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CONFLICTING VIEWPOINTS OF PSYCHIATRY AND THE LAW ON THE MATTER OF CRIMINAL RESPONSIBILITY

I.

INTRODUCTION

The perennial conflict between members of the legal and medical professions on the question of the relation of mental abnormality to criminal responsibility is a matter of common knowledge. Every sensational trial, especially for a capital offense, brings it again to the forefront and in almost every book of an exclusively legal or medical character are found spirited attacks against the views held by the opposing group.¹ The clash of opinion on this subject may perhaps be best illustrated in the words of the participants themselves. Recently a well-known psychiatrist made the following statement:

“In the practical application of psychiatry to the problems of the criminal law the prevalent concepts of tradition and long usage conflict sharply with psychiatric attitudes. Popular theories of retribution and established methods of dealing with offenders almost entirely prevented a scientific envisagement of crime until recently when psychiatrists, in spite of their original limitation of field, discovered and demonstrated that types and trends of abnormal psychology extended far out from the asylum into the court-room, school, and home. Psychiatric experience and technique were found equally applicable to the irascible employee, the retarded school child, the persistent stealer, the compulsive drinker, the paranoid murderer and the textbook cases of epilepsy, melancholia and schizophrenia. Faced with the legal partitions of misbehavior into *insane* and *criminal* psychiatrists found themselves with no technical interest in nor agreement with these partitions, but with a driving concern in all the unpropitious trends of human character; with all acts, thoughts, emotions, instincts and adaptations either socially or individually adverse. Some of these constitute committable *insanity*, some do not; but all of them are psychiatric problems.’”²

¹ S. Sheldon Glueck, *Mental Examination* (1923) 14 *Jour. Crim. Law* 573.

² Winfred Overholser, *What Immediate Practical Contribution Can Psychiatry Make to Criminal Law Administration?* (1930) 55 *Am. Bar Ass'n Rep.* 594.

As an antithesis to the picture thus portrayed, a statement by a well-known judge in a recent book may be quoted: "More solemn nonsense is being said and written concerning the mentality of criminals than upon any other discussed subject. Mankind worships wonder-makers. The fortune teller, the voodoo man, the prophet of the marvelous find followers in all lands, through all ages. No fakir is quite successful who does not more than half believe in himself. Also, everyone stands for the excelling importance of his own calling. Even the professional second story climber will put up an argument to justify his business. The self-styled practical psychologists, who dabble in the prisons and fret the courts, are neither more nor less than, five times out of six, lineal descendants of the women who told fortunes with cards. The practical psychologists are, in the main, honest in their belief, while the fortune tellers only half believe in themselves. Notwithstanding their general sincerity, the first named will often fake a little to avoid being unjustly beaten on a point. A good many officials in charge of courts, prisons, and parole boards, work under the influence of their doctrine, that crime is the result of mental deficiency. A more dangerous and pernicious teaching could not invade the prison or the courtroom.'" ³

There is not another scientific field like this one of criminology where so many writers are found, expressing so many wild speculations ⁴ and divergent opinions. Nor is the conflict a clear cut and well defined one, between two opposing views, susceptible of any sort of rationalization or orderly classification. Rather it is carried over into the opposing factions themselves, increasing the confusion and permitting the assertion of an united front only in the face of an attack by the common enemy. So great is the confusion that Lord Justice Blackburn stated before a committee of the House of Commons:

"I have read every definition of insanity that I could meet and was never satisfied with one of them; and have endeavored in vain to make one satisfactory to myself. I verily believe it is not in human power to do it.'" ⁵

³ *Op. cit. supra* note 2.

⁴ John F. W. Meagher, *Crime and Insanity* (1926) 11 Va. L. Reg. 577.

⁵ Church and Petersen, *Nervous and Mental Diseases* (1915) 529.

"There is no satisfactory definition of insanity. It is essentially a comprehensive term, including in its general sense every form of mental derangement whatever its source or cause, whether the mental condition is congenital or the

Neither is the conflict limited to extra-judicial inquiry and discussion,⁶ for the United States Supreme Court in an adjudicated case has stated that "opposite opinions of persons professing to be experts may be obtained to any amount."⁷ Meanwhile the impatience of the public with the experts, the lawyers, the judges and with the law itself continues to grow and the abuse of the press tends to become more and more vitriolic.⁸

The problem of insanity in its relation to the administration of the criminal law may become important in one of three respects, *viz.*, insanity at the time that the offense was committed, at the time of the trial, or at the time that the

result of arrested mental development or accident, or caused by physical disease, dissipation, old age, or inherited." Wm. C. J. Meredith, *Insanity as a Criminal Defense* (1931) 5.

⁶ "The experts who are called upon to give opinions in the course of the litigation are dissatisfied with the conditions under which they must assist in the administration of justice, are dissatisfied with the lawyers and the law,—and the lawyers and the courts are dissatisfied with the experts." Roscoe Pound, Address delivered at Minneapolis, Minn., June 7, 1928.

⁷ *Winans v. N. Y. & Erie R. R. Co.*, 21. How. 88 (1852).

"The frequent spectacle of scientific experts differing in their opinions upon a case according to the side on which they are retained tends much to discredit such testimony or to impair its force and usefulness and inclines us to prefer the formation of an opinion upon the real facts, when the case is not one beyond the penetration and grasp of the ordinary mind." *People v. Kemmler*, 119 N. Y. 580, 583, 24 N. E. 9, 10 (1890).

"The defense of insanity has been so abused as to be brought into great discredit. It has been the last resort in cases of unquestionable guilt, and has been the excuse to juries for acquittal where their sympathy has been with the accused." *Guiteau's Case*, 10 Fed. 161, 165 (1882).

"In spite of the disrepute of insanity pleas and insanity experts, it is likely that there are many more insane, defective, and irresponsible persons who are unjustly convicted of crime than there are guilty persons who succeed in escaping by pretending insanity." Henry W. Ballantine, *Criminal Responsibility* (1919) 9 *Jour. Crim. Law* 485, 486.

"Common sense inferences and intelligent observation are more reliable as a practical guide to the accomplishment of justice than the refined distinctions and technical niceties of alienists and experts in psychopathic inferiority." *Commonwealth v. Devereaux*, 256 Mass. 387, 152 N. E. 380 (1926).

⁸ "The public is gaining a vast distrust of the testimony of alienists in murder trials. It is accustomed to set down this testimony as something that can be purchased. And in a great measure this is true." Editorial, *New York Evening Post*, quoted by *Mental Hygiene*, June, 1928.

sentence is being carried out.⁹ Or, for present purposes, it may be classified into insanity which exists at the time of the alleged criminal act and that which comes into existence subsequently.¹⁰ In the majority of cases, of course, the insanity is permanent and is present on all three occasions. However, it is necessary to distinguish between the three situations in order to indicate the fundamental concepts involved.

The presence or absence of insanity at the time the alleged act was committed involves the question of guilt or criminal responsibility and is a problem for the lawyer. Its presence subsequently does not involve the question of guilt of the accused but rather the question whether or not the law shall be carried out with respect to him. It is therefore more properly a problem for the physician or penologist. Insofar as the intervention of insanity after the commission of the crime prevents the operation of the law by relieving the accused of the liability to stand trial¹¹ or suffer the execution of the sentence, it may be said to have a bearing upon his responsibility to the criminal law. In the last analysis there is no responsibility where the law does not exact the penalty prescribed, whatever the reason for its failure may be. However, the distinction between the two cases is readily discernible where the accused subsequently regains his sanity, for, where the insanity intervened, the operation of the law was merely suspended, and he is then required to stand trial or submit to the execution of the sentence. In the case of insanity which existed at the time of the act, the accused is discharged, from the institution where he was being held for treatment, and allowed to go

⁹ Edwin R. Keedy, *Criminal Responsibility of the Insane* (1910) 1 *Jour. Crim. Law* 394.

¹⁰ Glueck, *Mental Examination* (1923) 14 *Jour. Crim. Law* 573.

¹¹ "No man shall be called upon to make his defense at a time when his mind is in that condition that he does not appear capable of collecting together his thoughts and modelling a defense." *Freeman v. People*, Denio (N. Y.) 9 (1874); *Guagando v. People*, 41 *Tex.* 626 (1874).

entirely free in the same manner that any other committed lunatic who had regained his sanity would be. In simpler terms, the one problem goes to the existence or non-existence of the crime¹² while the other goes to the liability to punishment. The second is daily becoming more important and is being more and more written upon and discussed. And in many respects the problems are interwoven and common to both questions, and any discussion of the one must necessarily involve also a discussion of the other. However, the lawyer is primarily concerned with the criminal responsibility of the defective mentality, and it is that aspect of the problem which is the main consideration here.

To obtain the viewpoint of the criminal law, an examination of the adjudicated cases is necessary, and such examination will afford a reasonably secure foundation for a prediction of the result which the law will reach in a particular case and under a particular fact situation. Such an examination reveals the sum total of all the fact situations in which the law has been invoked against an individual of alleged defective or deficient mentality. If any difference of viewpoint exists with respect to the final disposition of these cases a change must be contemplated or desired in such disposition by the persons who hold the different viewpoint. Hence any conflict between the law and psychiatry must consist in the difference between the collected data on the one hand as to when the law punishes and, on the other, the collected opinions of those who would change the present system, as to when the law ought to punish. A search into what the law does in a given case necessarily involves the purpose of the law in inflicting punishment, for until this is known, there is no basis on which to proceed. No doubt, action has preceded theorizing in human society; but this

¹² "Insanity goes to the mental capacity of the defendant; unless he is sane he is not guilty. Whatever reasonable doubts of his sanity there are, are reasonable doubts of his guilt." J. B. White, *Presumption of Malice and Insanity* (1876) 3 Cent. L. Jour. 534.

does not mean that the reasons for such action were not present. They were merely unrecognized. The inquiry then must extend to the question, "Why does the law punish?" If any conflict of opinion exists its basis must be found in the difference between the existing purpose of the law in inflicting punishment, and the opinions of the critics of the law on what that purpose ought to be. Hence there is presented the counter inquiry, "Why should the law punish?" Moreover, in modern times, serious question has been raised whether or not the law ought to punish at all. In simpler terms, the motive of the law in reaching its results has been questioned. The present inquiry, then consists in an examination into the difference between the existing purpose of societal action in the treatment of criminal conduct, and the collected opinions indicating methods and purposes which, it is hoped, would result in improvement.

II.

THE VIEWPOINT OF THE CRIMINAL LAW .

A. Theories of Punishment

Various theories as to the purpose of punishment have been advanced at various times¹³ and by various people. Since the question is largely a metaphysical one based on philosophical speculation and depending very greatly upon the viewpoint of the individual himself and the particular classification to which he belongs,¹⁴ it is only natural that

¹³ For a history of the evolution of punishment see Gillin, *Criminology and Penology* (1926) Ch. XV.

¹⁴ "The lawyer says that punishment is to compensate for damage and to prevent further damage. The sociologist says that its purpose is to restore the social equilibrium which has been disturbed and to prevent further disturbance. The psychologist says that its purpose is to impress the mind of the person punished and of others to prevent repetition. The moralist says that it is to point out to the offender the error of his way and to reform him. The priest says it is to expiate his sin and make atonement. The physician says it is to eradicate the plague spot in the mind of the criminal. The eugenist believes that it purifies the race by eradicating the degenerative elements. The policeman says it is to instill in the minds of the public a proper respect for the persons charged with

some conflict and confusion should exist. Nevertheless, certain of these theories have been so persistently advanced that they have attained the dignity of being considered the orthodox theories of punishment. These are: (1) The theory of Expiation, (2) The theory of Reformation, (3) The theory of Prevention, and (4) The theory of Retribution.

Under the theory of expiation it is thought that the moral law which the criminal has outraged, asserts itself against him to make him realize that he has done wrong, and to expiate his offense;¹⁵ that in the very nature of the moral universe there is a necessary correlation between guilt and pain and that one who has done wrong must make atonement, by having pain inflicted upon him. The difficulties encountered under this theory are too great and too numerous to allow it to be accepted. The primary difficulty is that as a practical matter it is an impossible task to administer punishment in proportion to moral guilt because this would require a penetration of the mind and will, its badness and motives. The thoughts of men, however, are not open to other men and no judge is able to ascertain the degree of moral depravity in the culprit before him.¹⁶ Moreover, it would be impossible to regulate the amount of pain which punishment causes in fact because this depends upon the personality and temperament of the person on whom it is inflicted. The theory of expiation is an attempt to carry concepts of Divine law as contained in theology and religion into the field of imperfect human law, and is futile because it cannot function as a practical rule for guidance in the treatment of crime. In many instances, rules of law differ from the concepts of ethics, in some cases not going as

law enforcement. The soldier regards it as a public rejoicing over an enemy of general interest. And the criminal himself considers it a fee stipulated for the doing of the act." McConnell, *Criminal Responsibility and Social Constraint* (1913) 2.

¹⁵ McConnell, *op. cit. supra* note 14, at p. 6.

¹⁶ This difficulty led to the clarification of the difference between sin and crime. Gillin, *op. cit. supra* note 13, at p. 318.

far and in others passing beyond the moral code. Furthermore, under this theory it would be necessary to visit the same punishment upon the unsuccessful attempt to commit crime or upon the mere intent to do so, as upon the consummated crime, for the sin is just as great. As a practical matter this not only is not done¹⁷ but cannot be done because of the impossibility of making the necessary proof.

Under the theory of reformation it is thought that punishment is designed to effect the betterment and cure of those who come under its operation.¹⁸ It is thought that the criminal is abnormal and that by the operation of the law upon his mind, his cure may be effected.¹⁹ Punishment under this theory aims at the artificial creation of circumstances conducive to moral improvement in a temporary good environment supplied by the state. It is known that hardship does in some cases have the effect of improving the moral tone of the individual, and punishment has the advantage over ordinary misfortune in that it is seen by the culprit to have a causal connection with wrong doing.

Although punishment in many cases does have the effect on which the claims of the reformatory theory are based,²⁰ great difficulties are again encountered when it is attempted to rationalize all punishment on the basis of this theory. Capital punishment cannot be justified under this view and it would be absurd to attempt to reconcile the destruction of the offender with the theory that his punishment is meted out, for the purpose of reforming him. Nor can the punishment of the incorrigible offender, or the fixing of the penalty according to the enormity of the offense be justified. In the

17 "If a man takes an umbrella from a stand, intending to steal it, but finds that it is his own, he commits a crime." Kenny, *Outlines of Criminal Law* (12th ed.) 33.

18 McConnell, *op. cit. supra* note 14, Ch. IV.

19 Kenny, *op. cit. supra* note 17, Ch. II.

20 "As a result of the experiments of the penologist Brockway it may be regarded as scientifically proved that the disease of criminality can be cured." McConnell, *op. cit. supra* note 14, at p. 93.

first case the punishment must admittedly fail in its purpose and in the second, if reformation were the basis, the punishment would be inflicted, not according to the crime but according to the need to effect the reformation. Furthermore, this view would require the punishment of all who were morally bad, whether they broke the law or not, and would excuse those who were not morally bad even though they had broken the law. Certainly, under this theory there is no need for punishment where there is no need for reform. In the first instance it is open to the same objections with respect to motives and moral depravity which are advanced against the theory of expiation, and in the second it runs counter to the accepted practice in the treatment of acts which are merely *malum prohibitum*.²¹ Lastly, experience has shown that punishment does not reform in the majority of cases and whatever claims²² are made for the theory, they must yield in the face of the fact that in practice it is both unsound and untrue.²³

The theory that punishment is inflicted as a preventive measure is three-fold in its application. It operates, in the first place, upon the offender himself to prevent his repetition of the offense by disabling him through confinement or execution to have the opportunity to repeat. Secondly, it operates to inspire him with terror of the law as a result of his own experience and thus deters the repetition of the offense. And, thirdly, it operates, by reason of the example which the law makes of his case, to deter others from committing crime. Under this theory punishment is not an end in itself but a means of attaining an end. It is inflicted

²¹ "Offenses which are merely *malum prohibitum* are such acts as are in themselves indifferent and become right or wrong, just or unjust according to legislation." Bouvier, *Law Dictionary* (1928).

²² Osborne holds to the view that the real aim of modern penology is reformation. Thomas Mott Osborne, *Society and Prisons* (1916).

²³ "Reform of the criminal does not occupy the first place in any scheme of punishments now existing. No scheme of punishment is primarily adapted to that end. It is an afterthought and one of recent introduction." Mercier, *Criminal Responsibility* (1926) 35.

not because wrong was done, but that wrong may not be done. It is under this theory that mutilation of the body was practiced to furnish a living and continuous example of the authority and majesty of the law. The adherents of this theory are numerous,²⁴ and undoubtedly some weight is to be attached to their claims. Some of the applications of the criminal law can be explained on no other theory. Yet, it also is open to serious objections.

Insofar as punishment disables the offender by confinement or execution, it does prevent the repetition of crime. Yet a serious question arises whether this disablement is the reason for the punishment or merely a result of it. In the case where punishment is inflicted in the form of a fine, the penalty admittedly does not disable. In the case of confinement the disablement continues only for the period of the sentence and it is impossible to justify the freeing of recidivists under this view. Neither does it justify the punishment inflicted for crimes of passion or upon penitent offenders, both being cases where there is no danger of repetition. If the theory be that punishment inspires terror in the offender and thus prevents crime, both the penitent offender and the absolutely incorrigible one should go free. In the one case there is no need for punishment. In the other it is useless since it will only increase the hatred for the law in the individual whom punishment cannot possibly tame.²⁵

When the viewpoint is shifted and the deterrence of others is regarded as the aim of punishment, these difficulties are obviated but others are substituted. If example were the underlying basis, the punishment should be designed to fit

²⁴ Salmond regards deterrence as the main end in view and all other as merely accessory. Salmond, *Jurisprudence* (8th ed.) 121 *et. seq.*

Bentham contended that example is the most important end of all. Bentham, *Principles of Morals and Legislation* (1789).

"Most authorities still regard the deterrent effect as the chief aim of punishment." John F. W. Meagher, *Crime and Insanity* (1926) 11 Va. Law. Reg. 577.

²⁵ McConnell, *op. cit. supra* note 14, Ch. III.

the enormity and diffusion of the temptation to commit crime rather than the enormity of the offense, and the lesser crimes should be visited with the greater penalties while the more heinous should be treated leniently until the point was reached where a crime which had no possibility of imitation and could allure a single perpetrator only would go unpunished.²⁶ Obviously such a gradation of penalties is impossible. Assuming the deterrent theory of punishment to be the correct one, if the penalties were adjusted according to the diffusion of the temptation to commit crime, the effect would be, not to eliminate crime but to substitute a new class of "lesser crimes" toward which the temptation would become greater. The result is a circuitry of argument which leads nowhere. Moreover, if deterrence were the aim, not only would punishment be inflicted in public but it would be widely publicised in order to bring it to the knowledge of the greatest possible number of people. Yet this is contrary both to the course of historical development and to the practice of the present day.

Where there is no reason to inflict punishment for the purpose of either disablement or deterrence of the individual himself, it is unjust to require him to suffer. This contention is met by the argument that the suffering of the individual is necessary for the benefit of society as a whole and is therefore justifiable. But to carry this argument to its logical conclusion would be to require the punishment of all persons who by heredity, environment, or exposure to temptation, were potential criminals, in order to impress upon them the majesty of the law and to prevent them from following their natural inclinations. There would be no necessity to withhold punishment until the crime had been consummated. Yet the horror with which such a sugges-

²⁶ Mercier, *op. cit. supra* note 23, at p. 36.

tion is met²⁷ must indicate that some other theory of criminal punishment is the underlying and primary basis. It might be pointed out, further, that under this theory the same penalty should be attached to the unsuccessful attempt as to the consummated crime for in both cases the offender is equally dangerous to the community, but practically, this is not done. And, lastly, experience has shown that punishment deters neither the offender himself nor others.²⁸

Under the theory of punishment for retribution, punitive suffering is inflicted upon the criminal as an act of justice, because he merits it, to compensate for evil done.²⁹ Under this theory punishment is not inflicted as a means of attaining an end but is itself the end to be attained.³⁰ It is punishment for the sake of punishment and embodies the rule in the law of Moses,³¹ "An eye for an eye and a tooth for a tooth."³² Reciprocity being considered the fundamental

²⁷ In an experiment to discover the attitude toward punishment, hypothetical questions were submitted to students of the University of Wisconsin under such fact situations as to eliminate all but the particular theory to be tested. In one experiment the students were taken from a class where the social good was advocated as the only excuse for punishment by an eminent professor. Yet the sacrifice of the individual for the public good was in almost every instance required to be reinforced by indignation against wrongdoing before the subjects could be induced to favor it. Sharp and Otto, *Retribution and Deterrence* (1910) 20 *Inter. Jour. of Ethics* 438.

²⁸ Henderson, *Ethical Problems* (1910) 20 *Inter. Jour. of Ethics* 284; Dwight G. McCarty, *Mental Defectives* (1929) 14 *Ia. Law Rev.* 401.

²⁹ McConnell, *op. cit. supra* note 14, Ch. II.

³⁰ "Current opinion inclines to think that justice requires that a man who has done wrong ought to suffer pain in return, even if no benefit result to him or others." Sidgwick, *Methods of Ethics* (1907) 280.

³¹ Exodus, xxi, 23-28.

³² "Disobedience was the result experienced by the Creator and punishment the result experienced by the first offenders. Man's first disobedience therefore brought with it his first knowledge of the law of retribution. That the first punishment inflicted was not corrective may be inferred from the fact that it was inflicted not alone upon the principals and their accessory but upon their descendants for all time, even the earth being thenceforth accursed. Whether man's first contact with an arbitrary will has no greater support than a mere allegorical conception, or is in fact a Divine revelation from the Creator, the influence that it has exerted upon mankind is clearly recognizable." Charles Kerr, *The Law of Avenge* (1927) 14 *Va. Law Rev.* 265.

principle of morality, the only requirement for punishment under this theory is the doing of a wrongful act.³³ Retribution takes precedence not only in age but in importance to all other theories.³⁴ Retributive punishment is the order of all nature and primitive man shared with animals the emotion of resentment at injury and the tendency to retaliate. In its origin, legal punishment is vindicative for in early times punishment took the form of private vengeance such as the blood feud and trial by battle in England.³⁵ As society developed, the wergild was substituted as an alternative remedy³⁶ but where it was out of reach of the accused or the injured party refused to accept, the law left the culprit to be slain. As the sanction of the law developed, the state exacted the penalty but the retributive force was not destroyed.³⁷

The theory of retribution as the basis for punishment is very generally condemned as being unworthy of either the individual or the state, because it serves no useful purpose and because man should be guided by his intelligence rather than his emotions. Seldom are these contentions supported by reasoned argument. Nor can the law, either in its origin or in its present practice be explained in any other way. The condemnations are in reality expressions of opinion on what the purpose of the law should be in dealing with criminal conduct rather than the existing purpose. No other theory may be advanced to explain the sentiment that punishment should be just. On no other theory can the mitiga-

³³ History recalls the infliction of punishment upon animals and even upon inanimate objects. E. P. Evans, *The Criminal Prosecution and Punishment of Animals* (1906).

³⁴ Mercier, *op. cit. supra* note 23, at p. 37.

³⁵ The same is true under other systems of law. Thus Abner was slain by Joab in revenge for the blood of Asahel. II Samuel, ii., 3.

The city of Bibeah was destroyed for the murder of a concubine of a member of the tribe of Israel. Judges, xix., 20.

³⁶ The Hebrews also practiced the payment to the injured party of a money composition for crime. Exodus, xxi., 18, 19, 30.

³⁷ Mercier, *op. cit. supra* note 23, at pp. 38, 39.

tion of punishment because of extenuating circumstances, or the fixed penalty, inflicted according to the gravity of the offense, be upheld. The passionate emotion into which the community is thrown at the news of a horrible crime, and the resulting manhunt, indicate the desire for satisfaction of the outraged sense of justice. This sense of justice is instinctive in man and no amount of training will suffice to instil rationality into an instinctive emotion.³⁸ It is natural to enjoy seeing virtue rewarded and wrongdoing punished. In fact it is upon this instinct that the entire pleasure derived from fiction and drama is based. Punishment is³⁹ and always has been the result of the sense of moral justice and the law punishes because the acts are considered morally wrong.⁴⁰ The objections which are advanced against the other theories of punishment disappear when the theory of retribution is considered as the primary basis. Except in one instance—the infliction of punishment for acts which are merely *malum prohibitum*—every application of the criminal law may be explained on this theory.⁴¹

³⁸ John Alan Hamilton, Making Punishment Fit the Crime (1922) 12 Jour. Crim. Law 159.

³⁹ "Even today with all our enlightened and humane concepts there is a popular demand for more severe punishment. Cold-blooded murders and brutal crimes of all kinds inflame the public. Hanging and the electric chair are still resorted to for convicted murderers, but murder continues and these horrible examples are not effective deterrents. The public still demands more severe and effective punishment to combat the crime wave and our criminal system is declared ineffective because punishment is not swift and sure enough." Dwight G. McCarty, *op. cit. supra* note 28.

"In the experiments of Professors Sharp and Otto at the University of Wisconsin, seventy-six out of a hundred of the subjects could be induced to favor punishment for the sake of punishment in one hypothetical question or another. Retribution and Deterrence, 20 Int. Jour. of Ethics 438.

⁴⁰ "Punishment faithfully reflects the emotion of social resentment. Whenever the offense inspires less horror than the punishment awarded it, the rigor of the penal law is obliged to give way to the common feelings of mankind." Gibbon, Westermarck, Vol. I, p. 199.

⁴¹ "The state virtually says to the criminal or prospective criminal, 'Do what you like. I lie low and wait until you have committed an offense. Then I come down on you and do what I consider my duty. I cannot prevent you from doing wrong; you are a free agent. But neither am I at liberty to alter the consequences of your choice. For my line of conduct is but the necessary moral complement of your conduct.'" Openheimer, Rationale of Punishment (1913) 267, 268.

In the case of acts which are not wrong in themselves but merely illegal, the primary basis of punishment is admittedly deterrence. The underlying principle is that the acts, although not wrong, are socially undesirable and hence punishment is attached to prevent them. Even here it is evident that the distinction between the two classes of crimes is really only a matter of degree. As time goes on and the recognition of their social undesirability becomes more and more firmly established the acts will become morally wrong. Here again the greater penalties are attached to the acts which are considered the more socially harmful so that retributive punishment may be said in a way to reinforce deterrent punishment. Except in this case, however, it is probably true that retribution is the primary aim and the other purposes of criminal punishment are only incidental.

B. Criminal Responsibility

If retribution is the basis of punishment and the reason why the law punishes, it follows that penalties may be inflicted only in cases of guilt. The law must be just, since it mirrors the social sense of justice, and the innocent must not be made to suffer. Hence the law can punish when and only when an act is committed which is wrongful in the eyes of society. In order to be wrongful an act must be first of all, harmful to others for no matter how undesirable it may in some cases be considered, no punishment attaches for acts which concern only the actor himself.⁴² Wrongfulness here is the wider term and all wrongful acts are harmful, although the converse is not necessarily true.

On the surface it would seem that this contention is not borne out in at least one class of cases—suicide and attempted suicide. In effect, however, these cases actually illustrate the operation of the rule. Where the person committing or attempting to commit suicide has dependents, obviously there is detriment both to them and to the com-

⁴² Mercier, *op. cit. supra* note 23, at p. 81 *et seq.*

munity upon which they are thrown for support. Moreover, the common law crime of suicide is based upon the early conception that the state is interested in the life and welfare of its citizens for the purposes of taxation, defense, and productivity. To deprive the state of its citizens, is to perpetuate an act harmful to the state.⁴³ Hence the law inflicted its penalty in such cases where the wrongdoer was not successful in his attempt, and the law could act. And in the case where the suicide was successful the law nevertheless exacted its due in the ignominy of a criminal death and the resulting forfeiture of property. It is interesting to note that where the more modern view prevails and the doctrine that the individual exists for the benefit of the state has been repudiated, suicide is held not to be a crime.⁴⁴

The distinction between wrongfulness and harmfulness is borne out in the practical administration of the criminal law and is indicated by the justifications which the law allows to be interposed as defenses to some harmful acts. In cases where acts are committed in furtherance of public justice such as executions,⁴⁵ and arrests,⁴⁶ in furtherance of domestic authority,⁴⁷ for the prevention of crime,⁴⁸ in self-defense,⁴⁹ in defense of others,⁵⁰ and in defense of property,⁵¹ there is no doubt but that harm results, and yet no punishment is inflicted because the moral sense of society is not outraged; in effect the acts are not considered wrong.

⁴³ *Com. v. Mink*, 123 Mass. 422 (1877); *McMahon v. State*, 168 Ala. 70, 53 So. 89 (1910); *Turner v. State*, 119 Tenn. 663, 108 S. W. 1139 (1907).

⁴⁴ *People v. Roberts*, 211 Mich. 187, 178 N. W. 690 (1920); *Blackburn v. State*, 23 Oh. St. 146 (1872); *Grace v. State*, 44 Tex. Crim. Rep. 193, 69 S. W. 529 (1902).

⁴⁵ *Mercier, op. cit. supra* note 23, at p. 86.

⁴⁶ *U. S. v. Rice*, 1 Hughes 560, Fed. Cas. No. 16, 153 (1875).

⁴⁷ 2 Kent Comm. 203; 1 Bl. Comm. 452.

⁴⁸ *Story v. State*, 71 Ala. 329 (1882).

⁴⁹ *Shorter v. People*, 2 N. Y. 193 (1849).

⁵⁰ *Saylor v. Comm.*, 97 Ky. 184, 30 S. W. 390 (1895); *Snell v. State*, 29 Tex. App. 236, 15 S. W. 722 (1890).

⁵¹ *State v. Patterson*, 45 Vt. 308 (1873); *Story v. State, op. cit. supra* note 48.

However, justification for harmful acts is not unlimited license and when the harm attempted to be justified is the result of excessive force unreasonably applied, the justification fails and criminal responsibility attaches.⁵²

A further requisite of wrongful conduct is that it be intentional. Under the retributive theory of punishment the idea of moral wickedness is interwoven with that of legal crime. Hence to constitute a crime⁵³ and subject the offender to liability to punishment, or, to constitute legal criminal guilt, there must be present a mental as well as a physical element.⁵⁴ Markby and Salmond go farther and require the volitional element in their definition of an act,⁵⁵ but whether it is required as one of the elements of an act or as a necessary complement to constitute an act a crime can make little practical difference. This volitional element is known as the *mens rea* or guilty mind and is necessary to every crime.⁵⁶ It is based on the underlying concept of free will in the determination of conduct and reflects the natural feeling that it is both impolitic and unjust to make a man answerable in a case where he could not have chosen otherwise.⁵⁷ Hence it follows that if, when the volitional element is absent there is no crime, the accused should be allowed to disprove his guilt by showing the absence of *mens rea*. This is, in fact, the case since evidence is admissible to disprove intent⁵⁸ and the presence or absence

⁵² *Boyd v. State*, 88 Ala. 169, 7 So. 268 (1889); *State v. Terrel*, 55 Utah 314, 186 Pac. 108 (1919).

⁵³ "It is alike the general rule of law and the dictate of natural justice that to constitute the guilt there must not only be an act but a criminal intention." *People v. Flack*, 125 N. Y. 324, 26 N. E. 267 (1891).

⁵⁴ *Kenny, op. cit. supra* note 17, Ch. III.

⁵⁵ *Markby, Elements of Law* (3rd ed.) § 215; *Salmond, Jurisprudence* (2nd ed.) 527.

⁵⁶ 4 Bl. Comm. 20; *The Queen v. Tolson* [1889] L. R. 23 Q. B. Div. 168; *Kenny, op. cit. supra* note 17, at p. 40.

⁵⁷ *Holmes, The Common Law* (1881) 54.

⁵⁸ *People v. Flack, op. cit. supra* note 53; *Filkins v. People* 69 N. Y. 101 (1887).

of intent is a fact question for the jury.⁵⁹ Where there is no will to do the act because the party cannot know the nature of it, as for instance in the case of infancy⁶⁰ or somnambulism,⁶¹ responsibility does not attach. The same is true where the will is not directed to the deed as in the case of a mistake of fact.⁶² The third class of cases in which acts which are ordinarily considered wrongful do not result in crime is the situation where the freedom of choice is removed because the will is overcome by compulsion. This class includes public compulsion, such as acts committed in the course of warfare or under court order,⁶³ coercion,⁶⁴ and acts committed because of the driving force of necessity.⁶⁵

In some cases the law does attach criminal responsibility to acts which result in harm, although no harm was intended, on the ground that there is an inference that a party intends the results which are the immediate and natural consequence of his acts.⁶⁶ There is, therefore, at least a *prima facie* presumption of intent, which arises from the doing of the act.⁶⁷ It is on this theory that responsibility

⁵⁹ *People v. Flack*, *op. cit. supra* note 53.

⁶⁰ Under the age of seven there is a conclusive presumption of the lack of *mens rea*. Between the ages of seven and fourteen there is a rebuttable presumption and over the age of fourteen full criminal responsibility. *Kenny, op. cit. supra* note 17, Ch. IV; *Godfrey v. State*, 31 Ala. 323 (1858); *State v. Arnold*, 35 N. C. 173 (1851).

⁶¹ "Can anyone doubt that a man who . . . committed what would otherwise be a crime in a state of somnambulism would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing." Mr. Justice Stephen, *The Queen v. Tolson, op. cit. supra* note 56, at p. 187.

⁶² *State v. Brown*, 38 Kan. 390, 16 Pac. 259 (1888); *State v. McDonald*, 7 Mo. App. 510 (1879).

⁶³ *Hunter v. Wood*, 209 U. S. 205 (1907); 1 U. S. Comp. Stat. 592.

⁶⁴ *Bish*, *Crim. Law* (9th ed.) § 359; *Com. v. Neal*, 10 Mass. 152 (1813); *Riggs v. State*, 3 Cold. (Tenn.) 85 (1866).

⁶⁵ *U. S. v. Ashton*, 2 Summ. (U. S.) 13 (1834); 1 *Hawkins P. C. Ch.* 28, § 26.

⁶⁶ *Rex v. Holt*, 7 Cas. & P. 518 (1826); *Rex v. Hunt*, 1 *Moody Cr. Cas.* 93 (1825); *Reg. v. Franklin*, 15 *Cox C. C.* 163 (1883).

⁶⁷ *Jeff. v. State*, 39 *Miss.* 593 (1860); *Filkins v. People, op. cit. supra* note 58; *State v. Cooper*, 13 *N. J. L.* 361 (1833); *Simpson v. State*, 81 *Fla.* 292, 87 *So.* 920 (1921).

attaches for negligent⁶⁸ and wanton⁶⁹ acts and the volitional element is supplied by the intent to do the act rather than by an intentional seeking of harmful results. In such cases there really is a presence of guilt because even though there is no intent to inflict the particular harm which results, the negligent, reckless or unlawful act is itself considered wrongful.

However, in the case of acts which are merely *malum prohibitum* and not wrong in the moral sense, the element of guilt from a moral standpoint is not required to be present as a pre-requisite to criminal responsibility. In such case the crime does not rest in the doing of the act with an evil intent but in the doing of the act.⁷⁰ The situation is analogous to liability without fault in tort or the application of an objective rather than a subjective test in the construction of a contract. Here deterrence is the avowed basis of punishment. Even here, however, retribution must come to the assistance of deterrence inasmuch as it is necessary that the doing of the act itself be intentional⁷¹ and if deterrence were the only aim, mere proof of the act would be sufficient to warrant the penalty.

In general, then, it may be said, as Mercier put it:⁷²

“Responsibility attaches to acts which are wrong and no others. A wrong act is a voluntary act in which the actor seeks gratification by inflicting harm upon others and responsibility is the more undoubted, the more closely, the more deliberately, the more frequently the will is concerned in the act. Therefore to incur responsibility by a harmful act, the actor must will the act, intend the harm, and desire primarily his own gratification. Furthermore, the act must be unprovoked and the actor must know and appreciate the circumstances in which the act is done.”

⁶⁸ Bradley v. People, 8 Colo. 601, 9 Pac. 783 (1885); Comm. v. York, 9 Metc. (Mass.) 93 (1845); Comm. v. Adams, 114 Mass. 323 (1893).

⁶⁹ Vandermark v. People, 47 Ill. 122 (1868).

⁷⁰ Comm. v. Hersey, 2 Allen (Mass.) 173 (1861); People v. Powell, 63 N. Y. 88 (1875).

⁷¹ Stephen, History of Criminal Law (1883) Vol. II, p. 97.

⁷² Mercier, *op. cit. supra* note 23, at p. 176.

C. Insanity

The foregoing discussion has developed the necessity of the volitional element to constitute a criminal act, as well as the reason for it. It was indicated that where the *mens rea* is lacking because of the immaturity of the offender, the defense of infancy may be successfully interposed to criminal prosecution and an acquittal obtained because no crime has in fact been committed. However, it is evident that the absence of the volitional element may arise as well from a morbid or diseased condition of the mind as from immaturity and when such a condition does in fact exist, there is no crime.⁷³ This is the basis of insanity as a defense to crime and goes to the question of capacity. In the same manner the question of insanity is raised to challenge the capacity to execute a contract or testamentary document. In these analogous cases the same result is reached, that is, the very existence of the will or contract is denied.

The English law has from early times recognized insanity as a possible defense to crime and various legal tests to determine the irresponsibility of the insane have been proposed by judges from time to time since the early common law. The "counting twenty pence" test of Fitzherbert in the sixteenth century,⁷⁴ the "fourteen year old child" test of Hale,⁷⁵ the "wild beast" test of Judge Tracy in *Arnold's Case* in 1724,⁷⁶ and the "insane delusion" test brought into prominence by the brilliant advocacy of Erskine in *Hadfield's Case*,⁷⁷ have all been discarded along with many definitions and ideas of insanity and mental weakness put forward

⁷³ "There must be two constituent elements of legal responsibility in the commission of every crime and no rule can be just and reasonable which fails to recognize either of them: (1) capacity of intellectual discrimination and (2) freedom of will." *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887).

"Sanity is an ingredient in crime as essential as the overt act, and if sanity is wanting there is no crime." *Chase v. People*, 40 Ill. 352, 358 (1866).

⁷⁴ 1 Hawkins P. C. 2.

⁷⁵ 1 Hale P. C. 13, 15.

⁷⁶ *Rex. v. Arnold*, 16 How. St. Tr. 695 (1724).

⁷⁷ 27 How. St. Tr. 1281 (1800).

in various decisions during this early period. In their place the "knowledge of right and wrong" test contained in the McNaughton rules of 1843 was established. The McNaughton rules were laid down by the Judges of England in answer to questions propounded to them by the House of Lords after the acquittal of Daniel McNaughton⁷⁸ on a plea of insanity had resulted in a heated debate on the subject.

In effect, the McNaughton rules laid down the requirements, which have by the force of time and precedent become crystallized into the legal concept, that to establish a defense on the ground of insanity it is necessary to prove that at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was committing, or if he did know that, not to know that what he was doing was wrong. The requirement of consciousness to establish criminal responsibility extends not only to knowledge that the act is one which he ought not to do but that it is contrary to the law of the land. This test has reference not to the knowledge of right and wrong in the abstract, but with respect to the particular act committed. It is evident that under this test not every and all instances of insanity will excuse the commission of crime. If, when the act was committed, the accused had sufficient mental capacity to understand the nature and quality of the act and to know that it was wrong,⁷⁹ he is generally

⁷⁸ 10 Clark & T. 200 (1843).

⁷⁹ "There is no law which will excuse or palliate a deliberate murder on the ground that the perpetrator of it is unlearned, passionate, ignorant, or even of weak mind, unless the weakness of mind amounts to such a defect of reason as to render him incapable of knowing the nature and quality of his act, or if he does know it, that he does not know that it is wrong to commit it." *Fitzpatrick v. Comm.*, 81 Ky. 357 (1883).

"All that was suggested was that he (the accused) was more ignorant and somewhat more stupid than common men; of bad education, bad passions, and bad habits. Now these are precisely the common causes of crimes, but certainly they form no legal excuse or justification for the commission of them." *U. S. v. Cornell*, 2 Mason (U. S.) 91, Fed. Cas. No. 14, 868 (1820).

responsible for the commission of the act, whatever may be his capacity in other particulars.⁸⁰

In the United States various tests have been adopted to determine the criminal responsibility of insane persons accused of crime and it is not unnatural that with forty-nine tribunals of last resort, some confusion should exist. In general the cases fall into three groups although there are some further slight variations. In the first of these are included those states which have adopted the "right and wrong" test as laid down in the *McNaughton* rules and which have limited the defense of insanity to those cases where the accused does not have the required knowledge. This is the so-called New York rule⁸¹ and defines moral wrong as well as legal wrong with respect to the particular act.⁸²

A second group, while recognizing the "right and wrong" test of the *McNaughton* rules, does not limit the defense to knowledge only but recognizes the defense of moral insanity or irresistible impulse. This is known as the Massachusetts rule and is based on the idea that the required mental element of a crime may be lacking as well through the loss of the power of control⁸³ as through the impairment of the intellectual or reasoning faculties and that criminal responsibility depends not only on the possession of

⁸⁰ *State v. O'Neil*, 51 Kan. 651, 33 Pac. 287 (1893).

⁸¹ Edwin R. Keedy, *Insanity and Criminal Responsibility* (1917) 30 Har. L. Rev. 724.

"A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that at the time of committing the act he was laboring under such a defect of reason as not to know the nature and quality of the act he was doing or not to know that it was wrong." N. Y. Penal Law (1909) § 1120.

⁸² "A person is not insane who knows right from wrong and that the act which he is committing is a violation of law and wrong in itself." *Willis v. People*, 32 N. Y. 715, 719 (1865).

⁸³ "Insanity may not only affect the understanding but control the power of volition and a limitation of the question of insanity to understanding is objectionable." *Bradley v. State*, 31 Ind. 492 (1870).

will but upon the power over it.⁸⁴ Insane impulse is known among medical writers as "lesion of the will,"⁸⁵ and the situation is considered analogous to those cases where the will is overborne by compulsion as in the case of coercion, force, or driving necessity. In such case the act cannot in reality be considered the act of the person who does it. Rather, it is thought that he is only the innocent instrumentality,⁸⁶ by which the act is carried out, in the grip of a greater force which is really the responsible agency. This also is the basis for the attempted defenses on the ground of hypnotism but in that case it is not admitted that the will may be so overcome. It is evident that in order for insanity to be a defense in this situation it must be shown to exist with such violence as to render it impossible for the accused to do otherwise than yield.⁸⁷ As in the case of compulsion, so here, it is not sufficient that the course of conduct be highly desirable or advantageous.⁸⁸ It must in fact be necessary by removing the power of choice entirely.

The third group of cases denies the utility of any specific and universal legal test and holds that in all cases the question to be decided is whether the diseased condition and the crime are so inseparably connected in a cause and effect relationship that the latter may be considered as solely the

⁸⁴ In the case of irresistible impulse "the act was not the act of a voluntary agent, but the involuntary act of the body without concurrence of a mind directing it." *Comm. v. Cooper*, 219 Mass. 1, 5, 106 N. E. 545, 547 (1914).

⁸⁵ Meredith, *op. cit. supra* note 5, at p. 60 *et seq.*

⁸⁶ "If one accused of a criminal act knows it to be wrong he is equally irresponsible whether his will is overcome and his hand used by the irresistible impulse of his own mental disease or by the irresistible power of another person. If his mental, moral, and bodily strength is subjugated and pressed into an involuntary service, it is immaterial whether it is done by disease or by another man, or any other force set in operation without any fault on his part." *State v. Pike*, 49 N. H. 399 (1869).

⁸⁷ *Taylor v. Comm.*, 109 Pa. 262 (1885); *Scott v. Comm.*, 4 Het. (Ky.) 227 (1863).

⁸⁸ *Respublica v. McCarty*, 2 Dall. (Pa.) 86 (1781); *U. S. v. Holmes*, 1 Wall., Jr., (U. S.) 1, Fed. Cas. No. 15, 383 (1842).

product of the former.⁸⁹ Under this rule the only question to be considered is that of proximate cause and if this is found to be the diseased condition of the mind, the accused is not criminally responsible, irrespective of whatever other factors may exist.

Although the tests vary, it is evident that whatever the test applied, insanity does not in every instance excuse criminal conduct. However, in some cases where it does not excuse entirely, the diseased condition may be interposed to reduce the degree of the crime⁹⁰ and thus mitigate the penalty. For instance, although homicide is not excused, the accused may be found guilty of manslaughter instead of murder because of the absence of deliberation.⁹¹ A similar instance of the application of this rule may be found in the case of voluntary intoxication. As a general rule drunkenness is not an excuse for crime⁹² and legally the person who commits a crime while under the influence of liquor is generally in the same position with respect to criminal responsibility as any other person, if not worse.⁹³ This is quite in accord with the general attitude of the law with respect to criminal responsibility. Since drunkenness is wrong both morally and legally, the intention to drink and become intoxicated is sufficient basis for the liability of the accused for the consequences, just as the intention to commit other wrongful acts is sufficient basis for responsibility for unforeseen results. It is not unnatural that the law does not allow one wrongful act to be set up as a defense to another. However, if the intoxication is so excessive that

⁸⁹ *Parsons v. State, op. cit. supra* note 73; *State v. Jones*, 50 N. H. 369 (1871).

⁹⁰ *Anderson v. State*, 43 Conn. 514 (1876); *State v. Saxon*, 87 Conn. 5, 86 Atl. 590 (1913); *Weihofen, Partial Insanity* (1930) 24 Ill. Law Rev. 505, 515.

⁹¹ *Fisher v. People*, 23 Ill. 218 (1860).

⁹² *U. S. v. King*, 34 Fed. 302 (1888); *U. S. v. Claypool*, 14 Fed. 127 (1882); *Brimhall v. State*, 31 Ariz. 522, 255 Pac. 165 (1927).

⁹³ The earlier cases treated drunkenness as an aggravation rather than a matter in mitigation. *Beverly's Case*, 4 Coke 125 (1803); *Marshall's Case*, 1 Lewin C. C. 76 (1830); *Rex. v. Thomas*, 7 Car. & P. 817 (1837).

actual insanity supervenes, it may be raised in defense, for a person insane at the time the act was committed cannot be convicted of crime, whether the insanity is caused by drunkenness or otherwise.⁹⁴ Where the intention to commit the crime is proved not to have been formed before the drinking, and the crime was committed during a state of intoxication, then the confused mental state accompanying intoxication is taken into account secondarily on such questions as premeditation, deliberation and malice, not in defense, but to show that the lesser and not the greater crime was committed.⁹⁵

The question of insanity as bearing upon criminal responsibility is in all cases a question of fact for the jury to decide, and since the law is interested in the question of responsibility with respect to the particular act and not in insanity *per se*, each case is to be decided on its own facts only. A presumption exists that all men are sane and therefore the accused is presumed to be sane until a *prima facie* doubt has been raised. Then the burden is on the state to prove sanity. Although there is a presumption, where habitual, chronic or continuous insanity is once proved to exist, that this condition continues until the contrary is shown,⁹⁶ it is not conclusive, and even a court order committing the accused to an insane asylum just prior to the crime, does not relieve the jury of the question of criminal responsibility.⁹⁷

In order to assist the jury to arrive at their decision, the mental expert or the psychiatrist is called in. His duty in court is simply to discover the mental condition of the ac-

⁹⁴ Director of Public Prosecutions v. Beard [1920] L. R. App. Cas. 479.

⁹⁵ Cheadle v. State, 11 Okla. Crim. 566, 149 Pac. 919 (1915); Whitten v. State, 115 Ala. 72, 22 So. 483 (1896).

⁹⁶ State v. Johnson, 40 Conn. 136 (1873); Armstrong v. State, 30 Fla. 170, 11 So. 618 (1892); Goodwin v. State, 96 Ind. 550 (1884); State v. Reddick, 7 Kan. 143 (1884).

⁹⁷ People v. Willard, 150 Cal. 543, 89 Pac. 124 (1907).

cused.⁹⁸ After an examination of the accused, as well as his life history and antecedents, the expert submits his evidence as to the state of sanity or insanity;⁹⁹ but the evidence must be based on symptoms and circumstances which come within his own observation or are testified to by others, and mere speculations of the medical expert as to probabilities are not admissible.¹⁰⁰ While the evidence submitted by the expert may be given more weight by the jury because of the detailed knowledge from which he speaks and the qualifications which entitle his statements to greater consideration, it is not binding upon either the court or the jury, but is to be received along with evidence of prior commitments, eccentricities and all the facts and circumstances of the case, to enable the jury to decide whether or not, in the particular case, the insanity is of such nature as to relieve the accused of criminal responsibility.

Looking then to the viewpoint of the law, the following general propositions may be said to set out the situation as it now exists:

- (1) The Criminal law has been historical rather than logical in its origin and development.
- (2) Being historical, it has followed more or less closely the social development of mankind as well as his natural and instinctive tendencies.
- (3) Because of this connection, the underlying and primary purpose of the law is retributive justice.
- (4) Retributive punishment, based as it is on moral justice and the guilt of the party accused, or of wrong doing, requires all crimes of a certain nature to be treated in a certain way, resulting in the fixed penalty.

⁹⁸ Charles W. Burr, *Paranoia, Its Varieties and Importance* (1907) 48 *Jour. Am. Med. Ass'n.* (1852) 1855.

⁹⁹ *Boardman v. Woodman*, 47 N. H. 120 (1866).

¹⁰⁰ Singer and Krohn, *Insanity and the Law* (1924) 393.

- (5) When there are facts present which remove the element of guilt or wrongdoing, no responsibility attaches.
- (6) Insanity is such a fact and the actor is excused,
 - (a) In all jurisdictions when it impairs the knowledge of right or wrong or the nature of the act committed;
 - (b) In some jurisdictions when it impairs the control of the will over the body;
 - (c) And in still others when it is the proximate cause of the act.
- (7) The question of the presence or absence of insanity is a fact question for the jury and the purpose of evidence, of whatever nature it may be, is merely to assist the jury in arriving at the correct result.

III.

THE VIEWPOINT OF PSYCHIATRY

As has already been pointed out, a great confusion and divergence of opinion exists in the field of legal philosophy as related to crime and penology. There is no idea or theory which does not have its proponents and faithful adherents and since it is a field where no evaluation is possible because there is no basis upon which the various theories and opinions can be measured except other theories and opinions, it is only by the force of the number of its adherents that one theory could be raised above the level of the others. Any attempt at strict classification would therefore be an impossible task. However, there are certain fundamental points of departure between the attitude with which the law treats crime and the attitude with which, the critics of the law contend, crime should be treated. The theories of these critics are usually classified into the extreme and the moderate views, depending more or less upon the degree of difference exist-

ing between the law and what they would have the law to be. For present purposes no attempt at classification is made, but the points of variance are considered in an attempt to discover in what the difference of opinion consists.

A. Criminal Responsibility

The criticisms which the psychiatrists direct toward the law are not of a superficial or procedural nature only, but go to the very foundation of the attitude of the law by attacking the philosophical conceptions on which it is based.¹⁰¹ Admitting that the basis of criminal punishment is primarily theoretical retribution or, in some cases, deterrence reinforced by retribution, with the other purposes of punishment attaching as incidental bases only, the psychiatrists question both the correctness of these views and the usefulness of the policy which results. Without question, criminal responsibility is based on the idea that guilt attaches to wrongdoing and punishment is therefore merited. The psychiatrists question both of these conclusions.¹⁰²

A great controversy rages between the mentallistic and behavioristic psychologists, between the free-willists and the determinists on the question of freedom of choice. The criminal law is based on the idea of free-will¹⁰³ and before retributive punishment may be inflicted on the ground of moral guilt and in the name of moral justice, it is necessary to assume that the accused in doing the act was a free moral agent and might have done otherwise. The assumption is that, confronted by two or more alternative courses of action, the criminal is he who has deliberately chosen the illegal course and who by the same token could deliberately have chosen the path of virtue.¹⁰⁴

¹⁰¹ George W. Wickersham, *The Program of the Commission on Law Observation and Enforcement* (1930) 55 Am. Bar Ass'n Rep. 212, 228.

¹⁰² "All punishment as such is unjust, since no action is good or bad, or worthy of praise, blame, or repentance." Henry W. Ballantine, *op. cit. supra* note 7, at p. 493.

¹⁰³ Aschaffenburg, *Crime and Its Repression* (1866) 241 *et seq.*

¹⁰⁴ S. Sheldon Glueck, *Criminal Responsibility* (1923) 14 Jour. Crim. Law 208.

The contention of the determinists on the other hand is that it is an observable fact that organisms, man and animal alike, adjust themselves to their environments by means of hereditary and habit equipments.¹⁰⁵ These adjustments may be adequate or they may be so inadequate that the organism barely maintains its existence. Where crime is committed, the individual has failed to attain the socially acceptable minimum.¹⁰⁶ The contention is made that some individuals, who are sufficiently unfortunate to be born into unfavorable surroundings, with drunken, shiftless or loose-moralled parents and a low degree of intelligence or even a taint of insanity as a birthright, with the street and dens of vice as their only agency of education, and murder, lust, rapine, crime, and laziness their only acquired knowledge, are inevitably bound to a career of crime and must of necessity become criminals. It is not contended that choice is removed from them, for no doubt they have the power to choose, but that, being what they are, the result of the exercise of the power of choice is preordained.¹⁰⁷

It may be possible that from a high metaphysical point of vision, all acts are necessitated.¹⁰⁸ But the question is largely metaphysical and as in the case of the question of right and wrong in the abstract, without reference to custom, tradition or ethics, discussion is futile and leads nowhere. The law is a practical science and cannot be concerned with such factors. If this view were followed either all men would be exempt from responsibility or, arbitrarily, the individuals who in any way interfered with the social order would be segregated or destroyed, without reference

¹⁰⁵ J. B. Watson, *Psychology from the Standpoint of a Behaviorist* (1919).

¹⁰⁶ S. Sheldon Glueck, *op. cit. supra* note 104, at p. 221.

¹⁰⁷ "Each man's moral responsibility depends upon his conscience and each man's conscience upon his education; consequently what would be morally right in one man would be morally wrong in another." L. Vernon Briggs, *Medico-Legal Insanity* (1923) 14 *Jour. Crim. Law* 62, 65.

¹⁰⁸ Wharton, *Philosophy of Criminal Law* (1874).

to whether they were merely potentially harmful or had already done harmful acts. Briefly, behaviorism would do away with criminal responsibility entirely by establishing a strict cause and effect relationship.¹⁰⁹

It is certain that the position cannot be maintained, as some free-willists contend, that the mind is absolutely free. It is always subjected to outside influences and the assumption of a chaotic freedom of some extra-personal entity is impossible. However, the relationship of freedom of will, in a metaphysical sense, to criminal responsibility is only partial and vague. Freedom, as conceived today, does not rule out such causative factors as heredity, constitution and environment. Today the term means the capacity of a human being to act creatively and purposefully, albeit under the influence of motives and within certain necessary limitations. This is the meaning with which the term is used in the law.¹¹⁰

Closely akin to this question of freedom of will, but not exactly the same, is the theory that crime is a disease and a criminal offense is always a symptom of mental abnormality.¹¹¹ Under this theory, as the law stands at present, no one could be punished.¹¹² As a corollary to this theory stands the proposition that there is a particular criminal type, a born criminal. Both of these ideas have now been definitely exploded by daily experience¹¹³ and by scientific

¹⁰⁹ "The violent and bloodthirsty members of society should be put out of the way of further outrage without reference to the motive which induced them to disregard the right of life and property; the laws of man should be administered in the same spirit as are administered the laws of nature—a shortsighted man who has miscalculated his distance in attempting to swim a river, drowns; not because his motive is malignant but because he has violated a law. Insanity, like blindness or a 'wicked or abandoned' heart, is a defect of organization and the highest triumph of human tribunals should be to administer to the survival of the fittest." Gilbert H. Stewart, *Legal Medicine* (1910) 391.

¹¹⁰ *Op. cit. supra* note 104.

¹¹¹ Charles M. Jacobs, *Crime and Insanity* (1928) 46 *Med.-Leg. Jour.* 4.

¹¹² Henry W. Ballantine, *op. cit. supra* note 7.

¹¹³ Brasol, *The Elements of Crime* (1927) 286.

research.¹¹⁴ One startling discovery resulting from the data compiled under the Briggs law in Massachusetts was that only one out of every five of the prisoners examined were reported abnormal.¹¹⁵

The second criticism directed toward the basic principles of the criminal law is that punishment for the sake of deterrence cannot be sufficiently supported by results,¹¹⁶ while retributive punishment is not only useless but actually harmful. The contention is that in returning evil for evil, the first wrong is not only not undone, but a new wrong is perpetrated. The psychiatrists, then, would discard the orthodox theories of punishment as the principal and primary aims¹¹⁷ and substitute in their place punishment based on the theory of social utility.¹¹⁸ The contention is that the criminal law should be socialized.¹¹⁹ The principle of state action should be to secure such an organization of society that in it all persons may have full opportunity to live their largest lives. This is based on the idea that the state exists for the benefit of the individual rather than the individual for the state.¹²⁰ Insofar as the orthodox theories of punishment were useful, they would be retained under the theory of social utility. Thus retribution might be retained for its service as an outlet for the indignation of the community and for the elevation of the moral sense of the public at

¹¹⁴ Goring, *The English Convict* (1913) a symposium.

¹¹⁵ Winfred Overholser, *op. cit. supra* note 2, at p. 602.

¹¹⁶ "Psychiatrists contend that criminality is a state of mind; that there are people who because of either inherited or acquired defects are so unlike the remainder of the community that they are asocial and hence criminal; that they are morally color blind and cannot be taught a sense of duty to their fellows." Charles W. Burr, *Crime from a Psychiatrist's Point of View* (1926) 16 *Jour. Crim. Law.* 519, 523.

¹¹⁷ "The more corrupt the defendant's heredity and the more defective his mentality, the less his moral blame and punishability, but from a social standpoint, the greater the necessity for sending him to a proper institution." Henry W. Ballantine, *op. cit. supra* note 7.

¹¹⁸ McConnell, *op. cit. supra* note 14, Ch. V.

¹¹⁹ H. Douglas Singer, *Illinois Crime Survey* (1929) Ch. XV.

¹²⁰ A. Moresby White, *Legal Insanity* (1927) 18 *Jour. Crim. Law.* 165, 172.

large. Prevention and reformation, where the possibility of success existed, would also be useful; but the main outlook would be the protection of society¹²¹ and, when possible, to turn back into society social units which were capable of socially valuable functioning.¹²² The particular aim would be followed which in the particular case would have the greatest social utility.¹²³

The beneficial result of such a change of fundamental viewpoint would be to shift the focus of attention from the criminal act to the criminal himself¹²⁴ and would substitute treatment based upon diagnosis and scientific research¹²⁵ in the place of punishment based upon philosophical concepts which are the crystallization of customs and tradition and

¹²¹ "First comes the public welfare and the public safety. Second comes the care of the innocent victim of the criminal act. Lastly we should deal with the accused party." A. Moresby White, *op. cit. supra* note 120, at p. 174.

¹²² Karl A. Menninger, *Medico-Legal Proposals* (1928) 19 *Jour. Crim. Law* 367.

¹²³ "No provision is made for abnormals in the present social scheme; when we realize that there are two kinds of criminals, the sick and the normal, we have gone a long way in the handling of crime. Punishment in the usual way provided by law may be all right for the normal but certainly it is not the proper remedy for the other class. The mentally sick should be sent to a hospital and if found incurable, let us resort to the old punishment of banishment, not banishment to a foreign country but banishment to a hospital, farm, or colony where they can be properly treated and restrained." Dwight G. McCarty, *op. cit. supra* note 28, at p. 418.

¹²⁴ "The criminal and not the crime should be made the matter of prime consideration and the sentence, or better, the decision of the court should be calculated to cure the illness as it has been shown to exist in the conduct of the defendant." L. Vernon Briggs, *op. cit. supra* note 107.

"To the psychiatrist the criminal act is of secondary importance; the mental make-up impelling him to do it is the primarily important thing. The act therefore is merely a symptom to be interpreted; in law the act itself is the thing which makes a man a criminal." Charles W. Burr, *op. cit. supra* note 116.

¹²⁵ "Great as our achievements have been in the mechanics of life, remarkable and astonishing as have been our attainments in the material world, we are still as barbarians in the field of social relations and mutual human understanding. We have not failed to apply every new invention and device in the direction of improved business, commerce, and navigation, but we have failed miserably to apply with the same eagerness and enthusiasm, the latest scientific findings regarding the improvement of human relations. Science in its various fields has made many contributions pointing the way out of darkness into the light of increased human understanding. But as yet we have hardly begun to apply the wealth of material already at hand." Dr. Samuel Kohs, *Annual Report of Twenty First Annual Conference of the National Probation Ass'n.* (1927) 173.

the outgrowth of historical development.¹²⁶ Anti-social conduct would be treated in as unprejudiced and dispassionate a manner as a broken leg.¹²⁷ The criminal would be reformed if possible, disabled by segregation when required, or executed when necessary.¹²⁸ Such treatment, based on the individual characteristics of the criminal would necessitate the discarding of the concept of justice, since it would necessarily eliminate the fixed penalty and the cut-to-the-same-pattern treatment of all criminals who commit the same offense.¹²⁹ One of the chief criticisms of the law today, from a psychiatric viewpoint, is that it is too lenient with some and too severe with other offenders,¹³⁰ due to the fact that the punishment is inflicted according to the name of the crime rather than the character of the man committing it.¹³¹

Along with the concept of justice and the fixed penalty, the theory of punishment based upon social utility would re-

¹²⁶ *Op. cit. supra* note 122.

¹²⁷ H. Douglas Singer, *op. cit. supra* note 119, at p. 737.

¹²⁸ "Psychiatrists and psychiatric work contemplate the making of an estimate of future behavior. The main problem confronting the psychiatrist is whether or not the subject is likely to become a menace to himself or society." Samuel T. Orton, Annual Conference of National Probation Ass'n, *op. cit. supra* note 125.

¹²⁹ "The infliction of punishment is to be considered a clinic designed to combat a social and individual malady, rather than the verification of a threat of retribution which hangs over the head of wrongdoers." Henry W. Ballantine, *op. cit. supra* note 7, at p. 493.

¹³⁰ Winfred Overholser, *op. cit. supra* note 2, at p. 607.

¹³¹ "The patient should be treated and not the disease and it is as illogical to sentence the person who has committed a certain offense to a specific term of imprisonment as it would be to decide, when a patient is admitted to the hospital, the day on which he shall be discharged." H. Douglas Singer, *op. cit. supra* note 119, at p. 737.

"It is just as sensible to open the doors of the county hospitals for the chronic insane and permit the inmates to leave, as to allow the defective delinquent to be turned out of prison to commit new crimes." Frank C. Richmond, *Psychiatry and the Criminal*, (1926) 43 *Med.-Leg. Jour.* 39, 50.

"Ex-governor Cox of Ohio stated that it was a travesty on human intelligence to sentence a habitual criminal to one, two or three years in the penitentiary; and that it was a crime to release a known criminal back into society. The really big lesson which criminology must teach the law is that some competent authority ought to pass on the safety of turning the criminal loose." John F. W. Meagher, *Psychiatry and the Criminal* (1926) 43 *Med.-Leg. Jour.* 68.

quire the concept of criminal responsibility to be discarded. From the viewpoint of psychiatry, the concept of responsibility is academic and metaphysical and merely clouds the issue.¹³² The test of responsibility would be the ability to live in accordance with the social law and a violation of the law would be evidence of unfitness for a social existence regardless of the reason for its violation, and the underlying reason, instead of being the basis on which responsibility is determined would rather be a matter for consideration in regard to the treatment to be applied.¹³³

B. Insanity

Disregarding the more fundamental difference in the attitudes with which psychiatry and the law look upon the problem of crime and the purposes of punishment and accepting the viewpoint of the law that moral guilt and criminal responsibility are inseparably connected, there is still a further conflict on the question of determining when responsibility should attach in the case where the accused is of unsound mind. This conflict arises out of the criticisms of psychiatry which question the adequacy of any test for the determination of the criminal responsibility of insane persons and in particular the correctness of the test which is in use at the present time.

As has been indicated, the legal test for the responsibility of persons who set up insanity as a defense to crime is the knowledge of right and wrong as contained in the McNaughton rules, promulgated in 1843.¹³⁴ The contentions of the

¹³² Charles W. Burr, *op. cit. supra* note 116.

¹³³ Singer and Krohn, *op. cit. supra* note 100, at p. 413.

¹³⁴ McNaughton's Case, *op. cit. supra* note 78:

Q: "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit?"

A: "Assuming that your lordship's inquiries are confined to those persons who labor under such partial delusions only, and are not in other

psychiatrists are that the McNaughton rules were not the result of reasoning from fundamental principles of law regarding criminal responsibility but simply arose from the necessity of the case and were based upon its particular facts and evidence. Moreover, the rules were not only promulgated at a time when the medical profession had but a very narrow view of the scope and character of mental disorders,¹³⁵ but the rules themselves expressed still older medical opinion.¹³⁶

The first criticism advanced against this test is applicable from a strictly legal point of view and is directed to their authoritative effect because of their extra-judicial nature.¹³⁷ Whatever may have been the value of this argument had it been raised in 1843, it has certainly been overcome by the force of judicial precedent since that time and is therefore untenable. However, it will be noticed from an examination of the questions, that they refer to persons afflicted with insane delusions in respect *to one or more particular subjects of persons*. The answers are based on the assumption that the questions refer to persons afflicted with *partial delusions* and *who are not in other respects insane*. The rule, then, was the conclusion drawn from the premise that a person so afflicted was otherwise perfectly sane; a view

respects insane, we are of the opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your lordship to mean the law of the land."

Q: "If a person under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?"

A: "Making the same assumption that we did before, namely that he labors under such partial delusion only and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real."

¹³⁵ Edwin R. Keedy, *op. cit. supra* note 9.

¹³⁶ Glueck, *Mental Disorder and the Criminal Law* (1925) 76.

¹³⁷ Meredith, *op. cit. supra* note 5, at p. 29.

entirely in accord with the psychology of the time, which regarded the functions of the brain as divided into distinct parts, each of which had considerable independence of the others.¹³⁸

The theory of partial insanity in the sense of monomania has been entirely refuted and no longer exists.¹³⁹ The present day medical view is that insanity is a disease or disorder of the whole individual¹⁴⁰ and due to the fact that the highest or governing regions are disordered,¹⁴¹ the individual is thereby rendered a changed being. The mind being a unit, a disease manifesting itself along one subject is a disease of the whole mind and not of a part. Hence, delusional insanity or monomania really is an indication of a deep seated mental disorder and persons exhibiting such symptoms are insane and not partially insane. Returning to the McNaughton rules, the psychiatrists contend that they are vitiated at their very outset because the answers, by the strength of their own limitations in the assumptions of the judges, apply to a mental condition which does not exist, never existed, and could not exist.¹⁴²

Secondly, under modern medical theory, the case would be quite exceptional where a person could reason logically from a delusion. Yet, assuming such a possibility to be the case, and assuming that the answers of the judges were meant to be responsive to the questions and not limited as indicated above, the effect of rules laid down to cover the case of delusional insanity would be no greater than that of the legal rules already obtaining with respect to mis-

¹³⁸ Edwin R. Keedy, *op. cit. supra* note 9.

¹³⁹ "We cannot regard any part of the mind as being affected alone. Mind is not a thing to be divided into parts." Stoddart, *Mind and Its Disorders* (5th ed.) 174.

"To the medical man the use of the term partial insanity is as ridiculous as to say a patient has a 'touch of pneumonia' or to diagnose a case as partial pregnancy." Singer and Krohn, *op. cit. supra* note 100, at p. 216.

¹⁴⁰ Henry Wiehofen, *op. cit. supra* note 90, at p. 508.

¹⁴¹ Mercier, *op. cit. supra* note 23, at pp. 102, 103.

¹⁴² Mercier, *op. cit. supra* note 23, Ch. VIII.

take of fact. The only effect given to the presence of insanity is that it would allow the accused to entertain delusions which would in the ordinary person fall under the head of unreasonable mistake of fact, and would, as a result of the unreasonableness, afford no defense.¹⁴³

Thirdly, modern medical theory does not regard insanity itself as a disease but as a symptom of disease¹⁴⁴ which may manifest itself by disorders of conduct, disorders of bodily function or disorders of the mind.¹⁴⁵ Assuming the McNaughton rules to have the greatest possible effect that directive responsive answers could have, they abstract only one phase of mental life and apply only to a particular and specific mental disorder, delusional insanity. Yet in the courts they have been applied as tests for every possible phase of mental disorder, without respect to whether it is functional, intellectual or behavioristic, whether the delusions present were partial or total or whether delusions were present or not.¹⁴⁶ The result of such application is to make the knowledge of right and wrong, in all cases the determining factor.

Modern medical authority is convinced that the "right and wrong" test of responsibility is inadequate because it is applicable only to those conditions of the mind in which a defect of intelligence is primarily involved, such as *paresis*, *senile dementia*, and *feeble-mindedness*.¹⁴⁷ The test is based on the assumption that knowledge controls conduct,¹⁴⁸ although it is a well established psychiatric principle that

¹⁴³ "An insane delusion with reference to the conduct and attitude of another cannot excuse the criminal act, unless it is of such character, that if it had been true it would have rendered the crime excusable." *People v. Taylor*, 138 N. Y. 398, 406, 34 N. E. 275 (1893).

¹⁴⁴ Singer and Krohn, *op. cit. supra* note 100, at p. 408.

¹⁴⁵ Mercier, *op. cit. supra* note 23, at p. 109.

¹⁴⁶ Mercier, *op. cit. supra* note 23, at p. 205.

¹⁴⁷ William J. Hickson, *Understanding Criminals* (1918) 2 *Jour. Am. Judicature Society* 69.

¹⁴⁸ S. Sheldon Glueck, *Psychiatry and The Law* (1927) 14 *Va. Law. Rev.* 155, 168.

behavior is in many instances controlled by the emotions.¹⁴⁹ Psychiatrists contend that the brain is composed of two parts, the *cortex* or reasoning mind, and the *medulla oblongata*, which is the seat of the emotional centers. Behavior is in many instances the result of domination of the upper regions of the brain by the lower or the suspension of the activity of the upper regions so that the lower are in control; and both of these conditions are produced by emotional activity.¹⁵⁰ These conditions grade from mere automatic control, where the individual is no more than an automaton, through various degrees in which the upper regions retain some control. It does not necessarily follow that the individual will commit criminal acts while in this state, but it does indicate that lack of self-control is possible although the intellect is in no wise impaired¹⁵¹ and if criminal acts are committed, the contention is that the offender should not be held responsible. It is in an attempt to recognize these psychiatric principles that the law has been extended in some states to include irresistible impulse.

While psychiatry has discarded the term "partial insanity" in the sense of monomania as scientifically unsound, the term is nevertheless retained to indicate a general mental impairment which is partial in that it is not so complete as to come within the definition of insanity which relieves from criminal responsibility. The distinction is between insanity "partial as to thing" and insanity "partial as to degree."¹⁵² The failure to make this distinction has been the source of some confusion.¹⁵³ From a strictly medical viewpoint, if it is assumed that the brain is the seat of the mind or that the mind is no more than cerebral activity, and that all normal mental phenomena are regarded as the result of

¹⁴⁹ Dwight G. McCarty, *op. cit. supra* note 39.

¹⁵⁰ John R. Oliver, *Emotional States* (1920) 11 *Jour. Crim. Law* 77.

¹⁵¹ Mercier, *op. cit. supra* note 23, at p. 218.

¹⁵² Henry Weihofen, *op. cit. supra* note 90, at p. 508; Glueck, *Studies in Forensic Psychiatry* (1916) 132.

¹⁵³ *State v. Craig*, 52 Wash. 66, 100 Pac. 167 (1909).

a healthy brain, while abnormal phenomena are the result of a diseased or deranged brain, then the condition of a particular individual may be designated as either sanity or insanity, with no middle ground, for the brain must be either healthy or unhealthy.¹⁵⁴ However, such an omnibus definition is entirely useless for legal purposes. Even from a medical viewpoint it is impossible to carve the world into two parts, putting on one side those who are sane and on the other those who are insane, just as it might be said that all those in the cemetery are dead while those outside the cemetery are living.¹⁵⁵ Insanity is a matter of degree and those who are insane are not necessarily entirely insane, as is true in the case of death.¹⁵⁶ Between the two extremes of sanity and insanity lies every shade of disordered or deficient mental condition, grading imperceptibly one into another.

In law, on the other hand, insanity is synonymous with irresponsibility.¹⁵⁷ The law must draw a hard and fast line between sanity and insanity, for the question at issue is the determination of whether or not the accused is responsible. Hence the arbitrary legal tests for insanity are, in reality, tests for irresponsibility,¹⁵⁸ since the accused either is sufficiently insane to be excused or he is not. Psychiatrists contend that even the test of irresistible impulse is inadequate and that what is really needed is a provision for partial responsibility or degrees of responsibility to correspond to degrees of insanity.¹⁵⁹ This, of course, cannot be done under the present system and as a result a lack of

¹⁵⁴ Gilbert H. Stewart, *Legal Medicine* (1910) 354.

¹⁵⁵ Henry Weihofen, *op. cit. supra* note 90.

¹⁵⁶ "The naive popular idea that the insane are a degenerate species quite apart from the normal quietly disappears. In its place rises the conception that the frontier between what, in a given culture is supposed to be normal and what is supposed to be abnormal is not a cliff but a slope." Harold D. Lawswell, *The Study of The Ill* (1929) 23 *Am. Pol. Sci. Rev.* 996, 1001.

¹⁵⁷ John F. W. Meagher, *Crime and Insanity* (1923) 14 *Jour. Crim. Law.* 46.

¹⁵⁸ John F. W. Meagher, *Crime and Insanity* (1923) 41 *Med.-Leg. Jour.* 63.

¹⁵⁹ Henry Weihofen, *op. cit. supra* note 90, at p. 512.

harmony must always exist on any test of legal insanity which demands a fixed and arbitrary classification with the various classes divided by an unbending line.

From what has been said it would seem that very little defense of the criminal law could be advanced. However, the crux of the matter and the root of all the evils, lies in the fact that the question of mental abnormality or deficiency is fundamentally within the province of medicine¹⁶⁰ and cannot be reduced to the fixity demanded and required by legal rules, and thus simplified and catalogued.¹⁶¹ Insanity really has no definite meaning among medical men and properly speaking has no place in scientific medicine.¹⁶² The term insanity is a generic popular term and takes on a definite meaning only when used in law to determine responsibility.

Because of the very nature of the subject, psychiatrists are out of patience with the procedure of the criminal law, nor may their criticisms be deemed wholly unreasonable and unwarranted. In the first place, under the present system, the determination of the very perplexing problem of mental condition is left in the hands of the jury under instructions from the court. Both the court and jury, however, are manifestly unfit to make such a determination by their total lack of training.¹⁶³ For the purpose of assisting the jury in this duty, the expert is called in, but it is obvious from what has been said above that the psychiatrist is disqualified by his training from assisting in matters which con-

¹⁶⁰ "Lawyers and physicians mean two different things by the word 'madness.' A lawyer means conduct of a certain character. A physician means a certain disease, one of the effects of which is to produce such conduct." Stephen, *op. cit. supra* note 71, at p. 87.

¹⁶¹ Dwight G. McCarty, *op. cit. supra* note 123.

¹⁶² "Insanity is not really the name of any disease; it is not a diagnosis, it is not in itself even a symptom; in fact it is an expression having various and diverse meanings and signifies nothing definitely." Frank M. Woodbury *Relation Between Insanity and Crime* (1913) 4 *Jour. Crim. Law* 282.

¹⁶³ S. Sheldon Glueck, *Psychiatric Examination* (1927) 36 *Yale Law Jour.* 632, 648.

cern responsibility. To him mental abnormality is not commensurate with legal irresponsibility.¹⁶⁴ In others words, he does not talk in the same language as the jury because the terms change in meaning in their communication from the expert to his listeners. As a result, his assistance is valuable, not in determining the criminal responsibility of the accused, but in advising as to the final disposition of the case.

Assuming, however, that the psychiatrist does speak in terms of legal responsibility for the assistance of the jury, the use of the hypothetical question practically destroys the value of his assistance. He is not allowed to express an opinion as to the sanity or insanity of the accused¹⁶⁵ but is required to testify in answer to a hypothetical question submitted to him by counsel and in his answer he is required to assume that the hypothesis is true. The unreality of the situation is obvious and the result necessarily is that the doors are thrown open to partisanship. In the first place, skillfully framed questions are put which permit of neither a directly positive nor negative answer, but the psychiatrist is not allowed to explain.¹⁶⁶ Secondly, it is not only possible, but usual, to frame questions in such a way that the psychiatrist, being required to assume that the hypothesis is true, must give the answers desired. Obviously, the result of such a method of procedure is to get expert testimony which arrives at directly contradictory conclusions, although the expert may in each case be not only honest but correct in the conclusion reached.¹⁶⁷ However, the jury, who are unable to distinguish such nice refinements and subtleties, are misled into the perfectly natural but entirely erroneous assumption that the question in each case applies directly to the accused. As a matter of fact, it

¹⁶⁴ Karl A. Menninger, *Medico-Legal Proposals* (1928) 19 *Jour. Crim. Law.* 367.

¹⁶⁵ Singer and Krohn, *op. cit. supra* note 100, at p. 407.

¹⁶⁶ Winfred Overholser, *Psychiatry and The Law* (1928) 13 *Mass. Law Quar.* 28, 35.

¹⁶⁷ Singer and Krohn, *op. cit. supra* note 100, at pp. 375, 377.

may apply, in whole or in part, in both or neither of the cases. The situation is exactly analogous to the case of the blind men who upon meeting with an elephant for the first time, arrived at entirely different conclusions as to its character because they came in contact with different parts of its body. The net result of the whole procedure is to arouse the impatience of the public at large with everyone concerned in the trial and to bring both the law and psychiatry into disrepute.¹⁶⁸

In conclusion, the viewpoint of psychiatry may be summarized in the following general propositions:

- (1) The treatment of crime should be approached from a scientific rather than a historical viewpoint.
- (2) The underlying basis of treatment should be social utility rather than retributive punishment.
- (3) The concepts of justice and criminal responsibility should be abolished to make way for a treatment of the criminal rather than the crime.
- (4) Until such time as the viewpoint may be changed, modern psychiatric knowledge should be used to determine criminal responsibility in the place of outworn legal concepts which express the faulty knowledge of other times.
- (5) The criminal procedure should be modified and reformed to eliminate partisanship and the hypothetical question.

¹⁶⁸ "The defendant having decided upon his defense will bring forward experts to substantiate it and will have none others; the state on the other hand only calls in experts who will denounce the theory of the defense as utterly untenable. On both sides the experts air their theories and show the absurdity of the theories advanced by the other side. And all this not merely for the sake of having a discussion but to enable the jury to determine whether a man shall be deprived of his life, liberty, or property. The jury hears these conflicting theories; there is no court of experts to say which is correct and it therefore devolves upon the court trying the particular case to instruct the jury as to which of these theories the law regards as tenable." Gilbert H. Stewart, *op. cit.* *supra* note 154, at p. 421.

IV.

CONCLUSION

It is evident that with such fundamental and far-reaching differences of opinion existing, a real problem is presented. Without question the problem of the recidivist is one of the greatest in the treatment of crime today and the habitual criminal or repeater is a crying illustration of the inadequacy of our laws as they are.¹⁶⁹ Furthermore, it is a known fact that there are some special criminals, insane enough never to go to prison and yet wise enough never to remain long in an insane asylum.¹⁷⁰ On the other hand, it requires a good actor to successfully feign insanity, but there are many common varieties of mental disease which may and very often do escape ordinary observation.¹⁷¹

Manifestly, the psychiatrists are correct in their assertion that social utility should be the basis for the treatment of crime. No good purpose is served by retributive punishment. Not only is such a motive unworthy of both the individual and the state, but the results are actually harmful in many respects. No doubt the scientific approach is the better method. However, it must be remembered that there is a distinction between what is and what ought to be the law. And a further distinction exists between what the law should be and what it can be.

While it may be asserted that the scientific approach is the better method, the historical origin and growth of the law, and its close connection with individual and social sentiment, cannot be entirely disregarded. The law must concern itself with society, and it must reflect as closely as possible the average moral tone as represented by the mean of the aggregate of private consciences. While it

¹⁶⁹ Wm. Healy, *Studying the Offender* (1913) 4 *Jour. Crim. Law* 204, 205.

¹⁷⁰ John F. W. Meagher, *Malingering In Criminals* (1928) 45 *Med.-Leg. Jour.* 78, 11 *Va. L. Reg.* 577, 590.

¹⁷¹ Henry W. Ballantine, *op. cit. supra* note 7.

may be that the day of vindictive justice is passing, it is true only with a qualification. It will never pass beyond the possibility of a revival. The human vindictive instinct in varying degrees will always remain not far below the surface of habitual conduct. Both history and common sense teach us that this is so and it is a fact which cannot be ignored either in the criminal law or in criminology. It requires only the intense feeling of the public, aroused by the news of some particularly brutal or atrocious crime to indicate such a revival. In some instances the fact of insanity, in such an advanced stage as to excuse even under the present imperfect legal tests of criminal responsibility, has been reasoned away by the jury that the sadistic desires of the community might be satisfied.¹⁷² A further illustration may be made of the now rather isolated cases of mob justice. The gradual control of the vindictive impulse arising from human weaknesses is one of the tests of the progress of civilization and no savant is required to tell us that the millennium has not been reached. Moreover, it cannot be said that the treatment of crime has been entirely devoid of the scientific method, for its main characteristic, the individualization of punishment, has been recognized to a certain extent in the law today in the development of reformatories, probation, and the indeterminate sentence.

Much of the criticism directed at the McNaughton rules from the medical side is based upon a misapprehension. They assume that the rules contain a definition of insanity. And the legal definition thus obtained is contrasted with the medical conception of insanity, implying a conception of unsoundness of mind that is obsolete. It may be that the judges who framed the McNaughton rules took into consideration the medical view as to the nature of insanity

¹⁷² Winfred Overholser, *Psychiatry and The Courts* (1928) 19 *Jour. Crim. Law* 75.

generally accepted in 1843, if there was one. It is certain, however, that they were not professing to define disease of the mind, but only to define what degree of disease of the mind negated criminality. This is as much a legal question as the question at what age a child becomes criminally responsible. It undoubtedly is, and it is equally clear that it ought to be the law, that not every kind or degree of insanity should excuse from criminal responsibility.¹⁷³ The symptoms of insanity are the result of psychological phenomena identical with those found in the normal mind, but in the former the processes are carried to a more advanced stage and beyond the limits which are generally regarded as normal.¹⁷⁴ It is a matter of common knowledge that there are many so-called "warped" individuals in any community, in whom there exists some taint of insanity, but who are influenced by the ordinary fears and hopes that control the conduct of ordinary people and who are therefore amenable to the criminal law. They should be no more excused from the rigor of its penalties than they should be declared incapable of executing a contract or a testamentary document.¹⁷⁵ The far-reaching effect of granting immunity to everyone who is of unsound mind cannot be realized until the medical conception of unsoundness of mind is considered.¹⁷⁶ A man whose temper was intensely exasperated by suppressed gout would not be excused for any act of violence which he might commit in consequence, and

¹⁷³ Mercier, *op. cit. supra* note 23, at p. 213.

¹⁷⁴ Bernard Hart, *Psychology of Insanity* (1929) 140.

¹⁷⁵ "That eccentricity is not incompatible with soundness and clearness of mind cannot be better shown than by the life of Dr. Samuel Johnson who was one of the most vigorous thinkers of his time, and was one of the greatest sages and ablest writers that ever lived. Yet one of his contemporaries wrote as follows in 1766: 'He is as odd a mortal as you ever saw and you would not at first sight suspect that he had ever read or thought in his life or was much above the degree of an idiot.'" Gilbert H. Stewart, *op. cit. supra* note 154.

¹⁷⁶ "Many groups of intelligent people could not pass all the twelve year old psycho-metric tests. Yet because a man is not perfect mentally does not mean that he is insane legally." John F. W. Meagher, *Prevention of Crime* (1926) 43 *Med.-Leg. Jour.* 68.

if the disease were some obscure affection of the brain, producing feelings similar in all respects, he would not be excused merely because his complaint was classed as a form of madness.¹⁷⁷ Nor should a person who is bad by reason of disease, unconnected with the particular acts which he commits, be in a better position than the one who is bad by birth, education, or natural character.¹⁷⁸ Even admitted lunatics are capable of inhibitions and sublimations as is indicated by the disciplinary methods used to control the inmates of insane asylums. Certainly, then, every degree of unsoundness of mind should not be a justification for any crime which the individual chooses to commit,¹⁷⁹ and the problem of drawing the line between responsibility and irresponsibility devolves upon the criminal law. It is at this point that the controversy between psychiatry and the law for the most part exists, for the law even in its present form is adequate in cases which are pronouncedly on one side or the other, when they are discovered. The borderline cases do raise a practical problem¹⁸⁰ but even here the clash between the legal and medical conceptions for the most part disappear when it is recognized that a person of unsound mind may nevertheless be criminally responsible.¹⁸¹

It must be remembered that psychiatry itself is not well settled, and the disagreements among psychiatrists are often cited as arousing suspicion of their knowledge of the subject.¹⁸² Our knowledge of our own minds is imperfect and

¹⁷⁷ Stephen, *op. cit. supra* note 71, at p. 170

¹⁷⁸ Stephen, *op. cit. supra* note 71, at p. 185.

¹⁷⁹ Mercier, *op. cit. supra* note 23, at p. 227 *et seq.*

¹⁸⁰ John F. W. Meagher, *op. cit. supra* note 158, at p. 66 *et seq.*

¹⁸¹ "If criminals are to be permitted to roam through society at will, confident that because of bad heredity, and vicious environment they are secured against the penalties of the law, and when convicted of crime, they are for that reason to be absolved from guilt and merely placed in a state supported educational institution until feigned reform gives one the right to suppose that they are no longer dangerous and are to be then released to re-enact a drama of crime, our body politic is in a dangerous condition." Albert K. Stebbins, *Responsibility for Criminal Acts* (1928) 76 *Univ. Pa. L. Rev.* 704, 717.

¹⁸² John F. W. Meagher, *op. cit. supra* note 4.

our knowledge of the precise mental condition of others is still more imperfect. The courts are obliged to rely upon the evidence furnished them by witnesses whose means of knowledge are limited and who find great difficulty in communicating what they do know.¹⁸³ Insanity is not a definite entity like scarlet fever or tuberculosis, but is used to denote a heterogeneous group of phenomena which have but little in common. Moreover, its boundaries have varied from age to age according to the dominating conceptions of the period,¹⁸⁴ and changing medical theories which are the result of progress to a fuller understanding are still too far from perfect to warrant a change in the whole procedure of the law.

The law changes slowly. There is always a gap between the popular feelings, the passions of the hour and the permanent body of the law. The very permanency of the law requires that before change is made, there must be assurance that the law would be improved and that a practical workable method would be introduced.¹⁸⁵ Insanity is admittedly incapable of definition; its diagnosis is difficult and its effect upon conduct obscure. Therefore care must be used in making changes to be sure that they are based on principles which are tested and true. However, it must be pointed out that the fact that some difference of psychiatric opinion exists—a situation always found on the frontier of a young science is no reason why the law should not avail itself of the scientific facts upon which all are agreed and which are susceptible of experimental proof. Legal ancestor worship may be carried too far; and no real reason exists why contemporary knowledge and practice should not be substituted for the present out-of-date views.¹⁸⁶

¹⁸³ State v. Richards, 39 Conn. 591, 592 (1873).

¹⁸⁴ Bernard Hart, *op. cit. supra* note 174, at p. 138 *et seq.*

¹⁸⁵ See discussion by Joseph H. Beale in 13 Mass. L. Quar. 28.

¹⁸⁶ Glueck, *op. cit. supra* note 136, at p. 76.

Perhaps one of the greatest steps in the introduction of modern medical thought into the law is the Briggs law in Massachusetts. Under this law, psychiatric examination before trial by state paid and neutral experts is made a matter of routine. Where the medical experts reach the conclusion that the offender is legally irresponsible, criminal proceedings are usually dropped, although such a course is not required. The results under this method have been highly successful and indicate the desirability of its extension.¹⁸⁷ One of the more important advantages of such service is that it eliminates all partisanship and restores the expert to the well recognized and respected position that he occupied as the friend of the court before he became a partisan witness. Secondly, psychiatric examination is available in all cases and is not limited only to capital offenses which are probably the only cases where the defense would raise the question of its own motion, inasmuch as the penalty of the law would in most cases be less in degree than commitment to an asylum.¹⁸⁸ Thirdly, treatment of this discovers defectives and insane persons early in their criminal careers¹⁸⁹ and goes a long way toward solving the problem of the recidivist, since experience and research indicate that habitual offenders begin their careers early in life.¹⁹⁰ As a result, the attachment of a psychiatric clinic to juvenile courts has rather a wide application.

A similar expedient although not the same method is to provide for examiners appointed by the court in cases where the defense of insanity is raised. Although this does eliminate partisanship, it does not have the other advantages of the Massachusetts system. However, the objection to this method is that undue weight may be given to the testimony of the experts and may militate against the defendant. It

187 Cornelius F. Collins, *Psychiatric Clinic* (1929) 19 *Jour. Crim. Law* 337.

188 Meredith, *op. cit. supra* note 5, at p. 82.

189 Winfred Overholser, *op. cit. supra* note 2, at p. 599 *et seq.*

190 Wickersham, *op. cit. supra* note 101, at p. 224.

has in some instances been declared unconstitutional on this ground.¹⁹¹ A third expedient which is urged is to limit the jury to a determination of the fact question whether or not the accused did the act complained of and leave the question of mental condition for either the court or a jury of experts.¹⁹²

In 1922, a committee was appointed in England by the former Lord Chancellor, Lord Birkenhead, to consider what changes were desirable in the law and procedure of criminal trials where the plea of insanity was interposed. After receiving memoranda on the subject from the British Medical Association, and the Medico-Psychological Association of Great Britain and Ireland, the committee reported in November, 1923. In substance the report advocated the recognition of the defense of irresistible impulse but except in that particular, the McNaghton rules were retained.¹⁹³ In the United States a similar committee representing the American Bar Association, the American Medical Association, the American Psychiatric Association, and the Social Science Research Council has been appointed, but no report has as yet been submitted.¹⁹⁴

In the face of such whole hearted co-operation, it is likely that the differences of opinion will be adjusted in some measure, and some acceptable common ground will be reached. No doubt the law will continue to lag behind the more advanced thinkers of the time. This is always the case, but as modern thought advances to greater heights, the law will follow also in the process of its evolution and development.

Edward F. Streit.

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¹⁹¹ Winfred Overholser, *op. cit. supra* note 2.

¹⁹² A. Moresby White, *op. cit. supra* note 120.

¹⁹³ See Report of Committee, "Trial of Ronald True," Famous British Trial Series, p. 294.

¹⁹⁴ See 54 Am. Bar. Ass'n. Rep. (1929) 53, 56.