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THE MEDICO-LEGAL DILEMMA A SUGGESTED SOLUTION

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The dilemma confronting psychiatrists testifying in the law courts is embodied in the situation commonly called the "battle of experts." This battle, it may be contended, is an enlarged projection of psychological disagreements arising out of the subject matter itself. To the psychiatrist this scientific artifact inevitably brings dissatisfaction. To the legal profession and the public, the planning and strategy over the mental fate of the prisoner at the bar discredits sincere efforts to describe intricate mental states within legally proper boundaries. Dissatisfaction with legal rules and the apparent reluctance of attorneys to modify trial rules and practices governing mental disease and criminal responsibility, amounts almost to a cold war between the two disciplines.

But the appearance of intra-medical struggle between opposing psychiatric experts on a given case is often more apparent than real. Underlying the apparent battle of experts lies the application of the so-called "right and wrong" test for criminal irresponsibility to psychologic thinking. For example, two psychiatrists appearing on opposing sides may differ to some degree in their estimation of a given case. They appear however to be much wider apart when forced to express their opinions in terms of the "right and wrong" test. The public merely see the obvious aspect of the problem, i.e., the disagreement. They do not perceive the underlying ideational struggle wherein medical men try to fit modern psychiatric concepts into standards which jurists must uphold—concepts which are based on statutory law and legal tradition. The basic difficulty lies between fundamental legal and medical constructs. How did this conflict develop?

I. BACKGROUND OF THE CONFLICT

In the interests of clear thinking it may be advantageous to recite briefly the facts underlying this apparent impasse. In early times, the alienist was called by the court to aid in deciding the presence of in-

sanity and idiocy in those defendants on trial for criminal acts. The jury, however, in judging criminal irresponsibility utilized medical among other types of testimony from a common sense point of view, i.e., the reasonable view of the reasonable man. In this function the jury was guided by the presiding judge who presented the framework of existing law and legal precedent within which the jury was to estimate the question of responsibility. To quote Sir James Stephen:¹

"The question, 'What are the mental elements of responsibility?' is, and must be, a legal question. It cannot be anything else, for the meaning of responsibility is liability to punishment . . . I think it is the province of medical men to state for the information of the court such facts as experience has taught them bearing upon the question whether any given form of madness affects, and in what manner and to what extent it affects, either of these elements of responsibility (knowledge that an act is wrong and power to abstain from doing it)."

In time, legal principles establishing tests for irresponsibility which were understandable to the "reasonable man," became codified into a workable formula. This codification was compressed in the English law into the so-called McNaghten decision of 1843. In the English-speaking countries, including all of the States of the Union but one, the basic test utilized today is a direct expression or outgrowth of the McNaghten decision. The tests for criminal responsibility presented to the jury are today substantially as was stated in one part of the original opinion given to the House of Lords by Chief Justice Tindal;² that a person is irresponsible for crime if "he was laboring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

Thus, the jury tests the question of criminal responsibility as it is influenced by mental disease. The court enunciates the tests in accordance with the statutes and defines the limits of testimony as it applies to the crucial question of responsibility. The psychiatric expert interprets his understanding of the symptoms, signs and psychopathology of the prisoner in terms of its influence on knowledge of right and wrong in the particular act in question. The expert witness, however, gives testimony like any other witnesses and, like them, can entertain an opinion which, when qualified by his special scientific knowledge, is considered to be of particular value. The expert's function is to render

1. STEPHEN, SIR JAMES F., *HISTORY OF THE CRIMINAL LAW OF ENGLAND*, London, Macmillan Company, 1883, Vol. 2, P. 183.

2. *McNAGHTEN'S CASE*, 10 CLARK & FINNELLY 200 (1843).

medical opinion intelligible to the jury in such a way as to allow the latter to apply the tests for irresponsibility due to insanity, but neither judge nor jury is bound by expert opinion. The jury's duty is solely to estimate criminal responsibility of the accused under the McNaghten formula.

In practice, psychiatrists have utilized a rough standard which states that if a prisoner was clearly psychotic at the time of the act, he was also irresponsible, *i.e.*, he did not know wrong from right and did not know that he was doing wrong. Although the attempt to fit modern concepts of mental illness into the customary terms of legal tests has been accomplished with varying degrees of success as far as juries are concerned, it has been at the cost of mounting frustration on the part of the expert witness. This sense of frustration has both a real and a personal (*i.e.* psychological) basis.

The psychological basis for the psychiatrist's dissatisfaction will be first dealt with: It is the persistent feeling that his testimony is necessarily twisted out of context and that his best efforts to expound the scientific viewpoint are thwarted by virtue of the constraints of the law as embodied in the established tests. So strong has this feeling become among psychiatrists that many refuse to testify for one side, refuse to enter legal disquisitions, wishing to remain as physicians in maintaining a medical, non-judgmental attitude and non-punitive philosophy toward the prisoner on trial. In some quarters the feeling of being driven from the physician's traditional position through legal maneuvers amounts to an anxiety lest psychiatric testimony in court may be considered to have attained the level of a racket.

A recent statement by Zilboorg³ regarding the attitudes of the criminologic psychiatrist reflects this anxiety and adds a discernibly moralistic overtone:

It is most pertinent to differentiate between the doctor of medicine who is engaged in the business of detection of crime or who otherwise serves the ends of penal justice and the psychiatrist who is called upon to examine and testify as to the mental condition of a given defendant. There is nothing wrong in a medical man's choosing the job of psychiatric detective or psychiatric assistant in the prosecutor's office. But it must be clear that such a doctor of medicine is merely a specialist who hires himself to give his special knowledge to the state for value received; he is not a healer, not a physician, not a servant in the ministry of medical mercy. The medico-psychological detective M. D. is no more a physician than a mechanic is a physicist or a public accountant a mathematician.

3. ZILBOORG, GREGORY, *The Reciprocal Responsibility of Law and Psychiatry*, THE SHINGLE, Philadelphia, April, 1949, P. 83.

II. ROOTS OF CONFLICT

The real sources of difficulty which meet conscientious psychiatrists in determining responsibility are chiefly as follows:

(1) The legal dictum that restricts opinion to one or the other of two absolute choices in criminal trials—(a) total responsibility or (b) total irresponsibility due to insanity.

(2) The underlying assumptions of faculty psychology which are inherent in the McNaghten formula. Although these are consciously rejected in the psychiatrists' thinking, they nevertheless find their way into the experts' practical judgments concerning criminal responsibility.

(3) The confusion in lay minds between the degree of obviously externalized mental pathology (hallucinations or delusions) and the depth of actual ego pathology (psychopathology).

(4) The intrusion of basic personal convictions in problems of criminal responsibility about free-will or determinism, questions which are amenable only to philosophic or theological argument, about which there is no scientific evidence.

These conceptual difficulties require careful consideration at this point.

(1) The first problem is that of the presumed "*all or none*" character of criminal irresponsibility due to insanity. This situation has been clearly stated on many occasions. In a California case of recent date the Court⁴ reaffirmed the "all or nothing" approach: "Insanity . . . is either a complete defense or none at all. There is no degree of insanity which may be established to affect the degree of crime."

Confronted with such an absolute either-or-choice from which to choose his answer, the physician often complains, criticizing law and legal methods as out-moded, unrealistic or even as absurd.⁵ Still the justification for this principle is clear; the court has only two choices in its action. It must send the offender (1) to a penitentiary if sane, or (2) to a mental hospital if insane. Nether the penitentiary nor the sort of hospital usually available is well-adapted for the type of patient who causes the chief confusion in medico-legal questions of criminal responsibility.

However, there are other considerations bearing on this problem. Recently the theory of partial responsibility for crime due to a degree of mental disease less than that of legal "insanity"⁶ has been brought to the fore to render this absolutist attitude more in conformity with psychiatric knowledge and experience. Their case was contiguous to the problem of the *all or none* principle in that *intent* is modified by

4. *People v. Cordova*, 14 Cal. (2d) 308, 94P (2d), 40 (1939).

5. ZILBOORG, G., *MIND, MEDICINE AND MAN*, Harcourt, Brace & Co., Inc., New York, 1943.

6. WEIHOFEN, HENRY & OVERHOLSER, WINFRED "*Mental Disorder Affecting the Degree of a Crime*", *THE YALE LAW JOURNAL*, Vol. 56:959, (1947).

mental disturbance (in this case subnormality) not amounting to insanity or idiocy. These authors have urged the acceptance of the theory "that mental disorder, though not so pronounced as to come within the tests of criminal insanity, may nevertheless negative the particular intent requisite to the crime charged."

The particular problem presented by these authors was a case of murder⁷ by a man who was mentally subnormal, where mitigation of the charge of first-degree (premeditated) murder, due to mental disease, was disallowed. Weihofen and Overholser state their argument as follows:

First-degree murder requires deliberation and premeditation. If these are absent due to mental disease, premeditated murder cannot be charged. Scrutiny of the law as to this point has shown that half the courts of this land confronted with this question have answered the proposition stated above in the negative. In these states it would seem that a person can be held guilty of committing a premeditated killing even though he lacked the mental capacity to premeditate, providing the accused was not one who could not comprehend he was doing wrong under the right and wrong test.

To put the situation in graphic terms, it has been said that psychiatrists are faced with explaining the greys of human behavior which cannot be fitted into legal categories of blacks and whites.

The inescapable fact is that neither logic nor experience permits "the all or nothing assumption underlying our usual thinking on the effect of mental disorder on criminal responsibility—the assumption that a person is either 'sane' and consequently fully responsible for his acts, or else 'insane' and 'wholly irresponsible.'"

It is inconsistent with the facts of clinical experience to assume that the person suffering from disorder termed psychosis is necessarily without any awareness at all of such issues as right and wrong. There is little or nothing in medical evidence to indicate that all degrees of disability short of demonstrable psychosis imply that the subject has unimpaired (normal) ability to evaluate moral and ethical issues and conduct himself properly thereby. Some patients with delusions and hallucinations demonstrate to the physician their ability to understand and to follow many accepted rules of conduct. Other patients free of symptoms (obvious confusion, delusions, etc.) which would most readily explain a loss of ability to understand the "nature of the act," etc., show in their conduct strong evidence of abnormality in their evaluation of obvious social requirements. The physician called upon to give evidence may have to say, if he is to be honest, that he believes the

7. *Fisher v. United States*, 328 U.S. 463-495 (Oct. 1945).

accused is abnormal and psychiatrically ill but that this illness does not totally destroy the accused person's ability to distinguish between right and wrong. He may have good reason to believe that the person's psychiatric illness caused him to carry out the antisocial act without presuming a total loss of ability to reason about ethical questions.

Rather than an irreconcilable conflict between the jurist and the psychiatrist we must come to grips here with a broader and deeper problem. If we admit, what is plain in clinical experience, that psychiatric disability occurs in many degrees, and in many forms that contribute to anti-social conduct without totally abolishing the knowledge of right and wrong, we must if it is to be of any practical worth, provide some alternative besides the two now available to most courts for the disposition of the offender. The indeterminate sentence, special institutions, probationary systems of control and other like measures designed for the problems of those who do not fit into the two totally unlike, but theoretically clear-cut categories, must be provided by society. It is essential that workers in psychiatry and in law come together on a common ground of agreement in order to enable society to provide medico-legal instrumentalities and institutional facilities for a more reasonable and practical handling of numerous borderline offenders.

(2) The suppositions of the "faculty" psychology are particularly difficult to solve. It can perhaps be taken for granted that today neither the psychiatrist nor the enlightened jurist any longer believes that the human being can be effectively estimated and dealt with in terms of disparate faculties which in life-experience are never encountered in isolation. An intellect, emotions, a moral sense, a will, etc., can be set apart in words and interminable discussion may revolve about these verbal artifacts, but such discussion does not refer accurately or sensibly to anything we find in the functioning human being. For a great part of the period which witnessed the development of concepts of psychiatric disorder and of their effect on criminal responsibility, the assumptions of faculty psychology prevailed. Moreover, there are semantic difficulties involved here. For example: The identification of "mind" with logical reasoning ability, of "mental disorder" with clouded consciousness or gross irrationality, is still common. Some of our best organized textbooks on organic neurology include the psychoneuroses as disorders of the "nerves," sharply distinguished from those of the "mind."

Nothing could be more fallacious than reasoning which is employed

when one attempts to localize illness in a hypothetical "volition," dismembered from integrated human functioning. Arguments as to whether an impulse is pathologically strong or pathologically weak soon become little more practical or more enlightening than arguments about priority between the hen and the egg. As Hall⁸ points out, it has been said that if legal questions are determined on such a basis "you will soon make irresistible an impulse which now is resistible and resisted because of penal law."

Efforts to apply the McNaghten rule with its inherent concepts to cases on trial vividly illustrate the inapplicability of faculty psychology. The alternative concept of a sudden "irresistible impulse" in an otherwise perfectly normal organism is unsupported by modern psychiatric knowledge. Attempts within the confining framework of assumptions calling for an examination not only of an "intellect," but also of a "will," are unlikely to be helpful since in neither pursuit can we encounter a distinguishable element consistent with real life-experience.

Let us consider a case studied by Guttmacher⁹ which will illustrate a pertinent point:

Spencer married a woman who had been raped about six years before. The man was found guilty of rape and was given a sentence of five years. Spencer's wife, a very frail person, died without medical attention while this man was serving his penitentiary sentence. The cause of death was not determined, but Spencer was sure that her death was the result of the rape which had occurred six years before, about three years before he had married her. The idea possessed him that his wife was not going to be able to rest in her grave unless she was really avenged, and he decided that it was his mission in life to right this great wrong. A few months after this man had been released from the penitentiary, Spencer went up to him and asked him to take a walk. They started walking down the road together, and Spencer was overheard by some people who passed to say, 'You have been responsible for my wife's death. I hear voices at times telling me that I must kill you. Her spirit will never rest unless I carry out this request. I know that I am likely to hang for it and it's the wrong thing for me to do, but there is nothing else left for me to do.' Whereupon he killed him. He pleaded insanity and the Court upheld by the Court of Appeals, ruled that he was not insane. The Court of Appeals said it was clear that the witness heard Spencer say that he was doing what he knew to be wrong and that he would be punished. That was all that the Court needed to know in order to satisfy itself that he was a responsible agent.

The patient as described by Guttmacher, despite the hallucinations which undoubtedly would have insured his being classed as psychotic by most psychiatrists, was regarded by the Court as "responsible" be-

8. HALL, JEROME, *GENERAL PRINCIPLES OF CRIMINAL LAW* 514, Bobbs, Merrill Co., Indianapolis, Ind., (1947).

9. GUTTMACHER, MANFRED, *Criminal Responsibility*. BULLETIN OF THE U.S. ARMY MEDICAL DEPARTMENT, 3:681-694, Sept., 1948.

cause of his own statement to the effect that it was wrong to commit murder. An important question must be asked. Just how much "knowing" of the quality and nature of the act, just how much and what sort of evaluation and emotional appreciation of it is proved or indicated by such a statement from a man who is hallucinating? It might be contended that the hallucinations themselves did not constitute an adequate stimulus to the murder. But another question is necessary about the effect of hallucinations on the state of this man's ego integration.

It is not unusual to find patients with schizophrenia who can pronounce correct verbal judgments about matters they fail to evaluate adequately or react to normally. Recently one of us examined a defendant who had almost succeeded in strangling his wife to death. He "knew" this act was wrong at the time, was not apparently angry with her and was glad later he had been prevented from killing her. He had felt influences "from within" which were more effective in determining his decisions and acts than the impulse to avoid murder and to have his wife remain alive. This patient, who also had hallucinations and was obviously schizophrenic, did not attempt murder because of deficiency in the "intellectual" concept of right and wrong, but because his personality was so altered by illness that the social significance of the act was diminished or disordered.

In the case discussed by Guttmacher, definite evidence of irrationality was demonstrable. But the contrary evidence of a "rationality" at the crucial point of being able to express an opinion that to kill the man was wrong was accepted as proof that he "knew" the nature and quality of the act. One might say that here we have a "lesion of the intellect" demonstrated, but the lesion was not demonstrated to the satisfaction of the Court to be in such a place as to prevent the man from making a rational statement about his deed. It is doubtful if any psychiatrist today conceives of personality function existing except as an integrated process, as one in which no theoretically independent elements can be isolated for practical study. We do not find man "thinking" without also "feeling." We do not observe acts of "volition" altogether free of emotion.

Hall¹⁰ clarifies the very point on which agreement may be reached and intelligent action follow:

This view of the participation of the rational functions, including evaluation, in normal conduct does not imply any depreciation of the role of the instincts. For consistently with this theory one asserts the fusion of various aspects of the

10. HALL, JEROME, *Ibid.*, 499.

self. This means that moral judgment (knowledge of right and wrong) is not reified as an outside, icy spectator of a moving self. On the contrary, the corollary is that value-judgments are permeated with the color and warmth of emotion—as is evidenced by the usual attitudes of approval that coalesce with right decisions. Indeed all action, especially that relevant to the penal law, involves a unified operation of the personality The McNaghten rules provide an analytical device for dissecting this action.

If this view can be thus phrased by a jurist it seems obvious that psychiatrists can venture honest and sensible opinions on what evidence of medical impairment is found that may alter such a “knowing.” When no longer dismembered and falsified in one-dimensional aspect, but considered in all that we sometimes imply by “appreciation,” “realization,” “normal evaluation,” “adequate feeling,” “significant and appropriate experiencing,” etc., the term “knowing” does not restrict us solely to a discussion of the patient’s reasoning abilities in the abstract.

If the jurist and the psychiatrist would adopt the viewpoint expressed with clarity and inclusiveness by Hall, it seems that much confusion and inexactness would be avoided. After referring to typical arguments between those who contend for “reason” as a criterion and those who in contradiction emphasize “will,” Hall¹¹ says:

Opposed to these views and avoiding their particularistic fallacies is the theory of the integration of the self In terms of this theory any interaction with the environment is integrated in the sense that the various functions of personality coalesce and act as a unit. Although it is useful to distinguish the important “modes” or attributes of such action, the various functions are not actually separate. On the contrary, the affective, the cognitive, and the conative functions, as well as all others, interpenetrate one another. Thinking (knowing, understanding) e. g., fuses with tendencies to action and it is permeated also in varying degrees by the warmth of the emotions.

Hall suggests that concepts generally agreed upon in psychiatry be utilized to “implement the McNaghten rules.” To this suggestion we will turn our attention later.

(3) The third difficulty points to an undue emphasis placed on the presence or absence of external or peripheral manifestations of mental disease in determining responsibility. In court, the more subtle indications of central pathology are often ignored by the jury. There is general agreement that neither verbal reasoning nor other aspects of peripheral mental function always serve as reliable tests of the severity or genuineness of the personality disorder that lies beneath. Still, lay persons and professionals alike are impressed by external symptoms, such as delusions or hallucinations, to the point of relying on these symptoms to establish well recognized legal status of insanity.

11. HALL, *Ibid*, 520-521.

To the layman, even today, a patient in temporary delirium leaping over chairs and taking the broom-stick to hallucinatory monsters looks more genuinely psychotic than a deeply disordered but calm and brittle-worded schizophrenic. The brilliant and persuasive paranoiac is still less easy to recognize as psychotic but he may be seriously disabled. Some masked or ambulatory schizophrenics show no legally demonstrable signs of a psychosis, though for years inner psychopathology of a malignant sort has existed. The traditional attitude that limits the demonstration of evidence of irresponsibility to the external (and often the least important) aspect of what is being examined, forces the psychiatric expert into an absurd position regarding modern scientific psychiatry. This orientation, plus the demand for "all or none" judgments makes the work of the expert witness difficult in court.

(4) Finally, the confusions introduced by conscious and unconscious philosophic preoccupations and prejudices call for comment. When we think in terms of moral responsibility, we are likely, unless we are particularly careful to signify clearly what we are talking about, to find ourselves in the empyrean of metaphysics attempting solutions of ultimate philosophical and religious questions. However important or transcendent these questions may be, and however we answer them for ourselves, we are not as psychiatrists qualified to answer them expertly.

Is it possible for us to avoid attempts to settle the controversy over *free-will* and *determinism* (or *fore-ordination*) and still give an honest medical opinion about the questions we are asked in court?

Let us for a moment consider a viewpoint expressed by Grasset¹² approximately a half-century ago. Though immersed in many concepts not particularly germane to the present status of psychiatry, this celebrated pioneer contributes, despite the obsolescence of his terms, something distinctly clarifying and useful. Refusing all temptations to assume the role of arbiter in questions of man's moral obligations, (or whether or not any such obligations exist), Grasset confines himself to difficult enough but medically approachable problems. He attempts a judgment on whether or not the capability of the organism is impaired. Grasset's term "physiological responsibility" which he expresses in terms of the relative integrity of "psychic neurones," corresponds in a practical sense to our modern concept of the total personality and

12. GRASSET, JOSEPH, *The Semi-Insane and the Semi-Responsible*, Funk and Wagnalls Co., New York, 1907.

the pathologic states, abstruse or obvious, which may impair its ordinary capacity.

Not only is the pitfall of controversy about free-will versus determinism avoided by Grasset, but he also shows some respect for the complex essence of human functioning (as opposed to "knowing," "willing," "feeling," etc., as separate conceptual abstractions). Referring to what the psychiatrist must consider in estimating pathology and, hence, criminal responsibility, he wrote:

It consists in responding, as other men do, to the influence of ordinary motives of daily life, which rule conduct and human action, such as those drawn from religion, morality and all current ideas. Not to respond to such influences; not to feel any impression from things that impress everybody else; first to get to the point of no longer feeling these motives, then little by little to cease to understand them—all this means variation from the normal.

As emphasized by Grasset long ago it is the expert's job to give an opinion on whether or not the particular subject is damaged or deranged to such a degree that he cannot be counted on to show ordinary functional capacity. If we attempt to include in our opinion the ultimate solution of the free-will versus determinism argument, our opinion is not likely to be of practical value. Who can say that philosophical determinism has any better claims to final proof than free-will?

Hall also brings out many points to indicate that a good deal of the confusion we attribute to our legal co-workers (with their adherence to tradition, etc.), may arise from our own unwarranted attempts to force all interpretations to coincide with an unestablished doctrine of ultimate determinism.

If this philosophical question can be set aside as external to the professional fields of both the psychiatrist and the jurist, and if we do not confine ourselves to one or another concept of faculty psychology, Hall believes better opportunities for cooperative and successful medico-legal action would become available. Unless this can be done it is difficult to escape the pessimistic conclusions expressed by Zilboorg.¹³

When they all individually and jointly (judges, lawyers and jury), ask me whether the defendant in the dock is in my opinion insane, I must candidly state, if I am to remain true to my professional knowledge and faithful to my oath, first, that I do not understand the question and, second, that since I do not understand the question, I do not know whether the defendant is insane or not. I admit the situation is embarrassing and puzzling to all concerned, but it is beyond my knowledge and power to remedy or alleviate it.

13. ZILBOORG, GREGORY, *Misconceptions of Legal Insanity*, AMER. J. ORTHOPSYCHIATRY, Vol. 9, 1939, P. 540.

Continuing a discussion of the basic differences between medical man and jurist, Zilboorg makes many sound points and goes on to say:

We have reached a rather disquieting parting of the ways. This is undesirable from both your (the jurist's) point of view and mine. Your rules are unintelligible to me, and my inability to follow them is unintelligible to you.

III. IS THE CONFLICT SOLUBLE?

Psychiatrists have thus been led to serious attempts to lessen the disparity between legal standards and modern concepts of psychopathology. Solutions have been proffered, aiming to evade the "mythical" elements in the concept of responsibility by attacking the essential problem which is the danger of an insane criminal to society. Thus, Singer¹⁴ suggested a pragmatic solution by holding everyone responsible for his acts whether sane or insane, and then adopting measures that would (1) insure society against further criminal acts on the part of this person; (2) establish clearly that society cannot, for its own protection, tolerate such acts regardless of the reasons back of them and, (3) rehabilitate the offender if that is possible. Such a program however does not coincide with the traditional philosophy of criminal law which directs that punishment be given for wrongdoing unless personal irresponsibility is proved. There is no side-stepping the moral tenet which "represents the unstudied belief of most men"¹⁵ and which underlies the civilized world's concept of criminal justice. The words of Judge Nott¹⁶ succinctly present the judicial viewpoint:

The law has laid down what may be termed a working rule . . . and, while medical men may criticize that rule . . . yet when you see . . . its extreme simplicity, the ease with which it can be applied . . . I am not aware of any better working rule that these medical men or anyone else has ever put forward.

The burden of proof to improve tests of insanity in criminal offenders would seem to rest with those who strive to assay the delicate nuances of the mind in health and disease. To inveigh against "the vacuous psychology of the McNaghten rule and the hypothetical question," (Zilboorg)¹⁷ seems to evade the obvious duty of psychiatry which is to bring clarity and technical aid to an extremely complicated series of social-psychological problems. More than that, the solution offered the legal agents of society which would allow expert witnesses to discard

14. Quoted from WIGMORE, *The Deranged or Defective Delinquent*, ILLINOIS CRIME SURVEY 743 (1929).

15. *Cunningham v. The State*, 56 Miss. 269 (1879).

16. *People v. Purcell*, 214 N.Y. 693, 109 N.E. 1087.

17. ZILBOORG, GREGORY, *Ibid.*

concepts of psychology no longer tenable, must be pragmatic and workable.

From the analysis of attitudes and influences impinging on the psychiatrist's estimate of criminal responsibility in court, several constructive suggestions arise. Three of these suggestions are of a general nature and revolve around the psychiatrist's daily activity in clinic and court. The fourth is a specific suggestion for modification of the "test" of insanity to be presented to the jury and expert witness. This latter suggestion would require legislative enactment and would do much to remedy the "cold war" which makes it difficult for psychiatrists to translate concepts of mental pathology in terms of present legal tests.

The recommended measures to minimize the difficulties discussed above are:

(a) That psychiatrists in discussion with lay groups when testifying in court and when teaching medical students, accent the concept that mental illness involves the total personality; the persistent aim of mental experts in their dealings with the lay public should be the elucidation of the holistic view of the mind of man.

(b) Emphasis should be placed on the obvious fact that mental disease varies in degree within a tremendous range over minute gradations. This attitude is especially to be urged in dealing with criminal behavior resulting from the operation of pathologic impulses which range widely from those bordering on normality to seriously distorted personality reactions. It must also be emphasized that the ego which fails to deal satisfactorily with such antisocial impulses may be grossly ill despite the lack of ordinary irrationality as demonstrated in verbal tests. It is a corollary that the anxiety of lay people, the legal profession, and many psychiatrists lest such changes in attitude merely mean mollycoddling of offenders, should be allayed. It is a demonstrable fact that such a view of man's mental life more often leads to better protection of society by adequate segregation and treatment of those who are dangerous.

(c) That psychiatrists avoid the ultimate problem of free-will and determination in their medical judgments, since the issue of mental disease and crime can be met adequately short of the ultimate philosophic and religious questions involved.

(d) To implement this orientation it is recommended that the concept of "accountability" be substituted for that of "responsibility" in the legal test for criminal responsibility. This would mean that the question given the expert witness would be in language approximately

as follows: "In your opinion, was the defendant suffering from disease of the mind and if so, was it sufficient to render him unaccountable under the law for the crime charged?"

This latter suggestion, being a significant one, requires discussion.

IV. ACCOUNTABILITY, A SUGGESTED LEGAL TEST

At the outset it is essential to examine the semantic connotations, some obvious, some masked, but nevertheless potent, in the current term "responsibility" and in the new term suggested, "accountability." Although commonly considered synonymous, there are specific differences between them, sufficient to draw moral issues and metaphysical assumptions into what is exquisitely a problem in estimating the degree of ego disorganization in a given offender at the time of a given crime.

The concept of criminal responsibility implies the fact of moral knowledge; it presumes an acknowledgment that the individual is required not to do wrong and not to act contrary to law and further, that the accused knows what is wrong and what is right in social conduct and that, aside from mental deficiency or mental disease, he is able to do what is right. The joint connotation of moral knowledge and free choice of good conduct is indissolubly linked with the concept of "responsibility," as evidenced by the legal principle which allows such responsibility to be destroyed when insanity vitiates the power to know one is doing wrong when he knows the wrong. On the other hand the concept of "accountability" merely postulates an external value-judgment which society applies to the individual for his acts, i.e. punishability. Accountability can likewise be destroyed when mental disease is shown to impair the adaptive capacities of the organism to social standards. Accountability means punishment follows wrongdoing as defined by statute; responsibility means human beings are required not to do wrong because of a universal moral obligation.

Responsibility virtually means that an unwritten "agreement" is comprehended by every person in which he accepts and integrates within his conscience, the demand by society that he be "good." This structure which we absorb with our mother's milk so to speak, is the essential part of emotional education of children and is reinforced in the adult world by the universal presence of law and its punitive agents. So firmly has the "moral" law been imprinted on mankind that society has come to regard its flouting either as a mark of insanity (to witness the remark, "He's crazy with badness") or as a willful depravity demanding punitive retaliation. This prejudice underlies our collective reaction

to recidivistic criminals. It is an integral part of the influences that enter into and shape particularly, the superego aspect of the human ego. This is so well established as to require no explanation beyond the statement commonly made that ignorance of the law is no excuse. The courts have frequently and impressively confirmed the view that moral knowledge is equivalent to knowledge of the law. As Judge Cardozo¹⁸ put it, "Knowledge that an act is forbidden by law will in most cases permit the inference . . . (that) it is also condemned as an offense against good morals. . . . Obedience to the law is in itself a moral duty."

It is interesting to trace the equivalence in authoritative legal decisions, of moral to legal "wrong" as related to the question of responsibility for criminal acts. The basic postulate in ethics has always been that knowledge of *good* means knowledge of God's laws, the premise being that the highest human wish approaches God's perfection. The breaking of one is tantamount to the breaking of the other. The present tests for insanity seek, in fact, to assay the degree of insanity which would prevent an individual from understanding the laws of God and man and how such a failure to understand accounts for his thwarting these laws. This maxim is set forth in the clearest terms by Sir James Stephen,¹⁹ "A person who disbelieved in all moral distinctions, and had ridded himself of all conscience, would know that murder is wrong, just as an atheist would know that most Englishmen are Christians."

An early statement of this principle was made in the Bellingham case²⁰ in which Lord Mansfield put the test concerning responsibility of a madman in these words: "It must be proved beyond all doubt that . . . he did not consider that murder was a crime against the laws of God and nature."

In 1881, in a case of murder²¹ on appeal, the judges stated, "The laws of God and the laws of the land are the measure of every man's act and make it right or wrong . . . as it corresponds with such laws." In 1915, Judge Nott²² in explaining the McNaghten rule to the jury, stated of the accused that by "knowing that it was wrong," was meant "contrary to accepted standards of morality, contrary to the Laws of God and Man."

It is inevitable then that when moral judgment or moral knowledge remains the main point on which estimation of mental disease turns in deciding criminal responsibility, psychiatry can offer little constructive

18. Court of Appeals, N.Y., 1915, 216 N.Y. 324, 110 N.E. 945.

19. STEPHEN, SIR JAMES F., *Ibid*, P. 79.

20. *Bellingham's Case*, Old Baily 1812, Collinson on Lunacy, i, 636.

21. *People v. Moett*, 85, N.Y., 373.

22. *People v. Purcell*, *Ibid*.

help. What this all pervasive attitude means is that psychiatrists and the jury are called upon to estimate the influence of mental disease on moral knowledge. As matters stand it means also that moral "judgment" or "knowledge" must be measured almost entirely by tests of what the subject can rationalize in theory. How much or how little this rationalization truly reflects his actual judgment or evaluation is largely ignored. What we urge is an estimation of the degree of ego disability existing in the accused which would render him unaccountable or less than totally accountable before the law. Thus would the question of moral knowledge, as it is injured by mental disability or not, be circumvented and with it the whole question of whether or not man acts with a philosophically assumed free will to inculcated standards of moral behavior.

If the accused is mentally ill it is not necessary to put the question, was his moral knowledge affected? Rather, we would ask was the function of his ego so impaired that he could not, because of genuine disability, act within the limits of social demands and rules? The question then becomes not whether his knowledge of the quality or nature of the act, and his comprehension that he was doing wrong was affected, but whether the total personality (i.e., the ego), was impaired by mental disease to a degree rendering him unable to adjust to society's rules.

This is not hair-splitting dialectics; it is a practical solution for the psychiatrist who aids the court in judging the effect of insanity on criminal behavior. The present defense of an expert witness against the difficulty of reconciling legal tests and psychotic behavior sometimes is to say, "The accused is legally sane but medically psychotic." In doing so the psychiatrist protects his medical position and describes the prisoner's condition within the limits of legal rules. But would it not be more practical to present the test to the psychiatrist on the witness stand in another form: "Is this man to be considered less than fully accountable for his crime by virtue of mental disease, and to what degree?" The answer would be forthcoming in terms of how disabled the prisoner was and there would be no need for the dichotomy: legal insanity or medical psychosis.

The anticipated benefit in expert testimony by the use of the concept "accountability" is in the direction of providing an objective description and analysis of subjective phenomena in persons accused of crime in conjunction with an estimation of the degree of ego impairment resulting from his illness. In estimating the impairment the whole organism, not merely a traditionally restricted area of mental function will be the subject of the test, but the degree of disturbance of total personality

function will be examined. It will not be a question of whether his mental illness disturbs a moral sense to know right from wrong, but: Shall society hold him to account for doing what he did because of illness which impaired his capacity to react normally?

To be sure, morality is still recognized and valued, for society's demands and proscriptions follow a moral principle, but it does not enter as a crucial test for a psychiatrist and jury to apply in cases of mental illness. What the psychiatrist estimates is the degree of socio-biologic impairment (illness) of the person in terms of present-day psychological knowledge. The jury then would decide to accept or reject the psychiatrist's opinion of how accountable the prisoner is without recourse to the "knowledge of right and wrong" test. The suggested test is broader and more realistic. It is not applied to an arbitrarily isolated "moral sense" but to the functional capacity of the actual human organism as he is encountered in practical life and in medical study.

It may be argued that this reorientation of the insanity test in criminal defense would put too much power in the hands of psychiatrists. And that, further, their knowledge of what impairs the ego function in such delicate areas as mental abnormality, to say nothing of moral behavior, is still too scanty. It can be successfully argued, however, that our present day knowledge of the personality in health and disease is sufficient and objective enough to help more precisely the layman's understanding of human behavior and misbehavior.

Such a reorientation as proposed would enable the expert to give testimony more consistent with the established facts in his field of knowledge. With such an innovation there would still be room for difference of opinion in any given case. Application of a test for insanity based on accountability as opposed to responsibility, would not preclude psychiatrists appearing on opposing sides, but it would considerably reduce contentiousness because the accent would be on the degree of the prisoner's mental illness instead of confined to narrow criteria, such as the presence or absence of delusions.

Substituting the concept of accountability for that of responsibility should dispose of the difficulties presented by the McNaghten decision to expert witnesses. By emphasis on psychiatric findings bearing upon the degree of ego disorganization i.e., upon genuine disorder whether obvious or masked, and its effect on behavior, the psychiatrist will be better able to aid the court to whom society has assigned the difficult and complex task of determining moral responsibility in crime.