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PUBLIC POLICIES UNDERLYING THE LAW OF MENTAL INCOMPETENCY

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"SUCH is the unity of all history that any one who endeavors to tell a piece of it must feel that his first sentence tears a seamless web."[1] This famous observation has been frequently paraphrased as "The law is a seamless web." And in its application to the study of law the metaphor is peculiarly apt. It is a web so vast that only a small portion of it can occupy one's field of vision at any one time. Necessarily then, one must always remember that the strands which make up the particular portion of the web under scrutiny do not stop at the edge of the field of vision, but extend outward indefinitely into other fields. It is because of this fact that legal analysis of any portion of the law can at best be only a partial analysis. For our own convenience in thinking about it we have marked out imaginary boundaries upon the surface of the law. We have divided it into many subdivisions which we call crimes, contracts, property, torts, wills, etc. One can analyze in either of two ways. He can take a particular portion of the field, or he can pick up one of the strands and trace its course as it crosses one after another of our imaginary boundary lines. Orthodox legal analysis usually proceeds according to the former method, but there are certain phenomena in law and legal doctrine which can be studied much more profitably according to the other method.

Mental incompetency, or legal insanity, has usually been studied in the patchquilt fashion. It appears as a sub-heading of incidental interest in such widely diversified subjects as crimes, contracts, domestic relations, torts and wills. It can, however, be conceived of as a single strand in the seamless web. So viewed, it may appear to wind in and out of the various artificial subdivisions of the law, cutting across each at one particular place or another. And so conceived, it can be studied according to the second and less orthodox method of analysis. Few are the isolated areas in the law which are not intersected by this strand. Hence, any exhaustive analysis, even according to the single strand method, would bulk too large for one article. A beginning may be made, however, by scrutinizing the strand itself, and tracing its windings through one or two of the usual subdivisions of the law.

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[1] 1 POLLOCK and MAITLAND, HISTORY OF ENGLISH LAW, 2d ed., 1 (1911).

For the subject matter of our analysis we have selected the portion of the strand of mental incompetency which runs through the subdivisions of the law of contracts and of wills. These subjects were selected as the field of inquiry for three reasons: first, because they are intimately related, at least for the purposes of our present study; second, because the great majority of the cases dealing with mental incompetency on the civil, as contrasted with the criminal side of the law, will be found within these two subjects; [2] and third, the two subjects are analytically distinct, and hence conclusions drawn from the data in the one can be used to check conclusions in the other, and also to demonstrate the presence or absence of principles running through, or common to both.

As herein used the term contracts needs defining. It is not used in a narrow sense importing only a bargain transaction where consideration is necessary. It is used in its broad sense as embracing consensual transactions in general. Hence, in addition to contracts in the strict sense, it includes gifts and so-called voluntary conveyances.[3]

Proceedings for the purpose of adjudicating a mental incompetent in order to have him committed to an institution, or to have a guardian, conservator or committee appointed for him do not involve a consensual transaction and, therefore, will not be treated. The legal disabilities of infants due to their minority involve distinct problems, and are not considered.[4]

The bulk of the cases which deal with a diminution or extinction of legal responsibility by reason of mental incompetency treat the subject under the heading of insanity. Text writers, for the most part, have followed the same terminology. A departure from traditional nomenclature, therefore, calls for justification. This justification is found in the fact that the term "insanity" is used in different contexts with so many diverse and contradictory meanings that it becomes practically useless as an efficient symbol. One can never be sure what the word means when it is encountered, unless the context in which it is used

[2] This statement excludes from consideration the direct proceedings for the adjudication of an incompetent, which also bulk large.

[3] Contracts to marry are not included in this study for the reason that the consensual aspects of the contract are complicated by eugenic considerations, which involve an entirely distinct problem.

[4] Our problem concerns itself with the mental incompetency of adults. The legal incapacity of infants is due to chronological immaturity. However, the basis of the legal incapacity of infants is their presumed mental incapacity. WOODWARD, QUASI CONTRACTS 110-111 (1913).

is carefully analyzed. This has long been recognized. The opening paragraph of a rather recent book on insanity reads:

> "The difficulty of defining precisely the nature of insanity or of stating succinctly in what insanity consists has been recognized, not only by every writer on the subject, but by all—whether judges, legislators, or medical men—who have had to deal practically with the insane. A high legal authority—Lord Blackburn —when giving evidence before a Select Committee of the House of Commons some thirty years ago said:—'I have read every definition which I could meet with, and never was satisfied with one of them, and I have endeavored in vain to make one satisfactory to myself. I verily believe that it is not in human power to do it.'"[5]

The difficulty lies in the fact that insanity has a lay meaning, a medical meaning, and a legal meaning, no two of which coincide.[6] The lay meaning is vague and may connote anything from eccentric conduct to raving madness. Medical men are not agreed upon a definition of insanity for medical purposes, and courts are not agreed upon a definition of insanity for legal purposes. Doctors have disowned the word and coined their own term of mental disorder. Courts are aware of the fact that insanity is not a term which has legal significance, that only particular kinds or degrees of insanity require changes in legal relations.[7] Certain it is that the difficulties in using the word as a tool in accurate thinking have become so obvious and well recognized that it should be discarded. We will have to use the word occasionally, as it appears so frequently in the cases and in the writings, but we need a new term to denote the particular kind or degree of insanity or mental disorder which produces legal consequences. Hence the term mental incompetency, by which we mean that type or degree of mental dis-

[5] COOK, INSANITY AND MENTAL DEFICIENCY IN RELATION TO LEGAL RESPONSIBILITY 1 (1921).

[6] Webster's New International Dictionary (1922) gives this definition: "unsoundness or derangement of mind; madness; lunacy. Insanity takes so many forms that a satisfactory rigid or narrow definition cannot be made. . . . The test of insanity for the determination of legal responsibility or capacity, criminal or civil, differs from that by which insanity is determined for medical or physiological purposes, with the result that various conditions which are medically recognized as insane are not considered as doing away with legal responsibility or capacity."

[7] Estate of Collins, 174 Cal. 663, 164 P. 1110 (1917); Harrison v. Bishop, 131 Ind. 161, 30 N. E. 1069 (1891); In re Johnson's Estate, 222 Iowa 787, 269 N. W. 792 (1936); Aikens v. Roberts, 164 N. Y. S. 502 (S. Ct. 1917); In re Lundgren's Estate, 189 Wash. 33, 63 P. (2d) 438 (1936); Kaleb v. Modern Woodmen, 51 Wyo. 116, 64 P. (2d) 605 (1937).

order, in any particular case, which is legally significant and which produces a different legal result than would have flowed from the same situation had not that particular type or degree of mental disorder been present.

Where two parties enter into a contract that would be valid in all respects if both of the contracting parties were normal mentally, the courts will hold the contract to be legally ineffectual as such if one of the parties was mentally incompetent at the time the contract was made.[8] Where a will is made by a testator who is mentally incompetent at the time of the execution of the will, the courts will hold that it is legally ineffectual. Any intensive analysis of mental incompetency, even in such a restricted field as that of contracts and wills, must deal with numerous knotty questions. What degree or type of mental disorder is required to produce mental incompetency? Is mental disorder that produces mental incompetency to be measured by a qualitative or a quantitative standard? Or both? Where and how have the courts drawn the line between mental incompetency and normalcy? Is it a fixed line? Does it rise and fall with the judicial tide? Is it affected by a different setting in time or place? Is the line placed at the same level for all types of transactions? Is it the same for contracts as for wills? Is it placed at a different level if the contract or will is a complicated one rather than a simple one? And where and how does the law get its data which tells it where to draw the line? Is this merely a matter of judicial introspection, or are there objective sign-posts? Is it a question simply of the degree or type of mental disorder, or do extraneous elements intrude to exert an influence? Questions such as these indicate the richness of the inquiry.

The present paper does not attempt to answer all of these questions. It does, however, propose to make a beginning, to lay a foundation, as it were, for a complete analysis of the problem. This foundation will be found to consist of two parts: first, an examination of the legal or jural conceptions of mental incompetency, and second, an examination of the public policies which lie at the root of the law of mental incompetency.

[8] This statement presupposes an attack made upon the contract by the mental incompetent or his representative. If the mental incompetent ratifies the contract with full knowledge after he has been restored to mental health, it cannot be avoided at the suit of the other party.

I

LEGAL OR JURAL CONCEPTS OF MENTAL INCOMPETENCY

Legal relations exist only between human beings.[9] If each human being is conceived to have a mind, then we may say that a mind is a necessary prerequisite to the formation of any legal relation.[10]

In the normal transaction resulting in the creation of legal relations we presuppose a normal mind. As a matter of fact we usually do not think of mind at all as a necessary element in the creation of legal relations. It is such a usual and customary part of the legal landscape that we pay no attention to it in the average case. It is only when mind becomes disordered, ill or is apparently lacking that it becomes legally significant. It is at this point that we begin to hear of the law of mental incompetency.

If we are to measure degrees of mental disorder we must have some sort of standard. The obvious standard would be, of course, the normal mind. The obvious difficulty with this standard is that it, in itself, is very little understood and is pratically incapable of definition. However, before we can ascertain whether a mind is diseased or disordered we must compare it with a so-called normal mind, and thus we are driven to an examination of the normal mind.

Even a cursory examination of the literature on the subject shows that ideas upon the nature of the mind have varied greatly, according to their setting in time and place. Legal conceptions of the nature of the mind, as well as popular conceptions, were influenced by prevail-

[9] Corbin, "Legal Analysis and Terminology," 29 YALE L. J. 163 at 165 (1919).

[10] A few specific examples will illustrate the point. A great deal of the law of torts rests largely upon the intent (or mental condition) of the individual sought to be charged. The books are replete with references to malice, deceit, fraud, scienter, negligence, and presumed intent. All of these expressions connote mental states. In the field of criminal law we are constantly running into the idea that a mens rea is an essential ingredient. One of the general theories of the law of contracts grew up around the idea of the meeting of the minds of the contracting parties. "The fundamental idea of a contract is that it requires the assent of two minds." Dexter v. Hall, 15 Wall. (82 U. S.) 9 at 20 (1872). The modern objective theory of contracts places its emphasis upon the objective manifestation of the assent of the parties to the contract, regardless of their unmanifested subjective mental states. 1 WILLISTON, CONTRACTS, rev. ed., 9, 17, 25, 30-39 (1936); 1 CONTRACTS RESTATEMENT, §§ 3, 20 (1932). However, even in the objective theory there is the legal presupposition that two human minds are essential before any contract can come into existence. Also, in the law relating to testamentary disposition of property, it is presupposed that the testator has a mind capable of manifesting itself by voluntary or purposive action. The etymology of "will" as used in law demonstrates this, the term being used to denote the legal declaration of a person's mind as to the manner in which he would have his estate disposed of after his death. 2 BLACKSTONE, COMMENTARIES 499 (1756).

ing philosophical views. However, even philosophical views were not uniform for any particular time and place. There have always been competing philosophical answers to the question of the nature of reality. These competing views may be roughly classified into three schools of thought. One school maintains that the universe is composed of two entirely different types of existence, namely matter (the physical world) and spirit (the non-material world). In man both co-exist during his lifetime, but at his death the spirit departs, leaving behind only the material. The mind, according to this school, is a manifestation of the spirit or soul of the individual. This view is known as dualism. A second school holds that only ideas have reality. The "outside" or material world exists only in our ideas, but apart from our ideas it has no reality. The mind, according to this school, becomes the only reality. This view is known as idealism. A third school holds that only matter exists. There is no such independent thing as spirit or soul. Mind, then, according to this view, is a purely materialistic natural phenomenon, an as yet obscure chemico-electrical process of some sort, but nevertheless capable of being explained according to purely natural and scientific causes. This view is known as materialism.

A. *Dualism—The Historic View*

In the midle ages, and well into modern times, the dualistic conception was the most popular, not only with laymen but also with men of science and men of law. What, then, was the explanation of mental disorder according to this school of thought?

In the time of the classic Greeks, when an individual exhibited the phenomena of mental disorder his acts were regarded as caused by some spirit other than his own, acting upon him. If his eccentric conduct was harmless, his "controlling spirit" was benign; if it conflicted sharply with prevailing ethical codes or current mores, the afflicted person was thought to be "possessed" of an evil spirit or demon.[11] This demonological possession conception was revived in the middle ages and exerted its influence throughout this era until well into modern times.[12] However, existing side by side with this theory is the explanation that mental disorder is an affliction directly administered by God himself as a punishment for sin. Although demonological explanations of mental disorder could be used as the basis for a theory of non-responsibility of the individual, by regarding him as a mere pawn, no such theory seems to have been adopted. On the contrary, perhaps due to the in-

[11] HART, THE PSYCHOLOGY OF INSANITY, 4th ed., 21 (1931).
[12] Ibid., 22; JACOBY, THE UNSOUND MIND AND THE LAW 20, 27 (1918).

fluence of a theological doctrine of rewards and punishments, the individual was regarded as being responsible for the plight in which he found himself. Consequently, we sometimes find, during this period, the insane looked upon with reverence and awe, as creatures blessed by God with supernatural powers. Thus Tycho Brahe, the Dutch astronomer, had a fool for a companion, to whose mutterings he listened with the greatest reverence.[13]

On the other hand, the fate of persons suffering from mental disorder was not always so pleasant. This was especially true during the witchcraft epidemics, when many insane persons were regarded as in league with the devil and were put to death as witches.[14]

The influence of the demonological possession theory of mental disorder upon the law is largely restricted to the witchcraft trials. Not so, however, with the visitation of God theory, which produced palpable effects in legal doctrine. When an early English case raised the question whether a man could plead as a defense to a suit upon a contract the fact that he was insane at the time he entered into it, we find the court rejecting the plea and announcing as a reason for the decision the remarkable doctrine that a man should not be permitted to stultify himself.[15]

The doctrine that a man could not stultify himself by pleading his insanity as a defense to an action on a contract continued to be the law of England until the middle of the nineteenth century.[16] Although not expressly appearing in any of the cases, the reason prompting the adoption of this rule was probably the thought that insanity, being a visitation from God to punish a person for his sins, could afford no relief in law to the afflicted individual. Why should a court relieve an individual from the judgment of God?

While the history of early America is replete with demonological conceptions, as evidenced by the witchcraft epidemics, it is interesting to note that the non-stultification doctrine failed to obtain much of a foothold in this country.[17] Traces of it, however, are to be found. For

[13] BARR, MENTAL DEFECTIVES 25 (1904) (same page in later printings); DAVIES, SOCIAL CONTROL OF THE MENTALLY DEFICIENT 16 (1930).

[14] See JACOBY, THE UNSOUND MIND AND THE LAW 21, 32 (1918); DAVIES, SOCIAL CONTROL OF THE MENTALLY DEFICIENT 16 (1930); HART, THE PSYCHOLOGY OF INSANITY, 4th ed., 23 (1931); 1 WHARTON and STILLE, MEDICAL JURISPRUDENCE, 5th ed., 470 (1905).

[15] Beverly's Case, 4 Coke 123b, 76 Eng. Rep. 1118 (1603).

[16] COOK, INSANITY AND MENTAL DEFICIENCY IN RELATION TO LEGAL RESPONSIBILITY 71-73 (1921).

[17] Ibid., 73.

example, in a New York case,[18] an insurance company sued to foreclose a bond and mortgage given by one Hunt to secure a loan. After the mortgage was made, but before suit was brought, Hunt was adjudicated insane and a committee was appointed. Both Hunt and the committee were named defendants in the foreclosure proceeding. They pleaded as a defense to the action that Hunt was a lunatic at the time the mortgage was made. The lower court found Hunt was sane at the time of making the mortgage. The court of appeals, in affirming a decree for the plaintiff, said there was ample evidence to support the finding of the lower court that Hunt was sane, but went on to say that under the circumstances of the case,[19] even if Hunt were insane at the time the mortgage was made, the plaintiff could still recover. The court, speaking through Danforth, J., said:[20]

> "although in some cases a man may now, notwithstanding the old common law maxim to the contrary [citing *Beverly's Case*] 'be admitted to stultify himself,' yet he cannot do so to the prejudice of others, for he would thus make his own misfortune an excuse for fraud, and against that the doctrine of the maxim stands unaffected by any exception. . . ."[21]

One of the clearest expressions occurring in a court opinion of the dualistic conception of mind and the consequent rejection of the materialistic basis for mental disorder is found in an early Kentucky will case which involved the issue of testamentary capacity. Therein the court states:

> "We cannot admit that a paralysis, however universally it may pervade the system, affects the mind equally with the body. It could not do so unless the mind were material. . . . The nature of mind, and its mysterious connexion with matter, are equally incomprehensible. We know something of the organization of the one, and of the phenomena of the other. But how, or to what extent a paralysis of the corporeal, operates on the intellectual

[18] Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541 (1880).

[19] These circumstances were: it was a fair transaction in the ordinary course of business, plaintiff had no knowledge that Hunt was insane, and the court would be unable to place the parties in statu quo.

[20] Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541 at 545 (1880).

[21] Early legal text writers regarded insanity as a visitation from God. For particularly apt expressions, see BRYDALL, NON COMPOS MENTIS, or THE LAW RELATING TO NATURAL FOOLS, MAD-FOLKS, AND LUNATICK PERSONS, *preface*, 38 (1700); 1 COLLINSON, LUNACY, 5, 36, 404-405 (1812); LITTLETON, TENURES, § 405 (circum 1475) and 3 COKE ON LITTLETON, Hargrave and Butler editions, 247a; 1 WHARTON and STILLE, MEDICAL JURISPRUDENCE, 5th ed., 513 (1905).

man, no speculation can ever explain. . . . The faculties of each [mind and body] do not sink *'in pari passu.'* That which is immaterial and self evident, and which reasons, and thinks, and lives forever, does not always slumber, when the body is powerless. It may be sane, though occasionally lethargic. It may be sound and active, when the tongue, and the hand, and the eye, are incapable of motion; and may conceive and will, what they refuse to execute."[22]

B. *Idealism*

Idealism, as a philosophy, always seems to have been more popular with philosophers than with laymen. However that may be, certainly it has had no palpable effects upon the law of mental incompetency, and so we pass on to the materialistic conceptions of mind and mental disorder and their influence upon the law.

C. *Materialism—The Modern Scientific View*

During the period of time between 1500 and the beginning of the nineteenth century the modern scientific method was born and grew. The sciences had adopted a methodology peculiarly their own, differing entirely with the speculative method of philosophical dualism, and being based primarily upon empirical observation. Scientific attention being constantly focused on the material or phenomenal world, the philosophy that developed in the path of the scientific school tended to be a philosophy of materialism.

Now in the process of development are two relatively new sciences, whose business is to study the mind and mental disorder. Psychology treats of the mind in general and psychiatry, of mental disorder. As yet psychology is "no science, it is only the hope of a science."[23] There is no one science of psychology, but instead a host of rival schools of psychology.[24] But even so, a science is in the process of emerging. In the time of James the mind was still regarded by many psychologists as an entity, something having reality of its own which could be studied.

[22] M'Daniel's Will, 2 J. J. Marsh. (25 Ky.) 331 at 338, 339 (1829).

[23] JAMES, PSYCHOLOGY 468 (1900) (American Science Series, Briefer Course). Accord (as to the present status of psychology as a science): BENTLEY, BEHAVIOR KNOWLEDGE FACT 127 (1935); DASHIELL, FUNDAMENTALS OF GENERAL PSYCHOLOGY 639 (1937).

[24] BENTLEY, BEHAVIOR KNOWLEDGE FACT (1935), makes a scientific investigation of the various psychologies, largely from a nominalistic approach. His classification will be found beginning on page 19. It is much too technical to be reproduced here, but it is interesting to note that he places each of the following authors in a different school: Dashiell, Woodworth, Dunlap, Watson, Washburn, Hunter, Weiss, Kantor, C. K. Ogden, Dewey and M. Bentley.

States of consciousness, memory, instincts, feelings, and emotions were considered as real. There was a strong controversy about the existence of free will. Today, perhaps largely due to the behaviorism of Watson, most of these things have ceased to exist as realities for many psychologists. Today psychologists talk mostly in terms of behavior. Consciousness cannot be seen or measured in a laboratory, therefore it is treated as if it did not exist. Free will has been replaced by purposive action. Intelligence has ceased to be a noun and has become merely a qualifying adjective, i.e., behavior which objectively appears to be intelligent. It would not be a great exaggeration to say that psychology has ceased to be a science of the mind, as the word indicates, and has become instead a branch of physiology.[25]

Without attempting to reconcile or point out the differences in the tenets of the various schools, we can make one or two generalizations. In the first place the materialistic hypothesis lies at the root of most modern psychologies.[26] And in the next place, psychologists, for the most part, are not troubling themselves with non-measurable qualitative intangibles. They are sticking to observable measurable behavior which can be studied and tested under laboratory conditions. They are employing the behavioristic approach to their problem. They are looking at their problem *as if* the stimulus-organism-response methodology is sufficient to explain everything. They are largely discounting introspective factors. Many of them realize that this is not the *only* way to look at the problem, but the most effective way to look at it from the standpoint of getting results. That is typically the scientific attitude.[27]

[25] It is an exaggeration to this extent: psychologists today claim that they are studying behavior and mental experience. Whereas physiologists would only study an individual per se, psychologists study him in relation to his physical *and social* environment. Although highlighting behavior, they do to a limited extent study introspection. See Jastrow, "Psychology," 12 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 588 at 595 (1934); WOODWORTH, PSYCHOLOGY, 3d ed., 3, 5 (1934); ALLPORT, SOCIAL PSYCHOLOGY, preface (1924).

[26] DASHIELL, FUNDAMENTALS OF GENERAL PSYCHOLOGY 24 (1937).

[27] Hence, behaviorism represents a methodology. It is important to bear this point in mind. The mechanistic hypothesis is still only an hypothesis. Doubts there are as to its adequacy as a complete explanation. If it were adopted as a complete explanation of reality; if consciousness, intelligence, free will and value judgments were categorically rejected, the world would lose its richness, it would cease to present a challenge to us, to serve as a stimulus for purposive activity. As a matter of fact, the very investigators who adopt the mechanistic hypothesis as a methodology act as if they themselves were endowed with consciousness, intelligence and free will. To quote Selig Hecht: "I must act as if I were free to make a choice; I must have the vigor, the responsibility of behaving as a free agent. Yet I must always remember how complicated the origins of

To summarize and generalize: according to modern psychology, mind ceases to be an entity capable of separate study. In its place we have mere behavior of the individual, multiple responses to multiple stimuli.[28] In the light of this approach the concept mind gives way to behavior. And the sum total of an individual's behavior constitutes his personality.[29] Therefore the term mind may, in modern scientific parlance, be equated with personality. How, then, do the psychiatrists explain mental disorder?

Not until about the beginning of the nineteenth century did the idea become widespread in scientific circles that mental disorder, like physical disorder, was a disease produced by natural causes.[30] That idea is now pretty firmly entrenched. But it is still far from a satisfactory explanation. A disease of what? The body? The nervous system? The brain? And what of the cause? These questions are still perplexing psychiatrists, and opinions vary greatly.[31] Like its sister science, psychology, psychiatry finds itself broken up into contending schools. One author in a recent work lists and discusses eight main schools.[32] Another makes a more conservative classification into three main schools, which are overlapping and non-exclusive, the difference being one chiefly of emphasis.[33] The first is the medical school (neuro-psychiatric approach), which places its emphasis upon the thesis that mental disorder results from physical disease (not necessarily limited to the brain and central nervous system). The ideal of this school is to discover the specific disease which is responsible for the mental disturbance, to ascertain its

my behavior are, how determined they are by things I have long forgotten. In this way I shall lead a tempered, balanced but vigorous life." Hecht, "The Uncertainty Principle and Human Behavior," 170 HARPER'S MONTHLY MAGAZINE 237 at 249 (1935). ALLPORT, SOCIAL PSYCHOLOGY v (1924), says: "Like every fundamental viewpoint in a science, behaviorism is simply a convenient way of conceiving the facts. Many of its hypotheses are still unproved. Yet, on the whole, it fits the facts so well, and is so replete with possibilities for gaining further knowledge, that it should be of basic value to students of social science."

[28] DASHIELL, FUNDAMENTALS OF GENERAL PSYCHOLOGY 287 (1937).

[29] Behavior includes every action of the individual which can be observed objectively. This includes all functions of the physical organism, speech, gestures, attitudes, and reactions to environment. It must not be forgotten that behavior does not mean merely present behavior, but rather all behavior—the range of inquiry extending into the entire history of the individual. For another definition of personality, see ALLPORT, PERSONALITY, A PSYCHOLOGICAL INTERPRETATION 48 (1937).

[30] HART, THE PSYCHOLOGY OF INSANITY, 4th ed., 24 (1931); JACOBY, THE UNSOUND MIND AND THE LAW 20, 33 (1918).

[31] NOYES, MODERN CLINICAL PSYCHIATRY 60 (1934) [2d ed., 92 (1939)].

[32] SADLER, THEORY AND PRACTICE OF PSYCHIATRY (1936).

[33] Sullivan, "Mental Disorders," 10 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 313 (1933).

cause, its course, and its outcome. This approach has been particularly fruitful in those types of mental disorder which can be traced to observable lesions in the nervous system, particularly dementia paralytica (paresis) which is always accompanied by syphilitic lesions in the nervous system; and to a certain extent, in cases of senile dementia. Second is the hereditary school, which believes that at least most, if not all, mental disorders were ordained in the germ plasm. Third is the environmental school, which believes that (although taking account of constitutional deficiencies) psychopathic personalities are largely the result of their environment.[34]

More and more, psychologists and psychiatrists have been examining behavior in the light of social environment. If an individual's behavior conforms well with his social environment, if his behavior is such that he can satisfy, reasonably well, his individual and social wants in the particular environment in which he exists, then he is integrated with his social environment—that is, he is normal. If his behavior is such that he is not reasonably capable of satisfying his individual and social wants in the environment within which he exists, if because of peculiar behavior traits he is maladjusted to his social environment, then he is not integrated with it—he is abnormal.[35] The concept of mental disorder therefore becomes equivalent to maladjustment of a personality to its social environment.[36] This maladjustment

[34] Any classification of "schools" of psychiatry is bound to be arbitrary. If there is an American school it is a middle-of-the-road institution, borrowing freely from the special schools. See HENDERSON and GILLISPIE, A TEXT-BOOK OF PSYCHIATRY, 3d ed., c. 2 (1933); SADLER, THEORY AND PRACTICE OF PSYCHIATRY, preface (1936).

[35] Economic maladjustment to environment should be sharply distinguished from social maladjustment. It is true that in the borderline cases the two tend to merge, and that each tends to be an etiological factor in the production of the other. However, as used herein non-integration with environment is used with respect to the social aspect only—economic maladjustment is not included. It must also be borne in mind that we are speaking of maladjustment or non-integration from the standpoint of the observer—not the observed. Obviously, the afflicted individual very often fails to realize that he is maladjusted. When he can be made to see it, from the standpoint of the psychiatrist, he is said to have "insight" and the chances for successful treatment are immediately enhanced.

[36] Hence, in trying to determine whether or not mental disorder exists in any particular case the time and place elements are all-important. "Mental illness is an individual affair. Its symptoms have little meaning apart from the setting in which they occur. This setting includes not only the general mental and physical condition at the time, but the individual's personality, circumstances and history from his earliest days." HENDERSON and GILLISPIE, A TEXT-BOOK OF PSYCHIATRY, 1st ed., preface (1927) (reprinted in later editions). "A peasant, normal in ordinary surroundings of the fields, may be considered a moron in the city." BINET and SIMON, THE DEVELOPMENT OF INTELLIGENCE IN CHILDREN 266-267 (1916).

may range from a mild, almost imperceptible, neurosis to a violent psychosis.

The materialistic conception of the mind and mental disorder has had its effect upon the law. A few illustrations will demonstrate that courts, although not completely discarding dualistic conceptions, are yet cautiously following the lead of modern scientific research.

The Illinois supreme court, in 1863, characterized insanity as "a disease of the brain, of that mass of matter through and by which that mysterious power, the mind, acts." [37]

The Michigan Supreme Court, in 1889, declared that insanity is:

> "A diseased or disordered condition or malformation of the physical organs, through which the mind receives impressions, or manifests its operations, by which the will and judgment are impaired, and the conduct rendered irrational." [38]

In 1901 the Kansas legislature defined as insane "any person whose mind, by reason of brain sickness, has become unsound." [39]

The Nebraska Supreme Court, in 1909 states:

> "The medical definition of insanity . . . is a manifestation of disease of the brain characterized by a general or partial derangement of one or more of the faculties of the mind, in which, while consciousness is not abolished, mental freedom is perverted, weakened, or destroyed. . . . The older view regarded the human mind as a single indivisible potency not comprising distinct functions; and consequently that any impairment thereof must be absolute, and not partial. But modern medical science recognizes, as shown by the definition above quoted, that there may be a partial derangement of one or more of the faculties of the mind, leaving others practically unimpaired, and hence arises what is called partial insanity." [40]

In deciding that proceedings to determine insanity were of a civil and not a criminal nature (involving no constitutional right to trial by jury), the Texas supreme court in 1917 said: "Insanity is not a crime; in contradistinction it is a disease." [41]

[37] Hopps v. People, 31 Ill. 385 at 390 (1863).

[38] Blackstone v. Standard Life & Accident Ins. Co., 74 Mich. 592 at 613, 42 N. W. 156 (1889), quoting BUCKHAM, INSANITY IN ITS MEDICO-LEGAL RELATIONS, § 24 (1883) (erroneously reported in the case as § 23).

[39] Kan. Laws (1901), c. 353, § 50, Gen. Stat. (1935), § 76-1203.

[40] In re Estate of Ayers, 84 Neb. 16 at 23, 24, 120 N. W. 491 (1909).

[41] White v. White, 108 Tex. 570 at 579, 196 S. W. 508 (1917).

Judicial utterances of this nature,[42] although by no means demonstrating that courts now adopt a purely materialistic view of psychic phenomena, certainly indicate that many courts are ready to admit that mind is at least materialistically conditioned. It is probably safe to say that the legal conception of mind and mental disorder has followed in the wake of the modern scientific endeavors along these lines to a point where courts no longer countenance the idea that a mind can be dominated, controlled or directed by demons, spirits, or supernatural powers.

II

PUBLIC POLICIES UNDERLYING THE LAW OF MENTAL INCOMPETENCY

If a person is suffering from mental disorder of a certain character or degree the law will extinguish or restrict his contractual or testamentary capacity. Why should this be so? Why place mental incompetents in a special category and afford to them different legal treatment than the law affords the rank and file of individuals?

A. *The Legalistic Approach*

This question was answered by the Supreme Court of the United States, in regard to contractual capacity, in the leading case of *Dexter v. Hall.*[43] The action was ejectment. The defendant set up a title which depended upon the validity of a power of attorney. The plaintiff sought to avoid the effect of this chain of title by proving that at the time of the execution of the power of attorney the maker of the instrument was a mental incompetent. The lower court found for the plaintiff upon this issue, and in affirming the decision the Supreme Court said:

> "The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as such."[44]

Precisely the same explanation is given by the Iowa Supreme Court in *Van Patton & Marks v. Beals.*[45] The court held that a con-

[42] See also the cases dealing with spiritualism. They are discussed in Lee, "Psychic Phenomena and the Law," 34 HARV. L. REV. 625 (1921).

[43] 15 Wall. (82 U. S.) 9 (1872).

[44] Ibid., at 20.

[45] 46 Iowa 62 (1877). See also Dougherty v. Powe, 127 Ala. 577 at 579, 30 So. 524 (1900); Wells v. Wells, 197 Ind. 236 at 244, 150 N. E. 361 (1926); Christian v. Waialua Agr. Co., (C. C. A. 9th, 1937) 93 F. (2d) 603 at 610, revd. on other grounds, 305 U. S. 91, 57 S. Ct. 109 (1937).

tract made by an insane person is void. The opening sentence of the opinion reads as follows: "The general rule, doubtless, is that an idiot or insane person is not bound by his contract."[46]

In 1921 Mr. W. G. H. Cook published an analysis entitled "Mental Deficiency and the English Law of Contract."[47] Although confining himself to a study of English cases, Mr. Cook arrives at the same explanation for giving legal effect to mental incompetency as do the American courts from which the above quotations were taken. He says that a contract is based upon consent of the parties, that the two essential elements in consent are that it must be free and that it must be intelligent, that "Consent cannot be given where one of the parties is without an intelligent mind; therefore, in strict legal theory, a lunatic cannot give consent; and, consequently, he cannot enter into a contract."[48] Mr. Cook acknowledges an apparent exception to this rule in the cases dealing with an incompetent's contracts for necessaries, where the law holds the incompetent to his contract. He explains this by saying that it is not in fact an excepion to the rule, but that the basis of liability in this type of case is quasi-contractual.[49] Mr. Cook summarizes his analysis in the concluding paragraph of his article.

> "The alleged contract is void, but, with the object of preventing the lunatic from benefiting from his acts, the lunatic or his estate shall be required to make restitution to the other party where (1) the lunatic has derived benefit as a result of his act, and (2) where the other party has suffered loss as a result of the act of the lunatic."[50]

Diminution or extinction of contractual capacity by reason of mental incompetency is of common-law origin. Not so, however, of testamentary capacity. The right to make a will is a right created by statute.[51] Although the first wills act granted the right to everyone without qualification as to sanity, two years later the statute was amended to

[46] Van Patton & Marks v. Beals, 46 Iowa 62 at 63 (1877), quoting 1 PARSONS, PROMISSORY NOTES AND BILLS OF EXCHANGE 149 (1863): "there can be no contract unless there be a meeting of minds; and there can be no meeting of minds if the one party has no mind which can meet the mind of the other."

[47] 21 COL. L. REV. 424 (1921). The material in this article forms a part of Mr. Cook's book, INSANITY AND MENTAL DEFICIENCY IN RELATION TO LEGAL RESPONSIBILITY (1921).

[48] Ibid., at 425. Although the lunatic was not known to be such by the other party, and although he did in fact go through the objective acts necessary to create a contract, the legal theory is that no contract was in fact formed.

[49] Ibid., at 436.

[50] Ibid., at 441.

[51] At least in Anglo-American law. 1 PAGE, WILLS, 2d ed., 37 (1926).

exclude idiots "or any person de non sane memory."[52] Modern legislation generally specifies that a testator must have a sound mind, or sound mind and memory, or sound and disposing mind and memory.[53] Hence the cases in defining testamentary capacity are interpreting statutory language. However, the underlying question still remains: why must a person have a sound mind in order to enjoy the privilege of making a will? The question becomes still more pertinent when one considers the job that the courts have done in interpreting wills statutes. Generally speaking, even in the absence of any statutory requirement, a court will strike down a contract if one of the parties was a mental incompetent. However, even in the face of a statute which sets up a sound mind as a prerequisite to the capacity to make a will, much authority can be found for the proposition that it takes less mental capacity to execute a valid will than it does to execute a valid contract.

We found courts approaching the question from a strictly legalistic viewpoint in the above contracts cases. It was a matter of legal formulae. The legal formula for a contract required two minds which "met." If one of the parties had "lost his mind" there remained but one mind, there was no mind with which it could meet, the formula was not satisfied, and therefore there was no contract. I take it that the courts have something like this in mind when they preface their conclusions by the phrase "on principle." It would not be surprising to find the same legalistic approach used when the question of testamentary capacity is tackled. However, the task of the courts is easier here because they merely have to interpret a statutory formula. One of the indispensable statutory ingredients to a valid will is a "sound mind." All a court has to do is to examine the mind of the testator to see whether or not it is sound. But soundness of mind is not an absolute concept. As one court expressed it, "The mind grades up from zero to the intellectual boiling point so gradually that dogmatic tests are of little value."[54] The court must therefore measure the degree of unsoundness of the mind of a testator, if it is unsound, unless the court is willing to deny testamentary capacity to anyone whose mind is unsound in the slightest degree. The legalistic approach in will cases is well illustrated by a quotation from a textbook on the law of wills:

> "If the testator can do this [hold in memory the natural objects of his bounty, his property, and the scope and bearing of his will], he has *mind enough*. . . ."[55]

[52] 34 & 35 Hen. 8, c. 5, § 14 (1542), amending 32 Hen. 8, c. 1 (1540).
[53] 1 PAGE, WILLS, 2d ed., 230 (1926).
[54] Slaughter v. Heath, 127 Ga. 747 at 751, 57 S. E. 69 (1907).
[55] CHAPLIN, WILLS 12 (1892) (italics are in original text).

It is not too uncommon to find courts approaching the problem of mental incompetency with the assumption, explicit or implicit, that "mind" is something capable of quantitative measurement. As stated by the Supreme Court of Vermont, "less mind is ordinarily requisite to make a will, than a contract of sale. . . ." [56]

B. *The Broader Approach—Policies of Security and Equality*

Although this legalistic technique is employed by many courts, there are others which attempt to deal with the problem in a broader frame of reference. The legalistic approach, which denies validity to a contract where one "mind" is lacking, or denies validity to a will where the testator has not "enough mind" is more in accord with an earlier era in our law when mind was considered a separate and distinct entity. There is, however, a broader approach to the problem, an approach more in tune with the modern psychiatric conception of mental disorder, and an approach which does answer the question as to why a mental incompetent should be placed in a separate class from others in regard to his contracts and wills. No more fitting preface to this approach could be found than a quotation from Holmes' classic book, *The Common Law*:

> "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." [57]

In order to understand the public policies behind the rules of law which restrict or extinguish the contractual and testamentary capacities of mentally incompetent persons, we must first examine the public policies behind the law which give to normal individuals the power to enter into enforceable contracts and to make valid wills.

1. *The General Background*

We are so used to the idea that courts will enforce contracts and give effect to last wills and testaments—it has become such a normal

[56] Converse v. Converse, 21 Vt. 168 at 170 (1849).
[57] HOLMES, THE COMMON LAW 35 (1881).

and expected occurrence—that we give scant thought to the reasons why this should be so. Upon reflection, however, it appears that the legal enforceability of contracts and wills involves rather remarkable processes. When a court enforces the provisions of a contract at the behest of one party and against the resistance of the other it is throwing into operation the machinery of government in favor of one party and against the other. It is in effect conferring a limited amount of sovereignty on one party and putting the state's forces at his disposal.[58] Likewise, when a court gives effect to a will as made by a testator it is granting to him certain limited powers of sovereignty. The legislature of the state has already declared in its statute of descents and distributions how property shall be distributed upon the death of its owner. But, by another statute—the statute of wills—it has permitted the testator to disregard the statute of descents and distributions, and, within certain limits, to legislate for himself. Whether it is advisable to grant such powers to individuals, and the conditions upon which these powers should be withdrawn or suspended, involve fundamental questions of public policy.

If it is true that public policies are determining factors in shaping the law, it is also true that these same public policies are, in turn, dependent for their existence upon the ends which law was made to serve. We are not here concerned with making a comprehensive catalog of the ends or purposes of law.[59] Probably no general agreement among legal writers thereon could be obtained. Most would agree, however, that two of the ends of law are security and equality. From each of these, certain basic legal policies have developed.

Security is perhaps the more fundamental and deeply rooted of the two. In more primitive times the law was occupied almost wholly with trying to establish and maintain personal safety for individuals by the maintenance of peace and order.[60] At a later stage there came into existence the twin policies of protecting (a) the security of transactions and (b) the security of acquisitions. According to Dean Pound, as we have passed through the various stages in the development of our law we have progressed from thinking in terms of remedies to rights, from

[58] Cohen, "The Basis of Contract," 46 HARV. L. REV. 553 at 562 (1933); Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," 38 POL. SCI. Q. 470 (1923).

[59] For one writer's discussion of the ends of law, see Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 HARV. L. REV. 195 (1914). Cf. BENTHAM, THEORY OF LEGISLATION 119 ff. (1840) (Principles of the Civil Code, c. 2, first published in 1802).

[60] POUND, "The End of Law as Developed in Legal Rules and Doctrines," 27 HARV. L. REV. 195 at 198-204 (1914).

rights to the interests which are being protected by the enforcement of rights, and finally from the idea of individual interests to social interests. Modern law, he says, is interested in the security of social institutions.[61] The particular social institution with which we are chiefly concerned, as will appear later, is the family. The three particular public policies which are relevant to our present inquiry and which may be deduced from security, as one of the fundamental ends of law, are (1) it is the policy of the law to protect the security of transactions; (2) it is the policy of the law to protect the security of acquisitions; and (3) it is the policy of the law to protect the social institution of the family.

Jeremy Bentham argued that without security equality could not last a day, and accordingly he regarded security as life itself, equality, an ornament of life.[62] In the earlier stages of law, it is true, much more attention was paid to the business of maintaining security than to equality. However, in the later stages, more and more emphasis was placed upon the legal ideal of equality.[63] The legal maxim that the law makes no discrimination between persons, or differently phrased, that all persons are equal before the law, owes its origin to the notion that equality is one of the ends of law. This is a deeply ingrained ideal of law. It found expression in our Declaration of Independence, and the equal protection of the laws was expressly guaranteed by the Fourteenth Amendment in our Constitution.

Yet it is true that equality is a theoretical ideal and not a factual reality. People are not equals in any real or substantial sense, and the law has recognized this truth.[64] In realizing the glaring discrepancy between the real and the ideal, the law has sought to remedy the situation by producing equality where inequality had heretofore existed. It has developed a policy of equalization, which it has put into effect by extending a measure of protection to those classes of persons who are not, in any real sense, the equals of their contemporaries in the society

[61] Ibid., at 225-227.

[62] BENTHAM, THEORY OF LEGISLATION 121 (1840) (Principles of the Civil Code, c. 3).

[63] Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 HARV. L. REV. 195 at 217-220 (1914).

[64] Ibid., at 195-198; Cohen, "The Basis of Contract," 46 HARV. L. REV. 553 at 563 (1933); 2 ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH 603 (1914). For a graphic account of the situation in the sales field, see Llewellyn, "On Warranty of Quality, and Society: II," 37 COL. L. REV. 341 at 393-404 (1937). On the inequality of the drafting ability of parties to contracts generally, see Llewellyn, "What Price Contract?" 40 YALE L. J. 704 at 731 ff. (1931); Patterson, "Insurable Interest in Life," 18 COL. L. REV. 380 at 384 (1918).

in which they live. This protective policy has often operated in a sub rosa and inarticulate fashion; but more recently it has been given wider application and, at least in the field of legislation, it has been employed consciously and deliberately.

As a legislative policy its most striking application is perhaps to be found in labor legislation. Statutes requiring the payment of wages in cash instead of in script or in goods; statutes regulating the hours and conditions of employment; statutes designed to protect collective bargaining and outlawing so-called yellow-dog contracts;[65] workmen's compensation acts.[66] All of these, and others which might be mentioned, are attempts to overcome the economic disparity which exists between capital and labor, and to produce legal as well as theoretical equality.

The same policy is at work in the legislation designed to protect borrowers and debtors as against lenders and creditors. Here again legislation has recognized the unequal bargaining power of two groups or classes of people and has attempted to bring about something approximating factual equality by throwing a cloak of protection around the weaker of the two classes. We have usury laws whose purpose is to prevent those occupying a dominant position from exacting unconscionable bargains from a weaker class.[67] We have laws restricting the power of workers to assign their wages in advance of earning them.[68] And we have laws exempting certain property of debtors from execution: a homestead, a portion of the individual's personal property, the tools of his trade.[69] Minimum wage laws for women and child labor legislation are obvious examples of the same protective policy at work.[70]

Most of these laws seem to have been designed for the purpose of protecting individuals who comprise a factually handicapped class, but in many of the cases a deeper protection is sought to be accomplished, to wit, the safeguarding of the family as a social institution. Moreover, there are also those statutes which even more directly serve

[65] Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 HARV. L. REV. 195 at 229 (1914).

[66] Ibid., at 233. Compare the related problem of risk distribution in automobile accident cases, in regard to which the suggestion has been made that a solution may be found in establishing liability without fault plus compulsory liability insurance for all automobile owners. The question is discussed in Smith, "Compensation for Automobile Accidents: The Problem and Its Solution," 32 COL. L. REV. 785 (1932).

[67] Cohen, "The Basis of Contract," 46 HARV. L. REV. 553 at 587 (1933).

[68] For comment on these, see Llewellyn, "What Price Contract?" 40 YALE L. J. 704 at 735, 737 (1931).

[69] Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 HARV. L. REV. 195 at 232 (1914).

[70] West Coast Hotel Co. v. Parrish, 300 U. S. 379 at 394, 57 S. Ct. 578 (1937).

to protect the family. They may be exemplified by the statutes of descents and distributions, statutes prohibiting the husband from disinheriting his wife in his will, community property laws, and statutes requiring the wife's signature upon deeds and mortgages executed by the husband.

Thus far we have been considering this equalizing or protective policy of the law in its purely legislative application.[71] However, it has produced results just as profound, although less spectacular, when operating as a judicial policy. The whole common law of infancy is bottomed upon the conviction that while an individual is still immature and in a formative stage, both physically and intellectually, he should receive special protection from the law. He is disabled, for his own protection, from handling and disposing of his property. He is likewise given the privilege of avoiding any contract he may make, except for necessaries.[72] The equitable doctrine which prevents a mortagee from bargaining away his equity of redemption, as well as the legal rule which refuses to enforce forfeiture provisions in contracts, are based upon this fundamental policy of protection. The equalizing principle runs through the law of quasi-contracts and constructive trusts. It has also resulted in the rules requiring the fullest disclosure and utmost fair dealing by persons who stand in a fiduciary or confidential relation with the parties with whom they are dealing. It is the life of the law of undue influence and of duress. The common-law institution of dower, and the legally sanctioned spendthrift trust are devices attuned to the same end. Courts are applying the same policy when they refuse to enforce provisions in a contract by which a carrier exempts itself from liability for its own negligence.[73]

Judicial rules of construction and interpretation of contracts are straining to produce equality where equality in fact does not exist. Lop-sided contracts are construed most strongly against the economic-

[71] As a legislative policy, it is of course pertinent to the provisions in wills statutes requiring a sound mind.

[72] While it is frequently said that an infant is liable on his contracts for necessaries, the better view is that he is liable in quasi-contract for the reasonable value of necessaries. TIFFANY, DOMESTIC RELATIONS, 3d ed., 477 (1921); LONG, DOMESTIC RELATIONS, 3d ed., 496 (1923).

[73] The protective policy as a source of the development of some of the above legal institutions by judicial decisions is discussed in Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 HARV. L. REV. 195 at 217 (1914). (quasi-contracts, constructive trusts), at 229 (sanctity of equity of redemption in mortgages); Llewellyn, "What Price Contract?" 40 YALE L. J. 704 at 732 (1931) (equity of redemption); Patterson, "Insurable Interest in Life," 18 COL. L. REV. 380 at 384 (1918) (illegal contracts).

ally dominant party who drew them. This is especially noteworthy in the case of the contracts of insurance companies and paid sureties. Implied conditions, constructive conditions, and the doctrine of mutuality are judicial inventions designed to produce greater equality.[74] Examples of the same kind could be adduced from the adjective law. Many of them would be found in so-called legal presumptions.[75] One explanation for the res ipsa loquitur rule is that the defendant is in a better position to rebut negligence than the plaintiff to prove it, and thus, in order to equalize the positions of the two parties the defendant is handicapped by having the burden of proof shifted from the plaintiff to him.[76]

Underneath our bodies of legal doctrine, both legislative and judicial, and to a large measure conditioning them, we see at work two legal ideals: security and equality. In society as it actually exists, these ideals are often tending in opposite directions. If the law is to protect the security of normal transactions between individuals and if it is to protect the security of acquisitions, e.g., property, it must be ready to lend its aid to the enforcement of expectations, reasonably aroused.[77] This is what is meant when it is said that in the law of contracts the expectations of the promisee are to be secured. To that end the law lends the machinery of government to the promisee to compel enforcement of his contract. However, in our existing society, in a great many instances there is no real equality in the bargaining power of the two parties to the contract. By reason of a dominant economic position on the part of one party, and by reason of the necessitous circumstances of the other, a situation exists which permits unconscionable advantages to be taken. In these situations the ideal of equality cuts across and impairs, entirely or partially, the security of the transaction. Hence there must be, in such cases, a weighing in the balance of the two competing ideals of justice.[78]

Freedom of contract has long been a shibboleth of Anglo-American law.[79] Increasingly apparent, however, has become the realization that

[74] Llewellyn, "On Warranty of Quality, and Society: II," 37 COL. L. REV. 341 at 402-403 (1937).

[75] LANDIS, THE ADMINISTRATIVE PROCESS 36 (1938).

[76] HARPER, TORTS 185 (1933).

[77] POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922).

[78] This thought is aptly expressed in Cohen, "The Basis of Contract," 46 HARV. L. REV. 553 at 587 (1933).

[79] ". . . you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy; because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when

this freedom of contract is a highly qualified and restricted freedom. A more accurate statement would be: "The legal approach then is, fundamentally: a bargain or promise is enforceable unless reason appears to the contrary." [80] In pointing out that freedom of contract has become a shadow of its former self, Professor Patterson notes that the inroads on the doctrine have been made, chiefly, to equalize the bargaining power of the contracting parties. As to contractual purpose, freedom is still the rule, but that "proof that a contract is one, or one of a class, which has a harmful social or economic tendency will render it nugatory on grounds of public policy." [81]

Closely allied to the ideas of freedom of contract and security of acquisitions and a corollary thereto, is the idea of freedom of disposition of one's property. This freedom of disposition, during the lifetime of the possessor, can be exercised in various ways, the most usual channels being via gift and contract. However, the idea that a person may enjoy a freedom of disposition of his property in his lifetime naturally suggests that he should have the right to determine its disposition after his death. Much has been written for and against the thesis that the right to make a will is an inherent or natural right. [82] However, the great weight of authority in the United States, at least, is that the right of testation rests upon a statutory base. [83] A few courts, beguiled by the inherent fairness of such a system, hold that the power to direct how one's property shall be distributed after his death is a natural right. [84] However, it is nowhere an unrestricted right. It too is subject to regulation and qualification by principles suggested by countervailing public policies.

The first policy to be examined in this connection will be found underlying the statutory distribution which the law makes of a de-

entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." Sir G. Jessel, M. R., in Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462 at 465 (1873). This is a famous and oft-quoted passage. It is one of the strong judicial statements upholding the policy of freedom of contract. But note its qualifications: "men of full age and competent understanding" and "when entered into freely and voluntarily."

[80] Llewellyn, "What Price Contract?" 40 YALE L. J. 704 at 710 (1931).

[81] Patterson, "Insurable Interest in Life," 18 COL. L. REV. 380 at 384 (1918).

[82] See for example MAINE, ANCIENT LAW, new ed., c. 6 (1930) (same chapter in earlier editions); McMurray, "Liberty of Testation and Some Modern Limitations Thereon," 14 ILL. L. REV. 96 (1919).

[83] 1 PAGE, WILLS, 2d ed., 37-38 (1926).

[84] Will of Rice, 150 Wis. 401, 136 N. W. 596, 137 N. W. 778 (1912); Will of Ball, 153 Wis. 27, 141 N. W. 8 (1913); Harrison v. Bishop, 131 Ind. 161, 30 N. E. 1069 (1891).

cedent's estate in case he dies intestate. In such a situation the law apportions the decedent's property among his or her nearest relatives, who are usually the surviving spouse and children. Perhaps the origin of this system can be found in the asserted fact that in primitive societies the family was regarded as a unit and property was owned by the family community and not by individuals.[85] Perhaps the same considerations would apply if it were proved that in such a society family ownership did not in fact exist, but that the family was an economic unit and that this system would tend to preserve the unit. Whatever the origin may have been, certainly it may be persuasively argued that in our modern society the system persists because it is the policy of the law to protect the family (i.e., the dependents) of the deceased.

Statutes which grant to an individual the power of disposing of his property by last will and testament and thus of overriding the expressed policy of the state in the statutes of descents and distributions do not confer an arbitrary and unrestricted authority. They are frequently qualified by other statutes which give the surviving spouse a power to set aside the will, pro tanto, in case the testator does not give such surviving spouse a certain percentage of his estate,[86] by statutory restrictions regarding community property,[87] or by common-law curtesy and dower. In addition to these provisions which may be called family safeguards, the statutes require the testator to be of a certain age, up to a certain mental standard, and to comply strictly with the formula prescribed for the execution of the will. In other words, freedom of testation, like freedom of contract, is restricted by the operation of policies looking toward the protection of the family as a social institution.

2. *Application to Mental Incompetents*

In the light of this background it should be possible to determine the public policies which are at work in the law of mental incompetency. It might seem obvious that the protective policy of the law

[85] Page argues that the absence of the will in primitive societies is due to the fact that the community ownership of property by the family negatived the necessity for any such device. 1 PAGE, WILLS, 2d. ed., 7-8 (1926).

[86] For example, see Colo. Stat. Ann. (1935), c. 176, § 37 (giving the surviving spouse an election to take under the will or under the intestate laws); also ibid., § 41 (giving to a child born after the execution of a will the share it would take under the intestate law). Similar statutes have been enacted in many states. For the New York statutes on these two points, see N. Y. Consol. Laws (McKinney, 1939), bk. 13, "Decedents Estate Law," §§ 18, 26.

[87] Eight states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington) are operating under a statutory community property system. Statutes in these states provide that one spouse cannot by will deprive the other spouse of the surviving spouse's share in the community property. See, for example, Cal. Prob. Code (Deering, 1937), § 201; Wash. Rev. Stat. (Remington, 1932), § 1342.

motivated the different treatment accorded to mental incompetents in the general field of civil law. Why else, indeed, place them in a separate category, and why else give different legal effects to their acts? Yet if we merely say this is due to the protective policy of the law, we have left unanswered perhaps the most important part of the inquiry. Protection of whom? Three answers suggest themselves. (1) Protection of the public or of society at large from the acts of the mental incompetent. (2) Protection of the incompetent from society, because of the unequal position which he occupies toward his fellow men. (3) Protection, not of society, nor of the incompetent himself, but of the family or dependents of the incompetent. As a matter of fact, these three interpretations are not mutually exclusive, nor, in many cases, inherently antithetical. As a matter of fact they are all operating together in various fields of the law. The most striking example of the first—protection of the public—is seen in the criminal law and as expressed in statutes providing for the social isolation of mental incompetents in institutions. These matters, however, lie beyond the scope of the present inquiry. We are interested primarily in contracts and wills, and inasmuch as the underlying policies in these two fields differ they must be treated separately.

In the contract field the first differentiation which must be made is between the contracts executed by an unadjudicated but de facto mental incompetent and the contracts executed by an adjudicated incompetent. The latter is an incompetent who has been adjudicated such by a statutory proceeding brought for that particular purpose, the proceeding resulting in the commitment of the incompetent to an institution or, although no commitment is made, for whom a guardian, committee or conservator has been appointed. The general rule, whether by common law or by express statutory provision, is that adjudication incapacitates the person adjudicated from entering into contracts until the decree of adjudication is vacated.[88] Here we have the threefold application of the protective policy: protection to the incompetent, to his dependents in preventing a wasting of his estate,

[88] Walton v. Malcolm, 264 Ill. 389, 106 N. E. 211 (1914) (construing statutory provision making void the contracts of adjudicated lunatics); Hovey v. Hobson, 53 Me. 451 (1866) (holding that a deed of an insane person not under guardianship is only voidable, but that a deed of an insane person under guardianship is absolutely void); accord: Moran v. Moran, 106 Mich. 8, 63 N. W. 989 (1895); Smith v. Ryan, 191 N. Y. 452, 84 N. E. 402 (1908). But see Finch v. Goldstein, 245 N. Y. 300, 157 N. E. 146 (1927) (making a distinction between the legal effect of committing an insane person to an institution and of appointing a committee for him; holding the former type of proceeding merely made his contracts voidable—but note, that here a subsequently appointed committee was suing to confirm and ratify the act of the incompetent).

and protection to the public, by the notoriety which such a proceeding entails.[89] The court record of adjudication is notice to the world that the person is legally incapable of transacting his own affairs, and hence the public is given, theoretically at least, the opportunity of making binding engagements with the duly appointed representative of the incompetent.

The acute problem is presented, of course, where a person who is in fact a mental incompetent, but who has not been adjudicated, enters into a contract, and thereafter he or his legal representative[90] sues to set it aside. In most cases the contract is or has turned out to be a disadvantageous one to the incompetent, else he (or his representative) would not seek to avoid it.[91] That is the typical situation. The question of policy involved is a shield with two sides. Viewed from one side the argument is: protect the incompetent—relieve him from this harsh obligation, which he incurred unwittingly, not having intelligence enough to understand what he was doing. Viewed from the other: the security of transactions must not be impaired; contracts, once entered into, must be enforced.[92] The argument for the incompetent is more persuasive where the contract is purely executory, because cutting the knot merely leaves the parties as they were before—a promisee's expectations have been frustrated, but that is all.[93] Expectations are

[89] We might add also a policy to protect the taxpayer. This policy, if it exists, remains inarticulate. However, it might be argued that the state is interested in seeing that the incompetent does not waste his means of subsistence because it does not want to have to support him as a public charge.

[90] His legal representative will be his guardian, committee or conservator [or possibly his next friend, see Wager v. Wagoner, 53 Neb. 511, 73 N. W. 937 (1898)] if he is alive, but if he is dead his personal representative will be his heir, executor or administrator.

[91] The motivation in this type of suit is that it is unfair to the incompetent to let the transaction stand. The disadvantageous character of the transaction may have existed at the time the contract was made (e.g., gross inadequacy of consideration), it may have resulted from supervening change in values, or it may be because the incompetent has dissipated (or never received the benefit of) the consideration for his promise.

[92] There is another and closely allied policy involved. Unless the courts require a particularly strong showing of mental incompetency, to avoid a contract, it may be argued that incompetency may be fraudulently simulated by one seeking to find release from a bad bargain. This situation is not apt to arise as frequently in civil as in criminal cases (where simulated insanity is not uncommon) due to the stigma attached to insanity and the natural unwillingness of one to subject himself to this stigma except for the most compelling reasons.

[93] The fact that a contract remains executory may be a material factor in determining the decision in a particular case. This was recognized in: Wilkie v. Sassen, 123 Iowa 421, 99 N. W. 124 (1904) (where an executory contract was set aside, the court saying it might not have interfered if it had been executed); First National Bank of Missouri Valley v. Sarvey, 198 Iowa 1067, 198 N. W. 496 (1924); Wells v. Wells,

incorporeal. Where the contract has been completely executed, however, the argument against the incompetent grows in force. Undoing the contract will compel the promisee to disgorge. The reply is that this will result in no great injustice if the parties are placed in statu quo by requiring the incompetent to restore the consideration which he received.[94] The shoe really begins to pinch when the incompetent has either dissipated the consideration he received and hence is in no position to restore it, or where he has never received the benefit of the consideration.

This latter situation brings out most clearly the clash of the policies involved. Let us examine a concrete illustration. Mrs. Arnold, a mental incompetent, owns a piece of real estate. Her husband, acting as her agent, calls at the office of the *X* investment company and says his wife wants to borrow $5,000 and will give a first mortgage on the real estate owned by her to secure the loan. The *X* company is in the business of making this type of loans. Mr. Arnold gives the *X* company the abstract of title to the property. The *X* company examines the title and finds it clear. It sends an appraiser out to look at the property. He reports that it is worth $12,000. The *X* company tells Arnold it will make the loan. It draws up and gives to Arnold a note and first mortgage. Arnold has his wife execute them, returns them to the *X* company, gets the money, and departs for parts unknown. In due course there is a default in the mortgage and the *X* company sues to foreclose. A guardian is appointed for Mrs. Arnold, and he seeks to enjoin the foreclosure and have the note and mortgage declared invalid. Mrs. Arnold is in no position to return the consideration which she never received. Who is to prevail? The answer depends upon which of the two policies involved is considered more fundamental. On similar facts the Illinois court[95] held that the policy of protecting an incompetent who was in no position to protect herself outweighed the policy of

197 Ind. 236, 150 N. E. 361 (1926). An interesting case in this connection is Beach v. First Methodist Episcopal Church, 96 Ill. 177 (1880). There *X* became a party to a subscription contract and subscribed $2,000 to aid in the construction of a church. The construction was not started until after *X* had been adjudicated a mental incompetent. The court held that the subscription was merely a continuing offer and that insanity, just as death, revokes an offer. Note, however, that *X's* conservators had paid two-thirds of the money before there was a refusal to pay the balance.

[94] Restoration of the consideration received by the incompetent is usually required before a court will allow rescission of the contract. Coburn v. Raymond, 76 Conn. 484, 57 A. 116 (1904); Christian v. Waialua Agr. Co., (C. C. A. 9th, 1937) 93 F. (2d) 603; Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541 (1880). But see Gibson v. Soper, 6 Gray (72 Mass.) 279 (1856).

[95] Jordan v. Kirkpatrick, 251 Ill. 116, 95 N. E. 1079 (1911).

protecting the company. But the Arizona court[96] held to the contrary on the theory that the least harm would be done in the majority of cases by upholding the transaction; that it was the duty of the relatives of the incompetent and not the duty of the court to protect her.[97]

Where a contract of an incompetent is sought to be set aside after his death, or after his mental disorder has become permanent and he is no longer capable of being a productive member of society, the emphasis on protection shifts from the incompetent to his family or his dependents. Otherwise the problem remains the same.

In bargain transactions the two parties are in a sense antagonists. If one of them is under an obvious handicap, due to mental infirmity, it is easy to see why a sense of innate fairness would prompt the law to come to the aid of the afflicted person.[98] Even if the transaction is a gift, the same motive would operate to prevent the incompetent from injuring himself by dissipating his property.[99] However, when we seek the reason behind the rule that mental incompetency destroys the power to dispose of property by last will and testament, it is not sufficient to invoke the policy of protecting the afflicted individual. His will speaks only at the date of his death. By that time he is beyond the possibility of the law's protection. If this policy is to be used as an explanation of the legal requirement of a sound and disposing mind, it must, then, be referred to the protection of the family or dependents of the deceased.

It has been indicated that protection of the family lay at the root of the statutes of descents and distributions. It has been indicated that

[96] Sparrowhawk v. Erwin, 30 Ariz. 238, 246 P. 541 (1926).

[97] See also on this situation, Edwards v. Miller, 102 Okla. 189, 228 P. 1105 (1924). In Dickerson v. Davis, 111 Ind. 433 at 436-437, 12 N. E. 145 (1887), the court said: "The protection of persons who are so unfortunate as to be bereft of reason and incapable of managing their own estates, is of higher obligation, and an object more to be cherished by the courts, than is the protection of holders of commercial paper, however innocent they may be."

[98] "If a person, although not positively *non compos*, or insane, is yet of such great weakness of mind, as to be unable to guard himself against imposition, or to resist importunity or undue influence, a contract, made by him under such circumstances, will be set aside." Kelly's Heirs v. McGuire, 15 Ark. 555 at 603 (1855). ". . . contracts of persons who are of weak understanding, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon. . . ." Kilgore v. Cross, (C. C. Ark. 1880) 1 F. 578 at 583. See also, Thatcher v. Kramer, 347 Ill. 601, 180 N. E. 434 (1932); Encking v. Simmons, 28 Wis. 272 (1871); Crane v. Conklin, 1 N. J. Eq. 346 at 356 (1831).

[99] ". . . if error is committed it is better to err in favor of restoring the property of a feeble old woman to her dominion and control than to err in upholding a deed given under such circumstances as to cast suspicion on it." Payne v. Payne, 12 Cal. App. 251 at 253-254, 107 P. 148 (1910).

the law, for a reason, granted testators the power to legislate for themselves. The reason heretofore given may be buttressed by another. Legislation is usually drafted in terms of general application. It often fails to do justice in the particular case. It may be argued that in the normal run of cases the disposition of an estate made by the statutes of descents and distributions accords with justice. It may, with equal persuasiveness, be argued that there is a sufficient proportion of atypical cases to require provision to be made for them. The internal organization of each family differs. A husband may have made a partial distribution of his estate prior to his death. He may have made unequal advances to his children, based upon their needs at the time. He may feel that he should leave more of his property to a son who will have to make his own way in the world than to a daughter who has married a wealthy man. He may feel that his wife's inexperience with business matters and her generous and credulous nature unfit her for the task of managing his property after his death. Thus he may wish to set up a trust. Many other possibilities suggest themselves.[100] The statute of wills, then, gives a testator power to dispose of his estate in such manner as will best fit the peculiar circumstances of his individual family. However, before the law will entrust this power to him it requires, as a condition precedent, that the testator be of sound mind. The legal standard of a sound and disposing mind is certainly not high. To fall below that standard a testator must be unable to know the nature and extent of his property, unable to know who are the natural objects of his bounty, and unable to know how he wishes to dispose of his property.[101] Unless a man can come up to this minimum standard, the law will withhold from him this extraordinary power of testation and will permit his

[100] In Estate of Sexton, 199 Cal. 759, 251 P. 778 (1926), the testatrix disinherited her husband and left all of her property to her children. The court remarks, in sustaining the will, that it was just and equitable "in the light of the fact that contestant is a man of affluence." See also, Estate of Bacigalupi, 202 Cal. 450, 261 P. 470 (1927); Pass v. Stephens, 22 Ariz. 461, 198 P. 712 (1921). Many cases can be found in which the court gives great weight to the fact that the will was reasonable or unreasonable under the circumstances. See, for example: Crandall's Appeal, 63 Conn. 365, 28 A. 531 (1893); Barbour v. Moore, 10 App. D. C. 30 (1897); Jackson's Exr. v. Semones, 266 Ky. 352, 98 S. W. (2d) 505 (1936); Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69 (1907); In re Cissel's Estate, 104 Mont. 306, 66 P. (2d) 779 (1937); Guarantee Trust & Safe Deposit Co. v. Heidenreich, 290 Pa. 249, 138 A. 764 (1927).

[101] For various phrasings of the test, see: Puryear v. Puryear, 192 Ark. 692, 94 S. W. (2d) 695 (1936); Estate of Holloway, 195 Cal. 711, 235 P. 1012 (1925); Turner's Appeal, 72 Conn. 305, 44 A. 310 (1899); Hoskinson v. Lovelette, 365 Ill. 21, 5 N. E. (2d) 219 (1936); In re Johnson's Estate, 222 Iowa 787, 269 N. W. 792 (1937).

property to be distributed according to the intestate laws, which usually produce a just result for the family.

The argument that mental soundness as a prerequisite to testamentary capacity is bottomed upon the policy of the law to protect the family[102] is reinforced by the cases dealing with so-called "insane delusions." Even though a testator may have intellectual capacities far above the standard set by the law—even if he knows precisely the nature and extent of his property, and can name and give the history of the natural objects of his bounty through a list of fourth cousins, and knows precisely how he wishes to dispose of his estate—granting all this, his testamentary dispositions still will be held void if he entertains an insane delusion on but one subject where that delusion motivated the disposition made of his property. Thus the insane delusion rule presents an additional safeguard.[103] Psychiatrists will tell us that if a man entertains but one insane delusion referable only to one particular subject he is not of sound mind. This may be true in a medical sense, but it certainly is not true of the legal definition of a sound mind. To have legal effect the delusion must influence the disposition of the property. If it does not, it is disregarded.[104] But if the delusion does cause the testator to make a disposition which otherwise he would not have made, the will falls. Where the testator forms a strong dislike for one of the members of his family and therefore disinherits that member in his will the question will be presented: Was there any rational basis for that dislike? If it appears that there was, the will stands. If it clearly appears that there was no basis in fact for the discrimination, and particularly if it can be established that the dislike sprang from an irra-

[102] In the following cases there can be discovered a desire upon the part of the court to protect a testator's family or dependents by refusing probate to a will which was the product of an unsound mind: Estate of Wasserman, 170 Cal. 101, 148 P. 931 (1915); Lehman v. Lindenmeyer, 48 Colo. 305, 109 P. 956 (1910); Barbour v. Moore, 10 App. D. C. 30 at 51 (1897), wherein the court said: "The deplorable condition of their father [inebriated and poverty stricken] would naturally have directed the mind of the grandfather, if sound and unbiased, to the helpless condition of the children and suggested them as proper objects of his bounty in making a will"; Slaughter v. Heath, 127 Ga. 747, 57 S. E. 69 (1907); McDonald's Exrs. v. McDonald, 120 Ky. 211 at 217, 85 S. W. 1084 (1905), wherein the court states: "It is as necessary, in order to have testamentary capacity, for one to have such sensibilities as will enable him to know the obligations he owes to the natural objects of his bounty, as it is for him to have the capacity to know the nature and value of his estate, and a fixed purpose to dispose of it."

[103] In re Sandman's Estate, 121 Cal. App. 9, 8 P. (2d) 499 (1932); Davis v. Davis, 64 Colo. 62, 170 P. 208 (1918); Eubanks v. Eubanks, 360 Ill. 101, 195 N. E. 521 (1935); In re Kaven's Estate, 279 Mich. 334, 272 N. W. 696 (1937).

[104] Guarantee Trust & Safe Deposit Co. v. Heidenreich, 290 Pa. 249, 138 A. 764 (1927).

tional belief persistently held in the face of conclusive evidence to the contrary, the will falls.[105] It has even been held that a rational explanation of the belief merely creates a conflict in the testimony, which is not sufficient to require a reversal of a judgment in favor of the contestant.[106] Even where the delusion does not take the form of an irrational dislike for a member of the family, if the delusion causes the estate to be diverted from the natural objects of the testator's bounty the will falls.[107]

While the protective policy of the law as applied to the field of contracts was focussed primarily upon the protection of the incompetent individual from imposition by the other contracting party who was his antagonist, the policy as applied to the will cases is centered primarily on the protection of the family. However, just as in the contract cases we sometimes see protection of the family looming in the background, so in the will cases we sometimes see protection of the individual testator as a factor. Normally, the execution of a will is a unilateral act. It is not a bargaining transaction. There is no antagonist with whom the testator must match his wits. This, however, ceases to be true where some person seeks to apply undue influence or coercion to force a testator to make a particular distribution in his will. In such a situation, where there is a combination of mental incompetency and undue influence, it well may be argued that the transaction is analogous to the contract pattern and that, if the will is struck down, it is because of a feeling that if the testator's actual wishes cannot be carried out (because he had no freedom nor capacity to express them) at least he should be protected from being exploited by another.

The security of transactions does not bother us as much in the will cases as in the contract cases. It has, however, this much application. The natural objects of a testator's bounty do have perfectly understandable expectations of (a) receiving a portion of his estate if he dies intestate, and (b) of being named legatees or devisees if he leaves a will. These expectations do play a subtle and inarticulate role in the decisions of the cases.

There is also another consideration which exerts its influence. Many juries feel that they could make a fairer disposition of the testator's estate than he did by his will; therefore they want to remake it for him by knocking it out. If they are indiscriminately permitted to do

[105] See cases cited supra, note 103.

[106] Estate of Huston, 163 Cal. 166, 124 P. 852 (1912).

[107] In re Sandman's Estate, 121 Cal. App. 9, 8 P. (2d) 499 (1932); Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197 (1898); O'Dell v. Goff, 149 Mich. 152, 112 N. W. 736 (1907); Irwin v. Lattin, 29 S. D. 1, 135 N. W. 759 (1912).

so, their action will seriously impair the utility of this venerable institution. Appellate courts are very much alive to this danger as their decisions graphically indicate.[108] One court has expressed itself as follows:

> "The tendency to assail last wills upon the ground of mental incapacity and by frivolous and inconclusive evidence, chiefly of a speculative character, whenever the testator has not disposed of his property in a way to suit disappointed, and often, distant and distasteful relations, has grown to such alarming proportions in late years, that the Courts should be resolute in adhering to the old and long-settled principles of law respecting the admissibility of evidence, allowing no relaxation or refined modifications of them in this class of cases; if last wills and testaments are to be at all upheld by juries."[109]

To summarize. Our purpose was to bring to the surface and look at the broad public policies which have influenced the development of the law in regard to mental incompetency. In order to do this it was thought desirable first to examine the crucial concepts involved: mind and mental disorder. We found, in early Anglo-American law that mind was regarded from a purely dualistic standpoint, and that mental disorder was thought to be referable to demons or punishment at the hands of God. We found that the modern psychological conception of mind, which is of course still in process of evolution, is becoming more and more equated with personality because of the predominantly behavioristic approach. And we found that, broadly speaking, modern psychiatrists look upon mental disorder as synonymous with dislocation or non-integration of an individual with his social environment. And we found the courts more and more willing to adopt the materialistic hypothesis of mental disorder.

We have noted one approach to the question why a mental incompetent should be placed in a different class from others as far as his jural acts are concerned. This was the strictly legalistic approach. It is

[108] For a statistical study showing the infrequency with which will contests meet with success, see Powell and Looker, "Decedents' Estates," 30 COL. L. REV. 919 at 930-933 (1930).

[109] Berry Will Case, 93 Md. 560 at 564, 49 A. 401 (1901); see also Jackson's Exr. v. Semones, 266 Ky. 352 at 357, 98 S. W. (2d) 505 (1936), where the court said: "We have long adhered to the doctrine of testatorial absolutism, and have consistently decared that a citizen should not be deprived of this right conferred upon him by law upon slight, remote, and wholly unsubstantial and non-probative testimony. Jurors will not be suffered to make for the testator a will in keeping with what might be their ideas of justness or propriety."

the approach which would accord best with more primitive conceptions of mind and mental disorder.

And finally, we have tried to pursue another approach to the question why the jural acts of mental incompetents should be given special consideration by the law. This approach led us to examine basic public policies. Certain of them were clear enough. The legal ideal of equality, and the legal technique of producing it by casting a cloak of protection about those classes of individuals who, in society, occupy obviously disadvantageous positions. The mental incompetents are certainly in such a class. Not to afford them special protective treatment would be to lose sight of one of the great ends of the law. "There is no greater inequality than the equal treatment of unequals." [110] But the protective policy of the law is cross-cut by other policies. In order to decide a concrete case a court is faced with the task of balancing countervailing policies. The decision will be based upon the value judgment of the court. We began our study of the public policies underlying the law of mental incompetency by a quotation from Justice Holmes. It may properly conclude with another:

> "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." [111]

[110] ANTON MENGER, DAS BÜGERLICHE RECHT UND DIE BESITZLOSEN VOLKSKLASSEN, 4th ed., 30 (1908).

[111] From Justice Holmes' dissent in Lochner v. New York, 198 U. S. 45 at 76, 25 S. Ct. 803 (1905).