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Roy L. Stone

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Logical Translations in the Law

Judges, lawyers and witnesses must communicate among themselves and to the jury in language meaningful and understandable to experts in various disciplines and to the laymen of the jury. When questions of causality, responsibility, intention and, more particularly, the question of insanity arise in the courtroom, the participants in the trial often become confused by the several meanings ascribed to various concepts by lawyers, expert medical or psychiatric witnesses, and laymen. The confusion raised by the lack of communication among the various disciplines compounds the uncertainty in the jurymen's minds as to the weight and significance of evidence introduced from the divergent viewpoints of the lawyers, other experts, and the accused himself. The author of this article uses the recent English case of Regina v. Terry as a reference point for a discussion of the problems of translation into the ordinary language of the jury of the concepts and criteria used when members of the specialized disciplines offer evidence. The author offers procedures for such translations and an alternative method of putting and countering real and hypothetical cases by lawyers and other experts to the jury in situations in which sufficient common understanding is unavailable to make the proper translations. He also specifically supports a test through which a jury can, on the evidence presented to it from various sources and properly translated, make a determination of the responsibility of the accused with the capacities laymen possess.

Roy L. Stone*

Both philosophy and jurisprudence in recent years have developed corresponding tendencies in attempting to deal with the problem of causality. In philosophy, broad questions derived from the problems of atomic physics have arisen from the uncertainty principle expounded by Heisenberg in 1927. They have been analysed by Dr. Waismann in the following manner:¹ The

*Cambridge, England, Barrister-at-Law.

1. Waismann, *The Decline and Fall of Causality*, in *TURNING POINTS IN PHYSICS* 84 (1959).

uncertainty principle, which asserts that the concept of causality is logically indeterminate, leads us to doubt that our world is one in which there is no moral free will. On the other hand, the Freudian analysis of the mind into conscious and unconscious motives, desires, and the like has suggested that our world is deterministic and has led some to the conclusion that man is not responsible for, because he cannot control, his actions and that the workings of the unconscious, though modified in some ways by repression and sublimation, are essentially random.

In the jurisprudential sphere, this problem is reflected more narrowly in legal discussions of causation, as in remoteness of damage in liability for tort, and in questions concerning intention, recklessness, negligence, and insanity in responsibility for crimes. The old legal rules and practice relating to the obtaining of a knowledge of the accused's mind from his behavior have been subjected to criticisms based upon new findings. We see this reflected in Dr. Glanville Williams' comment:

[R]egard must be had to the make-up and circumstances of the particular offender, one would seem on a determinist view of conduct to be pushed to the conclusion that there is no standard of conduct at all. For if every characteristic of the individual is taken into account, including his heredity, the conclusion is that he could not help doing as he did.²

Professor Hart offers this rejoinder: "But 'determinism' presents no special difficulty here. The question is whether the individual had the capacity (inherited or not) to act otherwise than he did"³

Edmund, in a soliloquy in Shakespeare's *King Lear*, presents the arguments of jurisprudence:

This is the excellent foppery of the world, that, when we are sick in fortune, — often the surfeit of our own behaviour, — we make guilty of our disasters the sun, the moon, and the stars; as if we were villains by necessity, fools by heavenly compulsion, knaves, thieves, and treachers by spherical predominance, drunkards, liars, and adulterers by an enforced obedience of planetary influence; and all that we are evil in, by a divine thrusting on: an admirable evasion of whoremaster man, to lay his goatish disposition to the charge of a star! My father compounded with my mother under the dragon's tail, and my nativity was under *ursa major*; so that it follows I am rough and lecherous. 'Sfoot! I should have been that I am had the maidenliest star in the firmament twinkled on my bastardizing.⁴

2. WILLIAMS, *CRIMINAL LAW* § 28, at 82 (1st ed. 1953).

3. Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in *OXFORD ESSAYS IN JURISPRUDENCE* 29, 48 (Guest ed. 1961).

4. SHAKESPEARE, *King Lear*, in *THE COMPLETE WORKS*, Act 1, scene 2 (Oxford ed. 1943).

In the recent English case of *Regina v. Terry*,⁵ the diversity between the legal and psychiatric concepts of insanity brings out certain questions concerning both these philosophical and jurisprudential problems and affords us the excuse and the opportunity to consider the following matters. We will start by examining the psychiatric evidence in the *Terry* case and lead on to a discussion of the translatability of psychiatric and legal concepts into the ordinary language of the jurymen. We shall then consider some of the conceptual problems involved in deriving certain psychological and legal concepts which might have to be explained to the jury. Finally, after giving some account of the difficulties involved in deriving these concepts, we shall recommend a procedure for disposing of these problems in the directions and addresses to the jury.

I. THE NEED FOR TRANSLATION: THE PROBLEM AS PRESENTED BY THE *TERRY* CASE

Dr. S. A. Paterson was cross-examined by Mr. Lawrence:⁶

Q. Before I deal with this matter in any detail I want to know quite clearly what position you take up with regard to this man's state of mind at the time when this act was committed. In your view was he insane?

A. May I read out what he said about it my Lord?

Mr. Justice Stable: No, but you may answer the question.

A. My opinion, my Lord, is that he was suffering from schizophrenia.

Q. Will you please answer the question?

A. What attitude am I taking up about his state of mind?

Mr. Justice Stable: Repeat it, Mr. Lawrence.

Mr. Lawrence: I understand that you have been called here to give evidence about this man's state of mind at the time when this act was committed.

A. Yes.

Q. I am right about that, am I not?

A. Yes.

Q. I am simply asking you this: I want to know, upon that matter, quite clearly what position you are taking in your evidence?

A. I am saying that it is diminished responsibility.

Q. "Diminished responsibility" we will examine in a moment. Are you saying that this man at that time was insane?

A. Yes.

Q. He was insane?

A. Yes, in the medical sense.

Q. Are you saying that at the time of committing this act or acts he

5. [1961] 2 Q.B. 314 (C.C.A.).

6. The author frequently refers to material contained in the Trial Transcript, *Regina v. Terry*, *supra* note 5 [hereinafter cited as *Terry* Transcript]. The trial transcript is unavailable; a copy is in the office of the Director of Public Prosecutions, London, England.

knew or did not know the nature and quality of what he was doing?

A. Yes, he knew what he was doing.

Q. Did he know that he was doing wrong?

A. Yes.

Q. Then, at any rate, it is quite clear from that he is not insane from the legal point of view.

A. That is true, yes.

The *Terry* case, especially in this extract of cross-examination, raises more clearly than any other case a problem that confronts both judges and counsel as well as academic lawyers. It is a problem found in the wider philosophical context of intention generally; in the narrower legal context, as in the *Terry* case, it relates especially to the plea of insanity. The problem, one of logical translation, is outlined in the terms of general philosophy by Sir Isaiah Berlin as follows:

The most persistent symptom of the fallacy I have in mind is the desire to translate many *prima facie* different types of proposition into a single type. This process is so ingrained a practice on the part of philosophers and in particular logicians, that we hardly stop to ask what the motive for this operation is.⁷

In the law relating to insanity, it is not always made clear that the words "insane" and "sane," "the nature and quality of his act," "knows what he is doing," and "wrong" are used in three different senses: (1) by lawyers in accordance with the M'Naghten rules as judicially interpreted; (2) by psychiatrists giving expert evidence (in the old days in terms of *dementia praecox*, but nowadays in those Greek-rooted expressions of art deliberately peculiar to the discipline of psychology); and (3) by the jurymen in everyday language.⁸ An example is given by Dr. Glanville Williams: "Occasionally there may be a true case of insane automatism in which the jury, misunderstanding the nature of insanity (in consequence, perhaps, of medical evidence of insanity having been withheld from them), fail to find insanity and give an ordinary acquittal."⁹ And Russell has this to say: "The guilt of the accused must be established affirmatively to the satisfaction of the jury; and the case must be put by reasoning which the jury can understand and for this . . . [a] contrast must be clearly made out."¹⁰ The contrast of which Russell speaks is between *actus reus* and *mens rea* as contained in the maxim *actus non facit reum nisi*

7. Berlin, *Logical Translation* in 50 ARISTOTELIAN SOCIETY, PROCEEDINGS 158 (1949-1950).

8. *Ibid.*

9. WILLIAMS, CRIMINAL LAW § 95, at 318 (1st ed. 1953).

10. 1 RUSSELL, CRIME 25 (12th ed. Turner 1964).

mens sit rea,¹¹ which should be a rubric for all engaged in criminal proceedings — judge, jury, counsel, and witness alike. The reduction of legal argument and expert evidence into reasoning which the jury can understand is, therefore, a most important object. This article is a plea for such a reduction by means of logical translation.

The word “wrong” is perhaps the best example to use because it has both a legal and a moral connotation, and is used in the M’Naghten rules. In *Regina v. Windle*,¹² the word “wrong” as used in those rules was interpreted to mean legal and not moral wrong. Nowhere in the *Terry* case, however, were the criteria made clear by which the jury was to judge whether Terry knew that what he was doing was wrong. Common sense might not have suggested any need to discuss the language of morals or of the law relating to the particular crime to convince the jury that such an act was wrong,¹³ but in view of the psychiatric evidence presented and the nature and thoroughness of the cross-examination of the psychiatrists (to which I shall refer in detail), it is odd that such an important point should have been left undiscussed. What Berlin calls a fallacy is, I submit, merely a habit of mind which consists in thinking there is a model usage which governs any word of ordinary speech which has not been rigidly defined as something different in a particular discipline. When Dr. Johnson compiled his dictionary, he noticed that certain words had different signification in different disciplines, and, even more wisely, he appreciated and explained in the preface to the dictionary the gravitational pulls which distorted the circularity of what has been called the hard core of the central meaning of ordinary words when those words are used in peculiar disciplines. Ordinary words which have no special association with any one discipline may develop peculiar nuances when used in a peculiar discipline.

The differences between a lawyer’s task and a psychiatrist’s were commented upon by Freud.¹⁴ His article has gone little-

11. “An act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intention be criminal.” BLACK, LAW DICTIONARY 55 (4th ed. 1951).

12. [1952] 2 Q.B. 826. In *Windle* the court said “by ‘wrong’ is meant contrary to law . . .” *Id.* at 832. In *R. v. Giffard*, *The Times* (London) Feb. 7, 1953, p. 3, col. 3 (Cornwall Assizes 1953), the court is reported as similarly defining the question as “whether at the time . . . he knew he was breaking the law.” See generally WILLIAMS, CRIMINAL LAW § 159 (2d ed. 1961).

13. Terry and others planned a bank robbery. While committing the robbery Terry killed a clerk. In the defense it was argued that Terry suffered from schizophrenia.

14. FREUD, *Psycho-analysis and the Ascertaining of Truth in Courts of Law*, in 2 COLLECTED PAPERS 13 (1959).

noticed by those who are concerned with expert evidence in the criminal courts in common-law countries. Although Freud was talking to Viennese law students and although the problems of Austrian jurisprudence may be too remote to be analogous to Anglo-American jurisprudence, the general nature of Freud's remarks seems applicable to England and America. He notes the following differences:

[1.] With the neurotic, the secret is hidden from his own consciousness; with the criminal it is hidden only from you. In the first we have a genuine ignorance (though not altogether complete), whilst in the latter this ignorance is merely simulated. Connected with this is another difference more important in practice. In psycho-analysis the patient consciously helps to overcome his resistance because he expects to gain something from the investigation—cure.

[2.] The criminal, on the contrary, does not co-operate with you; he would be working against his whole ego.

[3.] As a compensation for this, however, you are only endeavouring to arrive at a conviction objectively; whereas our therapy demands that the patient himself should also arrive at the same conviction subjectively. It remains to be seen, however, how far your difficulties are increased or altered by the lack of co-operation on the part of the subject . . .

[4.] You must first determine experimentally whether the conscious resistance betrays itself by exactly the same signs as the unconscious resistance does.

[5.] I would also lay stress on the consideration that your experiments may possibly be subject to a complication which naturally does not arise in psycho-analysis. You may be led astray in your examination by a neurotic who reacts as though he were guilty even though he is innocent—because a lurking sense of guilt already existing in him assimilates the accusation made against him on this particular occasion. You must not regard this possibility as an idle one . . .¹⁵

Psychiatrists as witnesses are sometimes at a loss to know how to answer questions, not because of any wilful obtuseness, but because of a genuine misunderstanding over the concepts involved in the question, thus giving the witness a shifty appearance which cannot make a good impression upon the jury. The problem is evident in the constant demand from the bench to the medical witnesses: "Are you the sort of psychiatrist who thinks that all criminals are psychopaths?" What we have said about psychiatric witnesses can be said of lawyers. The disparity between the doctor's analysis of a case and the lawyer's is most clear over the question of the accused's responsibility, merely because of the disparity of concept.

In the *Terry* case, the psychiatrist described his diagnosis of schizophrenia (and, presumably, of medical insanity) as getting

15. *Id.* at 21-23.

a picture, "the whole picture." The process is articulated in the following piece of cross-examination (Dr. J. D. W. Pearce cross-examined):

- Q. Would you agree with this, that schizophrenia is not so much diagnosed on one symptom, as on an aggregate of symptoms?
 A. It is diagnosed on the total state, not just on the aggregated symptoms, but on the whole complex pattern of symptoms. Not just four symptoms, but the whole picture and nothing but the whole picture.¹⁶

Part of the defense was devoted to building up a picture of schizophrenia, but nowhere was there any reference, save perhaps in passing, to the vital question whether a schizophrenic's knowledge of the nature and quality of his acts, *i.e.*, whether he knows that what he is doing is wrong in the same manner as would an ordinary man in the jury box or as would a lawyer. In short, the question whether the psychological concepts of "knowledge of the nature and quality of an act" and "wrong" are equivalent to those of the M'Naghten rules or of ordinary speech was never touched upon.

The language of the judges in *R. v. M'Naghten*¹⁷ and other cases is not the only source of confusion in a discussion of insanity. The uses of the word "insanity" in ordinary speech, in the language of medical men, and in the language of the law, though they look alike, are completely different and can be slurred by critics seemingly well aware of this analysis. Dr. Glanville Williams, in discussing the famous *R. v. Hadfield*¹⁸ case, surprisingly falls into this trap. He sets out *Hadfield* as follows:

Hadfield's delusion was that the world was coming to an end, and that he was commissioned by God to save mankind by the sacrifice of himself. As he did not wish to commit suicide, he decided to shoot at the King in order to be hanged. He was acquitted on the ground of insanity; but Stephen thought that under the strict *McNaughten* rule as it was afterwards formulated he would have been convicted.¹⁹

Dr. Williams then makes this comment: "If the object of the legal rule is to supply a test of extreme insanity, there could hardly be a clearer instance than the man who murders another in order to be hanged: yet such a person is apparently responsible on the strict *McNaughten* rule."²⁰ The phrase "the test of extreme insanity" is ambiguous. In the context, it does not seem to relate

16. *Terry* Transcript.

17. 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

18. 27 State Tr. 1282 (1800).

19. WILLIAMS, CRIMINAL LAW § 159, at 493-94 (2d ed. 1961).

20. *Id.* at 494.

to legal insanity because it is contrasted with the M'Naghten rules. The criterion for the use of insanity in the *Hadfield* case is left vague or, even worse, is not given. The phrase may mean insanity in common parlance, according to a dictionary definition, or it may mean insanity according to a medical definition. If one uses the common parlance definition of "insanity," it could be equally well argued that one who wished to commit suicide, but could not bring himself to do so, was pre-eminently rational and completely sane in entering upon a course of conduct quite deliberately and finely worked out, accurately set in a conceptual scheme, with a full appreciation of the consequences, and carried to its conclusion in a cool, consistent, and calculated manner. (The metaphor of the military deployment of forces used in the *Terry* case²¹ by Geoffrey Lawrence Q. C. is apt here — Hadfield was playing a curious and, perhaps, dangerous game of chess using the law for its rules and the officers of the law for its pieces.) If the test were a medical test, then a whole book of criteria could be supplied to determine from the facts, as presented by Dr. Glanville Williams, whether Hadfield suffered "extreme insanity."

The use of "delusion" in setting out the facts of the case is also problematic because the overall picture of Hadfield might be one of schizophrenia. In cases of schizophrenia, it is difficult to discover the precise differences between delusion, illusion, and hallucination, all features of schizophrenia. I am calling for critics to state their criteria and to define with precision the standard upon which they rely.

To return to the cross-examination in the *Terry* case:

Q. Do I understand you to say that he is in fact, or was when you examined him in January of this year, a man suffering from the mental disease known as schizophrenia?

A. Yes.

Q. It is a question of degree, but will you tell me to what degree that disease, in your view, had developed by that date?

A. I would say to a moderate degree.

Q. To a moderate degree, but not to the degree of legal insanity?

A. I am doubtful about that, my Lord, because I can only say that it is medical insanity.

Q. You are being asked about legal insanity. I suppose you know what the old legal definition of insanity was?

A. The M'Naghten rules would not have held in this case.

Q. You are not being asked that. Do you, or do you not, know what the legal definition of insanity was?

A. Yes.

Q. It is clear from what you have already said that the degree of

21. *Terry* Transcript.

schizophrenia from which he was suffering when you examined him had not gone so far as to make him insane within the legal definition?

A. Yes.

Q. He knew what he was doing, and he knew it was wrong?

A. Yes, except for what he was doing—I am doubtful about that, because he thought it was somebody else who was doing it.

Q. There is no doubt that it was Terry's hand which fired this gun?

A. Yes, it was.

Q. Did he, at that time, know the nature and quality of his act?

A. Yes.

Q. Did he know that he was firing a gun?

A. Yes.

Q. Did he know he had a gun with him?

A. Yes.

Q. Did he know he was robbing a bank?

A. Yes.

Q. And did he know, as the person who did those acts, that what he was doing was wrong?

A. Yes.

Q. I do not quite understand the distinction here. Here you had this man Terry day after day going through the most carefully planned actions—and I will not repeat them—but each and all of them the result of an act of will?

A. Yes.

Q. You are not suggesting that he is an automaton, walking about in his sleep?

A. No, but he had that feeling, that he is an automaton. He hears a man's voice talking to him, and he does what the voice tells him to do.

Q. You did not believe that, Dr. Paterson, did you?

A. Yes.

Q. You mean he hears the voice of Legs Diamond²² and he thinks: "Shall I buy a brown suede coat in this outfitter's shop?" and Mr. Diamond tells him? Do you believe that?

A. He does hear the voice speaking to him from time to time.

Q. But it is quite clear from the brief resume of this case I have put to you that it was an exploit which was carefully planned?

A. Yes.

Q. And very carefully and deliberately carried out?

A. Yes.

Q. Ability to plan and execute a serious criminal offence is not, in your view, an abnormality of mind which impairs a man's responsibilities for his actions?

A. Yes, I think it is.

Q. You think it is?

22. Terry alleged that, except for five minutes in a cinema at Portsmouth, he was possessed by the spirit of Legs Diamond from November 9, 1960, to November 13, 1960, the crime having been committed on November 10th. This alleged possession required Terry to obey the commands, however immoral, of the American gangster. [1961] 2 Q.B. at 320.

- A. No, it is not, I beg your pardon.
- Q. I must press you in a little detail, to illustrate what I mean. This is not the case of a man who, in a sudden deluded state of jealousy, rushes upon a woman and murders her?
- A. No.
- Q. The acts we are investigating here and which took place on the morning of the 10th November are only part of a long history which goes back for some days and carries on for some days afterwards?
- A. Yes.
- Q. Starting from that point, let me examine the abnormality of mind — these delusions or this dream world. In order to come within the terms of the Section of the new Act, that abnormality has to be such as, first of all, to impair his mental responsibility for his acts?
- A. Yes.
- Q. A man who does something which he knows is wrong is, if he is an ordinary person, responsible for what he does?
- A. Yes.
- Q. In other words, this man has got to be shown, to the satisfaction of the Jury in the way described by my learned friend, to have an impaired mental responsibility?
- A. Yes.
- Q. And not only an impaired mental responsibility, but the impairment has to be substantial — whatever that means?
- A. Yes.
- Q. So that he is not wholly responsible, but only partly responsible for what he did?
- A. Yes.²³

This bit of cross-examination proceeds upon the assumption that the witness and counsel were agreed about the concept of responsibility. Admittedly, the words appear in section 2(1) of the Homicide Act,²⁴ and presumably counsel is entitled to assume the witness is talking about a signification of the word "responsible" within the meaning of the act. Counsel certainly proceeds to deal with the witness as if the witness understood, and indeed uses the word "responsible" within the meaning of the act and applies this usage to the case of a schizophrenic. The cross-examination then proceeds upon the lines that the accused, as a schizophrenic, withdrew into a dream world, during which withdrawal he planned and plotted, as an act of will, an operation described as a military deployment of forces: "Q. Do you say that this man, as a schizophrenic, was living in a dream world? A. Yes."²⁵ From such a description, ordinary canons of what is responsibility are

23. *Terry* Transcript.

24. "[H]e shall not be convicted of murder if he was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility . . ." Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 2(1).

25. *Terry* Transcript.

invoked to determine the accused's criminality. At this point the witness would have done well to discuss the criteria which he had in mind when discussing responsibility and schizophrenia. Whether or not his criteria differed from those of the section or from those of ordinary speech should have been clarified.

The late Professor Austin stated:

Both counsel and judge make very free use of a large number of terms of excuse, using several as though they were, and even stating them to be, indifferent or equivalent when they are not, and presenting as alternatives those that are not.

It is constantly difficult to be sure *what* act it is that counsel or judge is suggesting might be qualified by what expression of excuse.²⁶

I have heard much, particularly on the part of those studying forensic medicine, about the abuse or misuse of words by the lawyer, and particularly in the case of M'Naghten rules, when insanity is discussed; but I have found that the translatability from one concept to the other has never been essayed and, even worse, never been noticed. The *Terry* case brings out remarkably well the necessity for such a translation. After a preliminary excursion into the legal and philosophical notions of responsibility, we shall proceed to discuss how the translation can be made, *if* it can be made. We shall suggest that each and every time a case

26. Austin, *A Plea for Excuses*, in 57 ARISTOTELIAN SOCIETY, PROCEEDINGS 1, 23 (1956-1957). Earlier Austin had said:

Finally, the third source-book is psychology, with which I include such studies as anthropology and animal behaviour. Here I speak with even more trepidation than about the Law. But this at least is clear, that some varieties of behaviour, some ways of acting or explanations of the doing of actions, are here noticed and classified which have not been observed or named by ordinary men and hallowed by ordinary language, though perhaps they often might have been so if they had been of more practical importance. There is real danger in contempt for the "jargon" of psychology, at least when it sets out to supplement, and at least sometimes when it sets out to supplant, the language of ordinary life.

With these sources, and with the aid of the imagination, it will go hard if we cannot arrive at the meanings of large numbers of expressions and at the understanding and classification of large numbers of "actions." Then we shall comprehend clearly much that, before, we only made use of *ad hoc*. Definition, I would add, explanatory definition, should stand high among our aims: it is not enough to show how clever we are by showing how obscure everything is. Clarity, too, I know, has been said to be not enough: But perhaps it will be time to go into that when we are within measurable distance of achieving clarity on some matter.

Id. at 14-15.

arises, these shall be our procedures: We shall ask psychiatrists what their criteria for the use of each term are, what models they use, and what the peculiar features of their explanations are; we shall ask the same of the law; and we shall then examine how a judge should sum up so that the jury can understand the pertinence of the evidence and the law to the particular case. These procedures will establish the facts in question in the particular case; they also will establish what the jury is to determine. "The selection can only be made by the jury by reference to the rule of law."²⁷

II. LEGAL, MEDICAL, AND PHILOSOPHICAL NOTIONS OF RESPONSIBILITY

Insanity being in a sense a particular aspect of the general law of intention,²⁸ obliquely and sometimes directly, raises the question of an agent's responsibility for his actions. The wisdom or practical virtuosity with which the common law has judged actions, investigated intentions, and considered and obtained a knowledge of other minds, is remarkable. Between the two maxims, "the devil himself cannot try the mind of man" and "the state of a man's mind is as much a fact as the state of a man's digestion," much of the philosophy of mind ranges — from what has been called Descartes' "The Ghost in the Machine" or "the mind is a little man within the machine" to Ryle's behaviorism.²⁹ The device contained in the maxim that a man intends the natural consequences of his act puts the agent upon trial with respect to his behavior and allows him to defend or excuse or exculpate in his own words, which, after all, are in a sense the best evidence of his own intentions. The insanity cases raise, however, the trichotomy of what others think of his behavior, the facts of the case, and what he might see as his behavior, a trichotomy well brought out by Hampshire:

The situation that confronts a man at any particular time is susceptible of an indefinite set of alternative descriptions. We may therefore think of the situation as the agent would himself identify and describe it as

27. WILLIAMS, *CRIMINAL LAW* § 156, at 480 (2d ed. 1961).

28. For a general discussion of intention see KENNY, *OUTLINES OF CRIMINAL LAW* (18th ed. Turner 1962); WILLIAMS, *CRIMINAL LAW* §§ 14-34 (2d ed. 1961); Hart, *supra* note 3; Hart, *Acts of Will and Responsibility*, in *THE JUBILEE LECTURES* 115 (Marshall ed. 1960); Turner, *The Mental Element in Crimes at Common Law*, in *THE MODERN APPROACH TO CRIMINAL LAW* 195 (Radzinowicz and Turner ed. 1945).

29. RYLE, *THE CONCEPT OF MIND* (1949). See Austin, *Other Minds*, in *LOGIC AND LANGUAGE* 123 (2d series, Flew ed. 1953).

being *the* situation that the agent confronts. But he may of course both misdescribe and misconceive the situation in various different ways. He may suppose that there are features of it that call for action by him, when in fact these features are imaginary and not present at all. The intention that accompanies his action will then incorporate this misapprehension or misdescription. There will then be a wide divergence between the role that he has allotted to himself in his own intentions and his actual performance, even though the performance is entirely voluntary and deliberate.³⁰

Consider the psychiatrist's understanding of what Terry thought he was doing when in a state of withdrawal and the purely behavioristic account put by Geoffrey Lawrence Q.C.:

Q. In that hypothesis, as a schizophrenic he would have been the type to dissociate himself from what was going on around him and to withdraw—is that right?

A. Yes.

Q. To withdraw into this dream world—is that so?

A. Yes.

Q. Are you saying that at the time these acts were committed he was so, in that way, withdrawn into his own dream world?

A. Yes, into a dream world which made him aggressive.

Q. The evidence is that this bank robbery was plotted approximately a week before it happened?

A. Yes.³¹

The cry of the critic that the judges in criminal cases are developing an objective test³² relating to the accused's state of mind might have been influenced by a series of cases in which psychiatric evidence has been put in such a way that it suggests that all behavior, in the eye of psychiatrists, is exculpable, or at least plausible, in view of the strong determinism which pervades Freud's interpretation. The marvel of the old common law, in allowing the accused his own explanation in the subjective test, could be better argued if the trichotomy between the lawyer's, the psychiatrist's, and the plain man's concepts of insanity, intention, and responsibility were clarified and the appropriate logical translations made.

Within that scanty plot of ground delineated by the law, the *res gestae* and the evidence adducible to prove the *res gestae* in the case of insanity are fairly clear. No confusion should result from the few rules of criminal practice. The first rule is that insanity is a question for the jury, and therefore a question of fact, not a question of law. The second is that the insanity must be present

30. HAMPSHIRE, THOUGHT AND ACTION 192-93 (1960).

31. *Terry* Transcript.

32. For a criticism of the objective test see Williams, *Constructive Malice Revived*, 23 MODERN L. REV. 605 (1960).

at the time of the commission of the act. The third relates to the evidence of insanity, not the meaning of insanity, and upon this last rule the statements in books like *Russell on Crime* are clear.³³

It seems hardly necessary to reiterate that the jury is to decide the issue and that they may do so from the appearance and conduct of the accused. This is a simple matter of behaviorism, and no particular tests and no particular laws or rules of any peculiar discipline are prescribed as criteria for the juries' decisions. The jury also may draw the inference of insanity from direct evidence. The direct evidence here referred to is that given by any witness either for the prosecution or for the defense. After a period of doubt, the history of which *Russell on Crime* describes,³⁴ medical evidence concerning the accused's state of mind was made admissible. If only psychiatrists and doctors called as experts to give their opinions could limit their evidence to the question in issue — sanity or insanity — in such an intelligible form that the jury might understand, some of the wide criticism of the legal interpretation of insanity and the correctness of decisions raising this issue would be obviated.

The importance of this thesis can be indicated by reference to the two following propositions which are neither original nor startling, but are generally neglected or lost in the labyrinth of argument, evidence, comment, and criticism. The first is that the meaning of insanity is a question of law. It is a semantic question, not a logical one. The second proposition is that evidence to prove insanity should be directed to prove insanity as defined by the law, and generally according to the judge's answers in the *M'Naghten* case. The jury has to decide whether the accused at the time he committed the act complained of was sane or insane. This is a question of fact. The meaning of insanity is a question of law upon which the judge directs the jury. This entails that the jury decide upon criteria artificially fixed by law and not by reference to some common-sense notion of insanity.

The dichotomy between the question of fact (whether the accused was insane or not) and the question of law (the meaning of

33. 1 RUSSELL, *op. cit. supra* note 10, at 102:

But the modern rule is not so strict since the case of *Woolmington v. D.P.P.* in 1935, and it is now established that the prisoner need do no more than adduce evidence (or draw their attention to evidence adduced by the prosecution), which raises in the minds of the jury a reasonable doubt as to his sanity. The jury may draw the inference of insanity from direct evidence, or from the appearance and conduct of the accused at his arraignment or trial.

34. 1 RUSSELL, *op. cit. supra* note 10, at 120-22.

insanity) has been fairly well kept in the older cases.³⁵ Generally, the translatability necessitated by the dichotomy has been adequately performed. Since medical evidence has been admitted, with its own peculiar criteria for insanity, a trichotomy, and in some cases a profound confusion, has arisen, primarily because of the two peculiar and disparate definitions of insanity — the lawyer's and psychiatrist's — each definition obliquely derived from different views of an agent's responsibility for his actions and occasionally from the question whether, indeed, some actions can be attributed to the agent at all.

The law relating to insanity in criminal cases is a part of the broader law relating to *mens rea* and intention, a feature the law shares with philosophic discussion of intention. Particularly in those times when a prisoner was not allowed to give evidence in his own cause, the law indulged in a study of behaviorism³⁶ rather like the attitudes toward certain questions evinced by Wittgenstein,³⁷ by Ryle,³⁸ and by Freud.³⁹ The objective test which the law propounded resulted of necessity from requiring the jury to judge from the behavior of others. A rule of evidence, that a person is considered to intend the natural consequences of his act, has hardened into a maxim of law. When no evidence is available to explain or describe an accused intentions, the jury has to resort to its own conceptions of the actions, events, and things in the wide world, to common-sense notions, to an acceptance of a three-dimensional world of space and time in accordance with Newtonian physics and Euclidian geometry, to those fundamental concepts cased in the words of ordinary speech (as Johnson described the language of Shakespeare), perhaps even with a little refinement towards the language of science as described in the works of Bacon and Boyle, or to that of religion. But they seldom intellectualize further.

35. See generally the earlier editions of RUSSELL, *CRIME*.

36. For a present day example see Viscount Radcliffe's discussion in *Commissioner for Rys. v. Quinlan*, [1964] 2 Weekly L.R. 817, at 830:

It is true, however, that an occupier can be treated as having knowledge of a trespasser's presence, even though the latter is not visibly before his eyes at the time when the act that causes injury is done. He can be in a position in which he "as good as" knows that the other is there. It is this transference from direct to imputed knowledge that has been responsible for several decisions that would otherwise be difficult to explain consistently with the accepted definition of the occupier's duty.

37. See WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (1953).

38. RYLE, *op. cit. supra* note 29.

39. FREUD, *THE INTERPRETATION OF DREAMS* (2d ed. 1938).

From the cases on insanity cited by Russell,⁴⁰ especially from *R. v. Hadfield*⁴¹ and *R. v. Ferrers*,⁴² we can see the sort of language and the sort of reasoning which a jury could understand.

From *Ferrers*:

[I]f there be thought and design; a faculty to distinguish the nature of actions; to discern the difference between moral good and evil; then, upon the fact of the offence proved, the judgment of the law must take place.⁴³

From *Hadfield*:

[B]ut the premises from which they reason, WHEN WITHIN THE RANGE OF THE MALADY, are uniformly false: — not false from any defect of knowledge or judgment; but, because a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resistance, because unconscious of attack.

Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity; . . . but to deliver a lunatic from responsibility to criminal justice, above all, in a case of such atrocity as the present, the relation between the disease and the act should be apparent. Where the connexion is doubtful, the judgment should certainly be most indulgent, from the great difficulty of diving into the secret sources of a disordered mind; but still, I think, that, as a doctrine of law, the delusion and the act should be connected.⁴⁴

When the evidence of medical men was admitted in the early part of the 19th century to describe or, perhaps what is more important, to explain the state of mind of the accused, the first encroachment upon the old objective tests seems to have been made. By allowing a witness to explain what was once thought to belong to God and was not even within the power of the devil to try, the function of the jury was changed from deciding solely upon its own conceptual schema, to deciding partly upon the schema of another what it thought of the accused's behavior. With the admissibility of the accused's own evidence, the jury had further to consider what the accused said of his own behavior. Among these three functions lie three conditions which may often look alike and yet may differ completely. Hence there has developed that dichotomy between the objective test and the subjective test which, in the recent case of *Director of Pub. Prosecutions v. Smith*,⁴⁵ has become so marked and of such academic

40. RUSSELL, *op. cit. supra* note 10, at 105-25.

41. 27 State Tr. 1282 (1800).

42. 19 State Tr. 886 (1760).

43. *Id.* at 947-48.

44. 27 State Tr. at 1314 (Erskine, later Lord Chancellor Erskine, for the defense).

45. [1961] A.C. 290 (1960).

interest.

Viscount Kilmuir stated the facts of *Smith* in sufficient detail. Here a summary must suffice, although the case being an appeal from a direction of the judge to the jury, the evidence which the jury heard should be carefully considered. That evidence, either directly from its content or by way of irresistible inference which the jury were held by their lordships legitimately to have drawn, supports the following summary: Smith the respondent was driving his motor car when he was stopped by a policeman. In the back of his car were sacks of stolen scaffolding clips referred to as "the gear." The policeman Meehan asked Smith to draw in to the side. Smith did not respond but drove on with the policeman hanging on to the motor car. The evidence showed that Smith accelerated toward oncoming traffic reaching a speed of about 30 m.p.h. The evidence further established that the policeman's body first hit three motor cars, one with such force as to knock in the mudguard. The policeman's body was finally run over by a fourth motor car. The policeman died of his injuries. When Smith was arrested he asked, "Is he dead?" and on being told so he said, "I knew the man, I wouldn't do it for the world, I only wanted to shake him off . . . I didn't mean to kill him, but I didn't want him to find the gear."⁴⁶

Upon these facts the case went to the House of Lords, where the verdict of the court of first instance, finding Smith guilty of murder, was restored. Much academic controversy has arisen over this case concerning whether the doctrine of constructive malice has been revived. For the purposes of this discussion I wish merely to concentrate upon the question whether the test propounded by Lord Kilmuir imposes an objective or a subjective test for the jury. The accepted and impeccable direction which the trial judge gave to the jury was:

[I]f you are satisfied that when he drove his car erratically up the street, close to the traffic on the other side, he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer still clinging on, and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder . . . [O]n the other hand, if you are not satisfied that he intended to inflict grievous bodily harm upon the officer—in other words, if you think he could not as a reasonable man have contemplated that grievous bodily harm would result to the officer in consequence of his actions—well, then, the verdict would be guilty of manslaughter.⁴⁷

The Lord Chancellor formalized and slightly amended this test by saying: "In judging of intent, however, it really denotes an

46. *Id.* at 293-94.

47. *Id.* at 331.

ordinary man capable of reasoning who is responsible and accountable for his actions, and this would be the sense in which it would be understood by a jury."⁴⁸

Lord Denning suggests that it doesn't matter whether this test is called subjective or objective, though he is inclined to the view that it is subjective.⁴⁹ Glanville Williams⁵⁰ and Rupert Cross⁵¹ consider it to be an objective test. My point is that whatever it is called and whether evidence of the accused is admitted or not, it is a test which a jury can operate. The accused's story need not always be believed about his own state of mind. Philosophers and jurymen as well as Freud are entitled to be sceptics when told of the minds of others. We have remarked that Freudian psychology can make the solipsist sceptical about his own mind; a fortiori the jury may be sceptical about the accused's story as to the state of his own mind. How best can a judge instruct the jury concerning the inferences and interpretations to be drawn from the accused's story? The *Smith* case, it is submitted, makes this problem a little clearer.

A brief account of the history of the various tests must serve to show the grounds for their emergence and for any argument for preferring the one over the other. In the end, the objective and subjective tests amount to, or perhaps to put it less sharply, reflect the question of who is to judge the facts of the case: whether the accused acted as alleged; whether the accused at the time he acted thought as alleged; whether the accused was sane or insane. Are these questions for the jury, or are they mixed questions partly for the jury and partly for medical or psychiatric witnesses, or, indeed, on the issue of insanity, are they wholly for psychiatric or medical witnesses? There is the further problem whether the accused himself shall decide the question of his own intentions or his own mental state in light of both the particular privileges he enjoys in being able to tell his own tale and the preference he may have in choosing his own tale. In *Terry*, the accused's own tale might have shown him insane or suffering from diminished responsibility, and, without the evidence of others, seemingly no criteria existed by which to judge his story but the vague question of character and the equally illusory impression of reliability.⁵²

48. *Id.* at 325-26.

49. DENNING, *RESPONSIBILITY BEFORE THE LAW* 21-22, 29-31 (1961).

50. Williams, *Constructive Malice Revived*, 23 *MODERN L. REV.* 605, 606 (1960).

51. Cross, *The Need for a Re-definition of Murder*, 1960 *CRIM. L. REV.* (Eng.) 728, 731-32.

52. See [1961] 2 *Q.B.* at 324: "[T]he real and only question was: Was Terry fooling his psychiatrists or was his story a genuine one?"

Not only the history of the tests but also each situation itself argues in favour of the objective test if we are to retain trial by jury. The maxim *res ipsa loquitur* and the presumption of law that a person intends the natural consequences of his act discharge the burden of proof and leave it to the defendants to explain and exculpate their actions. In criminal cases, the interesting question arises whether, in view of the accused's position after the cases of *Woolmington v. Director of Pub. Prosecutions*⁵³ and *Mancini v. Director of Pub. Prosecutions*,⁵⁴ he is in too easy a position in those cases where *mens rea* is the vital question in issue. I submit that the holding of the *Smith* case, that the "reasonable man" objective test must be used by juries, supports, and is perhaps in some sense a result of, a view that the accused's own words concerning his intention puts him in too favorable a position. This case, decided under somewhat unfortunate circumstances and upon odd and perhaps unsupportable grounds, represents a preference for the objective test which was not fully articulated or explained. This criticism is supported by the broader argument of this paper.

I do not share the view suggested in *Russell on Crime*⁵⁵ or by Dr. Glanville Williams⁵⁶ that criminal policy or the policy of the law accounts for the decision in *Smith*. Rather the arguments for the "reasonable man" objective test are based upon principle discernable in history and derivable from all the cases (although some of the cases conflict), principle grounded in that rubric so strongly recommended by the learned editor of *Russell on Crime* and by other academic writers, "*actus non facit reum nisi mens sit rea*," and in the traditional method of trying questions of fact by jury rather than by experts or by the accused himself. In order to avoid those strong cases decided in the latter part of the 19th century and during this century that propound the subjective test, the "reasonable man" construction was interposed in the *Smith* case. This move avoided the strict subjectiveness of the newer cases, on the one hand, and the old method of the jury's trying the case exclusively according to its own conceptual schema, on the other. I submit that the construction of the "reasonable man" allows the jury to avoid a strictly personal decision based

53. [1935] A.C. 462: "If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted."

54. [1942] A.C. 1 (1941): "If the jury are left in reasonable doubt . . . the verdict should be not guilty."

55. 1 RUSSELL, CRIME 507-16 (12th ed. Turner 1964).

56. Williams, *Constructive Malice Revived*, 23 MODERN L. REV. 605 (1960).

upon private prejudices. Though it may be somehow vague, there is a distinction between deciding as one would oneself and deciding as one thinks another would in the same circumstances; juries seem to be asked to do the latter. Russell is *a propos* here:

Furthermore it [morality] necessarily led to the conception of *mens rea* as a subjective matter. It has already been suggested that in the archaic period of strict liability there was an underlying assumption that any harm which a man had brought about must have been intended by him, and it is always easy to see moral blame in one who is held to have hurt another purposely. The word felony began as a vituperative expression describing a vile kind of wickedness on the part of one whose mind was bent on mischief; it later became a technical term to denote the worst kinds of crime, and there appeared the legal requirement that felony should be expressly alleged in the indictment of the offender. In this way an intention to commit the crime came to be the outstanding example of *mens rea*—and a man's intention is essentially a subjective fact. In earlier law it had not been necessary to establish that the prisoner had intended to do what he had done, it was merely an incidental assumption that he had so intended. But at this later stage it had come to be accepted that it was incumbent upon the prosecution to establish the prisoner's *mens rea*, and so soon as *mens rea* had become subjective the burden was a heavy one.⁵⁷

One remark upon this short history; the subjective test, as it has come to be called, preceded in time the objective test and was superseded by it. Then the subjective test was revived and itself superseded, but as the earlier and later subjective tests differed, so, too, the earlier and later objective tests were different. Practice and pleading still play some part in conceptual change. A study of a whole case from a transcript may often enlighten what emerged from a reported case, and the insistence of the editor of *Russell on Crime* upon what a jury must decide, and how a case is to be argued before it, and how a judge is to direct the jury is salutary food for academic thought:

Returning to the ancient maxim it can be seen that the adoption of a moral standard of liability afforded some limitation to what, by modern standards, may seem the excessive severity of our ancient rules of liability. Of course the narrow rigidity of these rules may well have been due in large measure to the absence of means available to the early courts of law for the proof of an accused person's mental processes and their consequent doubts as to the efficacy of any such investigation. These difficulties and doubts were, however, slowly removed, and so soon as the courts had begun to feel competent to investigate the working of a man's mind it became possible to develop a subjective test of criminal liability of a more subtle kind. Thus in relatively modern times there has gradually appeared in the common law a more precise requirement than objective morality for the creation of liability

57. 1 RUSSELL, *op. cit. supra* note 55, at 32-33.

to criminal sanctions, and when this stage of development was reached the old rule became enlarged, so that not only, as we have stated above, must the conduct of the man (if he is to be held guilty) have been voluntary but he must also have had a certain attitude of mind towards the consequences of that conduct, namely, *he must have foreseen that those consequences would follow or could reasonably be expected to follow as the result of what he was doing or omitting to do*. This is the introduction of what is essentially a subjective matter, and therefore, if it is to satisfy the ancient maxim of the common law, it must be accounted *mens rea*, which thus takes on a new significance.⁵⁸

It is not at all certain how much the development of the law of insanity from the time of the *Ferrers* and *Hadfield* cases and the *M'Naghten* rules, accompanied as it was by the admitting of evidence of medical men, affected the development of the latest subjective test, which culminated in the statement of Bowen, L.J. in *Angus v. Clifford*⁵⁹ that "you must look into it [a man's mind], if you are going to find fraud against him." It has been suggested that the development of the law of insanity was an encouragement or an example to judges to try the wider questions of *mens rea* and intention upon what must be called psychological considerations. Suffice it to say that when Bowen was stating that the mind of man was as much a state of fact as the state of his digestion, Freud was investigating the secret sources of the disordered mind and, significantly enough, analyzing the mind into ego, superego, and id, and investigating the unconscious — not merely of the psychopathic but also of the normal. Here we have a parallel between the law and psychology. The need to explore the insane leads to discoveries relating to the sane. Philosophical discussions of intention also received an impetus from psychology about the same time.

III. THE MAKING OF LOGICAL TRANSLATION

I now wish to return to the problem of logical translatability. I have suggested that, in the discussion in court, the evidence to be adduced by psychiatrists or by other medical men in answer to the questions of counsel in informing the jury should include the criteria upon which their opinions are based. Their testimony should not consist only of expert evidence of considerable complexity and detail, itself subject to grave questions of doubt and uncertainty. The witnesses should readily acknowledge the distinction between insanity in the medical sense and insanity in the legal sense, but this acknowledgment is not of itself enough. The

58. *Id.* at 38-39.

59. [1891] 2 Ch. 449, 471 (C.A.).

difference is not merely one of words, as if one were merely labelling the case, but a difference in concept, a difference in the criteria, evidence, reasons, and purposes by and through which these concepts are derived. In comparing medical and legal concepts of insanity it is almost banal to remark that the law, with its talk of intention, act of will, foresight of consequences, knowledge, nature and quality of the act, wrong, and delusion, has set up a concept of insanity which is much like the comment of the man in the street who says that *X* must be made to do this, or that *Y* is an idiot, or like the description of Hamlet's noble mind o'er thrown or Lear's cry before the storm. The concept is derived from a conceptual scheme which knows nothing of ego, superego, and id, nothing of the unconscious, nothing of repression and sublimation and phantasy life. True, the older cases cited in the earliest edition of *Russell on Crime* show some insight, but it is the insight of a Shakespeare or a Proust into those cases of dementia praecox which we now call schizophrenia. These older cases are descriptions, however, and not explanations — incisive descriptions, perhaps, but nevertheless descriptions focused upon acts of will and knowledge and the like. The man who is like a brute or a child, incapable of looking after himself, is the paradigm of the insane down to the turn of the 19th century.

What of the psychiatrist's paradigm? What are his criteria, evidence, reasons, purposes? They are left untold in the evidence. The psychiatrist, interested in therapy rather than theory, rehashes an old but unanalyzed technique of medical diagnosis: "It is diagnosed on the total state, not just on the aggregated symptoms, . . . but on the whole picture and nothing but the whole picture."⁶⁰ This answer, given in cross-examination, reflects the language of Price in his textbook of medicine under the entry "schizophrenia."⁶¹ In the *Terry* case, the chief evidence of the experts was directed solely to building up the picture, the whole picture. This metaphor may be useful to describe a technique, but it does not elucidate those questions which underlie the problem of relating insanity and criminal responsibility. Case histories may well be used to illustrate the concepts of the psychiatrist much as Freud cites his histories in support of, or as evidence for, some hypothesis or axiom; but loosely-used case histories may not come near the legal point in question. The jury requires explanation and elucidation — not merely description, redescription, and reiteration —

60. *Terry* Transcript.

61. F. PRICE, TEXTBOOK OF THE PRACTICE OF MEDICINE (9th ed. Hunter 1956).

especially where the experts are in conflict. The explanation required is one of concept. Symptoms and their diagnoses seem hardly enough, especially when the symptoms are like family resemblances, one of which need not be like all the others, but some of which resemble some, and these resemble others.⁶²

This apparently naive use of case histories was probed by Wittgenstein when he suggested that psychoanalytic writings were not explanations but descriptions of behavior or mental states.⁶³ Ryle seems to me to answer Wittgenstein's scepticism and to raise other problems about the status of psychology.⁶⁴ If their remarks are correct (I hope to show, of course, that they are not when we consider logical translatability) a profound doubt is raised. If psychology is a matter of description, then the pictures given by a psychiatrist in evidence, by Dostoievsky in *Crime and Punishment*, by Shakespeare in *Hamlet*, and by counsel in his address to the jury, would all have the same force. It is doubtful that Coleridge's summary of Hamlet's situation as "continually resolving to do, yet doing nothing but resolve"⁶⁵ has the same force as a psychiatrist's statement about *X's* irresolution.⁶⁶ In reading the account of the fourth answer of the judges in the *M'Naghten* case relating to partial delusion,⁶⁷ one might consider that the writers on medical jurisprudence and insanity in the criminal law, cited by Dr. Glanville Williams⁶⁸ and so succinctly set out by him, think that psychology provided one description of insanity and the law another. In his own criticisms of the *M'Naghten* rules, Dr. Williams severely and perhaps savagely criticises the rules and the judges' interpretation of them. He concludes with some pith:

The conclusion is that the third question in the *McNaughten* rules leads to grotesque results; and the same conclusion is true of the first and second questions, in so far as the third question is merely a deduction from them. The rules mean that one has to subject the warped reasoning of the mentally afflicted to the same critical examination as if they were sane. One may be led, as will now appear, into the most abstruse problems of metaphysics.⁶⁹

At this point logical translations have to be made. We have to

62. Bambrough, *Universals and Family Resemblances*, in 61 *ARISTOTELIAN SOCIETY, PROCEEDINGS* 207 (1960-1961).

63. WITTGENSTEIN, *THE BLUE AND BROWN BOOKS* 22-23 (2d ed. 1960).

64. RYLE, *THE CONCEPT OF MIND* 324-27 (1949).

65. COLERIDGE, *SEVEN LECTURES ON SHAKESPEARE AND MILTON* 149 (1856).

66. *Compare ibid. with* E. JONES, *HAMLET AND OEDIPUS* (1949).

67. Called the third rule by Williams. See text accompanying note 69 *infra*.

68. WILLIAMS, *CRIMINAL LAW* §§ 142-77 (2d ed. 1961).

69. *Id.* at 502.

translate from the delusions of the paranoiac; as Freud has said in another context, we must translate from the dreams of a patient to the language of the psychiatrist's art.

For when this happens, we have only to follow our usual psycho-analytic technique (to strip his sentence of its negative form, to take his example as being the actual thing, or his quotation or gloss as being the original source) and we find ourselves in possession of what we are looking for—a translation of the paranoic [sic] mode of expression into the normal one.⁷⁰

Or, in cases of hysteria Freud tells us:

A string of reproaches against other people leads one to suspect the existence of a string of self-reproaches with the same content. All that need be done is to turn back each single reproach on to the speaker himself.⁷¹

...
If a patient exhibits doubts in the course of his narrative, an empirical rule teaches us to disregard such expressions of his judgement entirely. If the narrative wavers between two versions, we should incline to regard the first one as correct and the second as a product of repression.⁷²

These are the sort of translations that a jury has to make and which the judge should preeminently direct them to make. *Hoc opus haec labor est.*

I submit that these "most abstruse problems of metaphysics" must be clarified not merely by presenting medical symptoms side-by-side with lawyers' cases, but by comparing and contrasting the psychiatrists' criteria and evidence and reasons for saying particular symptoms are relevant with a jurisprudential analysis of the concepts (such as "mind" and "act") found in the law derived from relevant cases. As the law is now, whether we like it or not, the jury has to decide a question of fact concerning the mind of the accused from the warped reasoning of the mentally afflicted. Is it easier for them to subject the warped reasoning of the insane to the critical test of the sane than to judge according to the test of the warped reasoning of the insane? Whichever way we put it, we cannot obviate the necessity to make a translation. Even talking of the warped reasoning of the insane rather than of irrationality shows how we cling to the language of the sane rather than indulge in the surrealism of the insane. The task is not to claim a preference for this or that conception of insanity in a trial, but to clarify, according to the conceptual schema of the

70. FREUD, *Attempts at Interpretation*, in 3 COLLECTED PAPERS 417 (1959).

71. *Id.* at 45

72. *Id.* at 25 n.2.

jury, the requirements of law — whatever they might be — as to the state of mind of the accused upon the evidence of experts. This point cannot be over-emphasized. The textbook criticisms of the M'Naghten rules argue a preference for a medical definition of insanity. It is significant, however, that no satisfactory definition or test has been suggested⁷³ and it is submitted indeed, on philosophical grounds, that no definition can be universal and at the same time satisfactory. This is the case whether it be Socrates searching for justice or any other philosopher asking what is the nature of "Phi." It is the case also whether medical men are asking for the definition of insanity or judges are giving rules for determining what is insanity.⁷⁴

One should notice that Freud derived his conception of the unconscious in somewhat the same way that judges derived the concepts of intention and insanity in the 18th and 19th centuries — by observing the conscious acts or behavior of the accused and attributing to the cases that arose certain mental elements. As we have already shown, this process hardened from a rule of evidence into the maxim of law that a man is presumed to intend the natural consequences of his act. This change did not shift the burden of proof as to *actus reus* and *mens rea* upon the accused, but did require that the accused adduce evidence to explain his intentions over and above what could be derived from his behavior. It was thus, and only thus, that any concept of intention or insanity or negligence or recklessness could have been established in law. As has been asked before, how else can we know about other minds?

After the presentation of the criteria and arguments upon

73. See WILLIAMS, CRIMINAL LAW § 146 (2d ed. 1961).

74. The question raised in this paper came up incidentally in correspondence between Prof. Wechsler and Dr. Guttmacher. See MODEL PENAL CODE § 4.01, app. C (Tent. Draft No. 4, 1956). The draft (§ 4.01), concerned with giving a new definition or test of "legal insanity," provided: "A person is not responsible . . . if . . . he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Apart from certain inadequacies of the definition itself with which the correspondence was mainly concerned, Guttmacher objected to the method of definition itself: "Psychiatry is, I fear, of such a nature that attempts to make truly restrictive definitions must fail. . . . [I] felt that this was an opportunity for me to express my opposition to any attempts on our parts to accurately define or delimit in the law psychiatric entities or concepts." *Id.* at 184. It is not clear whether this is a pragmatic or a philosophical point. In my view it is both. The attempt to attain a universal or ideal in a definition is doomed to failure on logical grounds. The language of tentative draft #4 on this point has been retained without amendment. See MODEL PENAL CODE § 4.01 (Proposed Final Draft 1962).

which a psychiatrist and a lawyer would say that a person is insane, or that this or that amounts to or does not amount to insanity, and after the appropriate translation has been made into the ordinary language which the jury understands, there may yet be a further question, a further doubt which has to be resolved about the concept of insanity. The criteria may be insufficient, in the sense that there are not enough features in common to enable the translation to be made. In such a case we shall have to resort to the case-by-case procedure suggested by Professor Wisdom⁷⁵ to resolve the psychiatrist's or the lawyer's concept. This procedure involves the presentation of cases, actual or constructed. It is that putting and countering of cases which the common law and equity know so well as part of the ratiocination contained in the judicial process. It is also the putting and countering of cases which Freud uses in discussing paranoia.⁷⁶ A study of the cases, from instance to instance, reveals the concept to be grasped and establishes a principle or a premise to be applied. In the end the jury will have to compare the facts of legal cases like *Hadfield* and *Ferrers*, where legal insanity was found, with the facts of case histories presented by psychiatrists.⁷⁷

75. WISDOM, *Philosophy, Metaphysics, and Psycho-analysis*, in *PHILOSOPHY AND PSYCHO-ANALYSIS* 248 (1957).

76. See, e.g., FREUD, *Psycho-analytic Notes Upon an Autobiographical Account of a Case of Paranoia (Dementia Paranoides)*, in 3 *COLLECTED PAPERS* 387 (1959).

77. The author has not come across the logical translatability thesis here advanced in any discussion of the relationship between legal and medical insanity, although in deriving both legal and psychiatric concepts and criteria, the method of argument used is paraductive, great reliance being placed upon cases. There is both in legal and medical writings a leaning towards definition, and even where a writer or judge sees that what he is doing by way of argument is the establishing of rules, tests, and definitions by the putting and countering of cases, nonetheless they are prone to describe their work as proceeding from definitions, rules, or tests. Of course a code presupposes that the definition of method or rule propounding procedure is primary. An example of what I have in mind appeared in a lecture by Judge Bazelon, a portion of which is quoted in GLUECK, *LAW AND PSYCHIATRY* 96-97 (1962).

Bazelon, who gave the judgment in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), suggests in his lecture that his new "product" test is more fruitful than the test of insanity laid down in the M'Naghten rules because a case by case procedure interpreting the product test will produce a dynamism which *M'Naghten* lacks. If the M'Naghten rules are stultified it is suggested that two reasons may be given to explain this. The first is that of historical explanation, in that the House of Lords took the opinions of all the assembled judges who propounded rules. The status of the decision in the hierarchy of authorities and within the doctrine of precedence was almost statutory. Subsequent cases could only interpret the rules. The *Durham* case

There may likewise be cases where the criteria for the use of a word or for the description of a concept are themselves in issue, as when two psychiatrists dispute about whether Terry was schizophrenic, or Dr. Schreber⁷⁸ paranoiac, or Hadfield insane. In these cases, also, the presentation of the behavior of a Hadfield, a Ferrers, or a M'Naghten, showing how like and unlike the features of each case are, builds up a concept of insanity, the paradigm of which we saw in the judgment talking of "brute beast." This last situation, however, is not a case of logical translation but one where nevertheless the inability of psychiatrists to agree among themselves forces us to fall back on a case by case procedure.

To decide on the case of Dr. Schreber, Freud's technique is the same: "The study of a number of cases of delusions of persecution have led me as well as other investigators to the view that the relation between the patient and his persecutor can be reduced to quite a simple formula."⁷⁹ The simple formula, the seductive model, the economical paradigm, amount in the end to no more than definitions, to generalizations from particulars; and so long as the criteria for the use of the formula, the model, the paradigm, can be made explicit, the translation can be made. But when great doubt remains, we have to resort to the cases, the instances, and the features of the cases. Freud himself had to translate from the talk of the paranoiac into the language of psychiatry. He had to do that which the jury has to do. That is to say, in the words of Dr. Glanville Williams, he had "to subject the warped reasoning of the mentally afflicted to the same critical examination as if they were sane."⁸⁰

A lawyer will tell you how to find out what is in the mind of another without all these philosophical arguments. He will

was one of first instance and its status remains to be established as much as its interpretation by subsequent cases. Secondly, the *M'Naghten* case proceeded from an analysis of old cases and law which it either summarized, declared, made, or interpreted. There is nothing intrinsic in the *M'Naghten* rules which makes them more arid or less fertile than the product test. It is the logical structure of all tests which renders them ultimately infertile. Judge Bazelon sees the value of the judicial process, with its case by case arguments, as the best means to create a dynamic test of "insanity." He fails to see that the fulfillment of his own ambition to propound a test dooms the life force of that test in the very moment of its birth.

78. For a case study in paranoia, based upon the subject's autobiography, see FREUD, *Psycho-analytic Notes Upon an Autobiographical Account of a Case of Paranoia (Dementia Paranoides)*, in 3 COLLECTED PAPERS 387 (1959).

79. *Id.* at 423-24.

80. WILLIAMS, *CRIMINAL LAW* § 161, at 502 (2d ed. 1961).

tell you, as Mr. Justice Barry told the jury in *R. v. Charlson*:

Malice does not necessarily involve the existence of some hostility to the person injured. It does, however, mean that the act must be done consciously. The accused, in order to commit an unlawful and malicious act, must know what he is doing, and also he must realize that he has no lawful justification for his act.

. . . [A] person suffering from a disease may be deprived of the control of his actions. . . . A man in the throes of an epileptic fit does not know what he is doing. . . . [T]he actions of an epileptic are automatic and unconscious, and his will and his consciousness are not applied to what he is doing. . . .

The intention of the accused can, of course, only be inferred from all the circumstances which have been proved before you. Neither you nor I can ever look into the mind of an accused person and say with positive certainty what his intention was at any particular time. A jury is entitled to infer a man's intentions from his acts. As you were rightly told by the counsel for the prosecution when this case was opened, under normal circumstances a man is presumed to intend the normal consequences of his acts. If a man consciously and deliberately strikes another man or woman with a mallet of this kind, in ordinary circumstances any jury would feel entitled to say that he must have intended to do some serious injury. You cannot strike people on the head with a mallet or stab them in the chest with a knife, without the extreme probability that serious injury will result; and therefore, other circumstances being equal, the jury is perfectly entitled to infer the intent from the mere act itself.⁸¹

Such is a practical example of the advice which the learned editor of *Russell on Crime* gives:

It is submitted that it can be taken as now established doctrine, for common law crimes, that in the ancient maxim *actus non facit reum nisi mens rea* the last two words refer to the mind of the accused person, and thus require a subjective mental element of liability. That being so, for the practical purpose of putting a case of common law crime to the jury in language which they can be expected to understand, we need to translate or explain the Latin words *mens rea* by some expression which will include the new principle of liability above mentioned and, therefore, while excluding *negligence* (inadvertence) will cover both *intention* and *recklessness*, as we have defined those terms.⁸²

Now, the translation or explanation called for is not the same sort of jurisprudential analysis as that of Mr. Turner⁸³ or of Professor H. L. A. Hart,⁸⁴ though in an appropriate case, it may

81. [1955] 1 Weekly L.R. 317, 319-21 (Chester Assizes).

82. 1 RUSSELL, *op. cit. supra* note 55, at 50.

83. See TURNER, *The Mental Element in Crimes at Common Law*, in THE MODERN APPROACH TO CRIMINAL LAW 195 (Radzinowicz and Turner ed. 1945).

84. See Hart, *Negligence, Mens Rea, and Criminal Responsibility*, in OXFORD ESSAYS IN JURISPRUDENCE 29 (Guest ed. 1961).

involve a translation of the results of their analyses into language that the jury can understand. A question is thus raised whether the problems and concepts of jurisprudential analysis are really separate from the problems confronting juries. The words in the charge to the jury are "conscious act," "intention," "know what he is doing," "unconscious," "normal consequences." Each of these has received much philosophical and jurisprudential discussion and perhaps we are in the position in which Dr. Waismann found himself when he suggested that even though we cannot confidently perceive the causes of an event, we should not reason that the gaps in our perception open the way to moral freedom.⁸⁵ The extent to which the analyzing of legal concepts into a consistent, logical form can help a jury is a matter for hope only, and not a very confident hope. What I have argued about the clarity of the psychological and legal conceptions affects only, perhaps, the questions which will be put to the jury or, perhaps, the clarity of the evidence for the jury, but these are nevertheless important matters.

CONCLUSION

The jury has to apply to the facts of the particular case a decision based upon criteria provided by the law. The judge's directions have to be made in terms that a jury understands. Psychiatrists in their testimony use the language they employ in their professional activity. If the judge's concepts of fundamental legal relations are clear, he will find it easier, in his direction, to make those logical translations in the jurymen's universe of discourse. This argument in favor of logical translation is designed to facilitate that end. Hopefully this article has emphasized the need for translation into a common language which judge, jury, and psychiatrist can equally grasp and has, moreover, suggested ways in which it can be done.

One must end by noting that the problem of translation, though most dramatically presented in cases on insanity, pervades the whole administration of the law. There is, however, a difference in logical structure between an explanation of the law in ordinary words to a jury and a decision about a concept of law, such as a judgment concerning what negligence is, what a perpetuity is, or what an arrived ship is. The difference is well brought out in the somewhat criticised remark of Lord Chief Justice Caldecote in the case of *R. v. Bonnyman*:⁸⁶ "What quali-

85. Waismann, *The Decline and Fall of Causality*, in *TURNING POINTS IN PHYSICS* 154 (1959).

86. 28 Crim. App. R. 131, 134 (1942).

fication or what addition to the mere word 'negligence' is required in order to indicate to a jury the degree of negligence which they must find to justify a verdict of manslaughter?" On conceptual analysis, the importance of the phrase "in order to indicate to a jury," which describes the function of the judge in a trial by jury, is overlooked, and often the direction to the jury is treated as some sort of judicial decision upon a question of law.

In a sense, the direction of a judge to the jury concerns rhetoric rather than dialectic. I am not suggesting that cases involving directions to juries should not be treated as seriously as judgments in law involving questions of law. I am suggesting that the logical and legal basis upon which directions are made differ from judgments of law, where the great doubt in a case is solved by arguments of law. I am suggesting that, between directions and judgments, a lawyer might have to make different assessments and new translations and more acute explanations. It is probably easier to explain Newton's laws of gravity to a man in the jury box by reference to a falling apple and a traveling star than by reference to several conclusive pages of algebra, and likewise it may be easier to present a case to the jury in the language of the market place rather than in that of *Stroud, Judicial Dictionary* or *Termes de la Ley*.

What has been noted here about expert evidence arising out of the *Terry* case applies equally to expert evidence given in civil proceedings, to evidence upon matters of psychiatry, and to any other questions for an expert. It extends to the evidence of foreign law given by those professionally qualified in the system of law which they are proving. Here, nice questions of comparative law, and particularly comparative jurisprudence, have often arisen in the writer's experience. Without exploring the cases, it will not be too didactic to say that in this sphere of activity there is also an acute need to make translations.

An imaginary case was put in which I was asked how a court would decide when Einstein gave evidence, on one side, to the effect that a chain of causation could be ascertained, and Heisenberg advanced his uncertainty principle, which denies any such causal relationship, on the other. How a jury could decide the question boggles the imagination, though considering that in the past juries have decided what looked like questions for God, we have some grounds for confidence in this case. Whether the decision is right or wrong, it is at least a decision, and can best be helped by the presentation of the right translations, so that in the universe of its own discourse, the common word will stand —

exact, without vulgarity — according to the conceptual schema of those twelve good men and true, whom Dickens' Serjeant Buzfuz addressed in *Bardell v. Pickwick* as "an enlightened, a high-minded, a right-feeling, a conscientious, a dispassionate, a sympathising, a contemplative jury of her civilised countrymen."⁸⁷

87. DICKENS, *THE POSTHUMOUS PAPERS OF THE PICKWICK CLUB* 485 (Mod. Lib. ed. 1943).

