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THE CRIMINAL RESPONSIBILITY OF INSANE PERSONS.*

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In a trial which has recently aroused the attention of the whole country to a degree unusual even in criminal trials, the failure of the jury to arrive at an agreement regarding the mental responsibility of the defendant has awakened attention to the jury system and the law of criminal responsibility. Doubts have been freely expressed by thinking persons as to the capability of juries to correlate the facts with the law as expounded by the courts, and as to the soundness of the psychologic principles the law formulates.

In view of the wide public interest which has been excited, the great diversity of views which have been publicly expressed (for, like the Dreyfus affair, the case has been tried before the great jury of the public as exhaustively as before that of the court), and the importance to society that criminal acts shall not go unpunished where a just responsibility exists, and that the verdict, whatever it may be, shall meet with the approval of the community, it would seem as if the time had come to reopen the question of criminal responsibility.

If I take this question for my theme, it is not without some hesitation and personal misgiving, for I realize the difficulties inherent in this most intricate of problems, in which are bound up some of the most subtle questions of psychology, of public expediency and of law. Yet the time and occasion are opportune and invite the task. Few, if any, problems are ever settled for all time; new data accumulate, our knowledge grows, conditions change. In conformity with this progress, it is incumbent on us from time to time to readjust our conceptions and our procedures. This is as true in matters of public policy as in medicine and the other sciences. Criminal responsibility rests on the law of the land as expounded by the courts, but beneath the law are the fundamental principles on which in the last analysis the law rests, namely, the laws of the human mind which determine what the law ought to be, or, more concisely, what ought to constitute responsibility, who are "rightly liable to punishment" and ought to be punished.

As a medical man, I do not venture to discuss the law of the land. That is the province of the jurist. It has become gradually evolved through a series of de-

cisions delivered by legal minds. But, while the determination of the law should be made by those learned in the law, the determination of those conditions of the mind that lead to mental irresponsibility, in the sense of what ought to constitute responsibility, whether formulated into law or not, should be made by those learned in diseases of the mind.

The law governing irresponsibility for crime on the ground of insanity was formulated in the famous answers of the English judges to the inquiries of the House of Lords in 1843, as follows: "To establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act the accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." The law as thus defined has continued in England and America to the present day.

It is not, I believe, generally understood by laymen that the law in the great majority of the states and in England is not statute, but common law.¹ This is not entirely without importance, at least to my way of thinking, for statute law is the expression of the point of view and wishes of the community. If it does not represent public opinion in the matter which it governs, it can be amended or repealed, a process which is constantly taking place to make laws conform to the progress of thought and the changes in public sentiment. This sentiment itself is very largely molded by the diffusion through the community of information on any given subject by those who have special knowledge of it. So that in the case of mental responsibility, for example, the special knowledge of those who are learned in the diseases of the mind can make itself felt in shaping legislation which shall determine responsibility before the law. It is quite different with common law, which is the formulation of the opinions of a very learned body of men, but learned in a special branch of human knowledge—the law, a large part of which is made up of those opinions. Public opinion and sentiment to a very slight extent and only indirectly can shape, amend or formulate such laws; they rest entirely on the attitude of mind, the wisdom and special knowledge of judicial minds; nor can the knowledge of those learned in other branches of research, excepting indirectly, guide in their evolution. Fundamentally, every opinion rests on knowledge, and when any given opinion, such

1. In New York the common law has been codified as a test of responsibility; in South Dakota by statute, insane persons are not liable to punishment, "on proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness." In California and North Dakota no insane person is liable to punishment by the criminal code. I have not thought it necessary to examine the statutes in all the states, as those where a test of responsibility has been codified are known to be the exceptions. In some, even where the penal laws have been codified, the common law still remains in force so far as concerns irresponsibility on the ground of insanity (for instance Idaho and Utah).

*The article is slightly abbreviated. It appears in full, however, in the Transactions of the Section and the author's reprints.

as that of what ought to constitute mental responsibility, rests on knowledge of a special branch of human inquiry, mental disease, its wisdom is directly proportionate to the knowledge which he who expresses it has of that special branch of learning. When an opinion is judicially expressed, from that moment, by agreement of society, but none the less arbitrarily, it ceases to be an opinion and, unless overruled by other judicial opinions, becomes law. "That is not the law, Mr. Paine," a Massachusetts judge is said to have observed to that distinguished member of the bar. "It was the law until your honor spoke," was the retort.

As a matter of fact, the law recognizes that there are effects of disease on the mind which ought to relieve the individual of criminal responsibility, yet it is logical and permissible, if public policy so directs, that no relief of responsibility shall be admitted because of insanity; but once accept the principle that an abnormal condition of mind may relieve an individual of responsibility, and the determination of the sort of mental alteration which ought to involve irresponsibility must rest on a study and intimate knowledge of mental disease. There is no other knowledge that can determine that question. Further, if the law, after recognizing the principle that some persons ought not to be punished because of mental disease, adopts a test of responsibility which would punish those who, by the common consent of those who are familiar with the effect of mental disease, ought not to be punished (or vice versa) it becomes inconsistent and unreasonable. The legal opinion, then, which becomes the law and test of responsibility ought to be founded on common psychiatric knowledge, but knowledge in everything that pertains to natural science is progressive, while the law is conservative and lags behind the march of knowledge.

The question which those who are learned in rearrangements of the mind desire to reopen is whether scientific knowledge has not shown that the judicial knowledge on which judicial opinion has formulated mental responsibility in law was insufficient and, therefore, that the legal creeds should be modified. Legal, like religious, creeds may persist as empty formulas, while the opinions from which they sprung may change with each new increment of knowledge. Learned minds then continue to debate the formulas as if they had the force of truth and not only that of the power of organized society to enforce its will.

HISTORY OF THE LAW.

The circumstances under which the law was formulated in its present phraseology is not without bearing on an intelligent examination of the question. It arose out of what has become, in consequence, the celebrated case of *McNaghten*. In 1843 "*McNaghten*, being under an insane delusion that Sir Robert Peel had injured him, and, mistaking Mr. Drummond for Sir Robert Peel, shot Mr. Drummond dead with a pistol." The questions submitted to the jury were: "Whether, at the time the act in question was committed, the prisoner had or had not the use of his understanding so as to know that he was doing a wrong and wicked act; whether the prisoner was sensible, at the time he committed the act, that he violated both the laws of God and man." *McNaghten* was acquitted.

In consequence of the popular alarm over the verdict, the House of Lords submitted four questions to the fifteen judges of England, asking for an opinion of the law governing responsibility for certain offences committed by persons afflicted with certain kinds of insan-

ity, and also as to the terms in which the question should be submitted to the jury in such cases. The answers were unanimously given by fourteen of the fifteen judges and have been the law ever since, but, as will presently be pointed out, have been extended in application to classes of insanity which, some believe, the judges never had in mind, and to which they did not apply their answers.

It is interesting to note that the first question presumably was intended to cover the *McNaghten* and *Hadfield* cases. The questions and answers are as follows:

QUESTION 1.—What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons, as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

ANSWER 1.—Assuming that your lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting thereby excused?

QUESTION 4.—If a person under an insane delusion as to existing facts commits an offense in consequence thereof, is he contrary to law, by which expression we understand your lordships to mean the law of the land.

ANSWER 4.—The answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusions exist were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and kills that man, as he supposes in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

QUESTION 2.—What are the proper questions to be submitted to the jury when a person, afflicted with insane delusions respecting one or more particular subjects or persons, is charged with the commission of a crime (murder for instance), and insanity is set up as a defense?

QUESTION 3.—In what terms ought the question to be left to the jury as to the prisoner's state of mind when the act was committed?

ANSWERS 2 and 3.—As these two questions appear to us to be more conveniently answered together, we submit our opinion to be that the jurors ought to be told, in all cases, that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. [The remainder of the answer goes on to discuss the usual way the question is put to the jury.]

INCOMPLETENESS OF THE QUESTIONS AND ANSWERS.

These questions and answers have been critically analyzed both from a psychologic and a legal point of view by the distinguished Justice FitzJames Stephen and very recently by Dr. Charles Mercier in his work,

"Criminal Responsibility." Any one who wishes to examine the principles of responsibility, as well as the criminal law of the same, should familiarize himself with the writings of both these authors. Stephen, who has written voluminously³ on the subject and with considerable psychologic insight, has pointed out certain defects on the psychologic side in the law as defined by these answers. Mercier, with great acumen, has examined at much length what ought to constitute responsibility and has given, as it seems to me, a valuable analysis of the answers. In many points both these writers, one a learned judge and one a learned alienist and psychologist, are in accord. Mercier points out some curious and interesting facts regarding the relations of the answers to the questions and of both to the law as it has been applied ever since. Attention had never before been called, as he avers, to the fact that all four questions are not general, but restricted. Question 1 relates to persons who are afflicted with insane delusion in respect to one or more particular subjects or persons. Nothing is said about insane persons without any delusion, or to persons with general delusions, etc. But even this restricted question and that of Question 4 the judges do not answer, but, as Justice Stephen also points out, make a still more restricted reply by assuming that the "inquiries are confined to those persons who labor under such partial delusion⁴ only, and are not in other respects insane." This is a psychiatric assumption which probably has no basis in fact. In consequence a very serious difficulty is encountered and left untouched, as Justice Stephen says. This difficulty is the objection which medical men have frequently raised to the law, and develops one limitation to it, at least, and in consequence of which it did not even touch the *McNaghten* case as that case was decided by the jury. The difficulty is clearly and, from a medical standpoint, soundly stated by Justice Stephen as follows:

How would it be if medical witnesses were to say (as Dr. Griesinger says, and as the witnesses in *McNaghten's* case said in substance) that a delusion of the kind suggested never, or hardly ever, stands alone, but is in all cases the result of a disease of the brain, which interferes more or less with every function of the mind, which falsifies all the emotions, alters in an unaccountable way the natural weight of motives of conduct, weakens the will, and sometimes, without giving the patient false impressions of external facts, so enfeebles every part of his mind that he sees and feels and acts with regard to real things as a sane man does with regard to what he supposes himself to see in a dream? On these questions the answer throws no light at all, because it assumes the man to be insane in respect to his delusion only, and to be otherwise sane; in a word, the prisoner is treated as a sane person under a mistake of fact for which he is not to blame.

The difficulty becomes emphasized if we are entitled to say, as Dr. Mercier says: "There is not and there never has been a person who labors under partial delusion only and is not in other respects insane." Here is where the judges fell into a trap of sophistry owing to their unfamiliarity with mental disease and the ways in which the various faculties of the mind are affected. I take it that all medical men will be unanimous in the view that delusions are the effect and expression of a general mental derangement and not the derangement

itself, and, therefore, that the mind must be otherwise deranged than as shown by a particular delusion. There is probably in every case some dementia, and if a person is not otherwise insane he would not have a delusion. This makes the difference between an insane delusion and that kind of false opinion in sane people which under another use of the term is called a delusion.

The question is of a proper test of responsibility, and the test of the judges, so far as it is contained in Answers 1 and 4, is placed in doubt when their fundamental conception is shown to be erroneous. The assumption of the judges on which these answers were based, viz., of a person laboring under a mental delusion, but not otherwise insane, is fallacious.

Questions 2 and 3 apply to "a person afflicted with insane delusions respecting one or more particular subjects or persons," and ask what are the proper questions to be submitted to the jury. It was in their answer to these two questions that the judges gave their famous reply: "That [for persons with delusions] to establish a defense on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act that he was doing, or, if he did know it, that he did not know that he was doing what was wrong."

It will be noticed that these two questions refer to a particular class of the insane; namely, to those suffering from delusions; while it has happened that the answer, which has become the law, has ever since been applied to all the insane, whether they suffer from delusions or not.

Mercier has argued at considerable length that the judges in this answer must have referred to and must have intended their answer to apply only to those persons referred to in the question; namely, who are afflicted with delusions.⁵

Not being trained in the interpretation of the law, I do not feel so clear about this. If the answer is to be understood as a direct reply to the question asked, as it is logical to assume, then it would have this meaning if the words, "for persons with delusions," were understood to be implied after "that" and before "to establish a defense." It would then read "that for persons with delusions to establish a defense on the ground of insanity," etc. This reading is entirely compatible with the questions and the context, and it is the one which seems to have been assumed by no less a learned lawyer than Justice Stephen.⁷

On the other hand, it might fairly be argued that the

5. These words in brackets were not in the original answer, but are here interpolated for the purpose of making clear the interpretation mentioned below.

6. Mercier, indeed, goes further, and thinks that it is probable from the language and the context that the judges, in their answer to this question, intended to refer to persons who "labor under partial delusion and are not in other respects insane." It does not seem to me that this interpretation is warranted. Mercier, however, admits that it is open to doubt.

7. A large part of Stephen's argument is devoted to a defense of the judge's answers on the ground that delusions may be evidence of a mind being so diseased as not to know, in a broad, not literal, sense, that an act is wrong or as not to be able to control conduct. While his argument is based on the assumption that the answers referred only to persons with delusions, apparently he himself would by implication apply it to all forms of insanity. While Stephen's views as to what the law ought to be seem reasonable and sound as far as they go, his reasoning by which he attempts to bolster up the law as it is, is confused and far fetched. Further, the point does not seem to have specifically occurred to him that if the judges referred only to cases with delusions then the law was not intended to cover other kinds of insanity, and yet he himself apparently would so extend it.

3. A History of the Criminal Law of England, vol. II, chap. XIX, 1883. A General View of the Criminal Law of England, 2d edition, 1890. The Policy of Maintaining the Limits at Present Imposed by Law on the Criminal Responsibility of Madmen. Papers of the Judicial Society, 1855-1858. A Digest of the Criminal Law, 1877.

4. Partial delusion was apparently used as a synonym for monomania.

judges intended to go beyond the questions and to lay down the law not only regarding persons with delusions, but regarding all insane persons whether they had delusions or not. Whichever meaning be correct, one thing is plain, and that is that the intention of the judges is not clear, and it is remarkable that, with this uncertainty in the meaning of the judges, their answer should have been applied ever after as the law, without question, to all insane persons. That those learned in the law, who are most keen to point out defects of understanding of legal principles in laymen, should have continued thus either to pervert the meaning or disregard the ambiguity of the answers is a curious commentary on the human mind. However, such has been the case and, *ipso facto*, the answers have become the law, rightly or wrongly, in every case where any form of insanity is alleged in defense. But this extension of the application has had consequences in the distortion of the meaning of the English language which, as Macaulay would have said, every school boy would take exception to. I will return to this later, merely pointing out, as has been often done, that the application of the law hangs on the meaning of the word "know" in the phrase, "as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

But let us take the law as it stands and see how far it is a test and definition of responsibility, as that has been defined by the law. As I have before said, it is far from my purpose to discuss what the law is; that is, how it is to be interpreted, a task which is necessarily reserved for the lawyer, but to consider, first, whether under any interpretation the test of responsibility as submitted in accordance with the law to juries is a test of a certain psychologic state, a sound test of a state of mind which the law recognizes and attempts to define; second, whether it is a sound test of what ought to constitute responsibility; and, third, to discuss in a general way what the law ought to be, without regard to what it is, just as a legislator would have to consider the question if he were to enact a statute. These questions are largely psychologic questions, for, as the law was laid down by Mr. J. Tracy in the case of Edward Arnold, "guilt arises from the mind and the wicked will and intention of man, and if a man be deprived of his reason and consequently of his intention he can not be guilty."⁸

THE FORMULA AS A TEST OF WILL AND MALICE.

Insanity is not legally an excuse for an alleged crime "unless it produces in fact one or other of certain consequences." Justice Stephen has explained, and I must assume correctly, that the plea of insanity is only material so far as it traverses the charge that an act was done with "will and malice." The same principle was laid down by Lord Hale and since his time has been laid down again and again.

Now, "malice or maliciously mean an action flowing from a wicked and corrupt motive, a thing done *malo animo mala conscientia*," as Foster⁹ said.

"A jury, therefore, is not impaneled to try whether or not the prisoner is mad, but whether or not he is a wilful and malicious murderer." . . . "They [the judges] have laid down tests of responsibility, or, more strictly speaking, have specified facts from which, when

juries have found them, judges are to infer malice" (Stephen).¹⁰

The principle, then, may be thus stated:

Any one who commits a wrong act wilfully and maliciously is guilty of crime and is liable to punishment.

Any one who commits a wrong act, but, because of insanity, does not act wilfully and maliciously, is not guilty of crime and is not liable to punishment.

In the opinion of the fourteen judges of England, a test of absence of will and maliciousness in an insane person is not knowing the nature and quality of an act, or, if he does know it, not knowing it is wrong.

In the final analysis, then, the test is a psychologic one. Is it a sound and reliable test of absence of will and malice? The way to satisfy any doubts on this score is to apply it to actual cases which have been adjudicated, or well-known cases, the facts of which are not in dispute. Take the celebrated case of Hadfield. Hadfield, who thought himself our Lord and that, for the salvation of the world, he should die, deliberately fired at George III in order to be hung and that the world should be saved. He knew, as Stephen admits, what he was doing, that he was trying to kill the king; knew he was breaking the law and that he should be punished. He knew, therefore, the nature and quality of his act and that it was wrong. This formula of the judges should, therefore, if sound, have proved malice, and yet no reasonable person could hold that he acted with malice, nor did the judge so hold, for so evident was the contrary that the trial of the case was stopped by the court. The formula of the judges in this case, then, breaks down as a test of this oft-repeated principle of law. Which shall we cling to, the formula or the principle?

In numerous other kinds of cases, including cases without delusions, the formula will be found on examination likewise to break down. Take acts done under irresistible impulses or desires, whether homicidal, forging or stealing. These impulses are fairly well accepted as due to automatisms outside of the will. The afflicted persons know the "nature and quality of the act," etc., and, according to the formula, their acts should be wilful and malicious; but they are not wilful, for the subject fights against them; they are not malicious, for he begs piteously to be saved from himself.

As the knowledge defined in the formula does not prove malice, so the converse is also true: the absence of this knowledge does not show absence of will and malice. McNaghten, for instance, certainly acted wilfully and maliciously, and yet the jury held in acquitting him, if they followed the judge's charge, that he did not know the nature and quality of the act, or, if he did know it, that he did not know it was wrong.

The well-known case, cited by Dr. Taylor, of the man who had some insane delusion about windmills is a good illustration of the incompetency of the formula to prove absence of malice, even when interpreted in the broad sense in which Justice Stephen holds it should be taken. As will be presently explained, this writer thinks that by knowing that an act is wrong should be understood the ability "to judge calmly and reasonably of the moral or legal character of a proposed act." The man in question, owing to his delusion, would pass hours in watching windmills. To cure him, his friends kept him out of the way of windmills. He thought that if he committed a crime he might, as a punishment, be confined in some place where he could pass all his time watching windmills. So he mutilated and nearly killed a little

8. Quoted by Stephen.

9. Criminal Law, p. 256, quoted by Stephen.

10. Criminal Responsibility of Madmen.

girl. Now, that this man's motive was wilful and malicious seems to me beyond doubt. It was that through punishment he might gain an advantage for himself, as much as if he had murdered a man for his money. In fact, he did gain his end, for he was confined in such a place as he desired. He knew his act was wrong in the narrow sense, but that he knew it was wrong in the broad sense in which Justice Stephen would interpret the formula seems to me can not be reasonably held, and from the implication of his language it would appear that Stephen held the same view. Whether the man ought to have been punished is immaterial to my point, which is that absence of knowledge even broadly interpreted is not a reliable test of absence of malice. And so with numerous other cases that might be cited. Epileptics who not infrequently kill people while in their fugues or automatisms at such times act wilfully and maliciously, but, in the dream state in which they are, can not be said to have a knowledge that their act is wrong. The German case of Sörgel is in point.¹¹ In one of his fugues he killed a wood chopper whom he met in the forest that he might, according to a tradition, use his blood in a particular way to cure himself of epilepsy. On coming to himself some days later, he had no recollection of his deed and was acquitted by the court. In his delirious state he could have had no knowledge that his act was wrong. Likewise some cases of double personality in their second states acquire a criminal nature and commit illegal acts.¹²

We see, then, when we submit the principle of will and malice and the formula of the judges to the test of actual cases, that neither supports the other, and even that will and malice can not be held as a test of what ought to constitute responsibility.

If, in practice, every insane person who acts wilfully and maliciously were held liable to punishment and punished, I believe that the way it would work out would be that the moral sense of the community would be so shocked that the judicial law would not receive the support of public opinion and a statute law would be enacted in its place.

Indeed, I can not help thinking that the attempts to make the formula of the judges square with the principles of "will and malice" is but an attempted feat in logic to bolster up an insufficient psychologic test by reference to a principle of law which is antiquated and played out in its application to insanity.

THE FORMULA AS A TEST OF WHAT OUGHT TO CONSTITUTE RESPONSIBILITY.

But let us examine the formula of the judges, not as a test of another principle of law, but as a principle in itself, and see if it is a criterion of what ought to constitute responsibility.

It is plain that a great deal hinges on what is to be understood by the word "know" in the formula. Is it to be taken in its "obvious and literal" meaning, or is it to be interpreted in a broad way so as to cover all collateral knowledge with calm and judicial reasoning powers? Both views have been and are held. Let us examine the narrow view and see how far the formula will cover well-known cases. Take cases of insane people with delusions; it certainly fails in the Hadfield and McNaghten cases, as it failed in those cases as a test of will and malice. It would fail in Dr. Taylor's

case of the windmill man, unless it be thought that he ought to be punished, a questionable view. Again, take insane people who commit crimes in consequence of hallucinations. It is not very uncommon for a person to murder his children because he hears the voice of God commanding him to do so. Such a person knows that he is doing what is wrong in the legal sense. The ordinary legal view of such an act would be that the hallucination was the sole cause of the act and that he might be otherwise sane, but this is an entirely inadequate conception of the mental condition. In a great many, if not in all, such cases, the hallucination is not a sporadic phenomenon of false hearing, but arises as a result of previous false reasoning and illusions. He has the hallucination because in consequence of an already existing mental derangement he believes that he ought to kill his children for one reason or another. This is why he believes his hallucination to be true; it is a sensory automatism which is excited by and expresses his unsound belief. If we could examine the mental condition and mode of working of such a mind, we would find that, owing to the perfect jumble of his ideas, he had ceased to be a free agent to control his conduct according to the law, although he literally knew the nature and quality of his act and that it was legally wrong. At any rate the juries, I believe, have generally acquitted or the government has been satisfied not to prosecute such persons on the ground of insanity.

Again, apply the law to impulses, of which the following is an example in my own experience:¹³ A woman was the subject of attacks of an intense impulse to kill the child of a sister, of whom she was very fond. This obsession extended until she had a desire to kill other children and was afraid to be left alone with them. When the impulse came over her, like Lady Macbeth, she saw knives and blood about her, if this happened to be the particular method which came into her mind at the moment. She was so afraid of giving way to the impulse that she sought protection against herself, and measures were taken never to leave her alone with children. It is true that this person did not commit homicide, but she might have done so. Although homicides from such impulses are rare, they occasionally occur. The case cited by Dr. Paul Garnier, of a butcher's wife who was driven to cut by a big knife the throats of her children playing in the shop, is an instance. "I am not mad," she explained; "I know quite well what I am saying and doing. I only don't know what is the matter with me; for the last three months I do not recognize myself. What is going on within me is too horrible to tell. I adore my children, and something says to me: 'You shall kill them!' The first time I felt a shiver which shook me from head to toe. I had the butcher's knife in my hand; my two children were near me amusing themselves. The idea to cut their throats seized me all at once. 'Kill them! Kill them!' cried out to me my criminal desire." "Can anything more dreadful be imagined," remarked Garnier and Colin,¹⁴ and, it may be asked, would any juror convict such a person?

Minor criminal offenses, like stealing, known as kleptomania, are very common. The law certainly leaves all such cases entirely untouched.

The law does not touch the facts in certain paranoiac cases, of which that of P. H. C., reported by Dr. H. R.

11. Feuerbach: Remarkable Criminal Trial.

12. See Hysteria from the Point of View of Dissociated Personality, by Morton Prince, The Jour. of Abnormal Psychology, October, 1906.

13. Boston Medical and Surgical Journal, Jan. 21, 1897.

14. Tuke's Dictionary of Psychologic Medicine, vol. i, p. 596.

15. A Medicolegal Case of Well Poisoning, with a Plea for a Hospital Observation Law, by Henry B. Stedman, M.D., Proc. Am. Med.-Psychol. Assoc., 1904

Stedman,¹⁵ is an example. The accused, "a well-educated, intelligent man," but a man of bad heredity, with an unstable paranoiac type of mind, was charged with poisoning a well with intent to cause the death of his sister, against whom he had intense feelings of animosity, without reasonable cause. The sister was trustee for his children for a small sum of money (\$2,400), and his cause of complaint was that she would not give up the trust to himself, which he wished, not for the sake of the money, but for "the principle of the thing." He felt that he was under her "domination," her suzerainty; that she "had spoiled his life." He would willingly go to prison for life if it would end in her giving up the trust, etc. He believed there was a conspiracy or, at least, a community of interest between his sister and brother to "torment him and break down and ruin him." This idea, as he expressed it, absorbed all his being; it became his "religion," more than the life of his children. "She is my destiny, my evil genius," he said, and "it would not be wrong for me to kill her, but I will not say I would do it." The full account leaves no doubt of an insane mind, in consequence of which the accused was no longer a free agent and could not be held to be justly responsible. The court took this view and he was committed to an insane asylum without trial with the consent of the prosecution. The accused in this case undoubtedly knew the nature and quality of his act and that it was wrong in the legal sense, but that he ought not to be punished was not apparently questioned by the court or prosecution after his mental condition was determined.

There are numerous other states, such as certain cases of dementia, idiocy, fugues and dissociated personality, which the law, liberally interpreted, would not touch.

Should the knowledge required by the law be interpreted in a broad way, and if this is done will the formula "cover every case that ought to be covered by it"?

Mercier, after an elaborate examination of the psychology of responsibility, argues conclusively, as it appears to me, that not only must a broad interpretation be given to the language of the judges, but even then the test must be elaborated to cover conditions of mind which the language disregards. He proposes as a test a formula which I will later state.

Sir Fitz James Stephen, who is held by lawyers to be an authority of the highest rank as well as a learned judge, after an elaborate examination from a psychology, a medical and a legal point of view, has insisted that the terms in which the law is expressed are too narrow, though he also thinks that the principle, if properly understood (that is, interpreted according to his views!), is sound. "I also think," he says, "that the principle which they [the judges] have laid down will be found, when properly understood and applied, to cover every case which ought to be covered by it. But the terms in which it is expressed are too narrow when taken in their most obvious and literal sense, and when the circumstances under which the principle was laid down are forgotten."¹⁶

In another place Stephen says: "I think that the answers in question are unfortunately expressed and imperfect. They do not explain that the knowledge that an act is wrong, which is the test, not of insanity, but responsibility—that is, liability of punishment—means not knowledge of the truth of the general proposition that a particular class of actions are wrong, but a

power of appreciating the moral qualities of a particular action" (page 80).¹⁷

"By 'knowing either that an act is legal or that it is morally wrong,' I understand being able to judge calmly and reasonably of the moral or legal character of a proposed action: and that 'by controlling his own conduct' I mean able to refer calmly and reasonably to those motives which would lead men in general to resist temptation to crime and to allow proper weight to them" (page 79).

Certain it is that under a narrow construction even in the limited class of cases with delusions referred to in Questions 2 and 3 the law is not a sound test of what ought to constitute liability to punishment, for, under such a construction, Hadfield should have been hung and probably also McNaghten, as should also many other persons whom no jury would convict.

Whether or not the judges intended their words to be taken literally, I think that every one must agree that Justice Stephen's interpretation or something similar to it is that which ought to be put on them. But I also feel that the learned justice is hardly fair to the judges. He thinks that it was not intended by them that their word "know" should be taken in its literal and most obvious meaning. I do not wish to appear to dispute this view, but I must say that if it be correct the judges are placed in an unenviable position. To have deliberately left so important a matter open to doubt, and to be interpreted according to the personal attitude of succeeding judges, can, it seems to me, be justly characterized as culpable; particularly as the literal and obvious meaning leads to "monstrous consequences."

The words, too, it must be remembered, were expressly intended to be the terms in which the question of responsibility should be given to the jury, and it can hardly be thought that juries, like other laymen, would see in them any other meaning than that which is literal and obvious. To be sure, it is open to the judge to interpret their meaning for the jury, but I believe I am right in saying that it has not been the constant habit of different judges to understand and explain them in that broad and wise way in which Justice Stephen has viewed them, or in any uniform way. Indeed, I believe Stephen's views of the law are not generally accepted. Certainly in the Thaw trial I do not find that the formula of not knowing the nature and quality of the act, or that it was wrong, was laid down to the jury by Judge Fitzgerald in any but its obvious and literal meaning. If it had been laid down in the terms of Stephen it is difficult to see how the jury could have returned any other verdict than that of not guilty; or, if in the narrow way, of guilty.

For these and other reasons, I can not believe that the word "know" in law can have any settled technical meaning, as would be a layman's first supposition.

The extraordinary history of the present law proves that it is not safe to depend on the legal mind for a uniform interpretation, or on what has been called "judicial legislation" to determine what ought to constitute responsibility; for, as has been more than once pointed out, two at least of the answers of the judges were meant to apply to only a very limited group of insane people—a group which, if the word insane be properly interpreted, does not exist and never has existed, and the intention of the judges as to the application of the other two answers is at least in doubt; yet

17. General View of the Criminal Law. For an elaborate exposition of the same interpretation see History of the Criminal Law, pp. 163-175.

16. History of the Criminal Law, p. 123.

the legal mind by entirely overlooking this historical fact has applied the answers to every form of insanity. What could more cogently demonstrate the danger of judge-made law in matters requiring technical knowledge than the history of this law?

However broadly the language of the judges be interpreted, there is no question that those answers leave untouched many statements of facts of mental derangement which ought to be regarded as inducing irresponsibility. Stephen¹⁸ points out that in confining themselves to the effect of disease on "knowledge" the effect on will and emotions was disregarded. I may here further point out that to base legal responsibility solely on the condition of knowledge, the will and the emotions, is to base it on theoretical and somewhat academic divisions of the mind which, though useful, are really abstractions. The academic character of these distinctions is shown by a study of certain clinical states which are brought about by disease and which make a person incapable of controlling his conduct so as to conform to the requirements of the law. In many such states it is impossible to say, so complex is the working of the mind, where the fault lies, whether in knowledge, will, emotions, desires or reasoning. I may cite, for instance, the obsessions, the impulsions and the fugues (epileptic and hysteric), including dissociated personality. In excluding all these, besides many delusional, paranoiac and other states, the answers of the judges were not exhaustive and some believe were not intended to be so. Nevertheless, as Mercier well points out, subsequent commentators and decisions have attempted to make them exhaustive by so broadly interpreting the meaning of the language of the answers that the King's English has become so stretched and perverted that one wonders whether hitherto he has had a real acquaintance with his own native tongue. How further can language be stretched than it is in saying, as has been said, that not to be able to control oneself means not to know the nature of one's acts and not to know that an act is wrong means not to be able to "judge calmly and reasonably of the moral or legal character of a proposed act."

Under these interpretations the learned Justice Stephen maintained that "if it is not it ought to be the law of England that no act is a crime if the person who does it is at the time when it is done prevented either by defective mental power or by any disease affecting his mind from controlling his own conduct, unless the absence of the power of control has been produced by his own default." He admits, however, that the law is capable of being construed to support the opposite conclusion. I do not find that the broad construction is always or even generally put on the law. Certainly it was not in the Thaw case, as I have already pointed out. There Judge Fitzgerald, in his charge to the jury, simply laid down the formula to the jury without attempt at interpretation or qualification. The jury were left, if they saw fit, to understand, as I should have understood if I had been one of the jurors, the word *know* as commonly used in common parlance and not in any technical sense. The jury was expressly charged, too, that the law did not recognize irresistible impulses. And yet in the same case one of the experts, as he has since told me, in giving his answer to the hypothetical question as to whether the defendant did or did not know the quality of his act, took the word in the broad sense, similar to that given to it by Justice Stephen. One thing is certain, that, unless a broad interpretation is

given to the test formula, it must at times lead to monstrous consequences.

On the other hand, there is danger of erring too far on the other side and allowing, by too broad an interpretation, persons who should be justly responsible to escape what ought to be the consequences of these acts. If by "knowing" is meant the ability to "judge calmly and reasonably of the moral or legal character of a proposed act," it is questionable whether many psychasthenics, perverts, certain paranoiacs and others might not well come within the class of the not-knowing, and yet who could not be excused from liability to punishment without dangerously stretching the principle of irresponsibility. On this side, too, there is a vulnerable point in the present test which I have not seen alluded to, although I can not help thinking it must have been pointed out before.

The law says that "it must be clearly proved that at the time of committing the act the accused" did not know it was wrong. If these words are to be taken literally it is probable that very few insane persons know at this particular time their act to be wrong, though they have such a knowledge before and after. At that moment, particularly if the act is connected with a delusion, the insane mind is in such a condition of dissociation that no knowledge, i. e., no ideas beyond the very limited ones concerned in the specific action performed occupy the contracted field of his consciousness. The individual knows nothing or very little beyond what he is at the moment doing. For all else his mind is a blank, owing to a contraction of the field of consciousness. There is amnesia for all related knowledge and there is an absolute impossibility of synthesizing his dissociated memories and related ideas with the ideas which effect the specific act. So great is the dissociation that it is not uncommon for a person, after the committal of a crime, to have only a hazy, indistinct memory or none at all for his previous act. Cases of even sane persons are not uncommon where a crime performed in a moment of great excitement is followed by greater or less amnesia for the act. The emotion dissociates all but a fragment of a person's knowledge. In this respect, then, the law, if literally construed, is so broad as to exculpate many mentally deranged persons who might well be held to be responsible. It is hard to see how Thaw, for instance, if insane, could be convicted under this provision of the law. Is the law to be construed literally in one of its parts and freely in another, according to the case which it is desired to cover?

HOW SHOULD RESPONSIBILITY BE DETERMINED?

What practical procedure, then, have we to propose in order to determine responsibility? Within the short limits of an address of this kind I can only offer some general considerations.

In the first place, for reasons set forth in my opening remarks, the law should be statutory and the present test of common law discarded.

In the second place, when the defense of insanity is set up, the Maine system, which has been adopted by New Hampshire, Vermont and Massachusetts, would seem to be the most sensible procedure. The accused person is committed to an asylum to remain in the control of the court until it is determined by continuous observation under unbiased experts whether or not he is insane. If found insane, there would remain the question of responsibility. What should constitute irresponsibility and what should be the test? It is doubtful if under this procedure any formulated test would be

18. Stephen, *History*, p. 154.

required, for the way this plan would work out would, I believe, be found to be—indeed, I understand it has worked out, so far as tried, in this way: The accused having been found insane under a procedure brought by the public prosecutor, the latter in ninety-nine cases out of one hundred would be satisfied with the finding of this condition and would not further prosecute the case, supposing, of course, that sufficient safeguards to keep the insane person in confinement were provided for. The public prosecutor would recognize that, whereas the legal conception of insanity and legal irresponsibility are not synonymous terms, in the vast majority of cases insanity, as *medically* understood and classified, and moral irresponsibility are practically synonymous terms.

The controversy which has so long existed between the medical and legal profession over the responsibility of the insane will, I believe, if carefully analyzed be found to be largely due to the entirely different conceptions of insanity entertained by the two professions. The legal conception of insanity must be based entirely on book knowledge and has very little relation with the facts. The medical man's conception is that of the mental and physical behavior of the insane as actually observed and which can not be described so as to be appreciated by a person without practical experience. With these differences there naturally arises a difference in view.

But in the hundredth case where the accused would be found to be insane, under the procedure suggested, and where responsibility is questioned, what should be the test?

I doubt very much whether any single formula can be devised which will meet all the requirements, or at least I doubt whether any such formula can be devised which will be sufficiently simple to be presented to a jury of laymen and be understood. The formula proposed by Mercier may be as good as any; it is, "The actor must will the act; intend the harm; desire primarily his own gratification. Furthermore, the act must be unprovoked, and the actor must know and appreciate the circumstances in which the act is done," in order to incur responsibility by a harmful act. This seems to me somewhat complicated for the jury to thoroughly take in and is, furthermore, open to the same objection as the formula of the judges, in that a great deal depends on the interpretation of the term "know and appreciate the circumstances." I confess that I should not know myself exactly how this phrase should be interpreted, and it is probable that it would only follow the fate of the present formula and be interpreted in different ways by different judges.

I would submit for consideration whether, in the rare case in which the question of responsibility would be raised as to a person who had been judged insane after committal to an asylum for observation, the wisest procedure would not be to have the full observations of those who have carefully followed the case in the asylum presented to the jury. From these statements, which should include the presence or absence of hallucinations and delusions and obsessions, the condition of the will, the intellect, the emotions, the reasoning process and, in fact, a complete analysis of the mental condition, the jury could judge of the responsibility of the insane person without being limited by any legal formula. This, practically I believe, is what juries do to a large extent to-day, disregarding all formulas laid down by the court and deciding from what seems to them to be the merits of the case. Where the question of insanity,

however, is determined not in an asylum by unbiased observers, but in court under the present thoroughly rotten system of expert testimony, the alleged facts as found are contradictory and trials are apt to result in disagreements or unsatisfactory verdicts.

An alternative procedure would be the adoption of the California law of responsibility combined with the New Hampshire method of determining insanity. By the California code insanity itself is an excuse for responsibility; that is, an insane person can not commit a crime. If the condition of insanity were determined, not in open court as a result of a battle between experts lined up on either side, but under observation in an asylum by experts appointed by the court, I believe it would be found that in a vast majority of cases those persons who were found to be clinically insane would be found to be also irresponsible by any formula which is soundly based on psychologic and psychiatric principles.

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Original Articles

ALCOHOLIC INSANITIES.

A STUDY OF FOUR HUNDRED AND THIRTY-SEVEN CASES.*

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The subject of alcoholism is one of the most important. The pernicious influence that alcohol exercises on the individual's physical, intellectual and moral spheres of life shows that this poison presents a serious danger to society. Diametrically opposite views have been held as to the advisability of the use of a moderate amount of alcohol as a daily habit. The most recent researches of Reid Hunt¹ throw considerable light on the physiologic side of the question and show in the most conclusive manner that even extremely moderate amounts of alcohol may cause distinct changes in certain physiologic functions and that under certain circumstances these changes may be injurious to the body; certain physiologic processes even in moderate drinkers are distinctly different from those in abstainers.

Alcohol has a special predilection for the nervous system. We will not be concerned here with the pathologic changes produced by the poison in the nervous tissue or in its blood vessels, but exclusively with its effect on the mental processes of an acutely or chronically intoxicated individual. It is a well-established fact that alcohol produces insanity and that the latter presents constant general features, which, however, may undergo modifications in the course and in the intensity of the phenomena according to the individual and the nature of the beverage.

Alcoholism is not infrequently associated with pre-existing mental affections. In order to determine the nature of the mental disorder produced by alcohol, it is important to make the observations on individuals with a normal mentality prior to the alcoholic ingestion. Alcoholism occurring in the course of mental affections acts as an excitant and renders the symptoms of the pri-

* Read in the Section on Nervous and Mental Diseases of the American Medical Association, at the Fifty-eighth Annual Session, held at Atlantic City, June, 1907.

¹ Hygienic Laboratory Bulletin No. 33 of the Public Health and Marine-Hospital Service, February, 1907.