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TESTS OF CRIMINAL RESPONSIBILITY OF THE INSANE.

EDWIN R. KEEDY.*

A consideration of the tests of criminal responsibility of the insane requires a careful defining of the phrase "criminal responsibility." Responsibility means accountability for one's actions to some superior power, which in this case is the criminal law. The tests of criminal responsibility are the rules which determine the guilt (upon which punishment is based) of those who cause certain injuries, carefully defined by the law, to individuals or society in general. According as the law of one sovereignty differs from another, so responsibility varies; hence, criminal responsibility means one thing in England, another in Germany, and it means a different thing in Illinois from what it means in New York. The criminal responsibility of the insane means, then, the liability of those who are mentally disordered to be punished for certain wrongs as defined by the law of the place where the wrong was done.¹

The insanity (I am using the term to include the whole class of mental ailments, i. e., in the sense of mental disorder) of a defendant may have to be considered by the court in three different connections, determined by the time when the insanity was shown to exist: (1) insanity at the time of the doing of the wrong;² (2) insanity at the time of trial; (3) insanity after conviction. The third is of importance in affixing the punishment; the second determines whether the defendant can be tried, but the first, and the first only, has to do with the question of the defendant's guilt. Hence, the insanity that is material in determining responsibility for a wrong committed, is that which existed at the time the wrong was done. The character of treatment for one who is insane after trial and conviction, whether

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From a paper read before the Physicians' Club of Chicago. In the paper as read there was a discussion of the law of Illinois as to insanity in criminal cases. This portion of the paper is omitted here.

¹In a recent book (Oppenheimer, "The Criminal Responsibility of Lunatics"), the author discusses learnedly and at length the nature of criminal responsibility.

²"The forms of insanity in which crime is usually committed are mania, epileptic insanity, delusional insanity and alcoholic insanity, and sometimes puerperal insanity, delusional and homicidal melancholia, sometimes dementia and congenital imbecility, and also impulsive insanity, where there are uncontrollable homicidal, kleptomaniacal, pyromaniacal, destructive or animal impulses." Clouston, "Mental Diseases." 685.

penal or remedial, or both, is an important question, but is not involved in a consideration of the tests of criminal responsibility, as strictly understood.

I have thought it advisable to define the phrase rather carefully, because in many writings on the subject the point has not always been clearly understood. Thus criminal responsibility in this connection has been treated as synonymous with moral responsibility,³ and even of religious responsibility,⁴ and again, as responsibility to the law as it ought to be and not as it is.⁵

As criminal responsibility is a purely legal question, so insanity is a medical one which must be answered by the physician. He must decide, and is the only one qualified to decide, whether an individual is suffering from a mental disorder, and if so, to determine its character, just as he is the only one who can properly diagnose a case of physical ill-health.

It follows, then, that the subject of the criminal responsibility of the insane in its final analysis involves a dual question: that of insanity for the physician, and that of criminal responsibility for the lawyer. It is as absurd for a judge to attempt to decide the insanity of an individual, as for a physician to say whether a defendant is guilty of larceny. If the members of either profession have crossed the boundary line and invaded the province of the other, it is worth our while to seek an explanation for such conduct.

In the seventeenth and eighteenth centuries the symptoms of what are now recognized as mental diseases were attributed to the possession of the victim by the devil. One so possessed was considered as perversely wicked and hence to be treated with great harshness, and when brought before the court for a wrong done to be punished with the utmost vigor.⁶ It is not without interest to note that in the United States, and as late as 1862, this supernatural view was suggested in a judicial opinion. In *State v. Brandon*⁷ the court said: "The law does not recognize any moral power compelling one to do what he knows is wrong. 'To know the right and still the wrong pursue' proceeds from a perverse will brought about by the seductions of the evil one. * * * * If the prisoner knew that what

³See Maudsley, "Responsibility in Mental Diseases," 102. Stephen, "Hist. Crim. Law of Eng." (Vol. II), 127 discusses Maudsley's view.

⁴Charge of Lord Justice-Clerk Hope to jury in Gibson Case (1844), *Justiciary Reports* (Scotland), 2 Broun 332, cited in 1 *Jur. Rev.* 241.

⁵Mercier, "Criminal Responsibility," 8.

⁶Maudsley, "Responsibility in Mental Diseases," 9-11. See article "Insanity in its Relation to the Criminal Law," by Charles Scott, 1 *Jurid. Rev.* 237, 240.

⁷8 Jones (N. C.) 463.

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he did was wrong, the law presumes that he had the power to resist it, against all supernatural agencies, and holds him amenable to punishment."

The attitude towards the insane was not greatly changed when in the eighteenth and the beginning of the nineteenth centuries there was some recognition of the fact that their abnormalities were due to disease. The first judicial utterances regarding insanity as a defense to a criminal charge were in the early part of the eighteenth century, when the conception of insanity was still extremely vague, and to a large extent incorrect; and when medical treatment consisted chiefly of manacles and the lash.

In 1724 the trial judge in Arnold's case⁸ told the jury that "where a man is totally deprived of his understanding and memory and does not know what he is doing any more than an infant or wild beast, he will properly be exempted from punishment." This was a reflection of the popular attitude toward the insane.

In the trial of Earl Ferrers⁹ in 1760, the jury were told that if the defendant was able to comprehend the nature of his actions, and could discriminate between moral right and wrong, he should not be acquitted. Similar charges were given to the jury in all cases where insanity was a defense up to the year 1843. It must be particularly noted that the only expressions of judicial opinion on insanity as a defense were found in the instructions of the trial judges to the jury. According to the custom that has always prevailed in England¹⁰ the court, in instructing the jury, expressed its opinion upon the evidence; hence the statements of the judges in these early cases were not made as propositions of law, but represented in large part the medical view of the period regarding insanity as stated in testimony.

In the trial of Hadfield¹¹ in 1800 for high treason, in shooting at George III, the defense was insanity. It was shown in evidence that the defendant, at the time of the shooting, suffered from morbid delusions, but understood perfectly the nature and significance of his act. Kenyon, C. J., ruled that the defendant ought to be acquitted. This result was due to the eloquence of Erskine, counsel for the prisoner, rather than to the recognition of a new test of responsibility.

⁸16 St. Tr. 695.

⁹19 St. Tr. 886.

¹⁰A striking instance of this occurred recently in the trial of a defendant for murder. See Appeal of Ethel Harding, 1 Crim. App. Cas. 219 (1898).

¹¹27 St. Tr. 1281.

In 1843 one M'Naghten¹² was acquitted of a charge of murder, the defense being that the defendant was suffering from insane delusions. The medical witnesses testified that a person might suffer from delusions while otherwise of perfectly sound mind, and that the defendant was in this condition. The jury were told that if the prisoner was capable of distinguishing right from wrong with respect to the act with which he was charged, that he was a responsible agent and liable to punishment. After the acquittal the House of Lords propounded certain questions to the judges as to the law with respect to alleged crimes committed by persons affected with insane delusions, and how the jury should be instructed in cases where insanity was a defense. The judges replied that as matter of law the jury should be told what, in effect, is this, that to establish a defense on the ground of insanity, it must be shown that the prisoner was unable to distinguish between right and wrong with reference to the act which is alleged to be a crime. This answer was based upon the instructions to the jury by the judges in the preceding cases, with the addition of the qualification as to the particular act.

The judges replied to the question of the lords, as to the law governing a case where defendant was suffering from delusions, as follows: "Making the assumption that he labours under such partial delusion only and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." The judges thereby legally recognized two symptoms of mental disorder, one of which, viz., delusions, had never been expressly recognized in a criminal case before.

Many pages have been written in criticism of these rules of the judges,¹³ both as to their correctness, and as to the weight to be given them, since they were not made in a regular judicial proceeding. It is not my purpose to discuss these criticisms, but the point I wish to emphasize at this place is this, that the tests of the trial judges, on which the answers of the judges in McNaghten's case were based, were not the result of reasoning with reference to the fundamental principles of the law regarding criminal responsibility, but simply grew up from the necessities of the case, and were based upon the evidence at a time when even the medical profession had but a very narrow view of the scope and character of mental disorders.

¹²10 Clark & Finnelly, 200.

¹³2 Stephen, *Hist. Crim. Law of Eng.*, 154 *et seq.* Maudsley, "Responsibility in Mental Disease," 95 *et seq.*

The test as to delusions was the conclusion from the premise that the person so affected was otherwise perfectly sane. And it must be remembered that this was based upon the testimony of the physicians at the trial. This premise, now entirely refuted,¹⁴ was in perfect accord with the psychology of the time, which regarded the functions of the brain as divided into distinct parts, each of which had a considerable independence of the others. According to this view, either function might be impaired without causing a disturbance of the others.¹⁵

The answers of the judges in McNaghten's case have been without modification, the law of England ever since,¹⁶ and, with modification in some instances, the law of most of the states of this country. Tests which grew up in a period of superstition, originally referring to the evidence in the particular case, and never having any foundation in the principles of the criminal law, and which brought into being the anomalous phrase "criminal insanity."¹⁷

While the judges were applying narrow and obsolete medical facts, which they had crystallized into canons of law, the members of the medical profession, dissatisfied with the results of trials, in which persons were convicted who were suffering from mental disorders affecting not only their judgment but their power of control, expressed in writings and in their testimony as witnesses, their opinions as to the *criminal guilt* of those, who were affected with mental disorder.

Thus it will be seen that the encroachments of one profession upon the logical boundaries of the others were not due to a desire to trespass, but grew out of the real difficulties and peculiarities of the subject in which both were interested.

In addition to the two symptoms of mental disorder which were

¹⁴Mercier, "Criminal Responsibility," 174; 2 Stephen, "Hist. Crim. Law of Eng." 157, 161; Ray, *Med. Jud. of Insan.* 283; article by Morton Prince, M. D., in 49 *Jour. Amer. Med. Ass'n*, 1643, 1645.

¹⁵See Paton, "Psychiatry," 119.

¹⁶Criminal Code of England (1892, unaltered by the Amendment Act of 1900), Title I, Part II, Sec. 11.

In the case before the English Court of Criminal Appeal on February 11, 1910, an appeal was brought against a verdict of insanity upon an indictment for murder. In affirming the verdict and dismissing the appeal the court said: "It is beyond dispute that he is liable to epileptic seizures and homicidal impulses that he cannot control." Appeal of Albert Williams Ireland, 4 *Crim. App. Cas.* 87. Does this indicate the beginning of a tendency in England to depart from the strict rule of M'Naghten's Case?

¹⁷In *State v. Pike*, 49 N. H. 399 (1870), and *Parsons v. State*, 81 Ala. 577 (1886), it was clearly recognized that there should be no legal test of insanity. The ablest judicial discussion of the relation of insanity to the criminal law appears in the opinion of Doe, J., in *State v. Pike*, and that of Somerville, J., in *Parsons v. State*.

covered by the answers of the judges in McNaghten's Case, a third has been recognized as a defense by some of the courts in this country, viz., an irresistible or uncontrollable impulse, where the defendant by reason of mental disease has lost control over his actions. I realize that this phrase has been much criticized,¹⁸ yet as James,¹⁹ Clouston²⁰ and Diffendorf²¹ in his American adaptation of Kraepelin use it, I may infer that it is in good repute. When this defense was urged upon the courts, they were in some instances much confused by the relation which this symptom of mental disorder bears to the inability to distinguish between right and wrong, and some seemed to be of the opinion that one symptom embraced the other. Some courts concerned themselves with the purely medical side of the question, and expressed opinions as to whether a person could suffer from an irresistible impulse and still be able to distinguish right from wrong. Thus the Supreme Court of Appeals of West Virginia,²² through one of its justices, said: "For myself, I cannot see how a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through irresistible innocent impulse. Knowing the nature of the act well enough to make him otherwise liable for it under the law, can we say that he acts from irresistible impulse and not criminal design and guilt?*****I admit the existence of irresistible impulse, and its efficacy to exonerate from responsibility, but not as consistent with an adequate realization of the wrong of the act."

In some instances, while judges personally recognize the medical and psychological fact that a person may be subject to an uncontrollable impulse, while still able to distinguish right from wrong, they hesitated to accept this as a defense, because they felt that such a condition was readily confused with a case where the defendant acted in a passion of hate or rage. The difficulties of proof with reference to mental conditions retarded the judicial recognition of symptoms scientifically established.

I have attempted to show the manner in which the present law on the subject of the criminal responsibility of the insane has grown up, not deduced from legal principles, but derived from faulty views of medical and psychological science, and influenced by prejudice and superstition. These retarding influences are now

¹⁸See Mercier, "Criminal Responsibility," 128-131.

¹⁹James, "Psychology," Vol. 2, 425.

²⁰Clouston, "Mental Diseases," 337, 685.

²¹Diffendorf, "Clinical Psychiatry," 93.

²²*State v. Harrison*, 36 W. Va. 729 (1892).

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absent, and there is a clearer conception of the effect of disease on psychological phenomena. It is therefore suggested that the subject be considered *de novo* with a view of determining whether a test of criminal responsibility can be found that will be in accord with legal principles, and at the same time satisfy the demands of medical science.

The fundamental principle of our criminal law, recognized from earliest times, is, that one must do a criminal act with criminal intent in order to be convicted of a crime. There must be a concurrence of act and intent. This is the general test of criminal responsibility. The term "act" as used in the law means more than mere physical movement, even though accompanied by a physical result. The movement must be due to volition to constitute an act. This is the well accepted view of the leading writers on jurisprudence.²³ It follows, then, that if there is no volition, there is no act; and if no act, then no crime. The first question in a criminal prosecution should be: has the defendant committed a criminal act? Suppose B takes A's hand and with it strikes C, this is clearly not A's act. Suppose B strikes A below the knee, as a result of which A's leg flies up and strikes C. This is not A's act. Suppose A is suffering from locomotor ataxia, and as a symptom of the disease his foot flies out and strikes C. This again is not A's act. Suppose A, while tossing in the delirium of typhoid fever flings his arm against C. I do not think any judge would have difficulty in saying that this was not A's act and that he was, therefore, not guilty of a crime. Now, suppose A's hand strikes C because of an uncontrollable impulse, the symptom of mental disease. No distinction can be drawn between these cases, and yet many courts would not allow A a defense in the last case. Others would allow the defense without a consideration of the legal principle involved. When, therefore, it can be shown that the defendant's physical movement which caused the injury in question was due to an uncontrollable impulse he should not be convicted, which conclusion is based upon the most fundamental principle of criminal jurisprudence.

²³"Determinations of the will, and such motions of the body as are consequent upon determinations of the will, are (I conceive) the only objects to which the term 'act' can be applied with propriety." Austin, "Jurisprudence" (4th ed.), 376.

"An act is the bodily movement which follows immediately upon a volition." Markby, "Elements of Law" (3rd ed.), Sec. 215."

"An 'Act' may therefore be defined, for the purposes of the science, as a determination of the will, producing an effect in the sensible world." Holland, "Jurisprudence" (3rd ed.), 89.

"We mean by it (act) any event which is subject to the control of the will." Salmond, "Jurisprudence" (2nd ed.), 527.

The criminal intent, which is also necessary to create responsibility, is not a constant quantity, but varies with different crimes. Killing must be accompanied with one state of mind to constitute murder, with another to constitute manslaughter. The mental element necessary for burglary is different from that which will make a destruction of property malicious mischief. If the prosecution fails to prove the existence of the requisite state of mind, when this is questioned by the defendant, there can be no conviction of the crime charged. Anything which negatives the necessary criminal intent negatives responsibility. Thus mistake of fact is in some cases a defense—not for the reason that the defendant was mistaken, but because he did not have the criminal intent by reason of the mistake. A mistake that will negative the necessary intent in one case may not do so in another. The particular defense must be considered with reference to the requisites of the particular crime charged.²⁴

If then, a defendant is indicted for a crime, and his defense is that he was suffering from some form of mental disorder at the time the wrong was done, the inquiry, in accordance with legal principles should not be: "Is the defendant insane?" but "Did the defendant, while suffering from this particular form of mental disorder, commit an act with the intent required by the particular crime charged?" This inquiry is concerned with the symptoms of the mental disorder, and not with the vague nomenclature of insanity.

The statement has sometimes been made by judges that insanity may negative the criminal intent. The fault of this statement lies in the fact that it assumes criminal intent is a constant quantity, and that insanity is the name of a particular disease. Though the great majority of the cases in which insanity was set up as a defense, were prosecutions for murder, yet following are some of the crimes of which defendants have been convicted when the defense was insanity: rape,²⁵ burglary,²⁶ forgery,²⁷ running illicit distillery,²⁸ larceny,²⁹ mailing obscene literature,³⁰ passing

²⁴In *State v. Simms*, 71 Mo. 538 (1880), upon an indictment for murder the defense was erotomania. In discussing this defense the court said (p. 540): "No connection is perceivable between a species of monomania which leads to the commission of rape, and that which leads to homicide."

²⁵*Bothwell v. State*, 71 Neb. 747 (1904; *State v. Miller*, 111 Mo. 542 (1892).

²⁶*Hays v. Commonwealth*, 33 S. W. (Kan.), 1104 (1896).

²⁷*Langdon v. People*, 133 Ill. 382. (1890).

²⁸*U. S. v. Ridgeway*, 31 Fed. 144 (1887).

²⁹*Gruber v. State*, 3 W. Va. 699 (1869); *People v. Cummins*, 47 Mich. 334 (1882).

³⁰*U. S. v. Faulkner*, 35 Fed. 730 (1888).

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forged instrument,³¹ abduction,³² arson,³³ embezzlement,³⁴ robbery,³⁵ slander,³⁶ and incest.³⁷ Each of these crimes involves a different mental state.

The ordinary test of criminal responsibility will likewise cover the so-called border line cases, when some symptoms of mental disorder appear, but are not sufficiently marked or numerous to justify the use of a term which distinguishes the patient from the generality of his fellow-men. The symptoms should be measured with reference to the particular mental state which is a part of the crime charged.

Under this test each profession will occupy its proper province. The physician will determine the defendant's mental state, and the judge and jury will decide whether this mental state justifies conviction of the crime charged.

³¹*Riley v. State*, 44 S. W. (Tex. C. A.) 498 (1898).

³²*Walker v. People*, 26 Hun. 67 (1881).

³³*Knights v. State*, 58 Neb. 225 (1899); *State v. Richards*, 39 Conn. 591 (1873).

³⁴*U. S. v. Chisolm*, 153 Fed. 808 (1907); *State v. Berry*, 179 Mo. 377 (1904); *U. S. v. Young*, 25 Fed. 710 (1885).

³⁵*People v. Sprague*, 2 Parker Cr. Rep. (N. Y.) 43 (1849); *People v. Ford*, 138 Cal. 140 (1902).

³⁶*Kelley v. State*, 101 S. W. (Tex. C. A.) 230 (1907).

³⁷*Schwartz v. State*, 65 Neb. 196 (1902).