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# CRIMINAL RESPONSIBILITY OF THE INSANE— A REPLY TO PROFESSOR BALLANTINE

EDWIN R. KEEDY<sup>a</sup>

The Institute at the annual meeting in 1916 approved the following proposed bill, presented by the Committee on Insanity and Criminal responsibility:<sup>1</sup>

Sec. 1. *When Mental Disease a Defense.* No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering from mental disease and by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged.

Sec. 2. *Form of Verdict.* When in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense that he was mentally diseased at the time when he did the act or made the omission charged, then if the jury before which such person is tried concludes that he did the act or made the omission charged, but by reason of his mental disease was not responsible according to the preceding section, then the jury shall return a special verdict that the accused did the act or made the omission charged against him, but was not at the time legally responsible by reason of his mental disease.

Sec. 3. *Inquisition.* When such special verdict is found, the court shall remand the prisoner to the custody of [the proper officer<sup>2</sup>] and shall immediately order an inquisition by [the proper person<sup>2</sup>] to determine whether the prisoner is at that time suffering from a mental disease so as to be a menace to the public safety. If the members of the inquisition

<sup>a</sup>Professor of Law, University of Pennsylvania; Chairman of the Institute Committee on Insanity and Criminal Responsibility.

<sup>1</sup>At the time the proposed bill was submitted to the Institute the membership of the Committee was as follows:

Albert C. Barnes, Judge of the Superior Court, Chicago.

Orrin N. Carter, Justice of the Illinois Supreme Court.

Edwin R. Keedy, Chairman, Professor of Law in the University of Pennsylvania.

Adolph Meyer, Professor in Psychiatry in Johns Hopkins Medical School.

William E. Mikell, Dean of the Law School, University of Pennsylvania.

Harold N. Moyer, Physician, Chicago.

Morton Prince, Physician, Boston.

William A. White, Superintendent Government Hospital for the Insane, Washington, D. C.

<sup>2</sup>When this bill is introduced in the legislature of any state, the titles of the persons whose duty it is, according to the existing law of the state, to conduct such an inquisition, shall be inserted here. It is not proposed to change the prevailing practice in this respect.

find that such person is mentally diseased as aforesaid, then the judge shall order that such person be committed to the state hospital for the insane, to be confined there until he shall have so far recovered from such mental disease as to be no longer a menace to the public safety. If they find that the prisoner is not suffering from mental disease as aforesaid, then he shall be immediately discharged from custody.

Some months later the chairman of the committee published an article in the *Harvard Law Review*<sup>3</sup> in which the bill was discussed and supported. In February, 1919, Henry W. Ballantine, now professor of law in the University of Minnesota, adversely criticized the first section of the bill in an article appearing in this *JOURNAL*.<sup>4</sup>

Professor Ballantine stated the following objections to the first section:

I. It is not clear whether the phrase "particular state of mind that must accompany such act" embraces general, as well as specific, intent (p. 489).

II. If this phrase does include general intent, then the proposed test lays down a truism (p. 489).

III. "The proposed test sheds no light whatever on the vexed question whether irresistible impulse destroys responsibility" (p. 489).

IV. This section "would make insane persons criminally responsible for violating statutory provisions where no specific intent is necessary, and where fines are imposed as an incentive to compel persons to comply with the regulations at their peril" (p. 491).

In the writer's article, published in the *Harvard Law Review*, objection was taken to the tests ordinarily employed for determining the criminal responsibility of the insane on the ground that "they were framed from the medical standpoint and consist simply of a statement of certain mental symptoms, viz.: inability to distinguish between right and wrong, irresistible impulse and delusion, the existence of one or more of which is treated by the law as a defense"; that "these symptoms represent but a small portion of the phenomena of mental disease, and bear no necessary relation to the ordinary rules for determining responsibility"; and that "they are simply obsolete medical theories crystallized into rules of law."<sup>5</sup>

To the above propositions Professor Ballantine makes the following objections:

A. "Delusion is not recognized by English and American courts

<sup>3</sup>Vol. XXX, 535, 724.

<sup>4</sup>Vol. IX, 485.

<sup>5</sup>P. 555.

as a special test, but is simply one form of aberration which destroys knowledge of right and wrong or creates mistakes of fact" (p. 488).

B. The right and wrong and irresistible impulse tests are not based on medical theories and symptoms of mental disease, but "on the general conditions of legal responsibility" (p. 492).

Professor Ballantine's contentions are based largely on the following propositions which he lays down as general principles:

(a) Mens rea or general criminal intent is something apart from and independent of the elements of each crime.

(b) "The general subjective conditions of criminality presupposed as a general rule in addition to the particular state of mind, motive, or intent included in the definition of various crimes are then as follows: (1) Competent age; (2) some degree of sanity; (3) freedom from overpowering coercion, and (4) a "punishable state of mind, i. e., some blameworthy form of intentionality, consisting either of intent to commit some crime or to do some serious wrong" (p. 493).

(c) "A crime is not proved if the mind of the person doing the act is morally innocent" (p. 491).

I. The question presented by Professor Ballantine's first objection is whether the proposed test covers crimes which do not require a specific intent. This question may be answered by the following paragraph from the article by the present writer in the Harvard Law Review:<sup>6</sup>

"It is a fundamental principle of the criminal law that every crime, whether common law or statutory, with the exception of public nuisances and breaches of what are commonly described as police regulations, includes a mental element. This necessary mental element has been variously named. In the familiar maxim it is '*mens rea*.'<sup>7</sup> Bracton calls it '*voluntas nocendi*.' Lord Hale speaks of the 'will to commit an offense.'<sup>8</sup> Blackstone calls it 'vicious will.'<sup>9</sup> Austin uses 'criminal knowledge.'<sup>10</sup>

<sup>6</sup>P. 538.

<sup>7</sup>*Actus non facit reum, nisi mens sit rea.* Pollock and Maitland state that the original source of this maxim is to be found in the sermons of St. Augustine, where the wording is "*Reum linguam non facit nisi mens rea.*" The maxim later appears in the *Leges Henrici* as "*Reum non facit nisi mens rea.*" Coke states it "*Et actus non facit reum nisi mens rea sit.*" 2 Pollock and Maitland, *History of English Law*, 474, note.

<sup>8</sup>"*Crimen non contrahitur, nisi nocendi voluntas intercedat.*" 2 *De Legibus Angliae* (Twiss ed.), 126. ... ..

<sup>9</sup>"Where there is no will to commit an offence, there can be no transgression." Hale, *P. C.*, ch. 2.

<sup>10</sup>"An unwarrantable act without a vicious will is no crime at all." 4 *Bl. Comm.* 21.

<sup>11</sup>"Every crime, therefore, supposes, on the part of the criminal, criminal knowledge or negligence." 3 Austin, *Jurisprudence*, 326.

The terms usually employed are 'guilty mind,'<sup>12</sup> and 'criminal intent,'<sup>13</sup> the latter being divided into general intent and specific intent. All of these terms are open to objection. '*Mens rea*' was said by Stephen, J., in *Regina v. Tolson*,<sup>14</sup> to be confusing and contradictory, because it is used to include so many dissimilar states of mind. On the other hand, a recent English writer narrowly defines *mens rea* as 'knowledge or neglect of available means of knowledge that one's act is, or may be, in contravention of the law of England.'<sup>15</sup> 'Will,' as used by Hale and Blackstone, was probably a translation of the '*voluntas*' of Bracton and was equivalent to 'intention.'<sup>16</sup> 'Guilty mind' is objectionable because it suggests moral turpitude. 'Criminal intent' is not a satisfactory term to describe the mental element involved in every crime, (1) because, under the classification into general and special, 'intent' has different meanings,<sup>17</sup> and (2) because the mental element in some crimes is negligence, which is inconsistent with the idea of 'intent.' All these terms have a common fault in seeming to imply that the mental state involved in crimes is a constant quantity, whereas, as is well known, it varies in different crimes. The malice aforethought of murder is different from the *animus furandi* of larceny, and this differs from the negligence required for involuntary

<sup>12</sup>"The general rule of law is that a person cannot be convicted and punished in a proceedings of a criminal nature, unless it can be shown that he had a guilty mind." Field, J., in *Chisholm v. Doulton*, 22 Q. B. D. 736, 739 (1889).

"The second element which is essential to constitute a crime is what is called the mens rea—a 'guilty mind.'" Cherry, *Outline of Criminal Law*, 8.

"An act cannot amount to a crime when it is not accompanied by a guilty mind." Shirley, *Criminal Law*, 4.

<sup>13</sup>"Criminal intent is always essential to the commission of crime." Werner, J., in *People v. Molineux*, 168 N. Y. 264, 297, 61 N. E. 286 (1901).

"It is, therefore, a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist." Bishop, *New Criminal Law*, § 287. Bishop in the same section uses "evil mind."

"It is a sacred principle of criminal jurisprudence that the intention to commit the crime is of the essence of the crime." Turley, J., in *Duncan v. State*, 7 Humph. (Tenn.) 148, 150 (1846).

"To constitute a criminal act, there must, as a general rule, be a criminal intent." Hoar, J., in *Commonwealth v. Presby*, 14 Gray (Mass.) 65, 66 (1859).

<sup>14</sup>23 Q. B. D. 168, 185 (1889). "The maxim is recognized as a principle of English Law by all authorities, but the real difficulty arises, not as to the universality of its application, but as to its meaning. The '*mens rea*' generally means some *actively* guilty intention. It may, however, be mere negligence, if of a very gross description." Cherry, *Outline of Criminal Law*, 8.

<sup>15</sup>Stroud, *Mens Rea*, 20. Another definition is the following: "The mens rea, or guilty mind, of which the law speaks, is that mental state in which the actor, voluntarily doing an act, is conscious of the existence of facts, from which it follows as a matter of law that the thing done by him is an infraction of a duty or prohibition." G. A. Endlich, "The Doctrine of Mens Rea," 13 *Criminal Law Magazine*, 831, 834.

<sup>16</sup>"It is not, however, a 'will' in Austin's sense of that word; but is closely akin to, and includes, his 'Intention.'" Kenny, *Outlines of Criminal Law*, 37.

<sup>17</sup>"The general intent . . . is an intention to do the act done . . . . The specific intent is some independent mental element which must accompany the physical act in order that the crime in question may be committed." Beale, *Criminal Pleading and Practice*, § 136.

"Intent [to kill] is defined as a steady resolve and deep-rooted purpose or design formed after carefully considering the consequences." Clark, J., in *State v. Conly*, 130 N. C. 683, 687, 41 S. E. 534 (1902).

manslaughter and the intent to burn necessary for arson. Some writers avoid the difficulty of giving a definite name to the mental element of crimes by saying that a certain state of mind is involved in the definition of every crime.<sup>18</sup> If then the section under discussion had simply said 'state of mind' instead of 'particular state of mind' no question as to its scope could possibly be raised—it would clearly cover every offense which includes any mental element. The question then is, whether the addition of the word 'particular' has a narrowing effect. The word was used in its ordinary meaning of 'pertaining to a single thing,' the idea being to limit the inquiry to the mental element involved in the crime charged and no other. This is no unusual use of the word in this connection. Russell discusses the 'particular mental elements necessary to constitute particular crimes,'<sup>19</sup> and Kenny states that 'every crime involves (1) a particular physical condition, . . . and (2) a particular mental condition causing this physical condition.'"<sup>20</sup>

The phrase "the particular state of mind which must accompany such act or omission in order to constitute the crime charged," as used in the proposed section, was intended to cover all the elements of the mental state which must accompany the particular act before the accused can be held responsible for the wrong done. The above argument is aptly supported by the following statement from Wigmore on Evidence: "It [the criminal law] does not need to generalize in one phrase or term the exact nature of all possible criminal states of mind; it merely defines the criminal state of mind essential for each respective crime."<sup>21</sup>

A frequently quoted statement by Mr. Justice Stephen in *Regina v. Tolson*<sup>22</sup> is also pertinent. He said: "The full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed."

II. Professor Ballantine next contends that if the proposed section covers, as it does, offenses which involve only general intent as distinguished from specific intent, then the test amounts to an "absurd truism." What Professor Ballantine is pleased to call an "absurd truism" is in fact one of the most fundamental propositions of the criminal law, which we find expressed in the maxim, "Actus non facit

<sup>18</sup>"The full definition of every crime contains expressly or by implication a proposition as to a state of mind." Stephen, J., in *Reg. v. Tolson*, 23 Q. B. D. 168, 187 (1889). "The state of mind which accompanies an act is often of legal consequence as forming an ingredient necessary for the attachment of certain consequences." 1 Wigmore, *Evidence*, § 242.

<sup>19</sup>Law of Crimes, 7 ed. 102.

<sup>20</sup>Outlines of Criminal Law, 37.

<sup>21</sup>Sec. 242.

<sup>22</sup>23 Q. B. D. 168, 187.

reum, nisi mens rea sit." This was the principle which was applied by the English judges in insanity cases before the "right and wrong" and "delusion" tests were announced by them in *McNaughton's Case*<sup>23</sup> in 1843, these tests being derived from the testimony of the medical witnesses which was embodied in the summing up of the evidence by various trial judges.

The only possible theory on which insanity can be held to be a defense to a charge of crime is that it negatives the necessary state of mind. This has been clearly recognized by some courts. In *State v. Jones*,<sup>24</sup> Ladd, J., said: "When, as in this case, a person charged with crime admits the act, but sets up the defense of insanity, the real ultimate question to be determined seems to be whether, at the time of the act, he had the mental capacity to entertain a criminal intent—whether, in point of fact, he did entertain such intent." In *Stevens v. State*,<sup>25</sup> Gregory, J., said: "In a criminal case the jury must be satisfied beyond a reasonable doubt of the defendant's mental condition to commit the crime charged. This is but an application of the general principle that the criminal intent must be proved, as well as the act; that without a capable mind such intent cannot exist, the very element of crime being lacking." The same proposition has been stated by writers on criminal law and medical jurisprudence.<sup>26</sup>

In cases where the defendant acted under a mistake of fact, a defense similar to that of insanity, the well-accepted test is whether the mens rea was negated by the mistake.<sup>27</sup> Austin said in regard to mistake of fact: "Now here, although the proximate ground is ignorance or error, the ultimate ground is the absence of unlawful intention or unlawful inadvertence."<sup>28</sup> The following statement by Case, J., in *Regina v. Tolson*,<sup>29</sup> is to the same effect: "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defense. This doctrine is embodied in the somewhat uncouth maxim, *Actus non facit reum, nisi mens sit rea*. Honest and reasonable mistake stands in fact on

<sup>23</sup>10 Clark & Finnelly, 200.

<sup>24</sup>50 N. H. 369, 382.

<sup>25</sup>31 Ind. 485, 491.

<sup>26</sup>Harris, *Criminal Law*, 12 ed. 16; Wilshire, *Elements of Criminal Law*, 7; Highmore, *Law of Lunacy*, 197; Collinson, *Lunatics*, 471; Cooper, *Medical Jurisprudence*, 380.

<sup>27</sup>See my article, *Ignorance and Mistake in the Criminal Law*, 22 Harv. Law Rev. 75.

<sup>28</sup>Jurisprudence, sec. 687.

<sup>29</sup>23 Q. B. D. 168, 181.

the same footing as absence of the reasoning faculty, as in infancy or perversion of that faculty, as in lunacy."

III. Professor Ballantine's contention that "the proposed test sheds no light whatever on the vexed question whether irresistible impulse destroys responsibility" is fully answered by his later statement that "will is as necessary an element of criminal intent as are reason and judgment."<sup>30</sup> This is a complete recognition of the fact that under the proposed test irresistible impulse would be a defense. As "irresistible impulse" involves a lack of volition, this would necessarily negative the state of mind involved in the crime charged. Professor Ballantine cites inter alia in support of his statement that will is an element of criminal intent, the writer's article in the Harvard Law Review. Following is a portion of the discussion in that article relative to irresistible impulse:<sup>31</sup>

"Is irresistible impulse a defense under the proposed section? Yes.

"It is a fundamental principle of the criminal law that volition is a necessary element of every crime."<sup>32</sup> Stephen forcibly states this principle thus: 'No involuntary action, whatever effects it may produce, amounts to a crime by the law of England.'<sup>33</sup> Two different reasons for this well-accepted proposition are found in the books. The first is that without volition there is no act.<sup>34</sup> The second is that volition

<sup>30</sup>P. 497.

<sup>31</sup>P. 546.

<sup>32</sup>"Where it (volition) is absent, an immunity from criminal punishment will necessarily arise." Kenny, *Outlines of Criminal Law*, 40. "It is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise." Holmes, *Common Law*, 54.

<sup>33</sup>History of the Criminal Law, 100.

<sup>34</sup>"External acts are such motions of the body as are consequent upon determinations of the will." 2 Austin, *Jurisprudence*, 28.

"That is a man's act which he wills to do, exercising a choice between acting and forbearing, and the strongest moral compulsion still leaves freedom of such choice." Clerk and Lindsell, *Torts*, 2 ed., 7.

"An act is the result of an exercise of the will." Gray J., in *Duncan v. Landis*, 106 Fed. 839, 848 (1901).

"For all legal purposes an act presupposes a human being. It assumes that he is practically free to do such act or leave it undone. It implies that he desires a particular end, and that for the purpose of attaining that end he makes certain muscular movements. These motions thus willed, and their immediate and direct consequences are called, without any minute analysis, an act." Hearn, *Legal Duties and Rights*, 90.

"Jurisprudence is concerned only with outward acts. An 'Act' may therefore be defined, for the purposes of the science, as a 'determination of will, producing an effect in the sensible world.'" Holland, *Jurisprudence*, 9 ed., 100.

"An act is always a voluntary muscular contraction, and nothing else." Holmes, *Common Law*, 91.

"An act is the bodily movement which follows immediately upon a volition." Markby, *Elements of Law*, 6 ed., § 215.

"The movements of a man's limbs when he gesticulates in a troubled dream,



is a mental element that must accompany an act in order to constitute a crime.<sup>35</sup> It is sometimes said that volition is an element of criminal intent.<sup>36</sup> Under both these views a lack of volition due to mental disease is a defense to a charge of crime. Whenever an impulse is irresistible, there is *ex vi termini* a clear lack of volition. It follows, then, that the proposed section covers the case of irresistible impulse."

IV. Professor Ballantine's final objection to the proposal in question is that under it an insane person might be convicted of violating statutory prohibitions which involve no *mens rea* or criminal intent. Such prohibitions were classified in a leading English case,<sup>37</sup> as follows:

(1) "Acts which are not criminal in any real sense, but which in the public interest are prohibited under a penalty," such as the innocent sale of adulterated food; (2) "public nuisances"; (3) "cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right." In all three classes the penalty for violating the statute is a fine.

Professor Ballantine is correct in his contention that under the proposed test insanity would not be a defense to a charge of violating

or walks in his sleep, are manifest but not voluntary. Perhaps these last are not properly to be called acts at all; in any case they are not on the footing of normal acts." Pollock, *First Book of Jurisprudence*, 137.

"Acts are exertions of the will manifested in the external world." Pound, *Readings on the History and System of the Common Law*, 453.

"An act is an event subject to the control of the will." Salmond, *Jurisprudence*, 4 ed., 324.

"Suppose B takes A's hand and with it strikes C, this is clearly not A's act. Suppose B strikes A below the knee, as a result of which A's leg flies up and strikes C. This is not A's act. Suppose A is suffering from locomotor ataxia, and as a symptom of the disease his foot flies out and strikes C. This again is not A's act. Suppose A, while tossing in the delirium of typhoid fever, flings his arm against C. I do not think any judge would have difficulty in saying that this was not A's act and that he was, therefore, not guilty of a crime. Now, suppose A's hand strikes C because of an uncontrollable impulse, the symptom of mental disease. No distinction can be drawn between these cases, and yet many courts would not allow A a defense in the last case. Others would allow the defense without a consideration of the legal principle involved. When, therefore, it can be shown that the defendant's physical movement which caused the injury in question was due to an uncontrollable impulse he should not be convicted, which conclusion is based upon the most fundamental principle of criminal jurisprudence." From my paper on Tests of Criminal Responsibility of the Insane, 1 J. Crim. Law and Criminology, 394, 400.

<sup>35</sup>"In order that an act may by the law of England be criminal . . . it must be voluntary." 2 Stephen, *History of the Criminal Law*, 97.

<sup>36</sup>"Will is as necessary an element of intent as are reason and judgment." Simmons, C. J., in *Flanagan v. State*, 103 Ga. 619, 626, 30 S. E. 550 (1898).

"This distinct element in criminal intent consists not alone in the voluntary movement of the muscles (i.e., in action), nor yet in a knowledge of the nature of an act, but in a combination of the two—the specific will to act, i.e., the volition exercised with conscious reference to whatever knowledge the actor has on the subject of the act." Wigmore, *Evidence*, § 242.

<sup>37</sup>*Sherras v. De Rutzen*, 1895, 1 Q. B. 918

such a statute. And why should it be? It is a well-settled principle of law that an insane person is liable for his torts. As the statutory prohibitions under consideration more nearly resemble torts than crimes, there is no reason why an insane person should not pay the pecuniary penalty in such a case, just as he has to pay damages for his torts. As was said by Wills, J., in *Regine v. Tolson*:<sup>38</sup> "There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest."

Professor Ballantine cites no case where insanity was set up as a defense to a charge of violating such a statute, and the present writer has been able to find none. It is improbable that such a case will ever arise. Viewed from the practical point of view, the expense of establishing the insanity of the accused would be out of all proportion to the fine involved.

A. "Delusion is not recognized by English and American courts as a special test, but is simply one form of aberration which destroys knowledge of right and wrong or creates mistakes of fact."

Although Professor Ballantine cites no authority for this statement, it is obvious that he was relying largely upon the answers of the English judges to the questions propounded to them by the Lords in *McNaughton's case*.<sup>39</sup> In that case, which was tried in 1843, the defendant had a delusion that he was being continually followed by certain persons, who spied upon him, pointed at him, and talked about him. According to the medical testimony in the case, the act of shooting Mr. Drummond was the direct result of the delusion, the defendant mistaking Mr. Drummond for Sir Robert Peel, whom he believed to be one of the persons who were following him. There was no testimony that the defendant was unable to distinguish right from wrong. On the contrary, one medical witness testified "that a person may labor under a morbid delusion and yet know right from wrong." After a verdict of acquittal the case became the subject of discussion in the House of Lords, and the judges were asked what was the law of England relative to an insane delusion as a defense to a criminal prosecution. The judges, after making the assumption that the person suffering from the delusion was otherwise entirely sane, stated in substance that the delusion would be a defense (a) if the person did not know at the time of committing the crime that he was acting contrary to law, or (b) if treating the facts as believed by the defendant to be real, his

<sup>38</sup>23 Q. B. D. 168, 177.

<sup>39</sup>10 Clark and Finnelly, 200.

act would have constituted no crime. As has been often pointed out, the assumption made by the judges that a person may suffer from an insane delusion and at the same time be sane in all other respects, although based upon the testimony of one medical witness<sup>40</sup> in McNaughton's case, is entirely without justification.<sup>41</sup> In addition to this the answers of the judges relative to delusions was not in accord with the prevailing medical and legal views at the time.

In the early part of the nineteenth century delusion was regarded by some members, at least, of the medical profession as the sole criterion of insanity. Dr. Robert Darling Willis testified before a committee of the House of Commons in 1810 as follows: "In insanity the mind is occupied upon some fixed assumed idea to the truth of which it will pertinaciously adhere in opposition to the plainest evidence of its falsity; and the individual is always acting under that false impression."<sup>42</sup> Writing in 1823, Dr. Francis Willis said: "An unsound mind is marked by delusion."<sup>43</sup> An English barrister, writing in 1838, quotes Dr. Haslam as saying, "False belief is the essential of insanity."<sup>44</sup>

In 1800 Erskine made his famous argument in Hadfield's case.<sup>45</sup> Accepting the view of the medical profession that delusion and insanity were practically synonymous, he successfully contended that the presence or absence of delusion was the test of criminal responsibility, saying in part: "Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity, and where it cannot be predicated of a man standing for life or death for a crime, he ought not in my opinion to be acquitted."<sup>46</sup> Forty years later the Solicitor-General stated in his argument in *Queen v. Oxford*<sup>47</sup> that "Mr. Erskine's speech is considered by medical men as correct."

In 1862 Sir John Nicholl said in *Dew v. Clark*:<sup>48</sup> "The true criterion—the true test—of the absence or presence of insanity, I take to be, the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely, delusion." Shelford, an Eng-

<sup>40</sup>Dr. E. T. Monro.

<sup>41</sup>Ray, *Medical Jurisprudence of Insanity*, 283; Mercier, *Criminal Responsibility*, 174; Oppenheimer, *Criminal Responsibility of Lunatics*, 216; Article by Dr. Morton Prince, 49 *Journ. Amer. Med. Assn.*, 1643, 1645.

<sup>42</sup>Cited by Dr. Francis Willis, *Treatise on Mental Derangement*, 43 (London, 1823).

<sup>43</sup>*Ibid.*, 221.

<sup>44</sup>Stock, *Law of Non Compos Mentis*, 11.

<sup>45</sup>27 *How. State Trials*, 1281.

<sup>46</sup>Page 1314.

<sup>47</sup>4 *Rep. of State Trials*, N. S. 497.

<sup>48</sup>Addams, *Eecl. Rep.* 436, 441.

lish barrister, writing in 1847, repeated this test.<sup>49</sup> Lord Denman, in 1849, made the following statement to the jury in the case of *Regina v. Smith*: "To say that a man was irresponsible without positive proof of any act to show he was laboring under some delusion, seemed to him to be a presumption of knowledge which none but the great Creator Himself could possess."<sup>50</sup> In 1863 Baron Martin told the jury in *Regina v. Townley*<sup>51</sup> that "what the law meant by an insane man was a man who acted under delusions."

In this country there seem to be five different grounds on which a delusion has been held to be a defense:

(1) When the facts of the delusion, if true, would have been a defense.<sup>52</sup> (2) When the delusion destroys ability to distinguish between right and wrong.<sup>53</sup> (These were the two tests of the judges in *McNaughton's* case, which Professor Ballantine announces as the only theories by which delusion could be a defense.) (3) When irresistible impulse or inability to distinguish between right and wrong results from the delusion.<sup>54</sup> (4) When irresistible impulse results from the delusion.<sup>55</sup> (5) When the wrong done is the product of the delusion.<sup>56</sup> As already pointed out, this was the prevailing theory in England during a large part of the nineteenth century.

B. Professor Ballantine, in taking exception to the writer's view that the present legal tests, viz., inability to distinguish between right and wrong, delusion, and irresistible impulse, originated with the medical profession, and are medical theories crystallized into rules of law, says (a) that this proposition appears to him to "represent an absolute failure to understand the ethical basis of these rules of law, viz., that

<sup>49</sup>Lunatics, Idiots and Persons of Unsound Minds, 42.

<sup>50</sup>Quoted in Williams, *Unsoundness of Mind*, 4.

<sup>51</sup>3 F. & F. 839, 847.

<sup>52</sup>*Smith v. State*, 55 Ark. 259, 18 S. W. 237 (1891); *People v. Hubert*, 119 Cal. 216, 51 Pac. 329 (1897); *State v. Merwherter*, 46 Iowa 88 (1877); *Commonwealth v. Rogers*, 7 Metc. (Mass.) 500 (1844); *Thurman v. State*, 32 Neb. 224, 49 N. W. 338 (1891); *State v. Lewis*, 20 Nev. 333, 22 Pac. 241 (1889); *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275 (1893); *Taylor v. Commonwealth*, 109 Pa. St. 262 (1885).

<sup>53</sup>*People v. Willard*, 150 Cal. 543, 89 Pac. 124 (1907); *Smith v. Commonwealth*, 1 Duv. (Ky.) 224, 230 (1864); *Grissom v. State*, 62 Miss. 167 (1884).

<sup>54</sup>"In such a case [insane delusion] . . . there must exist either one of two conditions: (1) Such mental defect as to render the defendant unable to distinguish between right and wrong in relation to the particular case; or (2) the overmastering of defendant's will in consequence of the insane delusion under the influence of which he acts, produced by disease of the mind or brain." Somerville, J., in *Parsons v. State*, 81 Ala. 577, 596, 2 So. 854 (1886).

<sup>55</sup>*Flanagan v. State*, 103 Ga. 619, 30 S. E. 550 (1898); *Fouts v. State*, 4 Greene (Ia.) 500, 508 (1854); *Commonwealth v. Mosler*, 4 Barr (Pa.) 265, 266 (1846).

<sup>56</sup>*State v. Jones*, 50 N. H. 369 (1871); Lewis, *A Draft Code of Criminal Law*, 246.

criminal responsibility rests upon moral accountability, as in the case of children from 7 to 14," and (b) "the right and wrong and irresistible impulse tests are not based on obsolete medical theories or on arbitrary symptoms of insanity, but on the general conditions of legal responsibility."

The authorities seem to support the view of the present writer, Judge Somerville, in his notable opinion in *Parsons v. State*,<sup>57</sup> which Professor Ballantine describes as "probably the best exposition of the subject in the book," says: "The result is that the 'right and wrong test,' as it is sometimes called, which it must be remembered itself originated with the medical profession, in the mere dawn of the scientific knowledge of insanity, has been condemned by the great current of modern medical authorities, who believe it to be 'founded on an ignorant and imperfect view of the disease.'"<sup>58</sup> The same judge also refers to the right and wrong test as an "old rule of legal responsibility based on theories of physicians promulgated a hundred years ago."<sup>59</sup> Judge Doe, in his equally famous opinion in the case of *State v. Pike*,<sup>60</sup> said: "The knowledge test in all its forms and the delusion test are medical theories introduced in immature stages of science, in the dim light of earlier times, and subsequently, upon more extensive observation and more critical examinations, repudiated by the medical profession. But legal tribunals have claimed those tests as immovable principles of law."<sup>61</sup>

Judge Doe also stated the following: "Without any conspicuous or material partition between law and fact, without a plain demarcation between a circumscribed province of the court and an independent province of the jury, the judges gave to juries, on questions of insanity, the best opinions which the times afforded. In this manner, opinions purely medical and pathological in their character, relating entirely to questions of fact, and full of error as medical experts now testify, passed into books of law, and acquired the force of judicial decision."<sup>62</sup>

The "mistake of fact" rule as to delusion, announced by the judges after *McNaughton's* case, and usually followed today, which is based on the premise that except for the delusion the person is entirely sane, resulted from the testimony of Dr. E. T. Monro in *McNaughton's* case. He was asked: "Is it consistent with the pathology

<sup>57</sup>81 Ala. 577.

<sup>58</sup>P. 584.

<sup>59</sup>P. 584.

<sup>60</sup>49 N. H. 399.

<sup>61</sup>P. 437.

<sup>62</sup>P. 438.

of insanity that a partial delusion may exist, depriving the person of all self-control, whilst the other faculties are sound? (Answer) "Certainly, monomania may exist with general sanity."<sup>63</sup> This view of delusion was in perfect accord with the psychology of the time, which regarded each function of the brain as independent of the others.<sup>64</sup>

The further relation of the legal test of delusion to the medical theory was discussed under the preceding sub-heading.

As regards "irresistible impulse," the phrase is obviously of medical and not legal origin. It is in common use by medical writers to describe a symptom of mental diseases.<sup>65</sup> A recent writer, who is both a physician and a lawyer, devotes a chapter to the subject "Power of Self-Control," in which irresistible impulse is clearly recognized as a medical and not a legal conception.<sup>66</sup>

The following extracts from this chapter are conclusive on the point: "Some alienists, however, describe a special form of lunacy under the term 'impulsive insanity' as being characterized by morbid, irresistible impulses to do foolish, absurd, or criminal acts, and by nothing else."<sup>67</sup> "A stately number of monomaniæ have been described and dignified with special denominations: an uncontrollable impulse in the subject to kill himself or others (suicidal and homicidal monomania), to possess himself of the property of others (kleptomania), to burn (pyromania), to commit indecent acts (autoiomania), to ill-treat children (misopaedia), to use bad language (monomanie bestamiante)."<sup>68</sup> "Where are those tangible signs which a medical witness can put before the court convincing enough to enable a jury to differentiate between an irresistible impulse and one which was merely unresisted, and again, between the loss of self-control of passion and that of disease?"<sup>69</sup>

Judicial opinions also recognize the medical quality of irresistible or uncontrollable impulse. Wightman, Jr., in *Reg. v. Burton*,<sup>70</sup> says: "The medical man called for the defense defined homicidal mania to be a propensity to kill, and described moral insanity as a state of mind under which a man, perfectly aware that it was wrong to do so, killed

<sup>63</sup>4 Rep. State Trials, N. S. 919.

<sup>64</sup>Paton, *Psychiatry*, 119.

<sup>65</sup>See for example, Clouston, *Mental Diseases*, 337, 685, and Diffendorf's edition of Kraepelin, *Clinical Psychiatry*, 93.

<sup>66</sup>Oppenheimer, *The Criminal Responsibility of Lunatics*.

<sup>67</sup>P. 182.

<sup>68</sup>P. 188.

<sup>69</sup>P. 193.

<sup>70</sup>3 F. & F. 772, 780.

another under an uncontrollable impulse." Dillon, Ch. J., said in *State v. Felter*:<sup>71</sup>

"But if, from the observation and concurrent testimony of medical men who make the study of insanity a specialty, it shall be definitely established to be true that there is an unsound condition of mind—that is, a diseased condition of the mind, in which, though a person abstractly knows that a given act is wrong, he is yet, by an insane impulse, that is, an impulse proceeding from a diseased intellect, irresistibly driven to commit it—the law must modify its ancient doctrines and recognize the truth and give to this condition, when it is satisfactorily shown to exist, its exculpatory effect."

It would seem to follow from the foregoing discussion that the present writer was not in error when he stated "that the tests of irresponsibility now employed consist simply of a statement of certain mental symptoms, viz., inability to distinguish between right and wrong, irresistible impulse and delusion, the existence of one or more of which is treated by the law as a defense," and that these are medical theories crystallized into rule of law. It is, of course, true that in the case of irresistible impulse there is a sound legal reason, viz., lack of volition, why such a mental state should be a defense. As already pointed out, however, the test for determining responsibility should be framed in accordance with legal principles and should not consist of the statement of a symptom of mental disease. If the defendant committed the wrong because of an irresistible impulse, as there was lack of volition, he did not have "the particular state of mind which must accompany his act or omission in order to constitute the crime charged."

(a) and (b). The principles on which the test of the proposed statute is based are (a) that most crimes involve a mental state as an element thereof; (b) that this mental element varies with different crimes; (c) that this element includes mens rea or general criminal intent, as well as specific intent; and (d) that anything which negatives this mental element is a defense to the crime charged. Professor Ballantine agrees with these propositions so far as the specific intent is concerned, but he regards the mens rea not as an element of a crime but as something apart from it—a sort of general moral standard which is the same in all crimes and is independent of the essentials of the crimes themselves. He says, "All the elements of the particular crime, including the specific intent, may be present, but not the general conditions of criminal responsibility, which are the same for all

<sup>71</sup>25 Iowa 67, 83.

crimes."<sup>72</sup> He also says: "The general subjective conditions of criminality, presupposed as a general rule in addition to the particular state of mind, motive or intent included in the definition of various crimes, are then as follows: (1) Competent age; (2) some degree of sanity; (3) freedom from overpowering coercion, and (4) 'a punishable state of mind,' i. e., some blameworthy form of intentionality, consisting either of intent to commit some crime or to do some serious wrong—gross or culpable negligence may in the case of killing and perhaps of assault take the place of intent to do wrong."<sup>73</sup>

The questions presented by this divergence of view between Professor Ballantine and the writer are as follows:

1. Is mens rea or general intent an *element* of particular crimes?
2. Is mens rea a constant quantity which is "common to all crimes"?
3. Are infancy, insanity and coercion to be considered as defenses independently of the "intent included in the definition of various crimes" and the "punishable state of mind," or are they defenses only in so far as they negative such state or states of mind?

1. Professor Ballantine cites no authorities for his contention that mens rea is not an element of particular crimes. On the contrary, two of his citations, appearing in another connection, support the opposite view. They are as follows: "It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offense some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge, but as a general rule there must be something of that kind which is designated by the expression mens rea."<sup>74</sup> "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offense."<sup>75</sup> Other authorities to the same effect are as follows: "A criminal intent is generally an element of crime."<sup>76</sup> "The intent and act must both concur to constitute the crime."<sup>77</sup> "The full definition of every crime contains, expressly or by implication, a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime so defined is not committed."<sup>78</sup> "An unwarranted act with-

<sup>72</sup>P. 489.

<sup>73</sup>P. 493.

<sup>74</sup>Cave, J., in *Chisholm v. Doulton*, 22 Q. B. D. 736.

<sup>75</sup>Wright, J., in *Sherras v. De Rutzen*, 1895, 1 Q. B. 918.

<sup>76</sup>Waite, C. J., in *Reynolds v. United States*, 98 U. S. 145.

<sup>77</sup>Kenyon, C. J., in *Fowler v. Padget*, 7 T. R. 509, 514.

<sup>78</sup>Stephen, J., in *Regina v. Tolson*, 23 Q. B. D. 168.



out a vicious will is no crime at all."<sup>79</sup> "The state of mind accompanying a forbidden act is frequently an element material to make the act a crime."<sup>80</sup> "Every crime involves: (1) A particular physical condition. . . . (2) A particular mental condition causing this physical condition."<sup>81</sup> "The second element which is essential to constitute a crime is called the mens rea: a guilty mind."<sup>82</sup>

2. For his contention that mens rea is the same for all crimes Professor Ballantine cites no authorities. The quotation from the opinion of Cave, J., in *Chisholm v. Doulton*,<sup>83</sup> which he cites in another connection, and which has been already referred to, indicates a different view of mens rea. Cave said: "Sometimes it is negligence, sometimes malice, sometimes guilty knowledge." The most famous statement of the variable character of mens rea is that of Stephen, J., in the Tolson case, already cited several times. He said: "The mental elements of different crimes differ widely. 'Mens rea' means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible connection with a woman without her consent, and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence, it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name."<sup>84</sup>

Professor Ballantine takes exception to Stephen's view of mens rea by saying that "he seems to identify it with specific intent." The answer to this objection is that no specific intent is involved in most of the offenses named by Stephen. For example, no specific intent is required for murder, and "inattention" or negligence presupposes absence of such intent.

The variable character of mens rea is also indicated by the following statement from Wigmore on Evidence, already cited: "It (the criminal law) does not need to generalize in one phrase or term the exact nature of all possible criminal states of mind; it merely defines the criminal state of mind essential for each particular crime."<sup>85</sup>

3. Although Professor Ballantine cites no authorities in support of his contention that "competent age," "some degree of sanity" and "freedom from overpowering coercion" are to be considered as "sub-

<sup>79</sup>4 Blackstone, Comm. 21.

<sup>80</sup>Wigmore, *Evidence*, sec. 242.

<sup>81</sup>Kenny, *Outlines of Criminal Law*, 37.

<sup>82</sup>Cherry, *Outline of Criminal Law*, 8.

<sup>83</sup>22 Q. B. D 736.

<sup>84</sup>P.185.

<sup>85</sup>Sec. 242.

jective conditions of criminality" apart from and independent of the state of mind included in the particular crime and a "punishable state of mind," or, in other words, that infancy, insanity and coercion are defenses to a charge of crime independent of the mental elements of such crime, his language is reminiscent of a statement made by Stephen, J., in the Tolson case. It is as follows: "In all cases whatever, competent age, sanity and some degree of freedom from some kinds of coercion are assumed to be essential to criminality."<sup>86</sup> This gives no support to Prof. Ballantine's view. On the contrary, when the context is examined it is found to oppose it. Stephen was discussing the mental element in statutory crimes, and immediately before the statement quoted above was the following: "It is the general—I might, I think, say the invariable practice of the legislature to leave unexpressed some of the mental elements of crime."<sup>87</sup> It is clear that Stephen, instead of regarding competent age, sanity and freedom from coercion as elements of criminal responsibility independent of the mental elements of crime, treated them as incidents of such elements. This is the proper principle of law. *Infancy, insanity and coercion are defenses in so far as they negative the criminal intent or guilty mind.* The common law rule as to infancy was founded on presumptions as to capacity to form the criminal intent. Under seven, the infant was conclusively presumed to be incapable of having such intent; between seven and fourteen there was a presumption of such incapacity, but the prosecution was permitted to rebut the presumption; over fourteen the infant was considered as having the same capacity as an adult. Kenny states the rule as follows: "Those under seven years of age. There is a conclusive presumption that children so young can not have the mens rea at all. . . . Between seven and fourteen. Even at this age 'infants' are still presumed to be incapable of mens rea; but the presumption is no longer conclusive, it may be rebutted by evidence."<sup>88</sup> Russell says: "A child of seven and under fourteen years is presumed to be incapable of criminal intent, but the presumption may be rebutted."<sup>89</sup> McClain states the rule fully as follows: "An infant under seven years of age is by law conclusively presumed incapable of entertaining a criminal intent. . . . Between the ages of seven and fourteen an infant is presumed incapable of criminal intent."<sup>90</sup>

<sup>86</sup>P. 187.

<sup>87</sup>Ibid.

<sup>88</sup>Outlines of Criminal Law, 50.

<sup>89</sup>Law of Crimes, 7 ed. 59.

<sup>90</sup>McClain, *Criminal Law*, secs. 149- 150. To the same effect are 4 Blackstone, Comm. 21; Wills, J., in *Regina v. Tolson*, 23 Q. B. D. 168, 181; Stroud,

Likewise, the theory on which insanity can be held to be a defense in certain cases is that it negatives the criminal intent. This is well stated by Ladd, J., in *State v. Jones*:<sup>91</sup> "At the trial where insanity is set up as a defense two questions are presented: First, Had the prisoner a mental disease? Second, If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind as to take away the capacity to form or entertain a criminal intent." Also by Gregory, J., in *Stevens v. State*<sup>92</sup> (already cited): "In a criminal case, the jury must be satisfied beyond a reasonable doubt of the defendant's mental capacity to commit the crime charged. This is but an application of the general principle that the criminal intent must be proved as well as the act, that without a capable mind such an intent cannot exist, the very element of crime being wanting."

Coercion or compulsion is a defense when, by reason of it, the necessary mental element of crime is lacking. Blackstone said: "A sixth species of defect of will is that arising from *compulsion* and irresistible *necessity*. These are a constraint upon the will whereby a man is urged to do that which his judgment disapproves, and which, it is to be presumed, his will (if left to itself) would reject."<sup>93</sup> The underlying theory of compulsion has already been discussed under the topic "irresistible impulse," where the compulsion is internal. Such compulsion as pointed out should be a defense because there is lack of volition. On the same principle external compulsion is a defense. Stroud says: "Compulsion by mankind, in order to form an excuse under the principle of absence of volition, must be so complete as to leave no room for choice."<sup>94</sup> The principle is illustrated by Lord Hale: "If there be an actual forcing of a man, as if A, by force, take the arm of B and the weapon in B's hand and therewith stabs C, whereof he dies, this is murder in A, but B is not guilty."<sup>95</sup> Wilshire states the principle clearly as follows: "The mental element is absent where the act is involuntary."<sup>96</sup> He states as an example of absence

*Mens Rea*, 61; Clark, *Analysis of Criminal Liability*, 68; Harris, *Criminal Law*, 12 ed. 16; Cherry, *Outline of Criminal Law*, 16; Wilshire, *Elements of Criminal Law*, 7; Wharton, *Criminal Law*, sec. 86.

<sup>91</sup>50 N. H. 369, 393.

<sup>92</sup>31 Ind. 485, 491. To the same effect are Cave, J., in *Regina v. Tolson*, 23 Q. B. D. 168, 181; Harris, *Criminal Law*, 12 ed. 16; Wilshire, *Elements of Criminal Law*, 7; Highmore, *Law of Lunacy*, 197; Collinson, *Lunatics*, Cooper, *Medical Jurisprudence*, 380.

<sup>93</sup>4 Comm. 28.

<sup>94</sup>*Mens Rea*, 210.

<sup>95</sup>1 Pleas of the Crown, 434.

<sup>96</sup>*Elements of Criminal Law*, 6.

of will "where there is physical compulsion, as where A takes the hand of B and forcibly compels him to kill C."

(c) Professor Ballantine greatly overemphasizes the moral quality of mens rea, and thereby confuses motive and intent. He says that "a crime is not proved if the mind of the person doing the act is morally innocent."<sup>97</sup> This is directly opposed to his earlier statement that "conduct may be flagrantly illegal and at the same time morally innocent or even heroic."<sup>98</sup> This statement is taken from Stroud on Mens Rea, cited by Professor Ballantine. Stroud also says: "The law then is concerned to investigate a man's state of mind only in relation to the legal character of his acts, not in relation to their ethical or moral character."<sup>99</sup> Following his statement that no crime is proved if the mind of the person acting be morally innocent, Professor Ballantine says: "This involves knowledge of its wrongful or illegal character." This is directly opposed to the well established principle that ignorance of the law is no excuse. Where an act, even if not inherently wrongful, is done in violation of a statute making it criminal, the fact that the defendant did not know of its illegal character is no defense.

Professor Ballantine favors the retention of the "right and wrong" test,<sup>100</sup> although he admits that this test does not work well in practice, saying: "The right and wrong test may be applied in such a way as to convict almost any one except a total idiot or a raving maniac, or in such a way as 'to allow very considerable fish of the malefactor species to escape from the judicial net.'" The unworkable character of this test has been pointed out too many times to require discussion

<sup>97</sup>P. 491.

<sup>98</sup>P. 490.

<sup>99</sup>P. 10.

<sup>100</sup>Along with the right and wrong test Professor Ballantine recommends the following: "Was the defendant at the time of the commission of the act afflicted with a disease of the mind or with defect of intelligence, comparable to that of a child under (say) fourteen years"? It is apparent at once that mental disease finds no parallel in the mental state of a child. What resemblance is there between paranoia or dementia, for example, and youthful immaturity?

There is much more resemblance between such immaturity and "defect of intelligence." In fact the latter is simply a case of arrested mental development—the adult in years is a child mentally. By means of tests based on the mental reactions of normal children of various ages, psychiatrists and psychologists can determine with a fair degree of accuracy the mental age of a feeble-minded adult. There is consequently much reason for applying to such a person, for the purpose of determining his responsibility for a criminal act, the rule of the common law relative to infants. In the summer of 1918 the writer, who was then in the office of the judge advocate general of the army, recommended to the then head of the office, that this test be applied in cases where the defendant in a trial by court-martial was mentally defective. The recommendation was acted upon with what were apparently satisfactory results.

of this aspect of it here. The Thaw case may, however, be referred to as a concrete example.

*Conclusion.* Having discussed in detail the various objections and contentions of Professor Ballantine, it seems appropriate to conclude this paper with a brief summary of what are believed to be the advantages, both theoretical and practical, of the proposed test for determining the criminal responsibility of the insane as compared with the tests now employed. The following summary is taken from the writer's article in the Harvard Law Review, to which mention has already been made:

I. The proposed section is based upon the fundamental principle of criminal jurisprudence, that a crime has not been committed when the necessary mental element is lacking.

II. The proposed section embodies no medical or psychological theories and consequently will not be affected by changing views as to the nature and scope of mental disease. The difficulty with the existing legal tests on this subject is that they are based on medical theories, many of which are obsolete and with which the scientific knowledge of the present sharply conflicts. The proposed section does not limit the defense to any particular form or symptoms of mental disease.

III. The proposed section does away with all legal definitions of insanity. For purposes of determining criminal responsibility, the law, in some jurisdictions, has prescribed the requisites of insanity.<sup>101</sup> Much of the confusion that frequently arises when insanity is set up as a defense is due to the conflict between the legal definition of insanity and the conception of mental disease held by the medical experts.<sup>102</sup> The proposed section does not contain the word "insanity" and does not attempt to say what shall constitute such a mental condition.

IV. Under the proposed section the medical and legal professions will each perform their proper functions. Mental disease constitutes a medical problem, and the diagnosis and symptomatology of it should be determined by physicians. Criminal responsibility, on the other

<sup>101</sup>See the New York statute, Penal Law, 1909, sec. 1120.

<sup>102</sup>We believe that a want of harmony must ever exist between the legal and medical doctrines of insanity in its connection with responsibility. The two cannot be identical, and for this reason—Law demands a fixed rule—Medicine admits but a general principle. What would be thought of the physician who undertook in the definition of any, even the simplest, disease, to say, 'Certain symptoms must be present'? His theory would lead to a series of disappointments, his practice be a continuation of blunders! Yet, Law steps forward with her definition of unsoundness of mind; and, according to this definition, on which both the life and reputation of society may depend, one-half mankind are mad, and half the mad are wise." Williams, *Unsoundness of Mind*, 2.

hand, is a legal question,<sup>103</sup> and the rules for determining such responsibility should be fixed by law and administered by the legal profession. Under the proposed section the medical witness will state his opinion regarding the mental condition of the defendant at the time of the alleged offense,<sup>104</sup> and the judge will then describe to the jury the mental element involved in the crime charged. The function of the jury will be to determine whether the defendant, as a result of the mental condition portrayed by the witness, had the particular state of mind described by the judge. It will not be necessary for the expert witness or the judge to use technical terms in performing their respective functions, and as a result the jury will have less difficulty than at present in reaching an intelligent and appropriate verdict.

V. The proposed section establishes the principle that mental disease, like intoxication and provocation, may lessen the degree of a crime.

VI. The proposed section prescribes a practical test. Under the present system the issue is beclouded by the introduction of special tests and unusual terminology. These have an inhibiting effect upon all persons concerned in the trial, so that they frequently lose sight of the real issue involved. Under the proposed section, the practice in a case where the defense is insanity will not differ from that of the ordinary case.

It may perhaps be argued that, as the proposed section does not contain a definite specification of mental symptoms, some courts may continue to apply their present rules in spite of the statute. This may be so. A study of the decisions under the Married Woman's Property Acts and the uniform Negotiable Instruments Law shows that some courts persist in following their previous holdings, no matter how the statute is phrased. The most that can be expected of any repealing statute is that it will guide an open-minded court to the indicated result. Many courts now recognize the illogical and unsatisfactory character of the present rules regarding insanity, which statutes or precedents compel them to follow, and will welcome the opportunity to be free of their restraint.

<sup>103</sup>"Criminal responsibility means accountability for one's actions to the criminal law." From first report of this committee, 2 J. Criminal Law and Criminology, 523.

<sup>104</sup>"The physician's duty in court cases is simply to discover the mental condition of the patient. This having been done, the question of the responsibility or irresponsibility, competency or incompetency, of a man in this mental state is a matter of law and to be decided by judge and jury." Dr. Charles W. Burr, 48 Jour. Amer. Med. Assn., 1852, 1855.