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THE TEST OF CRIMINALITY AS TO ACTS OF INSANE PERSONS—IS IT LAW, BARBARISM, OR BOTH?

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In the case of the *State* v. *Harrison,*[1] the Supreme Court of Appeals of this state, twenty-eight years ago, laid down the following as the law of West Virginia respecting the punishment of the partially insane as criminals:

> "A person partially insane is yet responsible for a criminal act, if at the time of the act he knows right from wrong, and knows the nature and character of the particular act and its consequences, and knows that it is wrong and is hurtful to another, and deserves punishment. In such case no mere irresistable impulse to do the act will exempt him from criminal responsibility for such an act."

The court in this case adopts as the true test the ancient rule of "right and wrong," and, in effect, says that an insane person, however unfortunate he may be, and however incapable he may be of exercising will power necessary to enable him to choose and follow the right course, may be hanged or imprisoned as a criminal, if, at the time of the act, he knows right from wrong, and knows the nature and character of the particular act and its consequences, and knows that it is wrong and hurtful to another and deserves punishment. Is this modern law, or ancient barbarism?

Whatever may have been the status of mental science when the Harrison Case was decided, and whatever may have been the learning of the court on that subject at the time, it is certainly now well established that insane persons may have keen perceptions of right and wrong, and may know the nature and character of their acts, whether they are wrong and whether they are hurtful to others, and understand clearly that they are wrong and may deserve punishment; and yet, in the grasp of a homicidal

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[1] 36 W. Va. 729, 730, 15 S. E. 982 (1892).

mania, the inhibitory thought may be so tardy and the will power so paralyzed, as to render such persons at the particular moment utterly incapable of choosing and following an opposite course.

Laws shielding insane persons from criminal punishment simply reflect the conscience of an enlightened humanity which revolts at the idea of treating so harshly and cruelly such unfortunates. This refined, humane sentiment certainly rests upon the moral irresponsibility of such persons, not only on account of their incapacity to know right from wrong, but also on account of their mental incapacity to choose and follow the right course at the time of the act. It is their lack of moral responsibility that exempts them, and this moral irresponsibility may arise from their mental inability to choose and follow, as well as to know, the right from the wrong course.

But the Supreme Court of Appeals, in the case cited, makes this old "right and wrong" rule the only test, and discards or rejects the other test, which it would seem, should go with it. These two tests should go together. This is undoubtedly the trend of modern teaching upon this question. Knowledge of the human mind and its intricate processes, and of the controlling influences over the human will, and of the power to choose and follow the one course of action or the other, and of the tardiness of inhibitory thought, has been enormously increased and improved since the decision of the Harrison Case twenty-eight years ago; and especially since the adoption of the rules and tests in England a hundred or more years ago, to which the court in the Harrison Case looked for light and guidance. It is one of the singular features, not only of the Harrison Case, but of practically all other similar cases, that the courts, in discussing the subject of insanity and other phenomena of the human mind,—subjects so purely scientific,—and in trying to arrive at and adopt correct legal doctrines relating thereto, rarely consult or cite modern scientific authorities upon such questions, but content themselves with a search backwards among the old decisions of other courts who had still less, and less accurate, knowledge on the subject. One has but to examine carefully the authorities cited in the Harrison Case to be impressed with this unique fact.

As far back as 1723, in the trial of Edward Arnold, Justice Tracy, still looking backwards for light, announced the barbaric doctrine that

> "A prisoner, in order to be acquitted on the ground of insanity, must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing no more than an infant, than a brute, or a wild beast."[2]

The age that announced as the law of justice-loving England this odious and brutal doctrine, so shocking to every humane sense in this humanitarian time, is the age in which was bred and nurtured the spirit of the law as announced by the English courts and House of Lords in the Daniel MacNaughton Case[3] nearly one hundred years ago; and the doctrine of the MacNaughton Case is almost precisely the doctrine announced in the Harrison Case. In the seventeenth century there arose in England a discussion between Lord Coke and Sir Mathew Hale[4] in which they, looking still backwards for precedents to the days when lunatics were burned at the stake as witches or persons possessed of devils, tried in the light of such precedents and under their wise (?) guidance to announce the true doctrine as to how far lunatics might be punished as criminals. Coke took practically the position now held by the court in the Harrison Case—in an age in which there was scarcely such a thing as mental science, when the science of medicine was in its infancy, and knowledge of human anatomy, and especially of the human brain, was childish as compared with present day knowledge. Hale elaborated upon the doctrine by his adoption of the level of understanding of a child fourteen years old as the test of responsibility in criminal cases. It was later in England that Justice Tracy announced the doctrine above quoted in the Edward Arnold Case. The MacNaughton Case is predicated upon the doctrines suggested by, and the principles elaborated from, this discussion; and this is the real basis of the law of West Virginia, and some other states in the year 1920.

But the courts of this country are beginning to recognize the harsh, if not barbaric, principles involved in the MacNaughton Case, and in the idea that the "right and wrong" test is the only test; and, keeping abreast of the enlightenment of the age and of the development of mental science, are more clearly understanding, and are beginning to announce, the doctrine that an insane person charged with crime, must not only be capable of knowing the nature and character of the particular act and its conse-

[2] 16 St. Trials 695.
[3] 10 Cl. & F. 210.
[4] 14 ENCYC. BRITANNICA, 11 Ed., 612.

quences, and that it is wrong and hurtful and deserves punishment, but that his mental condition must be such that he is capable of calling into requisition his will power, and be capable of exercising the power to *choose* and follow the right course.

There seems to be in all normal men that divine something that sits in judgment upon their acts and motives, and which, when men, under the influence of malice, greed, anger, passion, or other unrighteous impulses, begin to do a wrong thing, rises within them and sternly commands them to halt. That is the way of the normal mind. If, hearing this command and still heedless of it, one persists, he is responsible for his acts. That is common sense and common sense justice. If, on the other hand, the brain is so diseased or undeveloped, or the mind is otherwise so abnormal in its operations and so deranged that it is incapable of hearing or heeding this command in time to prevent the act, then it must be the irresponsible act of an insane person. If the mind is so deranged and the inhibitory thought is so tardy that this voice can not speak, or, speaking, can not be heard until after the act, then the act must be so irrational as to carry with it no criminal responsibility. There is here no power of choosing and following the right course; and one without such power is certainly insane or mentally deficient to the point of irresponsibility, and should be a subject of pity, not of punishment. Without such power of inhibitory thought and power of choosing and pursuing the right course at the time of the act, as well as of knowing the right course, the actor is as helpless in the grasp of his morbid and insane impulses as is an epileptic while in the throes of his convulsions. This seems to be the modern conception and doctrine of mental science, and seems to be the trend of the more modern decisions, and is certainly in harmony with the enlightenment of this scientific and humanitarian age.

If this be true, then the law of West Virginia, rooted in the doctrines of the old MacNaughton Case, must be a century behind time; and it is not too much to expect that our Supreme Court of Appeals, with its modern knowledge upon this question, and realizing that mental and physiological sciences have advanced more during the last twenty-eight years, since the decision of the Harrison Case, than in any two hundred years previous, and desiring to keep the law abreast of the scientific knowledge and the conscience of the time, will, at the first opportunity, so modify the doctrine of the Harrison Case as to modernize it and make

it embrace also the power to choose and follow the right course, at the time of the act, as a test of criminal responsibility. This question involving no rule of property, is one in which a change of position by the Supreme Court of Appeals will work no hardship or injustice upon any one, if society may still be adequately protected.

But the Supreme Court of Appeals, in the Harrison Case, speaking through that great and eminent jurist, of whom the state is justly proud, Judge Brannon, and quoting the utterances of judges in a number of other cases sounding notes of alarm, suggests, in effect, the necessity for the protection of society, of adopting the test of the "right and wrong" rule, and rejecting the further test of the ability to choose and interpose will power. It is all very true that society must be amply safe-guarded against criminal conduct, and that courts should be jealous of society's rights in this respect. And it is only too true that the plea of insanity in criminal cases is looked upon with suspicion, and is often, in fact generally, regarded as the last desperate resort of a cornered criminal. It is true, also, that the partisanship manifested by professional alienists in such cases, especially where money or political or social prestige is involved, greatly accentuates this fear and suspicion. But this state of the public mind only makes it the more difficult to secure actual justice for the defendant in a meritorious case; and makes more hazardous for him the interposition of this plea. Usually it is the defendant, and not society, who is in danger from such a defence.

But notwithstanding all this, the safe and proper thing for society always is the adoption by the courts of just and correct principles and tests in such cases. These notes of alarm and expressions of fear have been solemnly sounded by courts through all the ages. The courts warned us not to permit an accused to testify; or an interested party or his wife or child to testify; or a jury to become the exclusive judges of the facts or weight to be given testimony; or to give to an accused the right of trial by jury; or to permit to any one the right of free speech; or to permit any one to speak ill of the king; or to permit the public to be present at the trial of an accused; and so on. All these things, they warned, would detract from the safety of society, and open the flood-gates of crime. But in the end it has been invariably found by actual experience that society is best protected

by the adoption and enforcement by the courts of correct principles and just and humanitarian rules. Would the interest of society be better protected by hanging lunatics as criminals under the solemn forms of law because of the fear that some criminal might be able to feign insanity and fool the courts, the doctors and the juries?

Society has little to fear from impositions of this kind. The latest and best authorities on mental diseases show that the forms of insanity usually simulated, because of the facilities for so doing, are a maniacal state, dementia, or stuporous melancholia; and they say that

> "Only one with excellent knowledge of the symptoms of insanity can simulate any form of psychic disorder successfully."[5]

Indeed, so difficult is it to simulate insanity in any form that but few of the most accomplished actors upon the stage, with long, careful study, practice and training, have ever been able successfully to perform this delicate mental feat. Nature seems never to have equipped the normal mind to do such abnormal things.

The courts, therefore, are certainly not justified in the adoption of wrong and unjust principles and tests in such cases through any suggested fear for the safety of society. Such danger is fanciful and remote—just as the danger from the other things above mentioned, against which the courts uttered their solemn warnings, were fanciful and remote, and, in fact, non-existent.

The danger of the "right and wrong" test is that it may lead to the atrocity, under the solemn forms of law, of punishing as criminals poor, unfortunate creatures who are only too often the victims of society's inexcusable neglect. This was the sole test applied in Guitau's Case,[6] cited in support of the Harrison Case; and yet a *post mortem* examination demonstrated beyond question that the government had hanged a lunatic as a malefactor. Not long since *post mortem* examinations of some dozen men executed at different times in Cook County, Illinois, for murder, disclosed the shocking fact that in every instance the prisoner was simply an unfortunate man with brain lesions. All of them had crippled or diseased brains, and few, if any of them, even pleaded insanity as a defense.

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[5] CHURCH—PETERSON, NERVOUS AND MENTAL DISEASES, 9 Ed., 766.
[6] 10 Fed. 161, 195.

The writer himself recalls a recent sad case in which he chanced to be one of the very first upon the scene, where a demented mother, knowing the right from the wrong with respect to the act she was doing, and knowing that it was hurtful to others, and bemoaning the fact that she was impelled by an irresistible impulse to do so, beat out the brains of two of her sleeping children with a sledge hammer. This woman would have been a criminal worthy of the hangman's noose, by every principle of the "right and wrong" test of the Harrison Case; and the irresistible impulse which for the moment mastered her will power would have been no defence, had she been charged with a crime. Yet, simply because the victims of her sudden homicidal mania or impulses were her own children, showing so clearly her insanity in fact, no one thought of charging her with a criminal act.

Persons like these are the victims of an indifferent society which sees in its members here and there manifestations of these mental disorders, and, without attempting to take charge of such unfortunate ones and save and cure them by early treatment, looks complacently on until, under the stress and strain of some sudden excitement or deep emotion, or by reason of the whole system being flooded with some toxic poisons, the storm breaks, the brain crumples, the mind for a time collapses, reason is dethroned, or the will power is paralyzed, a tragedy occurs, and then the unfortunate lunatic is arrested, and society soothes its conscience by sending the victim of its own neglect to the gallows as a felon, or to an insane asylum as a hopeless maniac. And in such cases the frightful responsibility is thrust upon a jury, after a few hours, or a few days at most, of superficial investigation, of saying whether the poor, and oft-times friendless creature, at the time of the act, was just *sane enough to be hanged,* or *insane enough to permit a belated attempt to cure him in a hospital.*

It is not intended by this article harshly to criticise any of the courts, much less our own. The decision in the case in question is buttressed with authorities, and probably can not be said to be out of harmony with the trend of the decisions of that time. But the twenty-eight years since that decision was rendered have seen marvelous developments in medical and mental sciences with which the decision is certainly now out of harmony. Such being the case, the Supreme Court of Appeals, should it entertain this

view, can modify the holding only when a proper case is presented.

Of course, where the defendant voluntarily incapacitates himself by strong drink, drugs, or other cause, especially where such voluntary act may be so intimately connected with the criminal act as to show a sedate purpose to prepare for such defence, a different principle is involved. With that feature this article is not intended to deal.