 (1896); ME. REV. STAT. § 144-17 (1904); HARRISON, *supra* note 274, at 135–36. See generally KOREN, *supra* note 274 (compiling laws).

279. See, e.g., MO. REV. STAT. § 5789 (1879) (providing for notice).

legislative enactments simply made reference to “insane persons,” as if the designation was somehow transparent or meant to be defined in and through the commitment process.<sup>280</sup> Others effectively codified the common law standards elaborated in antebellum guardianship and commitment cases, authorizing confinement where it was either necessary to preserve property or life, or adjudged conducive to the mental health of the party in question.<sup>281</sup> Additional guidelines were frequently provided by process of elimination, as many codes contained lists of disfavored classes of persons; those who were determined to be idiots, congenital imbeciles, and epileptics might be turned away from asylums,<sup>282</sup> and similar treatment was often accorded to persons afflicted with delirium tremens<sup>283</sup> or some sort of “contagious or infectious” disease.<sup>284</sup> Space constraints in state-run facilities seemed to motivate many of these categorical rules, though some jurisdictions opted for a more flexible approach to this problem, giving priority to patients who had been sick for the shortest duration or otherwise presented the greatest prospects for recovery, with indigence tipping the scales in the cases that were “equally meritorious in all other respects.”<sup>285</sup> Confirmed lunatics with sufficient means were often redirected to private asylums, which tended to be more informal in their admissions processes, so long as the bills could be paid.<sup>286</sup>

The standards governing the question of discharge from confinement were generally no more elaborately stated than those with respect to admission. Superintendents were typically allowed to release any patient “not of suicidal or homicidal tendency” upon the application of relatives, friends, or the inmate himself, and in all other circumstances it was expected that hospital officials would discharge those who appeared to be more or less cured, or “probably incurable,” provided such persons presented no danger to the community or their own welfare.<sup>287</sup> Rejected applications

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280. E.g., OR. CODE §§ 3557–3562 (1887).

281. See, e.g., HARRISON, *supra* note 274, at 310.

282. E.g., HARRISON, *supra* note 274, at 42.

283. E.g., *id.* at 733.

284. E.g., TEX. GEN. LAW § 18-1 (1883); UTAH REV. STAT. § 2193; HARRISON, *supra* note 274, at 719; cf. MISS. REV. CODE § 664 (1880) (removal of certain people from asylum).

285. E.g., IOWA ANN. CODE § 2286 (discrimination between patients); NEB. COMP. STAT. § 40-37 (discrimination when lack of room).

286. See Dwyer, *supra* note 192, at 85.

287. See, e.g., TENN. CODE § 2037 (1884) (granting superintendents the authority to require the removal of a patient “whenever in their opinion it is advisable to do so”); KOREN, *supra* note 274, at 13 (quoting Digest of the Statutes of Arkansas, 1904).

for release were commonly subject to judicial review,<sup>288</sup> with the writ of habeas corpus available to the patient as a last resort.<sup>289</sup>

For their part, judges did little to further fill out what it was that made one fit for commitment, their opinions reflecting a basic uncertainty about whether the fact of mental illness, without any showing of dangerousness, ought to suffice as a basis for commitment, particularly as insane asylums increasingly took on custodial functions. Well into the 1860s, judges could be found uncritically invoking the precedent of *Oakes*, validating commitments procured by close relatives on therapeutic grounds alone, even where there had been no prior adjudication of the question of insanity.<sup>290</sup> Echoing the words of their medical brethren, they pronounced the asylum “a home for the sick, and not a prison”<sup>291</sup> and generally concurred with the doctors’ estimates that “legal formalities” were likely to cause more harm than good in most circumstances, injuring the patient’s health and reputation.<sup>292</sup> “Next to the dreadful malady,” one judge submitted, “no greater calamity can befall an insane man and his family, than to exhibit in detail his weakness to the gaze of the public, by an examination in court.”<sup>293</sup> To subject asylum inmates to such trials, another judge opined, would be to “inflict needless pain, and thus produce a certain evil, in order to avoid a contingent one.”<sup>294</sup> However, this judicial calculus did not hold true across jurisdictions or time, for there were simply too many borderline cases in which doctors and families disagreed among themselves and with each other about the existence of mental disease and the need for asylum care.<sup>295</sup> When placed in the middle of these

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288. See, e.g., IOWA ANN. CODE § 2267 (appeal to district court from finding of insanity); NEB. COMP. STAT. § 40-38 (appeal to judge for review by a commission); OR. CODE § 3557 (appeal to judge for review by a physician).

289. See, e.g., PA. STAT. § 14294.

290. See, e.g., *Porter v. Ritch*, 39 A. 169, 176 (Conn. 1898); *Denny v. Tyler*, 85 Mass. (3 Allen) 225, 229 (1861); *Davis v. Merrill*, 47 N.H. 208, 210 (1866).

291. *Commonwealth ex rel. Haskell v. Kirkbride*, 3 Brewster 586, 588 (Pa. 1871).

292. *Davis*, 47 N.H. at 210.

293. *Haskell*, 3 Brewster at 588.

294. *Davis*, 47 N.H. at 210 (invoking the authority of Dr. Isaac Ray).

295. As Judge Thomas Cooley observed in an 1880 law review article:

In a considerable proportion of cases of alleged mental aberration there is controversy respecting the fact. The supposed insane person will dispute it,—sometimes with no little vigor and shrewdness; friends may disagree respecting it, and the general public—who will in most cases know little on the subject—will be likely to have impressions of the party’s real condition derived as much from the supposed motives of those who make the allegation as from any known facts. A husband supposed to be harsh and tyrannical, who undertakes to put his wife under restraint as an insane person, is likely to find her relatives and the general community instinctively arrayed against him, and the case is prejudged upon prejudices. Indeed, when the most regular

disputes, judges took little solace from the fact that hospital inmates were “no longer put in a dungeon, or chained, or waistcoated and tortured, as of old.”<sup>296</sup> As they readily recognized, “[i]mprisonment is none the less a wrong, because the place of confinement is a palace.”<sup>297</sup> In a number of widely noticed habeas actions, courts discharged patients against medical advice, sometimes with the implication that there were likely others inside the asylum that did not belong there.<sup>298</sup> Indeed, one judge suggested that inmates might sometimes be in better mental health than their keepers, as loss of reason was a “well known” occupational hazard for them.<sup>299</sup>

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investigations are entered upon, the question of mental unsoundness is surrounded by so many difficulties that the most conscientious and intelligent experts are sometimes found unwilling to express positive opinions; and when they express them, any two may draw different conclusions from the same facts, according as they occupy different stand-points in respect to the surroundings.

Thomas M. Cooley, *Confinement of the Insane*, 6 S. L. REV. (n.s.) 568, 570–71 (1880). For an especially dramatic illustration of this problem, see *Commonwealth ex rel. Haskell v. Haskell*, 2 Brewster 491 (C. Phila. 1869) (describing an eleven-day trial featuring dueling doctors and feuding family members). The trial judge in *Haskell* appeared to be of the opinion that the relator had been wrongfully confined by a couple members of his family, who were also seeking to gain control of his property. *Id.* at 504. A jury found in the relator’s favor, and the court accordingly set aside a prior inquisition. *Id.* at 509–11. The erstwhile patient subsequently published an elaborate account of his travails. See EBENEZER HASKELL, *THE TRIAL OF EBENEZER HASKELL* (Phila. 1869).

296. *Commonwealth ex rel. Nyce v. Kirkbride*, 2 Brewster 400, 402 (Pa. 1868); see also *Look v. Dean*, 108 Mass. 116, 123 (1871) (“The kindness with which the plaintiff was treated, and the good motives which dictated his detention, should affect the question of damages, but cannot affect his legal right to his personal liberty.”).

297. *Nyce*, 2 Brewster at 402; cf. *Francke v. His Wife*, 29 La. Ann. 302, 309 (1877) (DeBlanc, J., concurring) (likening confinement in an asylum to treatment of a criminal).

298. See, e.g., *Nyce*, 2 Brewster at 400; *Commonwealth ex rel. Stewart v. Kirkbride*, 2 Brewster 419, (C.P. Phila. 1868); *Commonwealth ex rel. Draper v. Kirkbride*, 3 Brewster 393 (Pa. 1869). Also generating considerable press was the insanity trial of Susan Dickie, who was ultimately acquitted of the charge after eight years of confinement in New York’s Bloomingdale Asylum. See *In re Dickie*, 7 Abb. N. Cas. 417 (N.Y. Sup. Ct. 1879). Quite predictably, asylum doctors resented these judicial intrusions, with some making a point of noting (with what was not quite pride) the number of released patients who went on to commit homicidal or suicidal acts. See, e.g., W. W. GODDING, *THE RIGHTS OF THE INSANE IN HOSPITALS* 21 (Boston 1883); *The Writ of Habeas Corpus and Insane Asylums*, 39 AM. J. INSANITY 301, 301–03, 314–17 (1883); see also ORDRONAU, *supra* note 181 (critical assessment of existing judicial practices by New York’s lunacy commissioner, who was both medically and legally trained). Asylum doctors strenuously refuted charges of wrongful commitment. See, e.g., John B. Chapin, *Public Complaints Against Asylums for the Insane, and the Commitment of the Insane*, 40 AM. J. INSANITY 33, 36–37 (1883); *The Rights of the Insane*, 39 AM. J. INSANITY 411, 420 (1883); cf. *id.* at 423 (more moderately making the claim that “[f]ewer mistakes are made in this matter than in the diagnosis of almost any other disease in the community”); John B. Chapin, *On the Detention of the Insane, and the Writ of Habeas Corpus*, 53 AM. J. INSANITY 242, 242–43 (1896) (representing that “no willful, malicious act of hospital detention has thus far been disclosed, of which the public has any knowledge”).

299. *In re Dickie*, 7 Abb. N. Cas. at 423.



His opinion thus left readers with the disturbing image of a “diseased mind” at the helm of the hospital, and the added assurance that this was “doubtless” the case in other asylums as well.<sup>300</sup>

By the last quarter of the nineteenth century, patients’ rights had acquired a prominence of their own in judicial decisions. This tendency was especially well exhibited in *Van Deusen v. Newcomer*,<sup>301</sup> a false imprisonment suit brought by a female physician against the superintendent of the state insane hospital in Michigan, where she was allegedly “railroaded,” in the parlance of the day, by her supposed friends.<sup>302</sup> At trial, the defendant maintained that he had admitted the plaintiff with the full belief that she was insane, though he conceded there were no “manifestations of mental delusions as indicated danger to others.”<sup>303</sup> The plaintiff maintained she had never been insane, but insisted that, even had this been the case, the doctor had nonetheless violated her due process rights insofar as he restrained her liberty without prior judicial authorization to do so.<sup>304</sup> A sympathetic jury returned a verdict in the plaintiff’s favor, awarding her \$6000 in damages. On appeal, the defendant’s counsel offered an elaborate defense of the doctor’s actions, complete with statistical tables drawn from the asylum registers intended to show that “*all insane persons are dangerous* to themselves and to others”—a proposition he represented to be true as a matter of law and medical science.<sup>305</sup> But even were this

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300. *Id.* 422–23.

301. 40 Mich. 90 (1879).

302. The opinion indicates that the plaintiff, Nancy Newcomer, was married but informally separated from her husband, who seemed not to be involved in the litigation in any way. *Id.* at 105. Newcomer maintained her permanent residence and medical practice in Toledo, Ohio, though she had a married daughter living in Michigan, and it was during a family visit that the commitment was procured, *id.*, with Newcomer’s son-in-law and his mother taking the lead, *id.* at 123 (Cooley, J.). The application for admission was filled out by Newcomer’s sister, but there was conflicting testimony as to the reason for commitment, with some witnesses testifying that she was simply brought to the asylum for much needed “rest and quiet,” *id.* at 106 (Marston, J.), and it was likewise unclear whether she had objected to her confinement at any time before her release, which was apparently granted at the request or with the acquiescence of her “friends,” *id.*

303. *Id.* at 123 (Cooley, J.).

304. *Id.* at 124. The governing statutes for the asylum did not address the processes for commitment in the case of paying patients. *Id.* at 107–10 (Marston, J.). See also Dershowitz, *supra* note 192, at 823 (speculating that most propertied patients had been placed there by a court-appointed guardian). Newcomer’s case was processed by the asylum as if she was a pauper lunatic: One of the “superintendents of the poor” brought her with the necessary paperwork. *Van Deusen*, 40 Mich. at 106.

305. *Van Deusen*, 40 Mich. at 100. The counselor’s tables indicated that, of the 2395 cases presented for admission at the state hospital, 1481 had either threatened or exhibited violence to themselves or others. *Id.* The counselor went on to suggest that violent tendencies were more than likely present but as yet not manifest in most other cases. *Id.*

not true, he continued, courts ought to defer to the professional judgment of asylum officials, who were—like doctors in any other type of hospital—best equipped to make accurate judgments about the need for medical treatment. Locating such discretion in the doctors would promote early treatment and increase the likelihood of recovery, which further reinforced the importance of leaving treatment decisions to asylum superintendents, so long as the officials proceeded in good faith, as was emphatically true of his client. Before closing, the counselor briefly (and disparagingly) addressed the due process concerns raised by his opposing counsel, pronouncing the very “idea that the personal liberty clause in the constitution has any reference to any such sanitary institution as the Michigan asylum” to be “utter nonsense on its face.”<sup>306</sup>

After hearing these arguments, the four-member appellate panel unanimously reversed and granted a new trial on account of several erroneous evidentiary rulings, but they evenly split on the central legal question presented by the case: the process required before a citizen could be involuntarily placed in an insane asylum.<sup>307</sup> In Judge Marston’s opinion, joined by Judge Graves, there was no reason to depart from the approach Chief Justice Shaw had validated in *Oakes*. Indeed, they read the law to support the “right of friends and relatives of an insane person to request his reception at and treatment in the asylum” without any need to secure a court order first or to proffer some evidence of dangerousness.<sup>308</sup> These judges further maintained that the admitting doctor was entitled to a *presumption* that he had performed his duties properly, which could only be overcome by evidence of bad faith on his part.<sup>309</sup> The unwilling admittee could thus be lawfully placed in the superintendents’ custody—an outcome that was apparently unavoidable given that insane persons were “incapable in law of consenting” in the first place.<sup>310</sup> The two other judges on the panel, Cooley and Campbell, insisted upon the need for greater procedural safeguards to ensure against wrongful commitment. They thought this would be best accomplished by adopting the rule that an asylum official acted at his peril in admitting an alleged lunatic without a court order, placing the burden on him to prove that the admitted patient was actually insane or had freely consented to treatment.

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306. *Id.* at 104.

307. On both issues, Judge Cooley and Chief Justice Campbell held in the affirmative, while Judges Marston and Graves held in the negative. *See generally* Van Deusen, 40 Mich. 90.

308. *Id.* at 111 (emphasis added).

309. *Id.* at 118.

310. *Id.*

In setting out this position, Judge Cooley's prolix opinion is especially worthy of attention, as he sounded a new note of judicial paternalism, aiming first and foremost to safeguard the civil liberties of those supposed to be insane. "The privilege of defending the intellect is as sacred as the privilege of defending life itself," the judge averred, further maintaining that "nothing ought to be more certain in the administration of the State's benevolence than that a sane person never passes behind the doors of its asylums as a prisoner."<sup>311</sup>

Whether Judge Cooley's strictures were followed or not was more or less a matter of perspective. In the last decades of the century, there continued to be periodic "lunacy panics," which spurred courts and legislatures to take remedial action, whether to better protect the supposed lunatic, or those who might be harmed by him.<sup>312</sup> As was true at midcentury, the statutory reforms effected in this later period were largely procedural in nature, designed to minimize the potential for abuses in the context of guardianship and commitment proceedings. While sharing these same basic aims, judges in this period were more particularly concerned with clarifying and securing the constitutional rights of those made subject to such proceedings. At the outset of their opinions, they were prone to speak in unqualified terms as they set out the process due to the alleged lunatic under the fundamental laws of the land, baldly pronouncing that

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311. *Id.* at 137–38. Shortly after issuing this opinion, Judge Cooley amplified his views in a law review article, using this opportunity to further underscore the importance of a judicial inquest, though he was here envisioning a bench trial, having no enthusiasm for juries. Indeed, he went so far as to suggest that such a formal proceeding would, on balance, be more conducive to the welfare of the alleged lunatic as well as the public. Assuming that the patient retained "his sense of right and wrong," Cooley submitted that

the excitement of a trial conducted according to forms which he knows are established for effecting justice, before a tribunal which the community is accustomed to respect and obey, are likely to be far less violent and disturbing than a certificate from one who has condemned him unheard, and whose conclusion he fancies would have been different if he had been allowed the ordinary privileges which are accorded as of common right to every culprit.

Cooley, *supra* note 295, at 580. Although the law in Michigan remained unclear on this score, other jurisdictions moved in the direction Cooley favored. While private patients continued to be received at asylums informally, doctors now admitted them at their peril in many jurisdictions; risked liability for false imprisonment where there had been no prior judicial finding of insanity. See, e.g., *Porter v. Ritch*, 39 A. 169 (Conn. 1898); *Look v. Dean*, 108 Mass. 116 (1871); *Bacon v. Bacon*, 76 Miss. 458 (1898); *Emmerich v. Thorley*, 35 A.D. 452 (N.Y. App. Div. 1898). See generally BUSWELL, *supra* note 130, at 26. However, evidence of good faith might serve to mitigate damages. See, e.g., *Bacon*, 76 Miss. at 471–72 (generally allowing the possibility of mitigation but finding no reason to reduce the damage award on the facts of this case).

312. See, e.g., Appelbaum & Kemp, *supra* note 240, at 351–52; Dershowitz, *supra* note 192, at 841–44.

no one could be deprived of his liberty or property without notice and the opportunity to be heard.<sup>313</sup> But everything that followed from this was fraught with ambivalence.<sup>314</sup> In most jurisdictions, the procedural protections accorded to alleged lunatics were not as stringent as those guaranteed to criminal defendants. Indeed, it was widely held that those in the former class were not entitled to participate in the trial of their sanity where such activity was adjudged hazardous to their health, or to the well-being of others.<sup>315</sup> However, such rulings were made with reluctance, as judges recognized that false accusations of insanity might cause a sort of mental distress that was nearly indistinguishable from full-blown disease.<sup>316</sup>

The constitutional rights of the alleged lunatic were thus, to some extent, dependent upon his mental condition, which had yet to be

313. See, e.g., *In re Lambert*, 66 P. 851, 854 (Cal. 1901); *Smith v. People ex rel. Bartholomew*, 65 Ill. 375, 378–79 (1872); *In re Wellman*, 45 P. 726, 726–27 (Kan. Ct. App. 1896); *State ex rel. Blaisdell v. Billings*, 57 N.W. 206, 206–07 (Minn. 1893); *People ex rel. Sullivan v. Wendel*, 68 N.Y.S. 948, 949 (Sup. Ct. 1900); *In re Gannon*, 18 A. 159, 160 (R.I. 1889); *In re Allen*, 73 A. 1078, 1080 (Vt. 1909). Statutes specially providing for the summary confinement of inebriates were struck down as well. See, e.g., *People ex rel. Ordway v. St. Saviour's Sanitarium*, 56 N.Y.S. 431, 436 (App. Div. 1898); *In re Janes*, 30 How. Pr. 446, 454 (N.Y. Sup. Ct. 1866); *State ex rel. Larkin v. Ryan*, 36 N.W. 823, 827–28 (Wis. 1888). Similar rulings were made with respect to criminal defendants found not guilty by reason of insanity. See, e.g., *Underwood v. People*, 32 Mich. 1, 5 (1875) (striking down “inquisitorial” commitment statute authorizing detention without prior determination of present and future need for confinement); cf. *Ex parte Trice*, 53 Ala. 546, 548 (1875) (holding that person under criminal indictment for arson could not be summarily removed to insane asylum, as a preventative measure, while out on bail).

314. Consider, for example, the conflicting accounts offered by leading jurists (who also sat in judgment in actual cases) as to the rights of lunatics cared for in the privacy of their own homes, or those of their relatives and friends. Compare JOHN ORDONAU, COMMENTARIES ON THE LUNACY LAWS OF NEW YORK, AND ON THE JUDICIAL ASPECTS OF INSANITY AT COMMON LAW AND IN EQUITY 56 (Albany, John D. Parsons, Jr. 1878) (maintaining that the federal constitution prohibited public supervision of lunatics confined in these private spaces who had not committed any wrongs), with Cooley, *supra* note 295, at 573–75 (contending this was a misinterpretation of the law). The ambivalence manifest in late nineteenth-century jurisprudence can be well observed in CHRISTOPHER G. TIEDEMAN, TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 107–10 (St. Louis, F.H. Thomas Law Book Co. 1886) (documenting conflicting impulses in the decisional law as judges expressed general confidence in the good faith of doctors and family members and yet worried about locating too much discretion in private actors).

315. See, e.g., *Simon v. Craft*, 182 U.S. 427, 429, 436 (1901) (finding that due process was not denied to a person adjudged insane in her absence where the physician determined her presence would be injurious to her health, and where notice and an opportunity to defend had been given); *Chavannes v. Priestley*, 45 N.W. 766, 767 (Iowa 1890) (finding that due process did not require notice or one's appearance before one could be adjudged insane and restrained accordingly); cf. *County of Black Hawk v. Springer*, 10 N.W. 791, 791–92 (Iowa 1882) (finding constitutional protections less extensive in lunacy proceedings than those in criminal trials).

316. See, e.g., *Commonwealth v. Spink*, 137 Pa. 255, 267–69 (1890).

conclusively determined by the court. No amount of procedural maneuvering could make the substantive problem of gauging capacity completely disappear. Most judges had come to recognize this by the last decades of the century, exhibiting a pragmatic outlook as they addressed the problem case by case, drawing upon medical experts as they saw fit. Although curability—in and of itself—continued to be held as a permissible basis for confinement, courts were, on the whole, less deferential to asylum officers than their antebellum counterparts, with more than a few coming to doubt “the principle of law that an insane person has no will of his own,”<sup>317</sup> as originally stated by Chief Justice Shaw. Indeed, the *Oakes* opinion is best seen as something of a period piece, reflecting a certain optimism about human nature and the potentialities of medical science that diminished over the course of the century. Chastened by decades of experience adjudicating contested claims of incapacity and allegations of false imprisonment, late nineteenth-century judges would be more protective of the rights of the insane. Yet, all the while, the criteria for determining who was a fit subject for guardianship or commitment underwent little change over time, as judges continued to articulate the same basic linkages between sanity, self-government, and legal competence. In doing so, they left the outlines of the default legal person rather sketchy, which, as a practical matter, meant that there would be plenty of room for disagreement in almost any given case. As the century drew to a close, both legislators and judges appeared willing to live with this ambiguity. Still, courtroom proceedings would remain haunted by the twin specters of “enchained reason” and “lunatics at large.” Though these disturbing images could never be fully exorcised, judges took some solace in knowing that their judgment—whether in favor of or against interdiction or commitment—did not necessarily fix a party’s legal status for all intents and purposes.

#### B. The Capacity to Act

The legal borderland between competence and incompetence was indeed a broad and porous one in nineteenth-century America. Taking judicial notice of the episodic quality of so many forms of mental illness, and holding out hope for a cure in all but the most extreme cases, courts left room for the possibility that persons interdicted or incarcerated in asylums might yet perform a valid civil act. Ironically, judges would prove

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317. *In re Oakes*, 8 Mass. L. Rep. 122, 125 (1845).

far more skittish about finding incapacity where it affected only one transaction than they were where it operated to wholly dispossess a party of control over his property and person. Their wariness was due in no small part to the fact that these suits were often litigated by equally zealous parties, who skillfully crafted narratives intended to appeal to the sympathy of the court. In will contests, those who purported to be near and dear to the testator—who could no longer speak for himself—regularly squared off against each other, offering competing accounts of his true intentions, implicitly built upon their own notions of moral desert. The equities were no less difficult to balance where the disputants were unrelated and contending about contracts and deeds made at arms-length. For courts were frequently presented with contests in which one party could quite plausibly claim to have been ignorant of the mental debility of the other, particularly given how difficult everyone conceded it was—even for trained experts—to detect the existence of insanity.

Faced with these hard cases, one might have expected nineteenth-century judges to adhere to a “let-alone policy,”<sup>318</sup> maintaining a low mental threshold and refusing to set aside formally executed instruments in all but the most extreme of circumstances. Scattered rulings to this effect can indeed be found in the law reports of the period, but the weight of authority points in a different direction. Reasoning from premises in line with Enlightenment ideas about human ability, judges in most jurisdictions articulated more robust and demanding definitions of what it meant to have the legal capacity to act—in both domestic and business realms. To be sure, they exercised their authority rather gingerly as they interceded in the sphere of family relations, and they were far from unconcerned about maintaining the stability of commercial transactions. But they appeared no less invested in upholding a certain vision of moral agency, conceiving of the default legal person in terms of his capacity to exercise “rational liberty.” It is this concern that I highlight in the two Subparts that follow, comparing and contrasting the way this standard was characterized in cases involving disputed wills and contracts.

As a general matter, judges frequently declared that it took less capacity to make a will than a contract of sale, chiefly because the latter typically involved “two parties, and some degree of antagonism between their interests and efforts;—so that here mind is opposed to mind,” while in the case

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318. WALKER, *supra* note 77, at 237.

of the former, the testator “[wa]s left free to act upon his own perceptions.”<sup>319</sup> Still, judges were compelled to acknowledge that contemporary testamentary practices did not always fit this description. Indeed, in all too many cases, the testator was lamentably “beset by an army of harpies, in the shape of hungry expectants for property, altogether more perplexing than the ordinary circumstances attending a disposition of property by sale.”<sup>320</sup> Accordingly, as a baseline, judges tended to hold that it was important in both types of circumstances that one have sufficient mental strength to comprehend the value of property and to resist importunity or undue influence. However, they tended to conceive of the bounds of rationality in broader terms in testamentary cases, upholding the most “unnatural” and “unjust” of dispositions, as long as the testator seemed to be acting “according to a fixed purpose of his own,”<sup>321</sup> the will expressing his true sentiments about the persons named (and unnamed) in the document.

By contrast, inter vivos conveyances and commercial agreements were subject to greater scrutiny, as courts appeared more inclined to infer incapacity or unfair dealing from the substance of the transaction, enforcing relatively objective norms of reasonableness and equity in the process. Yet judges clearly regarded the transaction first and foremost as a means of deriving information about the actual mental condition of the alleged incompetent, in order to determine whether he possessed the basic capacity to reason. And it remained more than conceivable, on their analyses, that an individual might meet that threshold requirement and still make an improvident contract, which judges were fully prepared to uphold, absent proof of undue influence or fraud. The cases that would prove most challenging to nineteenth-century courts were those in which the incapacity of one party was latent and otherwise unknown to the other, effectively forcing judges to choose between “two innocents.” It was only in these sorts of cases that judges tended to adopt a wholly objective standpoint, rather reluctantly deciding to treat the insane party as if he were a sane and competent person, even in the face of clear evidence to the contrary.

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319. *Ex'r of Converse v. Converse*, 21 Vt. 168, 170 (1849); *see also* *Stevens v. Vancleve*, 23 F. Cas. 35, 38 (C.C.D.N.J. 1822) (No. 13,412); *Harrison v. Rowan*, 11 F. Cas. 658, 661 (C.C.D.N.J. 1820) (No. 6,141); *Comstock v. Hadlyme Ecclesiastical Soc'y*, 8 Conn. 254, 264 (1830); *Thompson v. Kyner*, 65 Pa. 368, 382 (1870).

320. *Ex'r of Converse*, 21 Vt. at 170.

321. *Tudor v. Tudor*, 56 Ky. (17 B. Mon.) 383, 394 (1856).

# 1. "A Disposing Mind"

In elaborating what constituted the default legal person in the testamentary context, early republican judges recast old common law formulations in light of new understandings of mind.<sup>322</sup> They held that the competent testator had to have a basic set of intellectual and moral powers, for otherwise, "the action, is not, properly speaking, his; he may, indeed, have performed the mechanical part of it, like a mere machine, but the essential part, the direction of the mind, that which makes it the action of the *man*, is not there."<sup>323</sup> However, judges hastened to add that there was no requirement that the testator "possess these qualities of the mind, in the highest degree, otherwise very few could make testaments at all; neither has it been understood, that he must possess them in as great a degree, as he may have formerly done; for even this, would disable most men, in the decline of life."<sup>324</sup> Indeed, they allowed that "the mind may have been, in some degree, debilitated, the memory may have become, in some degree, enfeebled; and yet there may be enough left, clearly to discern, and discreetly to judge, of all those things, and all those circumstances, which enter into the nature of a rational, fair, and just testament."<sup>325</sup> More particularly, it was said that the testator ought to be capable of recalling "the property he means to dispose of," as well as "the persons who are the objects of his bounty, and the manner in which it is to be distributed between them."<sup>326</sup> But it was hardly necessary "that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form,"<sup>327</sup> nor did he need to be able "to digest all parts of a contract."<sup>328</sup> By and large, judges expected that the execution of a will would be a relatively undemanding exercise, in view of the fact that

most men, at different periods of their lives, have meditated upon the subject of the disposition of their property by will; and when called upon to have their intentions committed to writing, they find

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322. Den v. Vancleve, 5 N.J.L. 680, 759 (1819).

323. *Id.*

324. *Id.*

325. *Id.* at 760.

326. Harrison v. Rowan, 11 F. Cas. 658, 661 (C.C.D.N.J. 1820) (No. 6,141).

327. *Id.*

328. Chrisman v. Chrisman, 18 P. 6, 11 (Or. 1888).



much less difficulty in declaring their intentions, than they would in comprehending business in some measure new.<sup>329</sup>

Although this model of the default legal testator was widely shared among early nineteenth-century judges, they were not in agreement about the operation of burdens of proof and presumptions when the mind was placed in issue.<sup>330</sup> In some jurisdictions, judges adopted rules that clearly favored heirs-at-law, insofar as they read the express requirement of a sound mind typically found in wills statutes to weaken or eliminate the force of the common law presumption of sanity, with the further implication that it was the proponent's burden to prove the testator's capacity.<sup>331</sup> But others eschewed such a conservative approach, insisting that a man was free to do "as he pleases with his own property"<sup>332</sup> in the United States, unless and until contestants could establish that the document in question was not an authentic expression of testamentary intentions.<sup>333</sup>

Judges on both sides of this issue nonetheless acknowledged that there were compelling practical reasons for maintaining a fairly strong presumption of sanity in the common run of cases. For they feared that if they relaxed this rule, they would not only invite capacity litigation, which might operate to drain the testator's estate, but also reduce his leverage over expectant heirs during the waning years of his life, when he most needed

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329. *Harrison*, 11 F. Cas. at 661. See generally Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 960, 976–77 (2006).

330. See generally 1 WHARTON & STILLÉ, *supra* note 135, at 33–34.

331. See, e.g., *Gerrish v. Nason*, 22 Me. 438, 441 (1843) ("The presumption, therefore, that the person making a will was, at the time, sane, is not the same as in the case of the making of other instruments; but the sanity must be proved."); *Crowninshield v. Crowninshield*, 68 Mass. (2 Gray) 524 (1854); *Phelps v. Hartwell*, 1 Mass. (1 Tyng) 71 (1804); *Aiken v. Weckerly*, 19 Mich. 482, 503 (1870); *Beazley v. Denson*, 40 Tex. 416, 435 (1874) ("Where the estate is disposed of by will, changing the course of descent and distribution as regulated by law, proof of mental capacity of the testator has always been exacted as essential to the establishment of the will."). See generally BUSWELL, *supra* note 130, at 207–09 (citing cases); 1 CLEVENGER, *supra* note 19, at 460–61 (same); 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).

332. *Kaufman v. Caughman*, 27 S.E. 16, 20 (S.C. 1879).

333. See, e.g., *Hawkins v. Grimes*, 52 Ky. (13 B. Mon.) 257, 269–71 (1852); *Higgins v. Carlton*, 28 Md. 115, 141–43 (1867); *Baxter v. Abbott*, 73 Mass. (7 Gray) 71, 83 (1856); *Brooks v. Barrett*, 24 Mass. (7 Pick.) 94 (1828); *Taff v. Hosmer*, 14 Mich. 309, 317 (1866). See generally BUSWELL, *supra* note 130, at 198–202 (citing cases); 1 CLEVENGER, *supra* note 19, at 459–60 (same). For a middle position, see, for example, *Boardman v. Woodman*, 47 N.H. 120, 139 (1865), *overruled in part on other grounds by Hardy v. Merrill*, 56 N.H. 227 (1875).

their constant care and support. As Chancellor James Kent reflected in the leading case of *Van Alst v. Hunter*<sup>334</sup>:

It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life, to command the attentions due to his infirmities.<sup>335</sup>

Mindful of such considerations, a few judges even went so far as to suggest that it might be best to simply revert back to the narrow common law tests set out by the old common law courts.<sup>336</sup> “To establish any standard of intellect . . . beyond the possession of reason in its lowest degree,” they feared, “would create endless uncertainty, difficulty and litigation.”<sup>337</sup> And it might also practically operate “to exclude females, ignorant persons, and persons laboring under violent and painful disease, from the power of testamentary disposition.”<sup>338</sup>

Yet even with the perils of raising the threshold of testamentary capacity in full view, most nineteenth-century American judges would sooner or later come to hold that a “glimmering of reason” did not suffice as a matter of law. One of the most oft-repeated judicial renderings of the “disposing mind” was that articulated by Judge Redfield in the leading Vermont case of *Ex’r of Converse v. Converse*.<sup>339</sup> Redfield held that the testator

must undoubtedly retain sufficient *active memory*, to collect in his mind, without prompting, particulars, or elements, of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their more obvious relations to each other, and be able to form some rational judgment in relation to them. The elements of such a judgment should be, the number of

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334. *Van Alst v. Hunter*, 5 Johns. Ch. 148 (N.Y. Ch. 1821).

335. *Id.* at 160.

336. *Id.*

337. *Stewart’s Ex’r v. Lispenard*, 26 Wend. 255, 303 (N.Y. 1841), *overruled by* *Delafield v. Parish*, 25 N.Y. 9 (1862).

338. *Id.* at 312. For New York cases following *Lispenard*, see *id.* at 303; *Clarke v. Sawyer*, 2 N.Y. 498, 499 (1849) (dictum); *Blanchard v. Nestle*, 3 Denio 37, 41–42 (N.Y. 1846). But see *Delafield*, 25 N.Y. at 27–28. The only jurisdiction outside of New York to maintain this minimal threshold in the testamentary context was Georgia. See *Potts v. House*, 6 Ga. 324, 352–54 (1849). It is worth noting, in addition, that the main opinion in *Lispenard* contained dicta recognizing delusion as a distinct basis for setting aside a will. *Lispenard*, 26 Wend. at 304.

339. *Ex’r of Converse v. Converse*, 21 Vt. 168 (1849). For cases in other jurisdictions adopting this rule, see, for example, *Runkle v. Gates*, 11 Ind. 95, 98 (1858); *Beaubien v. Cicotte*, 12 Mich. 459, 489 (1864); *Benoist v. Murrin*, 58 Mo. 307, 322–23 (1874); *Delafield*, 25 N.Y. at 29; *Thompson v. Kyner*, 65 Pa. 368, 378 (1870); *Tucker v. Sandidge*, 8 S.E. 650, 652–54 (Va. 1888).

his children, their deserts, with reference to conduct and capacity, as well as need, and what he had before done for them, relatively to each other, and the amount and condition of his property . . . .<sup>340</sup>

Judge Redfield went on to acknowledge that “capability of men in health to form correct judgment in such matters is no doubt very unequal,” further observing that “when there is no inherent incongruity in the will itself, and no just ground to suspect improper influence, juries are, and perhaps should be, very liberal in sustaining testamentary dispositions.”<sup>341</sup> Nonetheless, the judge maintained that “there must undoubtedly be some limit,” suggesting that “[w]hen one is confessedly in a condition to be constantly liable to commit the most ludicrous mistakes, in regard to the most simple and familiar subjects, he ought not to and cannot make a will.”<sup>342</sup>

It was in marking this limit that judges encountered the greatest difficulty, and the task was hardly eased by the introduction of the new medical psychology into the courtroom. Consider, for example, the 1839 Kentucky contest surrounding the will of Jeconias Singleton, a famously cantankerous farmer who left the bulk of his considerable estate to three of his four sons, wholly excluding the youngest one, William.<sup>343</sup> Though there was more than a little evidence going to show that William was guilty of misbehavior—that he had likely engaged in sexual intercourse with one of his father’s slave women<sup>344</sup> and, at some point, threatened the father’s life with a rifle<sup>345</sup>—the contestants contended that Jeconias suffered from a monomania on the subject of his son, which rendered his last will and testament invalid as a matter of law.<sup>346</sup> A jury trial yielded a verdict for the contestants,<sup>347</sup> and on appeal this judgment was affirmed, albeit by a divided court.<sup>348</sup>

The majority opinion held that the intensity of the hatred the father directed toward his son, combined with the severity of the punishment imposed by way of the will, constituted sufficient grounds for concluding

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340. *Ex’r of Converse*, 21 Vt. at 170.

341. *Id.* at 170–71.

342. *Id.* at 171.

343. *Singleton v. Singleton*, 38 Ky. (8 Dana) 315, 316, 322 (1839). Also excluded from the estate were one of the testator’s daughters and one of his granddaughters. *Id.* at 316. Neither side made much of their exclusion, however, possibly because the former was expected to subsist on her husband’s income, *id.* at 351 (petition for reh’g, Mr. Hewitt), and the latter had married against her grandfather’s wishes, *id.* at 343 (Robertson, C.J., dissenting).

344. *Id.* at 352.

345. *Id.* at 358.

346. *Id.* at 315–16 (majority opinion).

347. *Id.* at 315.

348. *Id.* at 331.

that it was the offspring of an insane mind.<sup>349</sup> A concurring judge wrote separately to dispute this judgment, as he thought the testator had acted only as a "rational but severe father" would.<sup>350</sup> However, this judge went on to find the will invalid on account of the "undue and insidious influence"<sup>351</sup> exercised by William's siblings, who were responsible for diverting "the natural flow of that tide of affection which would have brought the father to a reconciliation with his son."<sup>352</sup> A dissenting judge insisted that neither insanity nor undue influence was established by the evidence in the record, stressing that the law did not permit "the orthodox to stultify the heretical,"<sup>353</sup> and warning that the ruling in this case "will tend to render insecure and comparatively delusive the cherished right, given by law to every freeman of sound mind and legal discretion, to dispose, at his death, of the estate which he had acquired while living."<sup>354</sup>

In the decades to come, judges would continue to wrestle with the intertwined questions of moral, intellectual, and legal capacity raised by these contests, evincing ever more concern as the rates of litigation showed no signs of abating. As might be expected, juries were often persuaded to find against "unequal"<sup>355</sup> or otherwise "unnatural dispositions,"<sup>356</sup>

349. *Id.* at 330.

350. *Id.* at 331 (Marshall, J., concurring).

351. *Id.* at 333.

352. *Id.* at 332.

353. *Id.* at 339 (Robertson, C.J., dissenting).

354. *Id.* at 341.

355. Appellate courts regularly set aside jury verdicts. *See, e.g.,* *Stubbs v. Houston*, 33 Ala. 555 (1859) (brother over needy nephews); *Kinne v. Kinne* 9 Conn. 102 (1831) (shortchanging spouse); *Turner v. Cheesman*, 15 N.J. Eq. 243 (Prerog. Ct. 1857) (unequal will as between children); *Whitenack v. Stryker*, 2 N.J. Eq. 8 (Prerog. Ct. 1838) (shortchanging daughter); *Coffin v. Coffin*, 23 N.Y. 9 (1861) (shortchanging second wife); *Kachline v. Clark*, 4 Whart. 316 (Pa. 1839) (disinheriting son); *Woodward v. James, Ex'r*, 34 S.C.L. (3 Strob.) 552 (1849) (unequal will as between children); *Martin v. Teague*, 29 S.C.L. (2 Spears) 218 (1843) (unequal will as between children). For cases where the jury verdict against the will was affirmed on appeal, *see, for example, Roberts v. Trawick*, 22 Ala. 490 (1853); *Woodbury v. Obear*, 73 Mass. (7 Gray) 467 (1856).

356. Here again, many of these verdicts were set aside by appellate courts. *See, e.g.,* *James v. Langdon*, 46 Ky. (7 B. Mon.) 193 (1846) (emancipating slaves); *M'Daniel's Will*, 25 Ky. (2 J.J. Marsh.) 331 (1829) (same); *Brooke v. Townshend*, 7 Gill 10 (Md. 1848) (same); *Stackhouse v. Horton*, 15 N.J. Eq. 202 (Prerog. Ct. 1854) (excluding needy nephews and siblings); *Jolliffe v. Fanning*, 44 S.C.L. (10 Rich.) 186 (1856) (slave mistress emancipated and made beneficiary); *Farr v. Thompson*, 25 S.C.L. (Chev.) 37 (1839) (leaving estate to slave mistress); *Mercer v. Kelso's Adm'r*, 45 Va. (4 Gratt.) 106 (1847) (emancipating slaves). For cases in which the jury verdict against the will was affirmed on appeal, *see Florey's Executors v. Florey*, 24 Ala. 241 (1854) (testator's wife's illegitimate mulatto son made primary beneficiary); *Taylor v. Wilburn*, 20 Mo. 306 (1855) (wife over children); *Newhouse v. Godwin*, 17 Barb. 236 (N.Y. Gen. Term 1853) (free black testator makes white lawyer primary beneficiary, leaving wife and sister with relatively little).

particularly when they appeared to benefit “strangers-in-blood.”<sup>357</sup> Such rulings were regularly appealed, confronting reviewing judges with the same fundamental issues in case after case: How far could a testator deviate from conventional norms of rationality and morality without casting doubt as to his sanity, or the freedom of his will? Was there even a consensus as to what constituted rationality and morality in the first place? If there was not, by what standard were courts to gauge the testator’s sanity and freedom?

Although there was a considerable amount of doctrinal instability in the 1840s and 1850s as litigants tested the limits of the new diagnostic categories introduced by medical experts,<sup>358</sup> both trial and appellate judges would gradually work in the second half of the century to clarify the boundaries of testamentary capacity, undue influence, and fraud, so as to prevent community sentiment from overpowering the testator’s will, however eccentric. As a trial judge pronounced in an 1855 charge:

The law has not committed to us the power of disposing of men’s property as we please. . . . If the testator in the right use of his faculties has executed the instrument in due form of law, it is not in the power of court or jury or both together to treat it as null and void, and make a different disposition of his property to suit our notions of justice or propriety. A rich old man may marry a young wife or a handsome and obliging housekeeper, or maid servant—he may disinherit his own children and leave them beggars. You and I may think his conduct oppressive and unjust in the highest sense; yet if it be his will, we have no power to set it aside. It is true a will may be so outrageous, so contrary to the known desires and wishes of a testator, so absurd on its face, as to indicate or even demonstrate the want of sanity in a testator who could be guilty of signing such an instrument. But it must be a very extreme case to justify the rejection of a will on this account.<sup>359</sup>

This point was repeatedly reinforced by appellate judges, who stressed the subjective perspective from which questions of testamentary capacity were to be assessed. One stated:

That the will to others not having the means of knowing what the testator knows, not occupying his stand-point, not having lived his

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357. For one example, see *Dorsey v. Warfield*, 7 Md. 65 (1854) (stranger-in-blood made primary beneficiary). For cases where the jury verdict against the will was affirmed on appeal, see *McDaniel v. Crosby*, 19 Ark. 533 (1858) (stranger-in-blood made primary beneficiary), and *Pelamourges v. Clark*, 9 Iowa 1 (1859) (large bequest to Catholic church).

358. See generally Blumenthal, *supra* note 329, at 985–1006.

359. *Turner v. Hand*, 24 F. Cas. 355, 360–61 (C.C.D.N.J. 1855) (No. 14,257).

life, not having his secret affections and hates, may seem unreasonable, injudicious, and even unjust, is no reason why it should be declared the product of a diseased mind. A testator has a right to make an unreasonable, unjust, injudicious will, and his neighbors have no right, sitting as a jury, to alter the disposition of his property, simply because they may think the testator did not do justice to his family connections.<sup>360</sup>

Accordingly, the only question for the court was whether the testator had the capacity and freedom to make a will "that seemed to him right."<sup>361</sup>

Such attempts at clarification did little to stem the tide of testamentary litigation, though it did condition the manner in which the parties presented their competing claims. Opposing counselors endeavored to situate the disputed instrument within the broader context of the testator's "mental history," summoning up evidence beyond the four corners of the document—presenting what amounted to dueling biographies. More often than not, testifying medical experts only served to confirm that there were (at least) "two ways of telling a story."<sup>362</sup> The more predictable these courtroom performances became, the more members of the bench came to regard the participants with a jaundiced eye. An undercurrent of impatience and frustration ran through the decisional law, growing more pronounced in the last decades of the century. Judicial opinions rendered in this period were full of negative definitions of insanity in the legal sense—it could not be equated with a testator's

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360. *Boylan v. Meeker*, 28 N.J.L. 274, 277 (1860).

361. *Id.* at 278. For other leading midcentury decisions making the same point, see, for example, *Gardiner v. Gardiner*, 34 N.Y. 155, 162 (1865) (holding that a will cannot be set aside simply because "it is not such a will as a sensible person would make, or that it is harsh, capricious and unjust; nor, on the other hand, is it sufficient to avoid it, on the ground of undue influence, that it was made as the result of acts of attention and kindness," and defining undue influence as "the control of another will over that of the testator, whose faculties have been so impaired as to submit to that control, so that he has ceased to be a free agent, and has quite succumbed to the power of the controlling will"), and *Reynolds v. Root*, 62 Barb. 250, 252 (N.Y. Gen. Term 1862) ("No greater injustice could be done, in many instances, by a testator, than to so dispose of his property as to be what the world would call just. There are so many circumstances occurring, in every family, that never reach the public eye or ear, in which the conduct of children or relations is disclosed, affecting, in the most serious manner, the happiness of its members, that the parent alone is competent to determine how much each member of his family is fairly and justly entitled to, in the division of his estate.").

362. JOHN K. PORTER & JACOB B. JEWETT, PARISH WILL CASE, IN THE COURT OF APPEALS 120–21 (N.Y. 1862). For an especially pointed judicial commentary on the extent to which "doctors disagree," see *Delafield v. Parish*, 25 N.Y. 9, 74 (1862) (Gould, J., dissenting). Judicial frustration with this aspect of will contests led some judges to place limits on the number of experts that were allowed to testify on the issue of sanity. See, e.g., *Fraser v. Jennison*, 42 Mich. 206, 231 (1879).

"intellectual feebleness,"<sup>363</sup> "[p]enuriousness," or "miserly conduct,"<sup>364</sup> nor was it necessarily established by the erroneousness of his "religious creed,"<sup>365</sup> or the fact that she was "excitable, nervous, flighty and hysterical."<sup>366</sup> The same basic message was communicated by judges when they set out the standard of testamentary capacity in more positive terms. "That which is regarded in the eye of the law as 'a sound and disposing mind,'" courts increasingly held, "is not inconsistent with a very considerable degree of eccentricity"<sup>367</sup> or "moral depravity."<sup>368</sup>

In line with this development, a number of jurisdictions in this period formally rejected the medical doctrine of "moral insanity," pronouncing that a "disorder of the moral affections and propensities, will not, unless accompanied by insane delusion, be sufficient to invalidate a will."<sup>369</sup> And more generally, courts worked to explicitly distinguish legal tests of capacity from medical models of mental health. As an 1872 Georgia court explained, "[t]he medical writers treat the subject as philosophers and as healers," while "[t]he law inquires into it with the view of seeing . . . at what point it is best for the general good, to say that a man shall not be allowed to make a will."<sup>370</sup> The purpose of the judicial inquiry was not to address the "state of the mind as an abstract philosophical or medical question," but rather "to its capacity for the precise thing in hand." For it was conceivable that "a man may say and do things which a medical man would take as evidence of insanity," while remaining all the while "able to have a decided rational desire as to the disposition of his property."<sup>371</sup>

The minimal content given to the "rational" in late nineteenth-century decisions suggests that the default legal person had become, by this time, a rather deflated version of the Enlightenment self. To be counted among the competent, courts now held, it was enough to show that the

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363. Hall v. Dougherty, 10 Del. (5 Houst.) 435, 452 (1878).

364. Chandler v. Barrett, 21 La. Ann. 58, 62 (1869).

365. Mullins v. Cottrell, 41 Miss. 291, 325 (1866).

366. *In re Will of Blakely*, 4 N.W. 337, 339-40 (Wis. 1880).

367. Hutchinson v. Hutchinson, 38 N.E. 926, 927 (Ill. 1894).

368. See Blumenthal, *supra* note 329, at 1028 & n.403 (quoting *In re Jones' Will*, 25 N.Y.S. 109, 113 (Sur. Ct. 1893)).

369. Boardman v. Woodman, 47 N.H. 120, 122 (1865); see also *In re Forman's Will*, 54 Barb. 274, 291-92 (N.Y. Gen. Term 1869). See generally ISAAC F. REDFIELD, *LEADING AMERICAN CASES AND NOTES UPON THE LAW OF WILLS* 214-18, 256-58 (Boston, Little, Brown & Co. 1874).

370. Gardner v. Lamback, 47 Ga. 133, 192 (1872).

371. *Id.* at 193.

party in question “understood . . . what she was doing.”<sup>372</sup> What mattered most of all was that the disputed will was the result of the testator’s “free exercise of his own inclinations and judgment.”<sup>373</sup> This concern was most clearly communicated in a number of leading late nineteenth-century cases ratifying the wills of men and women who favored their mistresses, paramours, and illegitimate children over heirs-at-law.<sup>374</sup> In others, testators were allowed to use their wills as weapons, even to the point of disinheriting family members out of sheer spite.<sup>375</sup> For example, in *Potter v. Jones*<sup>376</sup> the court held:

While it seems harsh and cruel, so counter to all the feelings of our nature, that a parent should disinherit one of his children and devise his property to the others, or to cut them all off and devise it to strangers, from some unworthy motive, yet so long as that motive, whether from pride or aversion, spite or prejudice, is not resolvable into mental perversion, no court can interfere.<sup>377</sup>

And in still others, testators were allowed to pursue egomaniacal or quirky charitable projects, even where this meant that deserving family members were left with relatively little.<sup>378</sup>

There were, however, still limits to the judicial doctrine of testamentary freedom. Where it appeared that the surviving family members might become public charges if the will was upheld, courts were inclined not to do so. Thus, in *In re Ramsdell's Will*,<sup>379</sup> the court refused to allow a borderline idiotic woman to disinherit her insane children and instead devote her entire property—valued at upward of \$200,000—to the building of a gaudy marble tomb “adorned with four life-size marble statues of herself, her husband and her children.”<sup>380</sup> In the estimation of

372. *In re Journeay's Will*, 44 N.Y.S. 548, 550 (App. Div. 1897).

373. *Monroe v. Barclay*, 17 Ohio St. 302, 316 (1867).

374. See, e.g., *In re Ruffino's Estate*, 48 P. 127, 130 (Cal. 1897); *Ross v. Weaver*, 11 Ky. Op. 131, 131–32 (1881) (unreported decision); *Sunderland v. Hood*, 13 Mo. App. 232, 236–37 (1883); *Arnault v. Arnault*, 31 A. 606, 607–08 (N.J. Prerog. Ct. 1895); *In re Mondorf's Will*, 18 N.E. 256, 257 (N.Y. 1888); *In re Hamilton's Will*, 62 N.Y.S. 820, 823 (Sur. Ct. 1899); *Rudy v. Ulrich*, 69 Pa. 177, 185 (1871). But see *Kessinger v. Kessinger*, 37 Ind. 341, 343–44 (1871) (setting aside will benefiting mistress); cf. *Rollwagen v. Rollwagen*, 63 N.Y. 504, 507–08, 520, 522 (1876) (setting aside will benefiting former housekeeper who became testator's wife not long before his death).

375. See, e.g., *Sanderson v. Sanderson*, 30 A. 326, 330 (N.J. Perog. 1894) (“An apparently inofficious will is readily excused by the inofficious conduct of those who complain of it.”).

376. 25 P. 769 (Or. 1891).

377. *Id.* at 774–75.

378. See Blumenthal, *supra* note 329, at 1015–32.

379. 3 N.Y.S. 499 (Gen. Term 1889).

380. *Id.* at 501.



the court, the testamentary act alone established that the testatrix's "natural affection" was "blunted"—so far so, that she seemed incapable of understanding the "true import" of what she was doing with her property.<sup>381</sup> Judges also tended to respond moralistically where there was clear evidence of fraud as well as undue influence, as was the case in *Orchardson v. Cofield*,<sup>382</sup> which concerned a credulous old lady who gave all of her property to a confidence man she married and supported because she believed him to be "The Son of Wisdom."<sup>383</sup>

But short of such extreme cases, turn-of-the-century courts stood prepared to uphold unreasonable wills, so long as each was proved to be the "free and untrammelled expression of the testator's own desire."<sup>384</sup> Jurors were admonished that they were not "to try the will itself" but only "the testator's sanity."<sup>385</sup> And in appellate decisions, judges quite ardently defended the liberty of the testator, even where his last will offended the principle of "natural justice."<sup>386</sup> In other words, the default model of the competent testator was recast over time to comprehend a wider range of deviant behavior, registering judicial acceptance of the fact that "[w]hat is rational to one man is highly irrational to another."<sup>387</sup>

## 2. "An Agreeing Mind"

American judges likewise struggled to give practical effect to the ideal of liberty of contract, generally proving to be more hesitant to validate irrational contracts than wills. This hesitancy has not been much noticed in standard accounts of the history of contract law, which have depicted the nineteenth century as an era in which a "will theory" of contractual obligation triumphed over traditional equitable doctrines.<sup>388</sup>

381. *Id.* at 500; see also *In re Budlong*, 7 N.Y.S. 289, 292–93 (Gen. Term 1889); *Muse v. Douglass*, 4 Pennyp. 107, 109 (Pa. 1884).

382. 49 N.E. 197 (Ill. 1897).

383. *Id.* at 201.

384. *In re Hamilton's Will*, 62 N.Y.S. 820, 823–24 (Sur. Ct. 1899).

385. *Fraser v. Jennison*, 3 N.W. 882, 889 (Mich. 1879).

386. For an extended discussion of capacity litigation in this doctrinal context, see generally Blumenthal, *supra* note 329.

387. *Id.* at 1034 (quoting 1 WHARTON & STILLÉ, *supra* note 135, at 334).

388. This position has been asserted most forcefully by Morton Horwitz, who maintains: Only in the nineteenth century did judges and jurists finally reject the longstanding belief that the justification of contractual obligation is derived from the inherent justice or fairness of an exchange. In its place, they asserted for the first time that the source of the obligation of contract is the convergence of the wills of the contracting parties. HORWITZ, *TRANSFORMATION I*, *supra* note 25, at 160; see also KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 119–23 (1989). For criticism of Horwitz's account, see,

As the story has often been told, the expansion of the market economy undermined faith in objective value, prompting judges and jurists to conceptualize anew the law of contracts and the role of courts in enforcing these instruments.<sup>389</sup> Doubting the existence of a “just price,” members of the bench and bar placed increasing emphasis upon mutual assent as the basis of obligation, which, in turn, led them to recast the function of courts in resolving practical disputes. Judges once charged with the task of policing individual bargains for fairness were now expected to simply determine and effectuate the subjective preferences of the parties, as manifested in their express agreements.<sup>390</sup>

Pronouncements to this effect can certainly be found in the treatises on the law of contracts published in nineteenth-century America, but these sources also clearly establish the continuing force of traditional equitable principles as well as more abstract norms of morality and natural justice. One of the leading commentators of the day, Theophilus Parsons, may be taken as representative on this score. In every edition of his treatise, from 1853 to 1904, Parsons began by making the same expansive claim for his subject: “The Law of Contracts, in its widest extent, may be regarded as including nearly all the law which regulates the relations of human life. . . . All social life presumes it, and rests upon it; for out of contracts, express or implied, declared or understood, grow all rights, all duties, all obligations, and all law.”<sup>391</sup> On this jurist’s rendering, then, the parties to a given contract did not necessarily control all the terms to which they were bound—some were implied by the law. That which the law required might often be “discharged from a feeling which borrows no strength from a sense of obligation,” but in those cases where this did not obtain, courts provided the needed enforcement mechanism.<sup>392</sup> “In this sense,” Parsons explained, “*contract* is coordinate and commensurate with *duty*,” it being a general (if not universal) principle that “whatsoever it is certain man ought to do, that the law supposes him to have promised to do.”<sup>393</sup>

Thus, even as they recast the bonds of society in contractual terms, nineteenth-century jurists construed the will of the parties in light of

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for example, PETER KARSTEN, *HEAD VERSUS HEART: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA* 47–56 (1997); A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

389. HORWITZ, *TRANSFORMATION I*, *supra* note 25, at 180–81.

390. *Id.*

391. 1 THEOPHILUS PARSONS, *THE LAW OF CONTRACTS* 3 (Boston, Little, Brown & Co. 1853).

392. *Id.* at 3–4 (all editions).

393. *Id.* at 4.

certain “principles of reason and justice,” seeking “to find in a contract a meaning which is honest, sensible and just, without doing violence to the expressions of the parties, or making a new contract for them.”<sup>394</sup> And to the extent that these jurists did accord greater weight to the will of the parties, they took the requirement of “mutual assent” quite literally, stipulating that it “necessarily supposes a free, fair, and serious exercise of the reasoning faculty: in other words, the power, both physical and moral, of deliberating upon and weighing the proposed subject matter of the contract—its advantages and disadvantages.”<sup>395</sup> If either party was deprived of this power “from any cause whatever,” or otherwise “deemed by law not to have attained a sufficient degree of mental power,” there was “no *aggregatio mentium*, or mutual assent of minds; and, consequently, no binding agreement.”<sup>396</sup> The importance jurists attached to this requirement is reflected in their discussions of which “persons have the capacity to assent.”<sup>397</sup> Referencing a growing mass of decisional law on the subject, they aimed to provide some semblance of conceptual order by proceeding

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394. *Id.* at 4–5; see also WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL 4 (Boston, Charles C. Little & James Brown 1844) (“The law always presumes such agreements to have been made, as justice and reason would dictate, and assists the parties to any transaction, in an honest explanation of it.”).

395. JOSEPH CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS 4 (Boston, Wells & Lilly 1827); see also 2 KENT, *supra* note 82, at 450 (“Every contract, valid in law, is made between parties having sufficient understanding, and age, and freedom of will, and the exercise of it, for the given case.”); 1 ROBERT JOSEPH POTHIER, A TREATISE ON OBLIGATIONS, CONSIDERED IN A MORAL AND LEGAL VIEW 34 (translation, Newbern, Martin & Ogden 1802) (“The essence of the agreement consisting . . . in the assent, it follows that one must be able to assent, and consequently have the use of reason to be capable of contracting.”); 1 JOHN JOSEPH POWELL, ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS 10 (Walpole, David Newhall 1802) (“[T]he term ‘assent’ signifies the acquiescence of the mind to something proposed or affirmed; and involves, in consideration of law, first, a physical power of assenting; secondly, a moral power; and, thirdly, a deliberate and free use of those powers. Therefore the absence of any of these capacities in either of the parties to a contract or agreement, renders the person labouring under it incapable of entering into an agreement to bind himself, or, by virtue of his acts, others.”); SHELFORD, *supra* note 116, at 316; 1 STORY, *supra* note 181, at 227 (“[T]here must be a full and free consent to bind the parties. Consent is an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. And, therefore . . . every true consent supposes three things; first, a physical power; secondly, a moral power; and thirdly, a serious and free use of them.” (footnote omitted)).

396. CHITTY, *supra* note 395, at 4; see also 1 POWELL, *supra* note 395, at 10–11 (“[A] man who is not perfectly master of his reason, is incapable of giving a serious and valid assent to a contract or agreement thereby to bind himself; because such assent is an act of understanding, of which persons so circumstanced are morally incapable, their actions being the result of an irresistible impulse, the power of self-government being wanting.”).

397. 1 POWELL, *supra* note 395, at viii.

to characterize the default legal person, in large part by listing classes of persons who fell short of this standard.<sup>398</sup>

Although the basic types of disabled persons did not vary much from one treatise to the next, jurists were less than uniform in their descriptions and arrangements of these classes, and in the rationales offered for their existence. William Story, for one, conceived of disability as either “natural” or “legal,”<sup>399</sup> depending on whether it was the result of a mental infirmity (as was the case with lunatics, idiots, and drunkards), or instead supported by “public policy and convenience”<sup>400</sup> (which was true of outlaws and persons attainted, aliens, infants, married women, slaves, and seamen).<sup>401</sup> Other jurists were not as rigid in their categorizations of natural and legal disabilities, with some generating more extensive lists of disabled persons.<sup>402</sup> The class of persons that proved most difficult to definitively categorize was that of infants. Most often, the disability attaching to this condition was said to be “partly natural and partly legal,” as it was based upon the infant’s immaturity of judgment, which was legally presumed until the age of twenty-one, even in the face of actual proof to the contrary.<sup>403</sup> Recognizing the artificiality of this age

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398. See *id.* at 9–11; see also C.G. ADDISON, A TREATISE ON THE LAW OF CONTRACTS AND RIGHTS AND LIABILITIES EX CONTRACTU 71, 1 (London, V. & R. Stevens & G.S. Norton 2d ed. 1857) (inserting a section devoted to the subject “of parties capable and incapable of contracting and of the validity and invalidity of contracts” immediately following the first chapter of the volume concerning “the nature and attributes and legal authentication of contracts”); cf. C.G. ADDISON, A TREATISE ON THE LAW OF CONTRACTS AND RIGHTS AND LIABILITIES EX CONTRACTU 857 (Phila., Lea & Blanchard 1847) (treating “contracts with infants, drunkards and persons of unsound mind” as a residual category relegated to the end of the volume, rather than in closer proximity to the discussion of “mutual assent” and the other elements of a valid contract).

399. STORY, *supra* note 394, at 13.

400. *Id.* at 18.

401. See *id.* at 13–51; cf. JOHN NEWLAND, A TREATISE ON CONTRACTS WITHIN THE JURISDICTION OF COURTS OF EQUITY 1 (Phila., Benjamin Warner 1821) (providing that contractual incapacity arises “either from a maxim of natural justice, or from a regulation of positive law”).

402. See, e.g., CHITTY, *supra* note 395, at 4 (including as disabled “persons of non-sane minds,” drunkards, persons “deceived by fraud and chicanery, or depressed by an illegal imprisonment, or other unlawful violence,” and infants); 1 PARSONS, *supra* note 391, at 9–10 (including as disabled infants, married women, bankrupts or insolvents, *non compos mentis*, spendthrifts, seamen, aliens, slaves, outlaws, attainted, and excommunicated).

403. THERON METCALF, PRINCIPLES OF THE LAW OF CONTRACTS AS APPLIED BY COURTS OF LAW 36 (N.Y., Hurd & Houghton 1867); see also 1 POTHIER, *supra* note 395, at 34–36 (casting idiots, lunatics, and drunkards as naturally incapable of giving assent, and regarding married women and spendthrifts as rendered disabled by the law; infants straddled these two categories). For a wide-ranging historical study of the legal category of infancy, see HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY (2005).

threshold, Parsons set infants apart from the class of “persons of insufficient mind to contract,” which encompassed idiots, lunatics, drunkards, spendthrifts, seamen, and “persons under duress.”<sup>404</sup>

However such questions of classification were resolved, American jurists still had to grapple with a confounding welter of common law rules concerning when—or even whether—a plea of incapacity could be entered in order to avoid contractual liability.<sup>405</sup> For it appeared that a long line of English authorities, dating as far back as the reign of Edward III, provided that “no man shall be allowed to stultify himself, or plead his own disability.”<sup>406</sup> The rationale most often proffered for this maxim was that the party in question could not know what he did when he was “out of his senses,”<sup>407</sup> which was further bolstered by an underlying concern that admission of the plea would “open a gate to dissimulation, deceit, and fraud.”<sup>408</sup> Nonetheless, the party’s heirs, executors, or administrators were permitted to enter a claim of incapacity after his death, and the same

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404. 1 PARSONS, *supra* note 391, at 332–44. Theophilus Parsons did not expressly state the basis of the disability with respect to spendthrifts, *id.* at 337 (referring only to the “drinking, gaming, or other debauchery” associated with those placed in this class), though he did explain the constraints placed upon seamen as owing to their “reckless and improvident habits,” which resulted in “their inability to protect themselves against the various parties with whom they deal,” *id.* at 338–40. For duress to be legally cognizable, it had to “destroy the threatened party’s freedom”; violence or the threat of some “grievous wrong” might have this effect. *Id.* at 341–44. By contrast, Parsons offered no indication that there was any sort of mental basis for the legal disabilities attaching to married women, bankrupts, insolvent persons, aliens, slaves, outlaws, persons attainted, or persons excommunicated. *Id.* at 295–331, 345–71.

405. The fullest discussions of this subject that would have been available to American lawyers are contained in 1 COLLINSON, *supra* note 116, at 375–451, and SHELFORD, *supra* note 116, at 154–73.

406. WILLIAM BLACKSTONE, 2 COMMENTARIES \*291; *see also id.* at \*291 n.2 (citing 5 Edw. III 70); *Beverley’s Case*, (1603) 76 Eng. Rep. 1118, 1119, 4 Co. Rep. 123b, 123b (K.B.) (“That every deed, feoffment, or grant, which any man *non compos mentis* makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim in law, that no man of full age shall be in any plea to be pleaded by him, received by the law to . . . stultify himself, and disable his own person . . .” (citing *Stroud v. Marshall*, (1595) 78 Eng. Rep. 643, 37 Cro. Eliz. 399 (K.B.), and *Cross v. Andrews*, (1599) 78 Eng. Rep. 863, 40 Cro. Eliz. 622 (Q.B.))); *id.* at 1119–20 (“It is resolved, that it being an express maxim of the common law, that the party shall not disable himself, that he shall not have for it relief in any Court of Equity . . .”); 5 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 25–46 (Phila., T. & J.W. Johnson & Co. 1876) (1736); HUMPHREY DAVENPORT, AN ABRIDGMENT OF THE LORD COKE’S COMMENTARIES UPON LITTLETON 262 (London, Assigns of Richard Atkyns & Edward Atkyns, Esq. 1685). *But see Yates v. Boen*, (1739) 93 Eng. Rep. 1060, 2 Strange 1104 (K.B.).

407. BLACKSTONE, *supra* note 406, at \*292.

408. 1 POWELL, *supra* note 395, at 23 (suggesting that the insanity plea was of particular concern because this condition, unlike infancy or duress, could be easily feigned); *see also* 2 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 21 (Boston, Cummings, Hilliard & Co. 1823) (speaking of “the fraud to be feared, from putting it in one’s power to feign or counterfeit insanity or inability, and then to avail himself of it”).

was true of a committee appointed during his lifetime,<sup>409</sup> though it hardly seemed obvious that these other parties were necessarily less prone to proceed under false pretences. Misgivings about the “illogic” and sheer “inconvenience” of the maxim were aired in commentaries published through the centuries by an array of detractors, from Anthony Fitz-Herbert<sup>410</sup> to Blackstone.<sup>411</sup> All the while, English courts gradually carved out a number of exceptions, such that by the early decades of the nineteenth century it was no longer clear to what extent the rule itself continued to prevail.<sup>412</sup>

Not feeling bound by these precedents, American jurists tended to regard the maxim as something of a historical curiosity.<sup>413</sup> They declared it simply nonsensical that the plea of incapacity was allowed in criminal but not civil cases, as recovered lunatics were thus left with no remedy against those who procured deeds or contracts from them while in an enfeebled state.<sup>414</sup> It was, of course, conceivable that a person “may assume this disability,” but the possibility of feigned pleas hardly warranted a

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409. See SHELFORD, *supra* note 116, at 167.

410. ANTHONY FITZ-HERBERT, *THE NEW NATURA BREVIVM* 466–68 (Dublin, H. Watts 9th ed. 1793). Fitz-Herbert balked at the maxim and cited to a number of earlier authorities, predating Edward III, which permitted the plea. *Id.* at 467. He found the maxim especially offensive insofar as it was understood only to apply to persons *non compos mentis* in civil cases. Regarding the conditions of infancy, duress, and insanity as analogous, he insisted that “it standeth with reason, that a man should shew how he was visited by the act of God with infirmity, by which he lost his memory and discretion for a time.” *Id.* at 466. Moreover, he could not see reason why a person *non compos mentis* should be excused from liability for murder and yet forced to adhere to his supposed contracts and deeds, thereby being made to “forfeit his lands or goods.” *Id.*

411. See BLACKSTONE, *supra* note 406, at \*291–92 (casting the evolution of the maxim as “somewhat curious” and questioning the “loose authorities” upon which it was based).

412. See *id.* For conflicting evaluations of the rule in this period, compare 1 POWELL, *supra* note 395, at 19–20 (concluding “upon a fair investigation of the question . . . that, according to the spirit of the common law, the strongest arguments will be found against receiving such a plea [of incapacity]”), with CHITTY, *supra* note 395, at 28–29 (noting the efforts of “ancient common lawyers” to establish this maxim, but announcing that “common sense and natural justice appear to have prevailed on this point; and doubtless, at the present day, idiocy or lunacy would be a good defence to an action at law on a simple contract, or bond”). See generally DANE, *supra* note 408, at 19–20 (“Can one stultify himself? This important question seems to be unsettled. . . . [A]uthorities are certainly both ways.”); SHELFORD, *supra* note 116, at 167, 259–62 (observing that the maxim “seems in some instances to have been relaxed,” further noting that the authorities on this subject were “conflicting” and finally pronouncing that “it does not appear to be now clearly settled to what extent the above maxim prevails”).

413. See COOPER, *supra* note 92, at 377–78; see also 2 KENT, *supra* note 82, at 451 (announcing that the common law maxim had been “properly exploded, as being manifestly absurd, and against natural justice”).

414. COOPER, *supra* note 92, at 378.

blanket prohibition.<sup>415</sup> No more substantial was the objection that the recovered lunatic could not remember the transaction in issue, for there were surely other witnesses who could testify as to the party's condition at the time the disputed instrument was executed.<sup>416</sup> Finding little merit in these rationales for the traditional rule, Joseph Story could only marvel at its existence: "How so absurd and mischievous a maxim could have found its way into any system of jurisprudence, professing to act upon civilized beings, is a matter of wonder and humiliation."<sup>417</sup> Unsurprisingly, the alienist Isaac Ray concurred in this opinion, though he was not mystified about the adoption of the rule. "It arose, no doubt, in part, from erroneous notions of the nature of insanity," he surmised, "and partly from apprehensions, not well founded, of the consequences, that might follow the admission of the plea of lunacy in avoidance of contracts."<sup>418</sup>

In early republican courtrooms, litigants attempted to exploit such apprehensions, warning of the vexatious lawsuits that would inevitably accompany any departure from the traditional doctrine.<sup>419</sup> "Leave men to the plain principles of the common law," they maintained, "and friends will take care of the weak and incapable."<sup>420</sup> Though there was some residual doubt on the question,<sup>421</sup> most judges in this era were inclined to limit the reach of the nonstultification rule<sup>422</sup> or repudiate

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415. DANE, *supra* note 408, at 21.

416. *Id.*

417. 1 STORY, *supra* note 181, at 229. It was, he continued, "a circumstance, which may well abate the boast so often and so rashly made, that the Common Law is the perfection of human reason." *Id.* at 230. Yet Story then went on to reconstruct the nonstultification rule in a more defensible form:

The true and only rational exposition . . . is, that the maxim is to be understood of acts done by the lunatic in prejudice of others; as to which he shall not be permitted to excuse himself from civil responsibility, on pretence of lunacy; and it is not to be understood of acts done to the prejudice of himself; for this can have no foundation in reason and natural justice.

*Id.* at 231. For his part, Thomas Cooper was considerably blunter: "This may be English law and English equity: God forbid it should be adopted here." COOPER, *supra* note 92, at 378.

418. RAY, *supra* note 92, at 13.

419. Webster v. Woodford, 3 Day 90, 96 (Conn. 1808) (argument of counsel).

420. *Id.*

421. See, e.g., Breckinridge's Heirs v. Ormsby, 24 Ky. 165, 177, 1 J.J. Marsh. 236, 254 (1829) ("Whether a person *non compos*, may or may not plead his disability, is in our opinion, yet a '*questio vexata*;' . . . The reason and equity of the case are on one side; the weight of more ancient authority on the other."); cf. Taylor v. Dudley 35 Ky. (5 Dana) 308 (1837) (acknowledging but resolving the question in favor of admitting the plea).

422. See, e.g., Millison v. Nicholson, 1 N.C. 515, 517 (1804) ("[N]either the authority of the cases nor the immutable principles of justice warrant its further extension or more rigorous application.").

it altogether<sup>423</sup>—registering greater concern that “a man without fault might be despoiled of his property and utterly ruined.”<sup>424</sup> While the risk that the plea might be abused was far from insubstantial, there were both practical and principled reasons for thinking it ought to be allowed. “It would seem to be a more enlightened policy,” one Massachusetts judge opined in 1827, “to discourage the making of contracts under such circumstances, rather than to facilitate the means of enforcing them.”<sup>425</sup> Indeed, some jurisdictions went so far as to declare the contracts of persons *non compos mentis* absolutely void<sup>426</sup>—even those fully or partially executed—unless they were adjudged to be “pledged for necessities.”<sup>427</sup>

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423. See, e.g., *Ring v. Huntington*, 8 S.C.L. (1 Mill) 162, 164 (1817) (depicting the maxim as a “relic of barbarism” unworthy of adoption as part of the common law of the state); see also *Webster*, 3 Day at 100; *Mitchell v. Kingman*, 22 Mass. (5 Pick.) 431 (1827); *Lang v. Whidden*, 2 N.H. 435, 438 (1822); *Rice v. Peet*, 15 Johns. 503 (N.Y. 1818); *Barrett v. Buxton*, 2 Aik. 167 (Vt. 1826). By 1840, a Pennsylvania judge pronounced it to be “settled in America” that a party could avoid his own acts “by allegation and proof of insanity,” with the exception of contracts “of record” or for “necessaries.” *Bensell v. Chancellor*, 5 Whart. 371, 378 (Pa. 1840); see also *Dicken v. Johnson*, 7 Ga. 484, 492 (1849) (observing that the maxim had been “exploded”); *Burke v. Allen*, 29 N.H. 106, 114 (1854) (same); *Fitzhugh v. Wilcox*, 12 Barb. 235, 237 (N.Y. Gen. Term 1851) (same).

424. *Mitchell*, 22 Mass. (5 Pick.) at 433.

425. *Id.* at 434.

426. See, e.g., *Jenners v. Howard*, 6 Blackf. 240, 240 (Ind. 1842) (“If the mind be incapable of assenting, the law pronounces the contract void.”); *Rogers v. Walker*, 6 Pa. 371 (1847) (finding the conveyance of a lunatic void, not voidable); *In re Desilver’s Estate*, 5 Rawle 111 (Pa. 1835) (holding deed of madman absolutely void).

427. *Seaver v. Phelps*, 28 Mass. (11 Pick.) 304, 306–07 (1831); see also *Leach v. Marsh*, 47 Me. 548, 555 (1859); cf. *Fitzgerald v. Reed*, 17 Miss. (9 S. & M.) 94, 102–03 (1847) (declaring the contracts of persons *non compos mentis* “if not wholly void, at all events voidable, unless when they relate to necessities suited to their condition in life,” and directing that the parties be placed “as nearly as practicable” in the positions they respectively stood before their entry into the contract); *Loomis v. Spencer*, 2 Paige Ch. 153 (N.Y. Ch. 1830) (setting aside the judgment against the lunatic but allowing the other party without notice of insanity to recover a sum equal to the benefit that lunatic received as a result of their dealings); *Carr v. Holliday*, 21 N.C. (1 Dev. & Bat. Eq.) 344 (1836) (holding that a lunatic has no capacity to contract but further providing that a court of equity will not interfere where goods sold to a lunatic cannot be restored to sane party who acted in good faith without notice of insanity). In defining the nature and extent of a lunatic’s liability for necessities, American courts tended to follow the English case of *Baxter v. Earl of Portsmouth*, (1826) 108 Eng. Rep. 63, 5 B. & C. 170 (K.B.), which held that a sane party was entitled to charges for the hire of carriages suitable to the insane party’s rank and position in life, albeit not on the ground of a contract, but for the actual use of the carriages. *Id.* at 64. For cases in line with this English rule, see, for example, *Henry v. Fine*, 23 Ark. 417 (1861), and *Richardson v. Strong*, 35 N.C. (13 Ired.) 103 (1851). See also *LaRue v. Gilkyson*, 4 Pa. 375, 376 (1846) (maintaining that “the word necessities is not to be restricted to articles of the first necessity, but that it includes every thing proper for the person’s condition”). For an especially capacious view of necessities in the case of lunatics (as distinguished from infants), see *Kendall v. May*, 92 Mass. (10 Allen) 59, 67 (1865) (“The interest which his heirs may have in the accumulation of his estate is to be wholly disregarded, when it comes in competition with his own happiness



The fact that the sane party proceeded in good faith and with no knowledge of the debility was deemed immaterial in these jurisdictions, as was the reasonableness of the underlying transaction, it being firmly held that “[t]he fairness of the defendant’s conduct cannot supply the plaintiff’s want of capacity.”<sup>428</sup>

As American courts grew more permissive with respect to the plea of incapacity, they also proceeded—if haltingly—to raise the threshold of competence to contract. As was the case in the law of wills, there was a handful of judges who clung to the traditional common law requirement

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or innocent pleasure. . . . Humanity and his right to his own property require that he should not be restrained or thwarted in his preferences and enjoyments, more than is necessary for his own welfare.”). Although the formal legal basis of a lunatic’s liability of necessities was not always clearly spelled out, most judges understood it to be implied by law, for his own benefit. See, e.g., *Pearl v. M’Dowell*, 26 Ky. (3 J.J. Marsh) 658 (1830).

428. *Seaver*, 28 Mass. (11 Pick.) at 306; see also *Leach*, 47 Me. at 554; *Gass v. Mason*, 36 Tenn. (4 Sneed) 497 (1857). In reacting against the old English dogma, some antebellum judges were prone to making sweeping statements about the contractual incapacity of persons *non compos mentis*. See, e.g., *Jenkins v. Jenkins’ Heirs*, 32 Ky. 72, 73, 2 Dana 102, 104 (1834) (“A contract is the agreement of minds. If there be no reason, or volition, there is no mind which can make a valid agreement.”); *Cole v. Cole*, 37 Tenn. (5 Sneed) 57, 59 (1857) (“If the mind is unsound at the time, it is incapable of consent, and that is an essential element in all contracts.”). Most, however, actually stopped well short of pronouncing the agreements and deeds of such persons void *ab initio* (and therefore capable of being avoided by either party). The terms void and voidable were not always deployed with technical precision in the decisional law, despite the fact that the distinction was one of great practical importance for determining whether and when the deeds and agreements of persons *non compos mentis* were capable of confirmation or ratification, and who could raise the defense of incapacity. See generally *Allis v. Billings*, 47 Mass. (6 Met.) 415 (1843). According to the great weight of authority, however, contracts of lunatics were “not absolutely void, but voidable”—assuming as they were executed before any judicial inquest into the issue of capacity. See, e.g., *Key’s Lessee v. Davis*, 1 Md. 32, 42 (1851); *Allis*, 47 Mass. (6 Met.) at 418; *Wait v. Maxwell*, 22 Mass. (5 Pick.) 217 (1827); *Jackson ex dem. Merritt v. Gumaer*, 2 Cow. 552, 568 (N.Y. Sup. Ct. 1824). A similar approach was taken to the contracts of drunkards in most jurisdictions. See, e.g., *Broadwater v. Darne*, 10 Mo. 277, 286 (1847) (“[D]runkennes does not render contracts void, so that the world may avail itself of it as a defense; it only makes them voidable, and the defense can only be set up by the party himself, or his representatives.”). But see *Berkley v. Cannon*, 38 S.C.L. (4 Rich.) 136, 141 (1850) (noting that “the alleged contract of one drunk to the degree of mental incapacity, was void”); *Barrett*, 2 Aik. at 170 (same). With respect to marriage contracts of persons *non compos mentis*, compare *Cole v. Cole*, 37 Tenn. (5 Sneed) 57 (finding that a marriage may be affirmed without any new solemnization, when a lunatic regains reason), with *Wightman v. Wightman*, 4 Johns. Ch. 343, 346 (N.Y. Ch. 1820) (adjudging marriage void *ab initio*, such that no decree of nullity was in strictness necessary in order to set it aside, though some sort of judicial decree was “equally conducive to good order and decorum, and to the peace and conscience of the party”). For other decisions following *Wightman*, see, for example, *Rawdon v. Rawdon*, 28 Ala. 565 (1856); *Jenkins v. Jenkins’ Heirs*, 32 Ky. (2 Dana) 102 (1834); *True v. Ranney*, 21 N.H. 52 (1850); *Crump v. Morgan*, 38 N.C. (3 Ired. Eq.) 91 (1843); *Foster v. Means*, 17 S.C. Eq. (Speers Eq.) 569 (1843).

of a "total deprivation of reason," primarily on instrumental grounds.<sup>429</sup> "How is a purchaser to protect himself, if the quantum of intellect is the criterion by which to determine whether the contract is valid?" asked a New York judge in the 1825 case of *Jackson ex dem. Caldwell v. King*.<sup>430</sup> "He may act with the utmost integrity, and yet be in danger; for although it be established that the party with whom he dealt had understanding, deemed sufficient for the provident management of his affairs, by this rule the contract would be void."<sup>431</sup> Yet without denying the difficulty of measuring minds—of specifying "the amount of intelligence necessary to make a contract"<sup>432</sup>—most nineteenth-century judges gravitated toward the position that something more than a "glimmering of reason" was required to be considered capable as a matter of law.<sup>433</sup>

In reformulating the old standards, judges took seriously the requirement of free and knowing assent, though they took care to add that mere inferiority of intellect was not, of itself, a disqualifying factor. The fact that, "in point of intellect," a party was "not upon an equality with mankind in general" did not, in itself, render him incompetent to contract.<sup>434</sup> Nor was "ordinary prudence" to be taken as "a necessary constituent of soundness of mind."<sup>435</sup> What was essential was that the party possess the capacity "to see things in their true relations, and to form correct conclusions"<sup>436</sup>—"to transact business with intelligence, and an intelligent understanding of what he was doing."<sup>437</sup> As a Kentucky judge concluded in

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429. *Jenkins*, 32 Ky. (2 Dana) at 102 (emphasis and internal quotation marks omitted). Here again, as was true in the testamentary context, the jurisdictions of Georgia and New York held most consistently to the traditional common law standards of capacity over the course of the antebellum period. See, e.g., *Maddox v. Simmons*, 31 Ga. 512 (1860) ("[T]o establish incapacity in a grantor, he must be shown to have been, at the time, *non compos mentis*, in the legal acceptance of that term; which means, not a partial, but an entire, loss of understanding."); see also *Davis v. Culver*, 13 How. Pr. 62, 66 (N.Y. Sup. Ct. 1855); *Odell v. Buck*, 21 Wend. 142 (N.Y. 1839); *Sprague v. Duel*, Cl. Ch. 90 (N.Y. Ch. 1839); *Jackson ex dem. Caldwell v. King*, 4 Cow. 207, 217–18 (N.Y. 1825). However, invocations of this traditional standard can be found in other jurisdictions as well. See, e.g., *Jenkins*, 32 Ky. (2 Dana) 102 (1834); *Hovey v. Chase*, 52 Me. 304, 315 (1863); *Hill v. Nash*, 41 Me. 585 (1856); *M'Creight v. Aiken*, 24 S.C.L. (Rice) 56 (1838).

430. 4 Cow. at 218.

431. *Id.*

432. *Hovey v. Chase*, 52 Me. 304, 306 (1863).

433. *Somers v. Pumphrey*, 24 Ind. 231, 245 (1865); see also *Hale v. Hills*, 8 Conn. 39, 43–44 (1830); *Frazer v. Frazer*, 2 Del. Ch. 260, 263 (Ch. 1861); *Lilly v. Waggoner*, 27 Ill. 395 (1862); *Prather v. Naylor's Adm'r*, 40 Ky. (1 B. Mon.) 244 (1841); *Hovey*, 52 Me. 304; *Dennett v. Dennett*, 44 N.H. 531, 537–38 (1863).

434. *Mann v. Betterly*, 21 Vt. 326, 329 (1849).

435. *Prather*, 40 Ky. (1 B. Mon.) at 247.

436. *Dennett*, 44 N.H. at 538.

437. *Hovey*, 52 Me. at 316 (emphasis omitted).

an 1841 case—in terms borrowed from the interdiction and testamentary contexts—the capacity to contract hinged upon “whether the individual is mentally competent to the rational government of himself and his affairs,” meaning nothing more (or less) than “a moderate comprehension of his immediate duties and relations, and of the value and uses of his property; a consideration of these things in his acts affecting them, and a direction of his acts by his own will.”<sup>438</sup>

Judicial characterizations of the default legal person were further revised in the middle decades of the century in light of advances in medical science. As early as 1830, the concept of partial insanity was recognized as a distinct basis for setting aside a legal instrument in the Connecticut case of *Hale v. Hills*,<sup>439</sup> in which the judge allowed that a party laboring under a delusion “might know, that he was delivering a deed, and yet the *right use of his reason* be so impaired as to leave him no rational understanding concerning the nature of the transaction.”<sup>440</sup> Reasoning along these same lines, a Tennessee court set aside an arms-length transaction in the 1846 case of *Alston v. Boyd*.<sup>441</sup> At issue in this case was an agreement concluded in 1828 that conveyed a large tract of land owned by the plaintiff Alston, who was claimed to be mentally deranged at the time.<sup>442</sup> Although there was no shortage of evidence showing that Alston “understood the value of property, was hard to trade with, and made some good contracts” during the time period in question, it was also clear that his mental health had declined precipitously in the years immediately preceding the execution of the deal.<sup>443</sup> Indeed, numerous lay and medical witnesses testified that Alston began

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438. *Prather*, 40 Ky. (1 B. Mon.) at 248.

439. 8 Conn. 39 (1830).

440. *Id.* at 44. In taking this view, the judge drew explicitly on Lord Erskine’s famous 1800 speech in *Hadfield’s Case*, (1800) 27 St. Tr. 1355 (Eng.), which was itself informed by the new medical psychology of the day. See generally EIGEN, *supra* note 30, at 48–54. In *Hale*, Erskine’s speech was made to stand for the proposition that

a person may be *non compos mentis*, and yet possess great vigour of intellect, unusual power of reasoning, peculiar subtilty and shrewdness, and a strong recollection of all the relations he stands in to others, as well as of all the acts and circumstances of his life. His mind, however, is unsound, by reason of the delusive sources of thought; all his deductions within the scope of his malady being founded on the assumption of matters as realities without any foundation, or so distorted and disfigured by fancy, as in effect to amount to the same thing.

*Hale*, 8 Conn. at 44.

441. 25 Tenn. (6 Hum.) 504 (1846).

442. *Id.* at 505. Sometime before the suit, a commission of lunacy was awarded, and Alston was thus placed under the control of a committee. *Id.* at 506.

443. *Id.*

exhibiting marked indications of insanity in 1825, when he “became impressed with the belief that his house and beds were haunted with evil spirits,” attempting at one point to set fire to the structure in order to destroy them.<sup>444</sup> He believed one such spirit also inhabited his skull, and therefore offered a slave his freedom “if he would split his head open with an axe.”<sup>445</sup> Moreover, upon the birth of his son, Alston was heard to proclaim that the newborn was Jesus Christ in the flesh.<sup>446</sup> The reviewing judge surveyed the trial record with evident discomfort, noting as he did how little could be “certainly known” about the operations of the human mind.<sup>447</sup> “Men are often seen insane upon a given subject, while upon other subjects they are apparently sane,” he observed, which prompted him to wonder whether “the entire understanding is not, more or less, implicated in the disease,” especially given it so commonly terminated in a “general derangement of mind.”<sup>448</sup> Since it was impossible to determine how far a monomaniac’s “perverted views” compromised his general reasoning powers, the judge proceeded to set aside the conveyance in question, concluding that Alston could not be deemed “a responsible agent, bound by his acts or his contracts.”<sup>449</sup>

Other antebellum jurisdictions were similarly receptive to claims of partial insanity, though they tended to be somewhat more exacting, insofar as they required that the delusion be linked more directly to the disputed transaction.<sup>450</sup> This can be seen in the Maryland case of *Thornton v. Appleton*,<sup>451</sup> involving a miserly old woman named Sarah Appleton, whose capacity to execute a promissory note in 1843 was litigated after her death by warring factions of her family.<sup>452</sup> The testimony indicated that Appleton’s competence had gone unquestioned until 1835, when she rather abruptly began to display “marked indications of insanity, on

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444. *Id.* There were, however, several “respectable witnesses” who insisted Alston was “afflicted with hypochondria, but was not insane.” *Id.* at 505–06.

445. *Id.* at 506.

446. *Id.*

447. *Id.* at 507.

448. *Id.*

449. *Id.* The court further ordered that the defendant be compensated for improvements made to the land in controversy as well as the value of the land that had been conveyed to the plaintiff, to the extent that it had since been conveyed to third parties. *Id.* at 508.

450. See, e.g., *Jerry v. Townshend*, 9 Md. 145, 158 (1856); *Bond v. Bond*, 89 Mass. (7 Allen) 1, 8 (1863); *Gillespie v. Shuliberrier*, 50 N.C. (5 Jones) 161, 164 (1857).

451. 29 Me. 298 (1849).

452. *Id.*

particular subjects.”<sup>453</sup> From this time forward, she “pretended to be poor,” though she remained in possession of property estimated to be worth nearly \$30,000.<sup>454</sup> In addition, she became ridiculously litigious, seeking far and wide (and unsuccessfully) for a lawyer willing to assist her in pursuing entirely unfounded property claims to large portions of Louisiana, Boston, Washington, D.C., “the whole world, and ‘the cattle upon a thousand hills.’”<sup>455</sup> By 1839, she was writing letters to her legislative representative in which she complained that the governor was “chosen by the people, and not by God,” and further insisted that this illegitimate ruler owed her \$4000.<sup>456</sup> Appleton descended still deeper into a delusional world in the last years of her life, as she purported, at turns, to be “the daughter of Abraham and Sarah; the Virgin Mary; the Messiah, and afterwards, the Living God.”<sup>457</sup> With such facts in the record, the reviewing judge had no difficulty affirming she was insane, but he nonetheless entertained the possibility that the note had been executed during a lucid interval. This he thought plausible in light of testimony that Appleton was able to go on and off “her insanity track,” often exhibiting no signs of her delusions during business dealings, which were negotiated skillfully enough.<sup>458</sup> In the final analysis, however, the judge concluded that these appearances were deceptive, doubting there was any moment “in which she correctly recognized her true condition, and when her delusions . . . disappeared, and her faculties and affections . . . returned to their natural channels.”<sup>459</sup> As a consequence, the promissory note had to be set aside.<sup>460</sup>

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453. *Id.* at 300. Sometime before this date, the record indicates that Sarah Appleton’s husband died, and in 1829, she sustained a business loss of some \$20,000; these events are never explicitly linked to the onset of mental disease in the court’s opinion. *Id.*

454. *Id.*

455. *Id.* Appleton also contested the settlement of her husband’s estate, citing the Psalm 58 as authority. *Id.* at 301.

456. *Id.*

457. *Id.*

458. *Id.* at 301–02.

459. *Id.* at 302.

460. *Id.* In the second half of the nineteenth century, some courts would move even more decisively to bring the doctrine of delusion in contracts and deeds cases in line with that applied in those involving wills, requiring that the instrument be the offspring of the diseased mind. See, e.g., *Lemon v. Jenkins*, 48 Ga. 313 (1873); *Burt v. Quisenberry*, 24 N.E. 622, 623 (Ill. 1890); *Johnson v. Johnson*, 10 Ind. 387 (1858); *Lewis v. Arbuckle*, 52 N.W. 237, 239–50 (Iowa 1892); *Leighton v. Orr*, 44 Iowa 679 (1876); *Curtis v. Brownell*, 42 Mich. 165, 170 (1879); *Cutler v. Zollinger*, 22 S.W. 895, 897 (Mo. 1893); *Dewey v. Allgire*, 55 N.W. 276, 278 (Neb. 1893); *Lozear v. Shields*, 23 N.J. Eq. 509 (1872); *Wright v. Jackson*, 18 N.W. 486, 491 (Wis. 1884); *Ripley v. Babcock*, 13 Wis. 425 (1861).

The defense of incapacity would be broadened still further as nineteenth-century courts assimilated intoxication to the category of excusing conditions. This constituted a marked departure from traditional English common law, under which drunkenness was treated as an aggravating rather than a mitigating factor, hardly releasing the drunkard from responsibility for his civil or criminal acts.<sup>461</sup> These strictures were substantially relaxed on both sides of the Atlantic in the early decades of the century, as judges evinced a new willingness to privilege principle over precedent in recognizing intoxication as a good defense to a contract, at least where it deprived a person of the "exercise of reason,"<sup>462</sup> so that he had no "agreeing mind."<sup>463</sup> A person reduced to such a state, judges now reasoned, "so far loses his free agency, that he becomes a mere instrument in the hands of others, and . . . may *be made* to do the act imputed to him," rendering him irresponsible as a matter of law.<sup>464</sup> In fact, in a substantial number of jurisdictions, courts proved willing to entertain the defense of incapacity where the party's condition was "produced by his own folly,"<sup>465</sup> and not in any way procured through the contrivance of the other contracting party.<sup>466</sup>

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461. See, e.g., *Beverley's Case*, (1603) 76 Eng. Rep. 1118, 1123, 4 Co. Rep. 123b, 125, (K.B.) (finding that a man's drunkenness "does not extenuate his act or offence . . . but . . . aggravates his offense, and doth not derogate from [his] act . . . as well in cases touching his life, his lands, his goods, [and] any other thing that concerns him").

462. *Burroughs v. Richman*, 13 N.J.L. 233, 236 (1832).

463. *Id.* The leading English case was *Pitt v. Smith*, (1811) 170 Eng. Rep. 1296, 3 Camp. 33 (n.p.). For early American cases following suit, see, for example, *Wade v. Colvert*, 9 S.C.L. (2 Mill) 27, 29 (1818); *White v. Cox*, 4 Tenn. (3 Hayw.) 79, 82–83 (1816); *Barrett v. Buxton*, 2 Aik. 167, 170 (Vt. 1826); *Wigglesworth v. Steers*, 11 Va. (1 Hen. & M.) 70 (1806). See also *Campbell v. Ketcham*, 4 Ky. (1 Bibb) 406, 407–08 (1809); cf. *Foot v. Tewksbury*, 2 Vt. 97, 100 (1829) (requiring only that the intoxicated party be shown to lack the capacity to understand "the consequences of his contracts," on the rationale that this was enough to put others on notice of his unfitness to engage in such transactions). See generally CHITTY, *supra* note 395, at 29–30.

464. *Burroughs*, 13 N.J.L. at 238.

465. *Johnson v. Harmon*, 94 U.S. 371, 380 (1876).

466. *Barrett*, 2 Aik. at 171. To deal with one in such a state of intoxication, the judge continued, was "a violation of moral duty," regardless of whether the intoxication was "procured by the other party, or was purely voluntary"; the former circumstance only served to "stamp the transaction with deeper turpitude," aggravating the fraud that was common to both sorts of cases. *Id.*; see also *Campbell*, 4 Ky. (1 Bibb) at 407; *Burroughs*, 13 N.J.L. at 238; *Berkley v. Cannon*, 38 S.C.L. (4 Rich.) 136, 144 (1850) (holding that there was no need to prove contrivance on the part of the nondrunken party; this requirement was deemed obsolete, along with the "exploded" doctrine that "no one shall be allowed to stultify himself"; but courts should not give "a too ready ear" to the defense of drunkenness); *Wade*, 9 S.C.L. (2 Mill.) at 29; *White*, 4 Tenn. (3 Hayw.) at 82–83; *Wigglesworth*, 11 Va. (1 Hen. & M.) at 70–71; cf. *King's Ex'rs v. Bryant's Ex'rs*, 3 N.C. (2 Hayw.) 394, 395 (1806) ("If he was so drunk at the time, that he did not know what he was about; and if in

While sound policy surely counseled against admitting such a plea in cases involving crimes and torts, judges nonetheless held that

in questions of mere civil concern, arising *ex contractu*, and affecting the rights of property merely, policy does not require that any one should derive an unjust profit from a bargain made with a person in a state of intoxication, although brought upon himself by his own fault, or that he should be a prey to the arts and circumvention of others, and be ruined, or even embarrassed, by a bargain, when thus deprived of his reason.<sup>467</sup>

Importantly, most jurisdictions stipulated that the drunkenness had to be “complete and total,” refusing to sanction a defense of “partial intoxicat[ion].”<sup>468</sup> Though insanity and drunkenness were often analogous in their effects on the reasoning faculties, judges insisted that the latter was a “voluntary” condition—a vicious habit that ought not to be encouraged by the law.<sup>469</sup> The practical difficulty of gauging the effects of alcohol also weighed heavily on their minds, and they apprehended that “witnesses to a scene of revelry, are so apt to mistake or pervert the truth, that relaxing the rule at all . . . would be fraught with the most dangerous consequences, and would be a prolific source of frauds.”<sup>470</sup>

New grounds for doubting the drunkard’s capacity to contract were presented in antebellum works of medical jurisprudence, which gradually led some members of the bench to modify the common law rules still further.

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that situation he was induced to sign a paper for a debt which he did not owe, that was a *fraud*; and a fraud practised upon a man whether drunk or sober, will vitiate the instrument signed by him.”); *Foot*, 2 Vt. at 100 (noting that when a man, by intoxication, becomes “so destitute of capacity as to not know the consequences, his contracts are ranked with those of the insane, the idiot and the lunatic; and treated as of no binding force” since his impairment “must be as well known to the person trading with him”).

467. *Barrett*, 2 Aik. at 171; see also *Prentice v. Achorn*, 2 Paige Ch. 30 (N.Y. Ch. 1830) (following *Barrett*).

468. *Burroughs*, 13 N.J.L. at 238–39; see also *Harbison v. Lemon*, 3 Blackf. 51, 53 (Ind. 1832) (requiring proof that the drunkenness was “so great as to produce an absolute privation of understanding”).

469. *Burroughs*, 13 N.J.L. at 238 (emphasis omitted); see also *Reinicker v. Smith*, 2 H. & J. 421, 423 (Md. 1809) (extending the “privileges of drunkenness” only to those wanting in reason or victimized by fraud, lest the drunkard enjoy “advantages far superior to those which are enjoyed by the most prudent, shrewd, sagacious man”); *Wade*, 9 S.C.L. (2 Mill.) at 29 (“Intoxication will not be allowed to exonerate a man from his contracts, though it may be such as to lead him into imprudent and disadvantageous engagements; his liability must be the penalty of his vice. Were it otherwise, drunkenness would be the cloak of fraud: but where it is such as not to leave men the power of distinctly perceiving and assenting, they cannot be bound, because the very essence of a contract is the assent of the contractor to what he may be presumed to understand.”).

470. *Burroughs*, 13 N.J.L. at 238. See generally 1 STORY, *supra* note 181, at 234–38 (surveying the applicable rules pertaining to drunkards at law and in courts of equity).

The latest clinical reports indicated that drunkenness was not necessarily as voluntary as the law presumed—that it was all too frequently caused by, or otherwise indicative of, mental disease.<sup>471</sup> Indeed, leading medical jurists now introduced the possibility that the periodic impulse to drink to excess might be attributed to a cerebral disorder called “dipsomania,”<sup>472</sup> and they further suggested that continued use of ardent spirits could cause permanent damage to the structure of the brain, leaving victims prone to spells of “delirium tremens”<sup>473</sup> or “mania a potu,”<sup>474</sup> even after they quit the habit.<sup>475</sup> These terms soon found their way into the testimony and arguments presented by counsel, who pressed the limits of legal insanity as they contended their clients were sick rather than merely self-indulgent.<sup>476</sup> Although most judges were willing to recognize delirium tremens as a distinct and debilitating

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471. An especially compelling illustration was provided by Amos Dean in his treatise on medical jurisprudence, relating a physician's account of an inebriate who replied to the remonstrances of his friend, who painted the distresses of his family, the loss of his business and character, and the ruin of his health; “my good friend, your remarks are just, they are indeed too true; but *I can no longer resist temptation*. If a bottle of brandy stood at one hand, and the pit of hell yawned at the other, and I were convinced that I would be pushed in as sure as I took one glass, *I could not refrain*.”

DEAN, *supra* note 116, at 523.

472. *Id.* at 523 (emphasis omitted).

473. *Id.* at 521 (emphasis omitted).

474. *Id.* at 523 (emphasis omitted).

475. For examples of legal treatises picking up on these medical developments, see *id.* at 521–24, 587–90 (reviewing the symptoms and the legal implications of delirium tremens, mania a potu, and dipsomania); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 142 (Boston, Little, Brown & Co. 1852) (recognizing “insanity from delirium tremens” as a disqualifying condition within the law of marriage); HENRY FOLSOM PAGE, A VIEW OF THE LAW RELATIVE TO THE SUBJECT OF DIVORCE 173–76 (Columbus, J.H. Riley & Co. 1850) (discussing and citing to Johann Christoph Hoffbauer, Ray, and Jean Etienne Esquirol on dipsomania and related disorders); *cf.* 1 WHARTON & STILLÉ, *supra* note 135, at 71, 654 (recognizing delirium tremens as a mental disease, but noting that many other forms of mental unsoundness were likewise “the result of causes which the patient himself might have averted if he had chosen”). For a comprehensive survey of this subject in the English context, see MARIANA VALVERDE, DISEASES OF THE WILL: ALCOHOL AND THE DILEMMAS OF FREEDOM (1998).

476. See, e.g., *Rembert v. Brown*, 14 Ala. 360, 361 (1848) (mania a potu); *Dulany v. Green*, 4 Del. (4 Harr.) 285, 286 (1845) (mania a potu); *Van Horn v. Keenan*, 28 Ill. 445, 450 (1862) (dipsomania); *Menkins v. Lightner*, 18 Ill. 282, 284 (1857) (delirium tremens and mania a potu treated as interchangeable); *Achey v. Stephens*, 8 Ind. 411, 414 (1856) (delirium tremens); see also *Blagg v. Hunter*, 15 Ark. 246, 251 (1854) (jury charge placing gloss on evidence of drunkenness; instructing jurors that they may find it to constitute ground for finding delirium tremens, which would operate to avoid the act); *Morris v. Clay*, 53 N.C. (8 Jones) 216, 217 (1860) (same); *Clement v. Mattison*, 37 S.C.L. (3 Rich.) 93, 93 (1846) (same).



disease, they struggled to distinguish it from “mere intoxication”<sup>477</sup> and tended to hold claimants to a higher standard of proof, insisting upon a showing that the disease totally deprived the sufferer of his reason.”<sup>478</sup>

None of this should be taken to suggest that those afflicted with lesser degrees of mental impairment were necessarily treated as if they were perfectly sane. To the contrary, antebellum courts conceived of the borderlands of mental soundness as a rather wide region and adopted a protective stance with respect to its inhabitants. Judges assumed this position armed with a set of equitable rules specially designed for the benefit of those who were disabled but “not positively *non compos* or insane.”<sup>479</sup> Though it was a truism that “[m]ere mental weakness, or inferiority of intellect”<sup>480</sup> did not alone supply a basis for setting aside a contract or deed, it was just as consistently held that such mental deficiencies constituted material ingredients in establishing the existence of fraud, circumvention, or undue influence.<sup>481</sup>

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477. *Clement*, 37 S.C.L. (3 Rich.) at 94; see also *Menkins*, 18 Ill. at 285. See generally JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CONTRACTS 389–901 (Chi., T.H. Flood & Co. 1887) (citing cases).

478. *Dulany*, 4 Del. (4 Harr.) at 286 (setting aside deed of manumission where intoxicated grantor proved to be “incapable of doing any rational act”); cf. *Menkins*, 18 Ill. at 284, 285 (extending relief to acts performed when the party was “too drunk to exercise an agreeing mind—or a sound and disposing judgment,” and maintaining it would take more than “a mere sober interval of a few hours” to rebut proof of incapacity stemming from a confirmed case of delirium tremens); *Bliss v. Conn. & Pas. Rivers R.R. Co.*, 24 Vt. 424, 426, 428 (1852) (elaborating standards of incapacity and capacity that seemed to imply different thresholds; first providing that if the party’s mind “has become habitually diseased, his perceptive powers seriously affected, if he has become divested of his reason, and unconscious of his external relations, he has then assumed the character of one deranged, of a mind incapable of healthy action, and has lost that legal capacity that renders him responsible for his acts,” but then going on to state that legal competency depends upon possession of “as sound and healthy a mind, and of reason as unimpaired, as is required in making any contract or disposition of his estate”).

479. 1 STORY, *supra* note 181, at 238–39, quoted in *Ex’rs of Tally v. Smith*, 41 Tenn. (1 Cold.) 290, 298–99 (1860), and *Craddock v. Cabiness*, 31 Tenn. (1 Swan) 474, 482 (1852).

480. 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 424 (Boston, Little, Brown & Co. 6th ed. 1873) (citing cases); cf. 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 466 (S.F., A.L. Bancroft & Co. 1882) (describing it as “well settled that there may be a condition of extreme mental weakness and loss of memory, either congenital, or resulting from old age, sickness, or other cause, and not being either idiocy or lunacy, which will, without any other incidences or accompanying circumstances, of itself destroy the person’s testamentary capacity, and a fortiori be ground for defeating his agreements or conveyances,” but representing it to be no less well established that “mere mental weak-mindedness . . . unaccompanied by any other inequitable incidents” would not suffice).

481. *Juzan v. Toulmin*, 9 Ala. 662, 685 (1846); see also *Kelly’s Heirs v. McGuire*, 15 Ark. 555, 597 (1855); *Maddox v. Simmons*, 31 Ga. 512, 532 (1860); *Henry v. Ritenour*, 31 Ind. 136, 137 (1869); *Somers v. Pumphrey*, 24 Ind. 231, 235 (1865); *Farnam v. Brooks*, 26 Mass. (9 Pick.) 212, 221 (1830); *Dennett v. Dennett*, 44 N.H. 531, 536–37 (1863); *Bunch v. Hurst*, 3 S.C. Eq. (3 Des. Eq.) 273, 293–95 (1811); *Ex’rs of Tally*, 41 Tenn. (1 Cold.) at 299; cf. *Juzan*,

In elaborating these rules, judges insisted that it was not part of their task to “measure the size of people’s understandings or capacities,”<sup>482</sup> or to otherwise “equalize talents.”<sup>483</sup> They also disclaimed “all jurisdiction to interfere on account of the folly or improvidence of an act, done by a person of sound though impaired mind.”<sup>484</sup> Yet such forbidding statements were immediately followed by considerably more inviting ones, providing that “[t]hose who, from imbecility of mind, are incapable of taking care of themselves are under the special protection of the law.”<sup>485</sup> Indeed, judges promised to scrutinize the dealings of this class of persons, indicating as they did that a mental deficiency far less severe than required to justify the imposition of a guardianship would be sufficient to set aside “any important deed,”<sup>486</sup> where it was coupled with evidence of the inadequacy of consideration or other proof of unfair dealing.<sup>487</sup> These protective measures were to be taken irrespective of the cause of the deficiency—whether it be the result of “temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those incidental depressions which result from sudden fear, or constitutional despondency, or overwhelming calamities.”<sup>488</sup> In these sorts of cases, courts often saw fit to raise a presumption of fraud or undue influence, finding good reason to doubt that the afflicted party had “a mind adequate to the business”—that he was

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9 Ala. at 685 (“Hence it is said, that if consent be obtained, by meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.”).

482. Webster v. Woodford, 3 Day 90, 93 (Conn. 1808).

483. Thomas v. Sheppard, 7 S.C. Eq. (2 McCord Eq.) 36, 38 (1827); see also Somers, 24 Ind. at 245; Tracey v. Sacket, 1 Ohio St. 54, 59 (1852).

484. Sears v. Shafer, 1 Barb. 408, 413 (N.Y. Gen. Term 1847); *Kelly’s Heirs*, 15 Ark. at 598.

485. Craddock v. Cabiness, 31 Tenn. (1 Swan) 474, 483 (1852).

486. Juzan, 9 Ala. at 686.

487. See, e.g., *id.* at 685 (quoting Lord Wynford’s opinion in *Blachford v. Christian*, (1829) 12 Eng. Rep. 248, 1 Knapp 73 (P.)); *Wilson v. Oldham*, 51 Ky. (12 B. Mon.) 55, 57–58 (1851) (same); *Wilson v. Watts*, 9 Md. 356, 387 (1856) (same). See generally 1 STORY, *supra* note 181, at 241–42. Even greater scrutiny was applied to transactions between parties deemed to be in confidential relationships. See, e.g., *Sears*, 1 Barb. at 413–14.

488. *Craddock*, 31 Tenn. (1 Swan) at 482 (quoting 1 STORY, *supra* note 181, at 238); see also *Kelly’s Heirs*, 15 Ark. at 603. But see *Jones Adm’r v. Perkins*, 44 Ky. (5 B. Mon.) 222, 226 (1844) (expressing greater reluctance to interfere where the complaining party brought the mental disability upon himself “by his own drunkenness”); cf. 2 POMEROY, *supra* note 480, at 465–97 (noting that legal incapacity might result not only from insanity, but also from mental weakness, pecuniary necessity, illiteracy, ignorance, intoxication, undue influence, or duress, and further indicating special rules applicable to sailors, expectant heirs, and fiduciary relations). See generally 1 STORY, *supra* note 181, at 234–38.

capable of exercising the free will and deliberate judgment necessary to execute a valid agreement.<sup>489</sup>

Thus standing in the roughly charted territory between the default legal person and persons *non compos mentis*, the weak-minded were made the subject of a steady stream of capacity suits across the nineteenth century. In fact, litigants alleging mental unsoundness regularly included these equitable claims in their petitions to the court, presumably seeking to hedge their bets, as was so often the practice in testamentary disputes.<sup>490</sup> To a significant degree, capacity challenges brought with respect to contracts and deeds mirrored those involving wills, both at the level of procedure and substance.<sup>491</sup> This was due, at least in part, to the fact that a good number of the disputed conveyances and agreements were likely intended to operate as gifts or will substitutes.<sup>492</sup> Further inclining the courts in this direction was the identity of the disputants; as in will contests, they tended to be relatives of the grantor, whose death was

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489. *Ex'rs of Tally v. Smith*, 41 Tenn. (1 Cold.) 290, 299 (1860); see also *Harding v. Wheaton*, 11 F. Cas. 491, 494 (C.C.D.R.I. 1821) (No. 6,051), *rev'd on other grounds*, *Harding v. Handy*, 24 U.S. 103 (1826); *Juzan*, 9 Ala. at 685; *Whelan v. Whelan*, 3 Cow. 537, 586–87 (N.Y. 1824); *Nace v. Boyer*, 30 Pa. 99, 110 (1858); *Craddock*, 31 Tenn. (1 Swan) at 483. See generally BUSWELL, *supra* note 130, at 286 note (1885) (discussing operation of equitable principles and citing cases); ORDRONAU, *supra* note 181, at 306–10, 313–20 (same); 1 STORY, *supra* note 181, at 238–44.

490. Indeed, at least one commentator suggests the litigation strategy (and the underlying phenomenon of imposition) was more common in cases involving contracts than wills. See 1 FRANCIS WHARTON, A COMMENTARY ON THE LAW OF CONTRACTS 134–35 (Phila., Kay & Bro. 1882) (“The question of mental capacity rarely presents itself detached from that of undue influence. A person whose mind is enfeebled may make a will in solitude, but he cannot make a contract in solitude. To contract he must bring himself more or less completely within the sphere of the other contracting party; and it is hard to conceive of a case, therefore, in which he is not at least in some degree influenced by such other party.” (footnote omitted)). For typical examples of cases in which claims of mental unsoundness were supplemented with allegations of fraud, undue influence, or circumvention, see *Somers v. Pumphrey*, 24 Ind. 231 (1865); *Canfield v. Fairbanks*, 63 Barb. 461 (N.Y. Gen. Term 1872); *Haviland v. Hayes*, 37 N.Y. 25 (1867). As was true in will contests, judges relaxed the proof requirements for showing mental incapacity where combined with some evidence of fraud, undue influence, or imposition, see, e.g., *Corbit v. Smith*, 7 Clarke 60, 64 (1858) (holding that “a very modified degree of incapacity will be sufficient to invalidate, if the transaction is accompanied with fraud, imposition, or any over-exercise of authority”), or where combined with inadequacy of consideration, see, e.g., *Maddox v. Simmons*, 31 Ga. 512, 530 (1860) (observing that “where imbecility of mind and inadequacy of consideration unite, though neither standing alone, is sufficient, under ordinary circumstances, to invalidate a contract, the Court has granted relief, without other evidences of imposition; and especially is this the case where imbecility of mind and inadequacy of consideration is united with an abuse of confidence which the one party reposed in the other”).

491. See, e.g., *Greer v. Greers*, 50 Va. (9 Gratt.) 330 (1852).

492. For an example of an inter vivos transfer that was expressly made to avoid a will contest, see *Riggs v. American Tract Society*, 95 N.Y. 503 (1884).

often the occasion for the suit.<sup>493</sup> As a result, these cases often presented judges with the same conflicting imperatives to effectuate natural justice and individual freedom that were so often presented in courtroom battles over wills.<sup>494</sup> Yet, it was commonly said that the bilateral nature of a contract necessitated a higher threshold of capacity, in view of the fact that one could not “make a contract in solitude.”<sup>495</sup> Moreover, the irrevocable nature of inter vivos transfers effected by a contract or deed did incline some courts to alter the standards of incapacity and undue influence, effectively making it easier to set aside these instruments.<sup>496</sup> A distinctive and vexing set of problems emerged in contests involving what might be termed contracts for care—transactions in which an elderly or otherwise infirm party agreed to convey most or all of his property holdings to a relative or neighbor in exchange for lifetime support, often of his spouse and other dependents as well as himself.<sup>497</sup> Since these transfers partook of both the household and market economies, judges

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493. See, e.g., *Jarrett v. Jarrett*, 11 W. Va. 584 (1877).

494. For a typical instance, see *Buckey v. Buckey*, 18 S.E. 383 (W. Va. 1893). In this case, heirs disputed the legal capacity of their eccentric father, who died in 1888, not long after making grants favoring one son and a grandson over his other children. The deeds in issue were ultimately upheld by the appellate judge, who cited many leading precedents from wills cases in support of this ruling, concluding with Kent's oft-quoted opinion in *Van Alst v. Hunter*, 5 Johns Ch. 148 (N.Y. 1821). *Buckey*, 18 S.E. at 386–87; see also *supra* notes 334–336 and accompanying text.

495. 1 WHARTON, *supra* note 490, at 134.

496. See, e.g., *Lemon v. Jenkins*, 48 Ga. 313, 324 (1873) (“[I]n order to secure to a man the care and attention of those dependent upon him in his last days, the law keeps in his power the right to make a will, even when his capacity is less than would invalidate any contract or deed of gift he might make, to take effect immediately.”); *Haydock v. Haydock Ex'rs*, 34 N.J. Eq. 570, 575 (1881) (“The influence which is undue in cases of gifts *inter vivos*, is very different from that which is required to set aside a will. In testamentary cases, undue influence is always defined as coercion [sic] or fraud, but, *inter vivos*, no such definition is applied. Where parties hold positions in which one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected, and they set aside his gifts if he had not proper advice independently of the other.”).

497. Typical instances include, for example, *Speers v. Sewell*, 67 Ky. (4 Bush) 239, 240 (1868) (oral contract between father and son, whereby former agreed to convey to the latter his homestead tract in consideration for the latter's “living with him, attending to his business, and taking care of him and his wife during their lives”), and *Tracey v. Sacket*, 1 Ohio St. 55, 56 (1852) (elderly man conveyed real and personal property to his neighbor “in consideration whereof” the latter supplied “a written obligation to support him and his wife,” agreeing to provide them “with food and raiment, and every thing necessary to their very comfortable existence and support during each of their natural lives”). For a general discussion of some aspects of this phenomenon, albeit focused on oral promises, see Hendrik Hartog, *Someday All This Will Be Yours: Inheritance, Adoption, and Obligation in Capitalist America*, 79 IND. L.J. 345, 352, 357, 360–62 (2004).

would find it especially challenging to define the norms of fair dealing and requisites of capacity in these complex social spaces.

From the judicial standpoint, there was something almost inherently problematic about contracts for care, as they were typically made between parties of unequal mental and physical ability, the stronger being entrusted with not only the welfare but also the bulk of the property of the weaker party. Judges regarded it especially inadvisable to make such a conveyance to a person unrelated by blood or marriage and therefore lacking in the natural ties of affection thought to provide insurance against the worst forms of abuse.<sup>498</sup> But even within the family circle there was cause for concern, for these sorts of arrangements seemed to violate "those maxims of prudence that enjoin a man, whilst he has breath in his body, to keep the staff in his own hands, and not to divide his substance among his children till he come to die."<sup>499</sup> Courts accordingly examined these special contracts with a jealous eye and imported certain behavioral expectations into their assessments of the adequacy of consideration, implicitly or explicitly suggesting that these agreements could not be treated like ordinary bargains and sales in the marketplace.<sup>500</sup> In a fair share of cases, the caregiver was clearly guilty of fraud or gross neglect,<sup>501</sup> though there were at least as many others where such charges were unfairly brought by an ungrateful beneficiary, often at the urging of greedy relatives.<sup>502</sup> Still, the greatest proportion of cases unsurprisingly appeared to fall between these two extremes, presenting courts with the usual mass of contradictory testimony as to the character and conduct of the contending parties, while also raising more fundamental questions about what family members truly owed to one another.<sup>503</sup> Thus, faced with conflicts of equity

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498. See, e.g., *Beller v. Jones*, 22 Ark. 92, 99 (1860); *Cruise v. Christopher*, 35 Ky. (5 Dana) 181, 182–83 (1837); *Tracey*, 1 Ohio St. at 56; see also *Cadwallader v. West*, 48 Mo. 483, 500 (1871) (suggesting that the interposition and influence of the doctor-grantee who served as the grantor's caregiver precluded the grantor from reconciling with his own relatives).

499. *Nace v. Boyer*, 30 Pa. 99, 111–12 (1858). The *Nace* court nevertheless allowed the deed to stand. *Id.*

500. See, e.g., *Beller*, 22 Ark. at 100; *Clearwater v. Kimler*, 43 Ill. 272, 276–77 (1867).

501. See, e.g., *Harding v. Wheaton*, 24 U.S. (11 Wheat.) 103, 125–26 (1826); *Beller*, 22 Ark. at 101; *Cruise*, 35 Ky. (5 Dana) at 184–85; *Cadwallader*, 48 Mo. at 497; *Tracey*, 1 Ohio St. at 60.

502. See, e.g., *Clearwater*, 43 Ill. at 276–77; *Walton v. Northington*, 37 Tenn. (5 Sneed) 282, 283–84 (1857); *Mann v. Betterly*, 21 Vt. 326, 329–30 (1849); see also *Lindsey v. Lindsey*, 50 Ill. 79 (1869) (attributing the contrariety of testimony as to the grantor's mental condition to the fact of a family feud and upholding the conveyance); *Wray v. Wray*, 32 Ind. 126 (1869) (same).

503. It was not uncommon for judges to provide different answers at the trial and appellate levels. See, e.g., *Maddox v. Simmons*, 31 Ga. 512 (1860); *Nace*, 30 Pa. 99; *Birdsong v. Birdsong*, 39 Tenn. (2 Head) 289 (1859); *Gass v. Mason*, 36 Tenn. (4 Sneed) 497 (1857); *Craddock v. Cabiness*, 31 Tenn. (1 Swan) 474 (1852).

as well as evidence, judges were required to reconcile the concerns and interests of expectant (but not necessarily deserving) heirs, suggestible grantors (who could be quite manipulative themselves), and designated caregivers (who did not always deliver on their promises). In their opinions, judges found it nearly impossible to establish any general rules, save the proposition that each case had to be decided upon its own peculiar circumstances.<sup>504</sup> All too often, the factual record seemed to point toward the same sad truth—that no one cared very much for the grantor, who had apparently outlived the affections of his family and friends, remaining on earth “entirely too long to suit their convenience.”<sup>505</sup>

In judgments rendered upon these relationships, questions of capacity and fairness were thus clearly bound up with one another, even as they remained conceptually distinct, and importantly so in the minds of those who sat on the bench. Echoing their decisions in testamentary cases, judges held that the competence of a grantor did not simply turn upon the “propriety or impropriety of the disposition,” and they stood ready to enforce any agreement made freely and understandingly, “however unreasonable or imprudent or unaccountable it may seem to others.”<sup>506</sup> All the same, judges on the whole appeared less ambivalent about inferring incapacity from the abnormality of a transaction where the instrument at issue was a contract or a deed, rather than a will—especially when the alleged incompetent remained alive and able to speak for himself, or by way of a guardian.<sup>507</sup> However, courts invariably required some independent proof of incapacity, undue influence, or fraud beyond the agreement itself, steadfastly maintaining that the mere inadequacy of consideration was an insufficient basis for setting it aside.<sup>508</sup> To proceed otherwise, they recognized, would be “to exercise a sort of tyranny over the transactions of parties, who have a right to fix their own value upon their own labor and exertions.”<sup>509</sup> This right was best preserved by carefully distinguishing between “imbecility and eccentricity of mind,” and giving due weight to the fact that “[m]any of the brightest intellects that ever lived have partaken

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504. See, e.g., *Kelly's Heirs v. McGuire*, 15 Ark. 555, 597 (1855); *Greer v. Greers*, 50 Va. (9 Gratt.) 330, 333–34 (1852).

505. *Craddock*, 31 Tenn. (1 Swan) at 482.

506. See, e.g., *Greer*, 50 Va. (9 Gratt.) at 333; *Craddock*, 31 Tenn. (1 Swan) at 483.

507. See, e.g., *Allore v. Jewell*, 94 U.S. 506 (1876); *Beller v. Jones*, 22 Ark. 92, 99 (1860); *Whelan v. Whelan*, 3 Cow. 537, 585–88 (N.Y. 1824); *Birdsong*, 39 Tenn. (2 Head) at 296–98; *Gass*, 36 Tenn. (4 Sneed) at 603.

508. *Maddox*, 31 Ga. at 534.

509. *Id.* at 529.

of this latter infirmity.”<sup>510</sup> Such persons would be presumed to have their own reasons for buying and selling goods and services above or below the market price.<sup>511</sup>

Ironically, the cases that presented courts with the greatest difficulties were those in which the fact of mental incompetence was not in dispute, the sane party simply contending that he was ignorant of the other party’s disability at the time the supposed agreement was made.<sup>512</sup> This claim was perhaps most plausibly made where the parties proceeded at arms-length, though it could be maintained with respect to many face-to-face transactions as well, especially as nineteenth-century courts expanded the legal definition of insanity to include more circumscribed forms of mental disease.<sup>513</sup> The dilemma was the same in either event: If the disease was both real and recondite, which party ought to prevail? In the early decades of the century, as we have seen, courts tended to favor the disabled party, insisting that the fairness of one party’s conduct could not “supply” the lack of capacity on the part of the other.<sup>514</sup> However, judges writing at midcentury began to sound a different note, voicing greater solicitude for the plight of the sane (and innocent) party, as well as more pronounced concern about the security of commercial transactions.

One of the earliest and most prominent decisions along these lines was *Beals v. See*,<sup>515</sup> penned by Chief Justice Gibson of the Pennsylvania Supreme Court in 1848. The case involved a merchant who had purchased some overpriced ribbons for which he had no use. Several months after this transaction, the merchant was pronounced insane, and the administrator of his estate subsequently sued to recover the value of goods sold in

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510. *Id.* at 531.

511. For cases involving other sorts of contracts than those for care and yet articulating the same doctrine, see, for example, *Johnson v. Johnson*, 10 Ind. 387 (1858), and *Rippy v. Gant*, 39 N.C. (4 Ired. Eq.) 443 (1847).

512. In such cases, there had not yet been an adjudication of incompetency or insanity at the time the contract was made; in most jurisdictions, a formal finding of either would have rendered the contract void. However, when such a formal finding was made, it was quite common for the court to make a retrospective determination, finding that the want of capacity extended back to the date when the alleged contract was executed.

513. For explicit recognition of this problem, see, for example, *Lancaster County National Bank v. Moore*, 78 Pa. 407, 414 (1875) (“Insanity is one of the most mysterious diseases to which humanity is subject. It assumes such varied forms and produces such opposite effects as frequently to baffle the ripest professional skill and keenest observation. . .”).

514. See *supra* note 428 and accompanying text.

515. 10 Pa. 56 (1848).

exchange for the ribbons.<sup>516</sup> Although there was conflicting testimony as to whether the merchant “exhibited marks of insanity by his conduct,”<sup>517</sup> Chief Justice Gibson ultimately adjudged this evidence to be immaterial. Starting from the premise that a lunatic was “liable on his executed contract for necessities,” the judge extended this rule to cover “merchandise innocently furnished to [the lunatic’s] order,” imposing no requirement that the goods be suitable for his condition.<sup>518</sup> This was to stretch the doctrine of necessities beyond its conventional limits—a move the judge did not acknowledge as he elaborated the equitable and practical bases for his ruling:

Should [the lunatic] have made a wild and unthrifty purchase from a stranger unapprised of his infirmity, who is to bear the loss that must be incurred by one of the parties to it? Not the vendor, who did nothing that any other man would not have done. As an insane man is civilly liable for his torts, he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. A merchant, like any other man, may be mad without showing it; and, when such a man goes into the market, makes strange purchases, and anticipates extravagant profits, what are those who deal with him to think? To treat him as a madman, would exclude every speculator from the transactions of commerce.<sup>519</sup>

This was hardly a workable solution in nineteenth-century America, a nation teeming with insatiable opportunists, commonly afflicted with “an impatient desire to become suddenly rich by desperate adventure, instead of awaiting the slow but sure approach of wealth from industry and small profits.”<sup>520</sup> Apparently seeing no role for the court in containing or redirecting this speculative frenzy, the judge upheld the disputed contract. Had there been proof that the sane party both perceived and took advantage of the merchant’s mental infirmity, the judge was willing to concede, the outcome might have been different. But he flatly rejected the proposition that insane persons were categorically

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516. According to court records, the purchase was made on November 17, 1843, and the judicial inquest conducted the following February found that the merchant had been a lunatic since November 19, 1843—just two days after the execution of the contract. *Id.* at 56.

517. *Id.*

518. *Id.* at 60–61.

519. *Id.* at 61.

520. *Id.*



incapable of contracting “under any circumstances,” pronouncing this to be “a position altogether untenable.”<sup>521</sup>

Although the decision of the *Beals* court was widely noticed by judges and jurists in the second half of the nineteenth century, most would take a more balanced approach to the conflicting claims of sane and insane parties. In the vast majority of jurisdictions, courts inclined toward the rule first elaborated in a landmark 1848 English case, *Molton v. Camroux*,<sup>522</sup> which concerned the purchase of annuities by a lunatic whose debility was unknown to his insurers.<sup>523</sup> Here again, the contract was upheld, though upon a considerably narrower basis than in *Beals*. Writing for the court, Chief Justice Pollock explained:

We are not disposed to lay down so general a proposition, as that all executed contracts bona fide entered into must be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude, that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in statu quo, such contract cannot afterwards be set aside . . . .<sup>524</sup>

This was to significantly reframe the issue of legal capacity, the court suggesting it ought to be resolved by reference to the apparent rather than the actual mental condition of the party in question. As the English ruling was increasingly adopted and applied in American courts, judges would struggle with the implications of this focal shift, straining to assure

521. *Id.*

522. (1848) 154 Eng. Rep. 584.

523. *Id.* For leading American cases adopting the *Molton* rule, see for example, *Behrens v. McKenzie*, 23 Iowa 333 (1867); *Young v. Stevens*, 48 N.H. 133 (1868); *Matthiessen v. McMahon's Administrator*, 38 N.J.L. 536 (1876); *Lancaster County National Bank v. Moore*, 78 Pa. 407 (1875); *Lincoln v. Buckmaster*, 32 Vt. 652 (1860).

524. *Molton*, 154 Eng. Rep. at 590. On appeal to the exchequer chamber, this judgment was affirmed on the following ground:

[W]hen the state of mind was unknown to the other contracting party and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored altogether to their original position.

*Molton v. Camroux*, (1849) 154 Eng. Rep. 1107, 1108.

Though the principles governing this decision had been applied with regularity in courts of equity, *Molton* was regarded as the first English decision to declare them equally applicable in proceedings at law. See generally 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* 494–95 (1920).

themselves and the wider public that they were not doing any violence to the hallowed ideal of mutual assent.

One of the most thoughtful decisions on this score was the Vermont case of *Lincoln v. Buckmaster*,<sup>525</sup> written by Chief Justice Redfield in 1860. The case involved a sale of horses to a monomaniacal trader with the peculiar habit of “buying the most forlorn and desperate class of horses all over the county, with a view to the market, and that in great numbers.”<sup>526</sup> Although the seller had been advised of the buyer’s infirmity before the deal was concluded, Chief Justice Redfield credited evidence that the former proceeded in good faith, sincerely convinced that the latter was nonetheless fit for business. This hardly sufficed to establish the validity of the agreement, in the judge’s estimation, for the buyer’s mental condition left him “wholly incapable of making a binding contract, as much so as an infant, or a married woman.”<sup>527</sup> There was, of course, no denying that lunatics were often legally obliged to adhere to agreements they were theoretically incapable of making, as in the cases of *Beals* and *Molton*. But properly construed, these decisions were “chiefly for the protection and support of the lunatic, or his family, or to prevent serious injustice to those who have dealt with him, having no means of knowing or learning his incapacity.”<sup>528</sup> In other words, the liability of a lunatic ought to be limited to those goods and services that were clearly of benefit to him or converted to his use without permission or any fault on the part of the owner, such that it could be likened to a tort.<sup>529</sup> With these principles in view, Chief Justice Redfield concluded that the contract before him could not be enforced, reasoning that the business arrangement was “positively detrimental” to the buyer, whose mental defect could have been discovered by “a prudent and careful man.”<sup>530</sup> Having failed to measure up to this standard, the seller had only himself to blame, in the eyes of the court, for the loss he sustained was ultimately

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525. 32 Vt. 652.

526. *Id.* at 663.

527. *Id.* at 658; cf. *Fay v. Burditt*, 81 Ind. 433, 440 (1882) (“Every person may well be on his guard as to whether he is dealing with a married woman, or an infant; but not so as to the insane who afford no outward sign of their incapacity. The presumption of law is, that any person of mature years is of sound mind, and in the absence of something in his appearance or conduct to indicate, or of some other notice of the incapacity, the person who contracts with him fairly must be protected, else there can be no safety in dealing, one man with another.”).

528. *Lincoln*, 32 Vt. at 658.

529. *Id.*

530. *Id.* at 662.

the result of “his own foolhardy rashness and folly . . . in not making proper enquiry and examination into the affair.”<sup>531</sup>

Thus, in the space of a single opinion, the default legal person was cast in relation to the reasonable man in such a way as to imply that the perspective of the latter might have some bearing on the constitution of the former. The fact that a lunatic appeared competent from the vantage of “a man of reasonable sagacity and fairness,” the *Lincoln* court allowed, might provide a good reason for treating him as if he were capable of making a binding contract.<sup>532</sup> Nevertheless, the mere appearance of competence was neither a necessary nor a sufficient basis for imposing contractual liability upon a lunatic.<sup>533</sup> Moreover, it bears emphasis that the capacity to contract in *Lincoln* did not simply reduce to a question of the reasonableness of the sane party’s conduct or the fairness of the transaction from an objective point of view. For the court’s inquiry into these matters of reasonableness and fairness was primarily undertaken to gain insight into the actual states of mind of the parties to the agreement, and the judge stopped well short of holding that “all executed contracts are binding upon lunatics if the other party is not in fault.”<sup>534</sup> Nor was anything stated in his opinion to disturb the general rule that a lunatic would not be held liable under an executory contract, though the other party acted in good faith and without knowledge of the infirmity.<sup>535</sup>

By the last quarter of the century, the doctrine first formulated in *Molton* and further refined in cases like *Lincoln* had become the settled

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531. *Id.* at 663, 665; cf. *Chew v. Bank of Balt.*, 14 Md. 299, 319 (1859) (conceding there may be “no actual fault on the part of the bank” but choosing to place the burden of the loss upon this entity rather than the insane party; explaining that “the legal conclusion results from the justice and expediency, in such transactions, of casting the loss on those who can best provide against it”); *Curtis v. Brownell*, 3 N.W. 936, 941 (Mich. 1879) (“While it appears that Brownell had warning given which ought to have put him on his guard, we have not been satisfied that his conduct, when he made the bargain, was open to serious censure. It is nearly as much his misfortune as his fault.”).

532. *Lincoln*, 32 Vt. at 663.

533. *Id.* at 657–65. The court further noted that a lunatic whose impairment was obvious and known to the other party might still be liable for “necessaries for his support and care and for the maintenance of his family.” *Id.* at 658–59.

534. *Id.* at 660.

535. *Id.*; see also *Musselman v. Cravens*, 47 Ind. 1 (1874) (refusing to enforce a note given by a person of unsound mind for payment of a subscription for the erection of school building, which was deemed a contract that was “purely executory”); *Corbit v. Smith*, 7 Clarke 60, 64–65 (Iowa 1858) (noting that courts do not generally assist in the enforcement of executory contracts against mentally incapable parties unless for necessities).

rule in most American jurisdictions.<sup>536</sup> The “modern” rule, as declared by these courts, was that the contracts of lunatics were voidable in a proper case but not wholly void and that these contracts would generally be upheld where the other party proceeded in good faith and in (nonnegligent) ignorance of the existence of the incapacity, unless the parties could be placed *in statu quo*.<sup>537</sup> All the same, this rule never enjoyed universal appeal. Indeed, there remained a number of jurisdictions that consistently held to the position that all the contracts of insane persons were either absolutely void<sup>538</sup> or unconditionally voidable at the option of the insane

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536. See, e.g., *Burnham v. Kidwell*, 113 Ill. 425 (1885); *Copenrath v. Kienby*, 83 Ind. 18 (1882); *Fay v. Burditt*, 81 Ind. 433 (1882); *Wilder v. Weakley*, 34 Ind. 181 (1870); *Harrison v. Otley*, 101 Iowa 652 (1897); *Ashcraft v. De Armond*, 44 Iowa 229 (1876); *Behrens v. McKenzie*, 23 Iowa 333 (1867); *Corbit*, 7 Clarke 60; *Gribben v. Maxwell*, 7 P. 584 (Kan. 1885); *Brown v. Cory*, 9 Kan. App. 702 (Ct. App. 1900); *Garland v. Rice*, 4 Ky. L. Rptr. 254 (1882); *Rusk v. Fenton*, 77 Ky. (14 Bush) 490 (1879); *Flach v. Gottschalk Co. of Balt. City*, 41 A. 908 (Md. 1898); *Schaps v. Lehner*, 55 N.W. 911 (Minn. 1893); *Wells v. Covenant Mut. Benefit Ass'n of Ill.*, 29 S.W. 607 (Mo. 1895); *Young v. Stevens*, 48 N.H. 133 (1868); *Yauger v. Skinner*, 14 N.J. Eq. 389 (Ch. 1862); *Riggs v. Am. Tract Soc'y*, 95 N.Y. 503 (1884); *Mut. Life Ins. Co. of N.Y. v. Hunt*, 79 N.Y. 541 (1880); *Merritt v. Merritt*, 59 N.Y.S. 357 (App. Div. 1899); *Riggan v. Green*, 80 N.C. 237 (1879); *Hosler v. Beard*, 43 N.E. 1040 (Ohio 1896); *Lancaster County Nat'l Bank v. Moore*, 78 Pa. 407 (1875); *Sims v. McLure*, 29 S.C. Eq. (8 Rich. Eq.) 286 (1856); *Bank v. Sneed*, 36 S.W. 716 (Tenn. 1896). See generally 1 WHARTON, *supra* note 490, at 143; see also ORDRONAU, *supra* note 314, at 300–03 (“The principle may therefore be considered as settled both in this country as well as in England, that while contracts made with insane persons are in general voidable, they are subject nevertheless to the qualification that a contract made in good faith with a lunatic for a full consideration and which has been executed without knowledge of insanity, or such information as would lead a prudent person to the belief of mental incapacity, will be sustained.”); cf. 1 THEOPHILUS PARSONS, *THE LAW OF CONTRACTS* 447 n.1 (John M. Gould ed., 9th ed. 1904) (observing that “[t]he limits of a lunatic’s liability are shown by decisions holding that information such as would lead a prudent person to suspect the incapacity will avoid the contract . . . and prevent a recovery for money lent or services rendered.”); 1 WILLIAM W. STORY, *A TREATISE ON THE LAW OF CONTRACTS* § 83, at 79 (Boston, Little, Brown & Co. 5th ed. 1874) (“In all cases where the circumstances under which a contract is made, are such as would, in the mind of a reasonable man, induce a belief in the insanity of the other party, the contract would be held to be invalid on the ground of fraud.”). On this point, see, for example, *Wilder*, 34 Ind. 181; *Matthiessen & Weichers Refining Co. v. McMahon’s Administrator*, 38 N.J.L. 536 (1876); *Lancaster*, 78 Pa. 407.

537. *Rusk*, 77 Ky. (14 Bush) at 493; see also sources cited *supra* note 536. In England, the 1892 case of *Imperial Loan Co. v. Stone*, (1892) 1 Eng. Rep. 599 (Q.B.), would adopt a rule more adverse to insane persons than *Molton*, which had required a showing of knowledge of the incompetent person’s mental condition in order to set aside an executed contract. *Molton v. Camroux*, (1849) 154 Eng. Rep. 1107, 1108. *Imperial* extended this rule to executory contracts. 1 Eng. Rep. at 601.

538. See, e.g., *Dexter v. Hall*, 82 U.S. (15 Wall.) 9 (1872); *German Savs. & Loan Soc’y v. De Lashmutt*, 67 F. 399 (C.C.D. Or. 1895); *Edwards v. Davenport*, 20 F. 756 (C.C.S.D. Iowa 1883); *Dougherty v. Powe*, 30 So. 524 (Ala. 1900); *Thompson v. New England Mortgage Sec. Co.*, 110 Ala. 400 (1895); *Kennedy v. Marrast*, 46 Ala. 161 (1871); *Rawdon v. Rawdon*,

person or his representatives.<sup>539</sup> Still, others proved willing to favor the lunatic over the sane party where it appeared that the former had not received the benefit of the consideration, though through no wrongdoing or fault of the latter.<sup>540</sup> And to the end of the century, courts across the country disagreed as to the burden of proof with respect to the question of the sane party's good faith and want of knowledge of the incapacity.<sup>541</sup>

Legal commentators in the Gilded Age would split on whether this was a desirable state of affairs. Francis Wharton wrote approvingly of the majority rule, deeming it to be both "more fair and more philosophical."<sup>542</sup> He thought it provided "[s]ufficient protection" to insane persons

by holding their contracts voidable when it is shown that their incapacity was known or practised upon, while the transaction of business is assisted by the opportunity given in lucid intervals, or upon recovery, for the ratification of contracts really conducive to the interests of both parties.<sup>543</sup>

However, Joel Bishop was more hesitant to endorse this rule, maintaining that the want of notice ought never to be "absolutely controlling," and defending a narrower view of the scope of a lunatic's contractual liability,

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28 Ala. 565 (1856); *Elder v. Schumacher*, 33 P. 175 (Colo. 1893); *Sullivan v. Flynn*, 20 D.C. (9 Mackey) 396 (1892); *Rea v. Bishop*, 59 N.W. 555 (Neb. 1894).

539. See, e.g., *Somers v. Pumphrey*, 24 Ind. 231 (1865) (infant and insane treated alike; deed of latter as well as former can be avoided as against bona fide purchaser for valuable consideration); *Hovey v. Hobson*, 55 Me. 256 (1867) (same); *Gibson v. Soper*, 72 Mass. (6 Gray) 279, 282 (1856) ("The law . . . holds the adult to the bargain which the infant may avoid; the sane to the obligation from which the insane may be loosed. It does not mean to put them on an equality. On the other hand, it intends that he who deals with infant or insane persons shall do it at his peril. Nor is there, practically, any hardship in this; for men of sound minds seldom unwittingly enter into contracts with infants or insane persons."); cf. *Arnold v. Richmond Iron Works*, 67 Mass. (1 Gray) 434 (1854) (describing contracts made by those of unsound mind as voidable but capable of being ratified once the individual's mind has been restored).

540. See, e.g., *Hull v. Louth*, 10 N.E. 270 (Ind. 1886); *Physio-Med. Coll. of Ind. v. Wilkinson*, 108 Ind. 314 (1886); *N.W. Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535 (1883); *Van Patton v. Beals*, 46 Iowa 62 (1877); *Johnson v. Stone*, 42 N.Y. 380 (1885); *Feigenbaum v. Howe*, 66 N.Y.S. 378 (App. Div. 1900); *Mahoney v. Goepper*, 8 Ohio Dec. Reprint 154 (1881); *Wirebach's Ex'r v. First Nat'l Bank of Easton*, 97 Pa. 543 (1881); *Snyder v. Laubach*, 7 W.N.C. 464 (Pa. 1879). See generally 1 PARSONS, *supra* note 536, at 447 n.1 (noting that in cases where "the lunatic has not received, but the party endeavouring to hold or charge him has parted with full value, there is disagreement even among the courts which profess to follow *Molton* . . .").

541. Compare *Schaps v. Lehner*, 55 N.W. 911 (Minn. 1893) (burden of proof on insane party), with *Hull*, 10 N.E. 270, *Fulwider v. Ingels*, 87 Ind. 414 (1882), *Riggs v. Am. Tract Soc'y*, 84 N.Y. 330 (1881), and *Hosler v. Beard*, 54 Ohio St. 398 (1896).

542. 1 WHARTON & STILLÉ, *supra* note 135, at 8.

543. *Id.* For similar sentiments, see ORDRONAUX, *supra* note 314, at 300–06; cf. *id.* at 312–20 (articulating a different rule for deeds).

grounded upon the ideal of mutual assent.<sup>544</sup> Others would lend further support to this latter view in the early decades of the twentieth century. Rather than embracing objectivism, a number of prominent legal commentators in this period reasserted the antebellum doctrine that the fair dealing of one party could not supply the want of capacity in the other. They further contended that insane persons should be accorded at least as much protection in the marketplace as infants, pointing out that it only multiplied their misfortunes to be held legally accountable for their civil acts.<sup>545</sup> “[I]f of two innocent parties, it is requisite that one should suffer,” reasoned W.G.H. Cook, surely “the courts should decide in favour of him who is least capable of protecting his own interests.”<sup>546</sup> Henry Goudy was even more sharply critical of the prevailing rule, declaring that it “can be rested only on the shifting sands of supposed expediency, and seems to give a shock to the most fundamental principles of contract law.”<sup>547</sup>

### C. The Capacity to Harm

The proposition that a lunatic was responsible for his torts was often baldly pronounced by nineteenth-century American judges—at least when the matter was not immediately before them, as we have already seen in the case of *Beals v. See*.<sup>548</sup> This was also true of the common law precedent most often invoked in support of this proposition, the seventeenth-century English decision in *Weaver v. Ward*,<sup>549</sup> which imposed civil liability on a perfectly sane soldier who claimed to have

544. See generally BISHOP, *supra* note 477, at 378–88.

545. See, e.g., Mannie Brown, *Can the Insane Contract? A Review of the Law Relating to the Contracts of Persons of Unsound Mind*, 11 CAN. B. REV. 600 (1933); W.G.H. Cook, *Mental Deficiency and the English Law of Contract*, 21 COLUM. L. REV. 424 (1921); Henry Goudy, *Contracts by Lunatics*, 17 LAW Q. REV. 147, 151 (1901); cf. 1 WILLISTON, *supra* note 524, at 494 (favoring the rule announced in *Molton* that is interpreted so as to preserve the lunatic's prerogative “to avoid the contract if it is oppressive”).

546. Cook, *supra* note 545, at 438.

547. Goudy, *supra* note 545, at 154. For evidence of the abiding judicial concern with the substantive fairness of marketplace transactions, see generally Note, *The Peppercorn Theory of Consideration and the Doctrine of Fair Exchange in Contract Law*, 35 COLUM. L. REV. 1090, 1091 (1935) (“[I]t is clear that there has been constant judicial delimitation, in the law of fraud and duress, of the permissible pressures to be used in the bargaining process.”).

548. 10 Pa. 56 (1848). *Beals* was, in fact, cited as authority for this proposition in other opinions and treatises. See, e.g., *Williams v. Hays*, 38 N.E. 449, 451 (N.Y. 1894); *Lancaster County Nat'l Bank v. Moore*, 78 Pa. 407 (1875); *Karow v. Cont'l Ins. Co. of N.Y.*, 15 N.W. 27, 28 (Wis. 1883). See generally THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 99–103 (Chi., Callaghan & Co. 1879).

549. (1616) 80 Eng. Rep. 284 (K.B.).

discharged his musket accidentally and against his will, thereby injuring another in his company.<sup>550</sup> Though the court determined that the defendant's actions did not constitute a felony, an offense that "must be done *animo felonico*," he was nonetheless held answerable in trespass, "which tends only to give damages according to hurt or loss," except where the injury was shown to be "utterly without [the actor's] fault."<sup>551</sup> In what amounted to dicta, the court went on to analogize Ward's situation to that of a lunatic, who was likewise made to pay for his trespasses. To be adjudged innocent in the eyes of the law, the court strongly hinted, something more was required:

As if a man by force take my hand and strike you, or if here . . . the plaintiff ran across [the defendant's] piece when it was discharging, or had set forth the case with the circumstances, so as it had appeared . . . that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.<sup>552</sup>

With these words, the *Weaver* court effectively validated the defense of "inevitable accident" but seemingly ruled out the possibility that insanity could serve as an excusing condition, at least where trespasses were concerned.<sup>553</sup> Scholars ever since have disputed the significance of this ruling, deploying it to competing ends in the perennial debates about the basis of tort liability within the Anglo-American legal tradition. Some have seized upon the case as evidence that tort liability has always been fault-based,<sup>554</sup> while others have read the opinion as a relic of a more primitive era, or—at best—a sort of way station in the inexorable

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550. *Id.* at 284.

551. *Id.*

552. *Id.*

553. The defense of inevitable accident may be traced further back to *The Thorns Case*. Y.B. 6 Edw. 4, fol. 7, Mich., pl. 18 (1466). See generally Stephen G. Gilles, *Inevitable Accident in Classical English Tort Law*, 43 EMORY L.J. 575 (1994). The sixteenth-century English case of *Cross v. Andrews*, (1598) 78 Eng. Rep. 863, 40 Cro. Eliz. 622 (Q.B.), further supported the imposition of liability regardless of mental illness, invoking the same nonstultification rule that had traditionally operated in cases involving contracts and deeds. In this case, the court upheld a suit against a lunatic innkeeper who had failed to protect the property of his guests: "And to say he is of non sane memory, it lieth not in him to disable himself, no more than in debt upon an obligation." *Id.* at 863, 40 Cro. Eliz. at 622.

554. See, e.g., J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 456–59 (3d ed. 1990); C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 190–91 (Greenwood Press 1970); Percy H. Winfield, *The Myth of Absolute Liability*, 42 LAW Q. REV. 37 (1926).

movement from strict liability to the modern doctrine of negligence.<sup>555</sup> Still others have declared the precise meaning of the decision to be essentially unclear, with some suggesting that it expresses a fundamental ambiguity about the basis of tort liability that persists to some degree into the present.<sup>556</sup> Yet in all these varying readings of *Weaver*, the liability of the lunatic is treated as a historical constant, holding true regardless of whether strict liability or negligence was taken to be the dominant rule at any given moment.

A different story emerges when one turns to the nineteenth-century American cases and commentaries that were centrally concerned with the status of the insane tortfeasor. Although there was not a great deal of capacity litigation in this field of private law, the cases that did come before the courts were challenging beyond their numbers, gradually leading a number of prominent American jurists to advocate more particularized standards of liability—standards that took greater account of the mental debilities of individual actors. Indeed, it was in the supposed heyday of objectivism that jurists grew most vocal in this respect, urging that the harmful acts of the lunatic ought to be assimilated to the category of inevitable accidents.<sup>557</sup>

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555. See, e.g., 8 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 453–58 (5th ed. 1931); Francis H. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9, 16–18 (1924); John Henry Wigmore, *Responsibility for Tortious Acts: Its History*, in SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 474, 505 n.5 (1909). For other scholars offering the same general account of the evolution of tort law, see, for example, LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409–27 (1973); HORWITZ, *TRANSFORMATION I*, *supra* note 25, at 85–89; James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908); George F. Deiser, *The Development of Principle in Trespass*, 27 YALE L.J. 220, 235–36 (1917); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 367–68 (1951); Nathan Isaacs, *Fault and Liability: Two Views of Legal Development*, 31 HARV. L. REV. 954, 966 (1918).

556. See, e.g., Gary T. Schwartz, *Weaver v. Ward*, 74 TEX. L. REV. 1271, 1272 (1996) (reading *Weaver* as ambivalent on the question of whether liability should be strictly imposed on the basis of the harm caused or the blameworthiness of the defendant, and further observing that this basic ambivalence “remains in evidence in both contemporary tort doctrine and contemporary tort theorizing”). For other works emphasizing greater contingency and complexity in the evolution of tort law, see, for example, KARSTEN, *supra* note 388, at 81–85; G. EDWARD WHITE, *TORT LAW IN AMERICA* 3–19 (2003); JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 43–70 (2004); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 927 (1981).

557. These developments were no doubt spurred forward by the demise of the writ system and the accompanying search for abstract legal principles; in this intellectual climate, the legal status of disabled persons acquired a new salience. See generally WHITE, *supra* note 556, at 8–12; Patrick Kelley, *Infancy, Insanity, and Infirmary in the Law of Torts*, 48 AM. J. JURIS. 179, 184 (2003).



Turning first to the antebellum law reports, it appears that the published decisions tended to rather summarily uphold the liability of lunatics for their civil wrongs. So a Vermont court ruled in the leading case of *Morse v. Crawford*,<sup>558</sup> involving a pair of oxen allegedly strangled by the defendant, who had been entrusted with their care and keeping by the plaintiff. The defendant sought to escape liability by pleading insanity and further contending that his mental debility was known to the plaintiff at the time the oxen changed hands from the one to the other. In the opinion of the court, the defendant's plea was unavailing. "It is a common principle," the judge maintained, "that a *lunatic* is liable for any *tort*, which he may commit, though he is not punishable *criminally*. When one receives an injury from the act of another, this is a trespass, though done by mistake, or without design."<sup>559</sup> While the plaintiff might have displayed a "want of prudence" in entrusting the oxen to a man in the defendant's condition, he certainly did not thereby assent to their destruction, and so he was entitled to recover the value of this property.<sup>560</sup>

Reasoning along similar lines, a New York court sustained a charge of false imprisonment in *Krom v. Schoonmaker*.<sup>561</sup> The evidence presented at trial indicated that the defendant, the town sheriff, was manifestly "crazy" at the time that the warrant was issued—so much so that the plaintiff sought to have the defendant placed in civil confinement several days after the latter procured the arrest in issue.<sup>562</sup> Yet, this did not render the sheriff any less responsible for the injury done to the plaintiff, on the court's analysis. Relying on the same civil-criminal distinction as the *Morse* court, the judge acknowledged that a lunatic was "not a free agent, capable of intelligent, voluntary action, and therefore is incapable of a *guilty intent*, which is the very essence of crime."<sup>563</sup> It was nonetheless permissible to bring a civil action against the same individual, "because the *intent* with which the act is done is not material."<sup>564</sup> However, the court went on to note that the proof of the defendant's insanity might operate to limit the sum the plaintiff might rightly recover. Since a lunatic "has properly no will," the judge provided, "it follows that the

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558. 17 Vt. 499 (1845).

559. *Id.* at 502.

560. *Id.* The court did go on to acknowledge that a different case might have been presented, had the defendant shown that the plaintiff bailed the oxen to him "under an expectation that he might destroy them, so as to charge himself in trespass for their value." *Id.*

561. 3 Barb. 647 (N.Y. Gen. Term 1848).

562. *Id.* at 651 (suggesting the warrant was "but the freak of a madman").

563. *Id.* at 650.

564. *Id.*

only proper measure of damages in an action against him for a wrong, is the mere compensation of the party injured.”<sup>565</sup>

The capacity issue had considerably more life in the context of defamation suits brought in the same period. In one of the earliest such cases, *Dickinson v. Barber*,<sup>566</sup> the plaintiff complained that the defendant had, on several occasions, accused the plaintiff of being “criminally intimate with the defendant’s wife.”<sup>567</sup> The defense of insanity was offered in response, along with extensive testimony intended to show that the defendant remained insane for several years following the occasions when he made the slanderous statements. The court refused to admit this testimony insisting that any such evidence be limited to the months immediately following the last statement made. A verdict was returned for the plaintiff, which was affirmed on appeal in an opinion that raised more questions than it answered. For the court expressly reserved judgment on the question of “how far, or to what degree, insanity was to be received as an excuse in an action for defamatory words,” speaking only to the issue of damages.<sup>568</sup> “Where the derangement was great and notorious,” the judge allowed, “so that the speaking the words could produce no effect on the hearers, it was manifest no damage would be incurred.”<sup>569</sup> But if “the degree of insanity was slight, or not uniform,” he continued, “the slander might have its effect,” justifying a court in imposing damages upon the defendant, as was ultimately ordered in this case.<sup>570</sup> Greater clarity was provided in subsequent decisions rendered in other jurisdictions, generally tending to hold that a plea of insanity might be

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565. *Id.* Accordingly, the case was remanded so that evidence of insanity—excluded at trial—could be squarely placed before the jurors as they proceeded to recalculate the damages (set at \$350 at the conclusion of the first trial). *Id.* at 650–51. The rule announced in *Krom* with respect to damages was held fairly consistently across jurisdictions through the end of the nineteenth century. See, e.g., *Jewell v. Colby*, 24 A. 902, 902 (N.H. 1890) (holding evidence of insanity inadmissible in a wrongful-death action “unless the plaintiff claims punitive, exemplary, or a greater sum in damages than compensation for the actual loss sustained”); *Ward v. Conatser*, 63 Tenn. 64, 66 (1874) (“A sane man for his tort may be punished by vindictive damages for his acts. A lunatic or insane person is held liable only to make compensation for the loss sustained by his act, which injures another.”); BUSWELL, *supra* note 130, at 356–57 (observing that “those courts which apparently hold that punitive damages may be recovered in actions of tort as against sane defendants recognize a different rule in respect of insane tort-feasors, and in such cases limit the amount of damages recoverable to compensation for the actual injuries caused by the tortious act”).

566. 9 Mass. (9 Tyng.) 225 (1812).

567. *Id.* at 225.

568. *Id.* at 227.

569. *Id.* at 227–28.

570. *Id.* at 228.

admitted on the general issue of slander, either as an excuse or in mitigation of damages.<sup>571</sup> There was, however, a conflict of authority on the question of whether drunkenness might constitute a defense, though courts uniformly held that such proof might have a mitigating effect on the assessment of damages in any given case.<sup>572</sup>

Judges and jurists exhibited still greater confusion and conflict when it came to the question of whether an insane person could ever be guilty of negligence, which, in turn, raised the issue of whether negligence itself described a subjective state of mind, or was essentially an objective standard, applied without any reference to the actor's "personal equation." Although antebellum alienists might have been expected to take the lead in advocating an individuated standard, it was instead a prominent lawyer, Theodore Sedgwick, who offered one of the earliest arguments to this effect. In the 1852 edition of his *Treatise on the Measure of Damages*, Sedgwick contended that when sane adults were held liable for unintentional civil wrongs, the law presumed that "the act punished is that of a party competent to foresee and guard against the consequences of his conduct."<sup>573</sup> Insofar as this could not be said of lunatics, Sedgwick could see no good reason, either on grounds of policy or principle, for holding them civilly liable for their tortious acts. To the contrary, he submitted that such acts belonged "to the class of cases which may well be termed inevitable accidents"—a statement he let stand without any mention of *Weaver* or other relevant authorities.<sup>574</sup>

Sedgwick's position was substantially reinforced by a number of other influential commentators in the second half of the century, with Francis Wharton providing an especially elaborate discussions in his 1874 *Treatise on the Law of Negligence*.<sup>575</sup> Here again, the jurist had little

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571. See, e.g., *Yeates v. Reed*, 4 Blackf. 463, 465–66 (Ind. 1838); *Bryant v. Jackson*, 25 Tenn. (6 Hum.) 199 (1845); *Horner v. Marshall*, 19 Va. (5 Munf.) 466 (1817). See generally ORDRONAU, *supra* note 314, at 333–36.

572. Compare *Gates v. Meredith*, 7 Ind. 440 (1856) (drunkenness is a defense to an action for slander), and *Dawson v. State*, 16 Ind. 428, 429 (1861) (stating, in dicta, that "[i]n cases, both civil and criminal, where malice is an ingredient of the charge, it seems that simple intoxication may be given in evidence to rebut it; but this principle does not seem to be extended to the ingredient of intention"), with *Reed v. Harper*, 25 Iowa 87 (1868) (drunkenness is not a defense, though evidence to this effect might mitigate damages), and *McKee v. Ingalls*, 5 Ill. (4 Scam.) 30, 33 (1842) (noting that "drunkenness is no excuse for speaking slanderously").

573. THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 455–56 (N.Y., John S. Voorhies 2d ed. 1852).

574. *Id.* at 456.

575. FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE (Phila., Kay & Bro. 1874).

to offer by way of judicial precedents on the liability of the insane tortfeasor, proceeding more or less on the basis of principle and policy. Without propounding "any theory of the human will"<sup>576</sup> in the philosophical sense, Wharton submitted that *legal* accountability hinged upon the capacity to exercise "moral choice."<sup>577</sup> For a man to be "a juridical cause either through his acts or omissions," in other words, he had to be "a responsible originator," one who was ranked over and above those "necessitated forces" in the universe, which "act only as they are employed or impelled."<sup>578</sup> To illustrate this point, Wharton offered several negative examples, chief among which were insane persons and infants, who shared the common characteristic of being "incapable of reason."<sup>579</sup> On account of this disability, neither could be held liable for negligence, because one could not be "guilty of neglecting that which he has no mental capacity to perceive or do."<sup>580</sup>

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576. *Id.* at 89.

577. *Id.* at 92.

578. *Id.*

579. *Id.* Wharton went on to suggest that persons acting under compulsion or unconscious of the danger of their actions might also be deemed legally irresponsible. *Id.* at 93–94.

580. *Id.* at 93. For the same reason, Wharton suggested, an insane person could not be charged with contributory negligence, unless the mental disturbance was shown to be "caused by the sufferer's own fault." *Id.* at 272; see also JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW 223–25 (Chi., T.H. Flood & Co. 1889) (conceiving of insanity as a "particular form" of "an act of God," which "when sufficiently complete and profound, frees, as well from civil liability as from criminal, and any injurious act whereof it is the cause" and criticizing those "judges and legal writers" who have refused to recognize insanity as an excuse from liability for a tort); cf. *id.* at 225 (acknowledging the propriety of imposing tort liability on the lunatic innkeeper who has undertaken to keep the goods of his guests safe). See generally ORDRONAU, *supra* note 314, at 333 (citing WHARTON, *supra* note 575). Easily the most impassioned argument against the liability of lunatics for negligence was put forward in Timothy Brown, *The Liability of Persons of Unsound Mind and Infants for Torts in Civil Actions*, 1 S.L. REV. (n.s.) 346 (1875). Brown criticized *Weaver v. Ward* along with other common law authorities insofar as they authorized liability without requiring the plaintiff to show "anything savoring of culpability," *id.* at 348, and he lamented the fact that "the harshest and most unjust portion of [the *Weaver* doctrine], holding lunatics and insane persons liable for torts," continued to be defended by "respectable writers," *id.* at 350. He favored a more particularized rule, citing *Railroad Co. v. Gladmon*, 82 U.S. (15 Wall.) 401 (1872), for the proposition that the "degree of accountability varies with the age and capacity of individuals." Brown, *supra*, at 351–52. It followed that "[t]he person who is *non compos mentis* should not be made civilly responsible for failure to exercise a power he does not possess." *Id.* at 353. For in the final analysis, Brown insisted:

The law does not require impossible things. Insanity is an act of God. Why should the estate of a madman be chargeable for the acts he cannot prevent? God caused his insanity as much as the tempest or earthquake. The act of God is always an excuse. The principle that he who injures another must respond in damages for the injury, is believed not to be sound where the

This line of reasoning was directly countered by a number of equally prominent commentators, who were no more successful in summoning up authorities (other than *Weaver*) to support their assertions that insane persons were indeed accountable for their neglectful behavior, regardless of their actual mental condition. This was the stance taken by Thomas Shearman and Amasa Redfield, in their 1869 *Treatise on the Law of Negligence*,<sup>581</sup> which maintained that infants and persons of unsound mind were “liable for injuries caused by their tortious negligence” and further specified that they were to be “held to the same degree of care and diligence as persons of sound mind and full age.”<sup>582</sup> Though the commentators were able to cite to a number of cases applying this rule where infants were concerned, they were unable to marshal a single case that actually held a lunatic liable for what would have constituted negligence in the case of a sane person.<sup>583</sup> However, the two were able to supply other grounds for preferring their position, as they submitted that it would be fundamentally unfair to leave those injured by lunatics and infants without any means of redress—particularly in those instances in which the tortfeasor was possessed of a large estate.<sup>584</sup>

The case for holding lunatics liable for negligence was powerfully fortified by Thomas Cooley in his 1879 *Treatise on the Law of Torts*.<sup>585</sup> Proceeding more or less by definitional fiat, Cooley pronounced that the primary purpose of tort law was to redress wrong—to compensate the victim for “the injury done,” which meant that “the weakness of the party

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actor is not in fault, as shown by modern authorities. The child is only responsible for the exercise of the judgment it has. Hence those who have no reason to exercise, have no liability.

*Id.*

581. THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE (N.Y., Baker, Voorhis & Co. 1869).

582. *Id.* at 63.

583. *Id.* at 63 n.2 (citing cases). They were, however, able to supply authorities for the proposition that a lunatic was chargeable with contributory negligence. *See id.* at 55, 56 nn.2–4 (citing cases). In doing so, they also introduced an important distinction as between infants and lunatics:

All that we have said in regard to children is equally applicable to lunatics of any kind; with this difference as to the obligations of others toward them, that the sight of a child ought to be sufficient to induce every mature person to take greater care than he otherwise would, whereas a lunatic does not necessarily manifest his infirmity by his appearance, and one who is not aware of that fact is not to blame for dealing with him as a person of ordinary intellect.

*Id.* at 56 (footnotes omitted).

584. *Id.* at 63. This statement was importantly qualified by the authors, who went on to observe that “persons incapable of contracting could not be held liable for negligence in performing their contracts.” *Id.*

585. COOLEY, *supra* note 548.

committing it, or the absence of any deliberate purpose to injure, must commonly be of little or no importance.”<sup>586</sup> The case of the lunatic, he continued, provided “an apt illustration” of this general point.<sup>587</sup> Though the harmful act of a lunatic was, in a certain sense, an unfortunate occurrence, it was only fair that the consequences of such an act fall upon “the estate of the person committing the injury, rather than upon that of the person who has suffered it.”<sup>588</sup> In reaching this conclusion, Cooley expressly acknowledged the arguments to the contrary advanced by Sedgwick, conceding “there is some appearance of hardship—even of injustice—in compelling one to respond for that which, for want of the control of reason, he was unable to avoid,” thus “imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in full possession of his faculties.”<sup>589</sup> But for Cooley, the question of liability here reduced to a matter of public policy, and he offered three main reasons for holding the lunatic accountable for his civil wrongs.<sup>590</sup> First, he contended that there was “no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose.”<sup>591</sup> Second, he noted that it would be an “important stimulus” to the lunatic’s relatives, who were “entitled to succeed to his estate if it were preserved.”<sup>592</sup> And third, it had to be acknowledged that insanity

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586. *Id.* at 98–99.

587. *Id.* at 99.

588. *Id.*

589. *Id.* at 100.

590. It should be noted that Cooley recognized that “the responsibility of persons mentally incompetent” was not necessarily “co-extensive in all respects with that of other persons.” *Id.* at 102. In particular, he noted that proof of insanity might operate to mitigate damages or eliminate the basis for recovery altogether. *Id.* He further observed that insanity might constitute a complete defense in any case where “the wrong lies in intent.” *Id.* at 103. Perhaps most significant of all, Cooley suggested that the question of what constituted contributory negligence might depend upon the mental capacity of the party in question. *Id.* at 683. In addressing torts committed by infants, Cooley initially appeared to consider their position to be more or less congruent with that of mental incompetents, see *id.* 103–05, but he then went on to state that “actual maturity and capacity is important, not only as it may bear upon the question whether negligence actually existed, but also as it may guide in determining whether the plaintiff in a particular transaction was not himself chargeable with fault.” *Id.* at 105; see also *id.* at 683 n.1 (allowing that “[w]here infants are actors that might probably be considered an unavoidable accident which would not be so considered where the actors are adults” and citing cases to this effect).

591. *Id.*

592. *Id.*

was easily feigned, and that there was a very fine line “between insanity and the cunning of malice.”<sup>593</sup> For this reason, the jurist feared “a rule of irresponsibility in respect to such persons would be likely to result in similar difficulties in civil cases to those which have brought the administration of criminal law into disrepute wherever the plea of insanity is interposed.”<sup>594</sup>

By the 1880s, these two groups of jurists had reached a bit of a draw, as neither side could summon up any judicial authority in support of their position. Their competing standpoints would be considered most fully, if inconclusively, in the notorious fin-de-siècle case of *Williams v. Hays*,<sup>595</sup> which concerned the ill-fated voyage of the Emily T. Sheldon.

In the final hours before this brig wrecked along the coast of Cape Cod on March 22, 1886, at least one member of the crew began to suspect that his captain, William Hays, was not in his right mind.<sup>596</sup> Even after reporting that the vessel was in distress, it was only with concerted physical force that the steward was able to rouse Hays from the lounge in his cabin.<sup>597</sup> Once on the deck, the captain’s behavior grew more unsettling, as he gave “irresponsive answers to questions,” staggering about in a “dazed condition,” appearing “either drunk or insane.”<sup>598</sup> He could not be convinced that the rudder had sustained any damage, maintaining “I can’t see it, and you can’t, I think,” even though the log keeper had indeed inspected it with his own eyes and conclusively determined it was split.<sup>599</sup> Most troubling of all was Hays’s refusal of assistance offered by passing tugboats, the masters of which could see the difficulty under which the Sheldon was laboring.<sup>600</sup> “[W]e are all right,” he maintained with unwarranted equanimity, as the Sheldon grew ever more unmanageable.<sup>601</sup> Even after the brig struck the shore, Captain Hays insisted upon remaining at the helm, and it took rescuers several hours to coax him from his post into a lifeboat headed for the shelter of dry land.<sup>602</sup>

When called to account for the brig’s loss in a negligence suit brought in a New York state court, Hays claimed not to remember any

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593. *Id.* at 101.

594. *Id.*

595. 52 N.E. 589 (N.Y. 1899).

596. *Id.* at 590–91.

597. *Id.* at 590.

598. *Id.* at 591.

599. *Id.* at 590 (internal quotation marks omitted).

600. *Id.*

601. *Id.* (internal quotation marks omitted).

602. *Id.* at 591.

of these events.<sup>603</sup> The last action he recalled taking on the Sheldon's ill-fated voyage was retiring to his cabin, leaving the brig in the capable hands of his first mate.<sup>604</sup> As the captain told the story, it was a well-deserved rest, for he had been on constant duty for two straight days, navigating the brig through a violent squall, during which he spared but little time for food or sleep.<sup>605</sup> His labors on the deck left him feeling quite exhausted, and he feared he was about to suffer an attack of malaria.<sup>606</sup> So before lying in the berth of his cabin, he took fifteen grains of quinine—a dosage he was in the habit of administering to himself as a preventative matter.<sup>607</sup> The next thing he knew, he was in the life-saving station, with no earthly idea of how he had gotten there.<sup>608</sup> In thus setting out his defense, he did not deny that he was on the deck when the Sheldon ran aground, and he further conceded that he “might have said silly things and given silly orders,” giving off the appearance of being intoxicated even though he insisted he had not consumed any alcohol.<sup>609</sup> But he remained adamant that during these crucial hours, he “knew nothing of what occurred, that in fact he was, from some cause, insane, and therefore not responsible for the loss of the vessel.”<sup>610</sup>

Civil litigation arising from the Sheldon's wreck took well over a decade to resolve, as the case journeyed up and down the court system, ultimately leaving only ambiguity in its wake. It was actually Captain Hays who initiated the process, bringing an action on a policy of marine insurance in New York Superior Court in the fall of 1886, suing as part owner of the brig.<sup>611</sup> The defendant, Phoenix Insurance Company, argued against recovery, maintaining the loss was caused by the negligence of either the captain or his mate, and contending that the policy only insured against “perils of the sea”—defined as “natural accidents peculiar to the sea, which do not happen by intervention of man, nor are to be prevented by human prudence”—losses, in other words, that were “nobody's fault.”<sup>612</sup> The evidence presented at trial tended to show that

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603. Williams v. Hays, 38 N.E. 449, 450 (N.Y. 1894).

604. *Id.*

605. Wm. B. Hornblower, *Insanity and the Law of Negligence*, 5 COLUM. L. REV. 278, 285 (1905).

606. Williams, 52 N.E. at 590.

607. *Id.*

608. Hays, 38 N.E. at 450.

609. Hornblower, *supra* note 605, at 286.

610. Hays, 38 N.E. at 450.

611. Hays v. Phenix Ins. Co., 6 N.Y.S. 3 (1889).

612. *Id.* at 3.



the brig “was lost by reason of the omission of the plaintiff as master to take certain precautionary measures which a careful and prudent captain would have taken under the same circumstances,” and so the substantial issue litigated was “whether such precautionary measures were not taken in consequence of plaintiff’s intoxication or in consequence of plaintiff’s sickness, for which he was not to blame.”<sup>613</sup> Jurors were charged to identify the cause of the captain’s omission, and were additionally advised that the mate “could not be expected to ascertain the captain’s condition any sooner than that condition could be ascertained by a reasonable and careful man under the circumstances.”<sup>614</sup>

So instructed, the jury found no such negligence as would relieve the insurance company from liability, and their finding was sustained on appeal.<sup>615</sup> Once the company made payment on the policy, it became subrogated to the rights of the other part owners of the brig under the insurance policy issued to them.<sup>616</sup> As an assignee of the company, Stephen Williams subsequently sued Hays to recover the amount paid under the policy, alleging anew that the wreck of the Sheldon was “caused by the negligence, misconduct, and improper navigation of the defendant as master.”<sup>617</sup> Although Hays attempted to argue that the judgment in his previous suit against the insurance company operated as an estoppel, the New York Supreme Court ruled that the plaintiff stood in the shoes of the other part owners of the vessel, who were not precluded from maintaining an action against the captain.<sup>618</sup>

Accordingly, the case proceeded to trial in June 1892, and the issue narrowed once again to the question of what had led Hays to behave as he did on the deck of the Sheldon. As the trial judge charged:

[I]f you believe that the defendant’s conduct was caused by his own voluntary intoxication, of course he must suffer. If he, notwithstanding his fatigue, exhaustion, and exposure, sought relief in liquor and became intoxicated, there must be a verdict against him. If, on the other hand, you believe that he did not drink, and that his

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613. *Id.*

614. *Id.* at 3–4.

615. *Id.*, *aff’d*, 28 N.E. 254 (N.Y. 1891).

616. *Williams v. Hays*, 38 N.E. 449, 450 (N.Y. 1894). The court held that Hays, who was charged with “absolute control and management of the vessel . . . became her owner pro hac vice,” and further deemed Hays a “charterer or lessee of the vessel” (rather than an agent or servant of the other owners), “responsible to the other owners for due care in her management.” *Id.* at 449.

617. *Williams v. Hays*, 19 N.Y.S. 61, 61 (Gen. Term 1892), *rev’d*, 38 N.E. 449 (N.Y. 1894).

618. *Id.* at 61–62.

failure to act or to speak rationally was a result of an affliction which came upon him and of causes over which he had no control; in other words, if he lost his reason by a combination of exhaustion, exposure to bad weather and the effects of a drug taken while so exhausted, then I leave it to you to say whether, under those circumstances, he should be charged herewith [sic] negligence, carelessness, misconduct and improper navigation. . . . If, however, he was not guilty of negligence, in that he was not in his right mind, his condition being caused by no voluntary intoxication, but being the result of circumstances which were providential, and over which he had no control, and if his apparent condition was such that the mate was not guilty of negligence in refraining from depriving him of command and taking charge of the vessel, then the verdict should be for the defendant.<sup>619</sup>

The plaintiff excepted to this on two main grounds. First, he insisted that, as a matter of civil (as distinguished from criminal) law, "the sickness or insanity of the defendant is no excuse and does not free him from liability."<sup>620</sup> And second, he contended that "the circumstances proved here, under which the vessel went ashore, constituted negligence."<sup>621</sup> In response to these claims, the judge replied, "I do not say anything about an excuse. I think that the condition of the man's mind, caused by the act of God, and not by any voluntary act of his own, might be such that he could not be guilty of negligence, because he had not the capacity to act."<sup>622</sup> With the plaintiff's exception thus overruled, the jurors were left to deliberate, and their finding in favor of the defendant was affirmed by the general term, only to be reversed by the court of appeals,<sup>623</sup> in an opinion justly described as "enigmatical."<sup>624</sup>

Writing for the court's majority,<sup>625</sup> Judge Earl seemed at first to take the plaintiff's view of the law, declaring the "general rule" that "an insane person is just as responsible for his torts as a sane person"—excluding, of course, torts where intention was a "necessary ingredient."<sup>626</sup> Such cases

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619. Hornblower, *supra* note 605, at 286–87 (quoting Justice Barrett's charge to the jury in *Williams*, 19 N.Y.S. 61).

620. *Id.* at 287.

621. *Id.*

622. *Id.*

623. *Id.* at 287–88.

624. *Id.* at 288; see *Williams*, 19 N.Y.S. 61, *rev'd*, 38 N.E. 449 (N.Y. 1894), *rev'd*, 52 N.E. 589 (N.Y. 1899).

625. There were three dissenting judges: Peckham, Gray, and O'Brien. *Williams v. Hays*, 38 N.E. 449, 553 (N.Y. 1894), *rev'd*, 52 N.E. 589 (N.Y. 1899).

626. *Id.* at 450.

aside, the law of civil wrongs chiefly “looks to the person damaged by another, and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage.”<sup>627</sup> Drawing extensively on cases and commentaries—including those by Cooley as well as Shearman and Redfield—Judge Earl identified several distinct rationales for this rule of liability. Most often, he found, it was expressed as a corollary of the more general principle that “where one of two innocent persons must bear a loss, he must bear it whose act caused it . . . as he bears his other misfortunes”—a principle applied to infants as well as lunatics.<sup>628</sup> But considerations of public policy were also cited in support of the rule: it provided relatives of the lunatic (particularly those with ample estates) with “inducement to restrain him” and prevented tortfeasors from simulating insanity in order to escape liability.<sup>629</sup> Mindful of these authorities, Judge Earl ruled that if Captain Hays caused the vessel’s destruction “by what, in some persons, would be called willful or negligent conduct, the law holds him responsible.”<sup>630</sup> In other words, the captain was bound to act with as much care as the “standard man”—an “abstract or ideal man, of ordinary mental and physical capacity and ordinary prudence,” rather than with “such care as a lunatic, a blind man, a sick man, or a man otherwise physically or mentally imperfect or impotent, could give.”<sup>631</sup>

All of this, however, was significantly complicated by a further observation, seemingly offered by the judge as an aside:

If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing; and, if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault.<sup>632</sup>

With respect to this particular case, however, Judge Earl refused to express any opinion, although he did suggest that evidence of this sort would have only shifted the grounds of the captain’s liability to his

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627. *Id.*

628. *Id.*

629. *Id.*

630. *Id.* at 452.

631. *Id.* at 453.

632. *Id.* at 452.

servants' carelessness, as he found it "difficult to perceive how they could have failed to see that he was either incompetent to manage the vessel, or that he was willfully wrecking her."<sup>633</sup> And so he closed out his opinion by reasserting its key holding—that the fact that the captain was "insane and incapable of care" would not excuse him from his "negligent torts" any more than it would from those that were "active."<sup>634</sup> For Judge Earl asserted that Hays's liability would have been assured had he set the ship afire, "although his act was unconscious, and accompanied by no free will," and he could see no reason for ruling any differently where the captain had instead "negligently fired the vessel, and thus destroyed her, being incapable, from his mental infirmity, from exercising any care."<sup>635</sup> Because the jury had not been clearly instructed on these points, the judgment was reversed and a new trial was granted.<sup>636</sup>

Left with the unenviable task of retrying the case on remand, the trial judge directed a verdict in favor of the plaintiff after entry of largely the same evidence, without allowing the jury to pass on whether Hays's insanity had been solely caused by the storm, or if his servants exercised due judgment in regard to the condition of their master.<sup>637</sup> Given what Judge Earl had said about the "liability of a lunatic for his torts,"<sup>638</sup> the trial judge could not see the materiality of what *caused* his mental condition.

The defendant in doing what he did to protect the ship during the storm, was performing no more than his duty and was incurring demands upon his physical endurance to which mariners are at times exposed in plying their vocation. Further, the negligence alleged did not occur until after the storm was over. How, then, can the fact that the defendant became insane by reason of the stress of these duties make him an exception to a rule which declares mental unsoundness to be no excuse for negligence, although it may have come through no personal fault of the individual so afflicted? If the cause of the insanity is to be an element in determining the question of responsibility, then the fact of negligence depends not only upon the act but also upon the cause of and the responsibility of the lunatic for his mental condition. But this, I believe, will hardly be asserted. The distinction suggested, it seems to me, is,

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633. *Id.*

634. *Id.* at 453.

635. *Id.*

636. *Id.* at 450, 453.

637. See *Williams v. Hays*, 52 N.E. 589, 590 (N.Y. 1899); Hornblower, *supra* note 605, at 290.

638. *Hays*, 38 N.E. at 450.

therefore, merely fanciful, not real. It will not stand the test of reason. The suggestion was doubtless the outcome of a feeling of repugnance to a principle of law still felt to be against natural justice. But if the law is to stand as it has been declared, it must be accepted with all its logical consequences.<sup>639</sup>

This very ruling was pronounced unreasonable by a nearly unanimous appellate panel, which found that it established “a doctrine abhorrent [sic] to all principles of equity and justice.”<sup>640</sup> Writing for the court, Judge Haight suggested that Captain Hays had actually outperformed the “jural man of ordinary prudence”<sup>641</sup> while at the helm of the *Sheldon*:

For three days and nights he had been upon duty almost continuously . . . . The man is not yet born in whom there is not a limit to his physical and mental endurance, and, when that limit has been passed, he must yield to laws over which man has no control. . . . What careful and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion? To do more was impossible. And yet we are told that he must, or be responsible. Among the familiar legal maxims are the following: The law intends what is agreeable to reason; it does not suffer an absurdity. Impossibility is an excuse in law, and there is no obligation to perform impossible things.<sup>642</sup>

Perhaps feeling similarly about his prospects in a third trial, the plaintiff chose at this point to withdraw the case, leaving members of the profession only to wonder at the unsettled state of the law of negligence, lamenting the fact that “our jurisprudence, considered as a science . . . in this Twentieth-Century”<sup>643</sup> had nothing more definitive to say about the mental and physical constitution of the “standard man.”<sup>644</sup>

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639. *Williams*, 52 N.E. at 591.

640. *Id.* Judge Bartlett, the lone dissenter, sided with the trial judge in finding that the law of the case dictated a verdict for the plaintiff, because the undisputed facts showed that the defendant's insanity was not solely caused by his exertions in service to the *Sheldon* and that in any event he was liable for his crew's carelessness in allowing the vessel to drift to destruction “in the middle of a pleasant afternoon, with two steam tugs lying by, and offering a tow . . . .” *Id.* at 592 (Bartlett, J., dissenting).

641. *Hays*, 38 N.E. at 453.

642. *Williams*, 52 N.E. at 591–92.

643. Hornblower, *supra* note 605, at 278.

644. *Hays*, 38 N.E. at 453. For other legal commentators making note of the lack of settled authority on this issue, both before and after *Williams v. Hays* was handed down, see, for example, FRANK A. ERWIN, CASES ON TORTS 68 n.1 (N.Y., Banks Law Publ'g Co. 1900); Francis H. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9, 26 (1924–25); *Legal Notes*, 64 ALB. L.J. 96, 99 (1902); Editorial, *Negligence; Insanity as Defense for Tort*; *Williams v. Hays*, (N.Y.), 52 N.E. 589 (1899), 47 AM. L. REG. 649, 650 (1899); *Recent Cases*, 10 HARV. L. REV. 58, 65 (1896).

The judicial irresolution manifest in *Williams v. Hays* was mirrored in the legal literature of the period, indicating significant fault lines in the fin-de-siècle model of the responsible agent. This case fueled jurisprudential debates as to the relevance of actual mental ability in adjudication of competence and responsibility. And yet while there were those who continued to argue that the insane should be treated like sane adults, at least for purposes of establishing negligence liability,<sup>645</sup> this was fast becoming the minority view among Anglo-American jurists.<sup>646</sup> Those who wrote on this subject at the turn of the twentieth century tended to find greater complexity and ambiguity in traditional common law authorities like *Weaver v. Ward* than had previous generations of commentators, and most were unwilling to accept the rule of decision as between two “innocents” upon which judges relied in imposing tort liability upon lunatics.<sup>647</sup> Although they were prepared to concede that the “standards by which the law measures a man’s conduct” were “necessarily external” and that courts could not attend to “minute differences in character,” still they maintained that “blameworthiness” was the fundamental principle upon which tort law was premised—that even liability for negligence ultimately hinged upon the possession of sufficient mental capacity “for

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645. See, e.g., 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 171 (3d ed. 1906); 1 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 192 n.2 (N.Y., Baker, Voorhis & Co. 5th ed. 1898). They simply added *Williams v. Hays* to the list of august authorities supporting their view, citing only the first appellate opinion handed down by Judge Earl. Cf. 1 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 314 n.66 (N.Y., Robert G. Street ed., Baker, Voorhis & Co. 6th ed. 1913) (edition published after the death of the authors, citing to authorities critical of the *Hays* decision, and its underlying rationale).

646. See, e.g., MELVILLE MADISON BIGELOW, THE LAW OF TORTS 110 (8th ed. 1907) (“Logic has little to say in the face of the wreckage of past and spent forces; logical or not, they stand until courts or legislatures sweep them aside; and they may be put out of the question by some dominant force in society, returning to former ideas. Liability however has been put upon the ground that of two innocent persons he whose conduct occasioned the loss should be responsible; a doubtful application of a doctrine at best difficult to apply and honeycombed with exceptions.” (footnotes omitted)); see also 2 EDWIN A. JAGGARD, HAND-BOOK OF THE LAW OF TORTS 871–72 (St. Paul, West Publ’g Co. 1895); A. WOOD RENTON, THE LAW OF AND PRACTICE IN LUNACY 64–65 (Edinburgh, Wm. Green & Sons 1896); JOHN WILLIAM SALMOND, THE LAW OF TORTS 70 (1916); Ames, *supra* note 555, at 97–100; H. Dean Bamford, *Unsoundness of Mind in Relation to Torts*, 4 COMMW. L. REV. 2 (1906); Bohlen, *supra* note 644, at 864; W.G.H. Cook, *Mental Deficiency in Relation to Tort*, 21 COLUM. L. REV. 333 (1921); Hornblower, *supra* note 605. These writers summoned an array of authorities in support of their position, including Bracton, Hale, Blackstone, Bentham, Austin, Pollock, and Salmond, in addition to such landmark cases as *Weaver v. Ward*.

647. See, e.g., Bohlen, *supra* note 555, at 13–19, 23–29, 34–36 n.38; Cook, *supra* note 646, at 333–41, 343–44 (1921).

acting as a prudent man."<sup>648</sup> If Hay was, in fact, wanting in this respect, they contended he was not rightly regarded as the juridical cause of the shipwreck—it was to be treated as an inevitable accident, tantamount to an act of God.<sup>649</sup>

That the Sheldon's fate could generate such divisions of thought among eminent law writers and learned judges illustrates that the road to objectivism was paved with considerable ambivalence about the place of intention—and human ability more broadly—in the structure of liability. This was perhaps to be expected, given that the great expositor of *The Common Law*<sup>650</sup> could be cited on both sides of the issue.<sup>651</sup> For the same man who approvingly chronicled the evolution of the law from subjective forms of liability grounded in vengeance toward objective, external rules of conduct would make a rather striking concession just over a decade later, in an essay coincidentally penned the same year as the Earl opinion.<sup>652</sup> "In a proper sense," Holmes observed in *Privilege, Malice, and Intent*,<sup>653</sup> "the state of a man's consciousness always is material to his liability . . ."<sup>654</sup> Although one might read this as evidence of an "earlier" and a "later" Holmes,<sup>655</sup> *The Common Law* is actually riddled with statements of a similar sort; indeed, the Holmes of 1881 hazarded that "the condition of a man's heart or conscience" was arguably more salient in the civil than the criminal context, crucially shaping judgments about where the losses should lie.<sup>656</sup> More often, to be sure, *The Common Law* spoke in terms of what would be

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648. Cook, *supra* note 646, at 339 (glossing Holmes); see also Bamford, *supra* note 646, at 10 (reiterating argument of Cook without attribution).

649. Cook, *supra* note 646, at 344–50.

650. HOLMES, *supra* note 3.

651. Intriguingly, the critics of Judge Earl's opinion in *Williams v. Hays* were especially inclined to invoke Holmes in the course of their arguments. See, e.g., Bamford, *supra* note 646, at 11; Cook, *supra* note 646, at 350; Note, 43 CENT. L.J. 109 (1896); *Recent Cases*, *supra* note 644, at 182.

652. Holmes, *supra* note 2.

653. *Id.*

654. *Id.* at 5.

655. Morton Horwitz describes Holmes's 1894 article as an "about-face" motivated by a loss of faith in the coherence of custom, which led the jurist back to subjective standards "in order to preserve the integrity of common law adjudication." HORWITZ, TRANSFORMATION II, *supra* note 25, at 133, 139. While I think Horwitz overstates the extent to which Holmes's views on this matter shift over time, he does point to an interesting tension that pervaded nineteenth-century legal thought as well the work of this jurist. See *id.* at 109; cf. George P. Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 430 (1971) (noting the tension between Holmes's seeming support of the objective rule followed by his immediate acknowledgment of its exceptions, thereby displaying his "appreciation for the individualization of negligence").

656. HOLMES, *supra* note 3, at 50.

blameworthy in the "average man,"<sup>657</sup> averring that the "law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men"; each individual was required to have the qualities of "ordinary intelligence and prudence . . . at his peril."<sup>658</sup> Yet this putatively external standard was not of universal application; *The Common Law* made allowances for blindness and forms of mental weakness "so marked as to fall into well-known exceptions, such as infancy or madness,"<sup>659</sup> going even further in the case of "one . . . seized with a fit," whose "unconscious spasm"<sup>660</sup> was likened to a bolt of lightning, so that any resulting harm was "but the misfortune of the sufferer."<sup>661</sup> These various exceptions constituted qualifications of the general rule that "every man is presumed to possess ordinary capacity to avoid harm to his neighbors,"<sup>662</sup> effectively indicating that the presumption was not conclusive, and implicitly demarcating a basic legal threshold of capacity. Liability was thus conditioned upon possession of sufficient intelligence and will to provide an "opportunity of choice."<sup>663</sup> In sum, the teaching of *The Common Law* on this score seemed to be that the "internal character of a given act"<sup>664</sup> was immaterial, unless it was not.

What there was to keep these "well-known exceptions"<sup>665</sup> from swallowing the general rule of liability could not be easily divined from the jurisprudential writings of Holmes and his contemporaries. Indeed, the blind man, infant, lunatic, and epileptic continued to lurk on the margins of legal personhood (along with other stock figures like the idiot, drunkard, married woman, seaman, and spendthrift), standing ready as sources of

657. *Id.* at 51.

658. *Id.* at 108.

659. *Id.* at 50.

660. *Id.* at 95.

661. *Id.* (quoting *Harvey v. Dunlop*, Hill & Den. 193 (N.Y. Sup. Ct. 1843)).

662. *Id.* at 109.

663. *Id.* at 94, 155.

664. *Id.* at 108. For other examples of jurisprudential efforts to reconcile the subjective and objective, see Leon Duguit, *Objective Law*, 20 COLUM. L. REV. 817 (1920); Henry W. Edgerton, *Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849 (1926); Albert Kocourek, *Subjective and Objective Elements in Law*, 21 ILL. L. REV. 689 (1927); Albert Levitt, *Cause, Legal Cause, and Proximate Cause*, 21 MICH. L. REV. 34 (1922); Charles Morse, *The Psychology of Negligence*, 41 CAN. L.J. 233 (1905); Warren A. Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1 (1927); Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40 (1915). It is also worth noting that the *First Restatement of Torts* in 1934 contained the following caveat: "The Institute expresses no opinion as to whether insane persons are required to conform to the standard of behaviour which society demands of sane persons for the protection of the interests of others." RESTATEMENT OF TORTS § 283 (1934). This caveat was deleted in the 1947 version. RESTATEMENT OF TORTS § 283 (Proposed Final Draft No. 7, 1947).

665. HOLMES, *supra* note 3, at 50.



analogy and potential bases of legal exemption or disqualification, as the case might be.<sup>666</sup> Among these categories of persons, the one that proved most difficult for these late nineteenth-century jurists to delimit was that of persons “of unsound mind.” As this Article has shown, the outlines of this category only grew more indeterminate over the course of the nineteenth century—an ironic byproduct of the rise of the human sciences, and the new medical psychology in particular. Those seeking clarity (or simply taking advantage of the lack thereof) helped to generate troubling levels of capacity litigation, not only in the familiar context of criminal prosecutions, but in a wide array of civil actions as well. Positive judicial pronouncements that a man was free to “do what he will with his own”<sup>667</sup> paradoxically authorized seemingly endless streams of disappointed heirs to challenge conveyances and last testaments on grounds of mental incapacity and undue influence. Moreover, as American jurisdictions threw off the “ancient” English rule that “no man shall be allowed to stultify himself, or plead his own disability,”<sup>668</sup> multitudes were heard to do just that, pleading their incompetence so as to avoid all sorts of legal arrangements, ranging from matters of commerce to matrimony. And both before and after *Williams v. Hays*, it was open to any tort litigant to plead insanity in order to escape liability for punitive damages, intentional torts, and contributory negligence. With cases like these clogging court dockets, there was surely good reason to wonder whether the law’s twin presumptions of sanity and freedom were actually warranted. However, American judges and jurists did not allow these doubts to overwhelm them in the waning decades of the nineteenth century, nor did they simply take the objective way out, conclusively presuming everyone was as competent as the reasonable man. Instead, they continued to call upon the default legal person to resolve questions of mental competence arising in the private law context, endeavoring as they did to take the state of a man’s consciousness into account so far as was practically possible.

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666. In this regard, it is worth noting the flurry of late nineteenth-century treatises devoted to the subject of “the law of persons.” See, e.g., THEODORE W. DWIGHT, COMMENTARIES ON THE LAW OF PERSONS AND PERSONAL PROPERTY: BEING AN INTRODUCTION TO THE STUDY OF CONTACTS (Boston, Little, Brown & Co. 1894); JEREMIAH SMITH, CASES ON SELECTED TOPICS IN THE LAW OF PERSONS (Cambridge, Harvard Law Review Publ’g Ass’n 1899); WALTER C. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS (St. Paul, West Publ’g Co. 1896); EDWIN H. WOODRUFF, A SELECTION OF CASES ON DOMESTIC RELATIONS AND THE LAW OF PERSONS (N.Y., Baker, Voorhis & Co. 1897).

667. Boardman v. Woodman, 47 N.H. 120, 139 (1865).

668. See *supra* note 406 and accompanying text.

## CONCLUSION

“For the greater part of a century American courts strove valiantly but vainly to put the whole law in terms of the will.”

—Roscoe Pound<sup>669</sup>

In chronicling the role of the will in nineteenth-century American law, Roscoe Pound ultimately obscured as much as he revealed about the aspirations and proclivities of common law judges in this era. Contrary to Pound's characterization, this Article has shown that members of the bench were far more pragmatic in their thinking about moral agency and legal responsibility. To be sure, they began with an idealistic model of the accountable agent—what I have termed the default legal person. And they proceeded to premise civil liability on the capacity for rational and moral action, effectively inviting litigation about the competency of those who deviated from this norm. Yet in the cases that came before them, judges were forced to engage in practical reasoning about the concrete meaning of sanity and freedom in a variety of legal contexts. The law reports collecting their decisions provide illustrations of their struggles to square their Enlightenment conceptions of responsible agency with the facts of human nature revealed in everyday adjudication. It was in this courtroom environment that the judges' ideals were daily put to the test, and over time they would revise their expectations of individual ability.

By the end of the century, the default legal person that American judges deployed in civil contests was a somewhat denatured version of its former self. Still, it must be stressed that these judges never returned to the traditional common law standard of a “glimmering of reason,” nor did they embrace a wholly objectified model of a “reasonable man.” Instead, they persisted in defining legal competence in terms of the “capacity to reason,” even as they emphasized ever more strenuously that the irrationality of the act in question—be it a will, contract, deed, or tort—would almost never constitute sufficient proof, in and of itself, of the irresponsibility of the actor. In thus remaining more or less open to pleas of civil incapacity, American judges confirmed that the legal system did not oblige its subjects to do impossible things, and committed themselves to maintaining a certain correspondence between consciousness and culpability.

As the figure of the default legal person is brought more sharply into focus, it becomes clear that nineteenth-century American judges were not

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669. Pound, *supra* note 24, at 7.

simply or solely concerned with maximizing individual liberty or stimulating economic development as they managed the civil side of their dockets. The capacity suits that came to form a regular part of the courts' work proved to be quite taxing affairs, sometimes dragging on for months and years at a time, and invariably raising an array of unsettling issues—ones that not only threatened the security of marketplace transactions, but also challenged basic assumptions about domestic relations and the very constitution of the self. Although it was formally only the mind that was placed “in issue” by civil claimants, the ensuing proceedings almost unavoidably presented courts with broader questions of generational equity, social welfare, and human psychology, all the while providing judges with ample grounds for reconsidering how far medical science could be made a part of common law without undermining the traditional basis of legal responsibility.

The final judgments rendered in nineteenth-century capacity contests left many of these issues unresolved. Indeed, as we have seen, judges in this period were primarily concerned with specifying how much “mind” one needed to possess in order to be held accountable for a given civil act or wrong, recognizing as they did that internal states of consciousness could be only imperfectly gauged by means of external behavioral signs. In and through their rulings, they developed ways of modeling competence that would retain a certain appeal within American legal culture, even as a new century brought new insights from such fields as psychoanalysis, behavioral psychology, and neuroscience. Despite these advances, there remains a gray area between the uncontested competence of the reasonable man and the clear incompetence of the individual falling below the threshold set by the default legal person. Those who populate this murky middle ground continue to beguile and bedevil judges and jurists alike, as its inhabitants invite and yet resist objective measure. This is perhaps only to be expected within a legal system that treats mental weakness with such ambivalence, its officers seemingly unable to make up their minds whether the fool ought to be pitied or penalized for his improvidence.

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