

1913

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Smith Ely Jelliffe

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Recommended Citation

Smith Ely Jelliffe, New York State Bar Association Questionnaire Some Comments, 4 J. Am. Inst. Crim. L. & Criminology 368 (May 1913 to March 1914)

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THE NEW YORK STATE BAR ASSOCIATION QUESTIONNAIRE—SOME COMMENTS.¹

SMITH ELY JELLIFFE, M. D., PH. D.²

The State Bar Association have requested alienists throughout the State to make a specific response to a questionnaire which they have issued. This is to guide them in framing legislation relative to the "Commitment and Discharge of the Criminal Insane."

As this questionnaire raises points of paramount importance to society as a whole, and to lawyers and physicians, as specialized groups in society, I have thought that my own ideas concerning the questionnaire might be of interest, possibly of value, as a basis for a discussion at the New York Psychiatric Society.

We meet, in the first place, with the question: *What is the medical definition of insanity?* I consider this to be the crux of the whole situation. It is about this concept of a medical insanity that the controversy focuses, and it seems desirable to understand it at the outset, to outline a position, and to give one's reasons why.

My own position for many years has been that there is no such thing as a medical insanity: Moreover, there can be no such concept that is valid in the present state of our knowledge of clinical psychiatry. Hence a definition is impossible. Furthermore, if we as physicians do not eradicate from medicine the notion of insanity as an entity, we cannot expect the lawyer, who rarely comes in contact with clinical material, to know what our point of view is.

If present day psychiatry does not admit an "insanity"—how did the notion ever become current, and why has it become a false and misleading idea? The answer is not far to seek. Insanity like many other concepts, or generalizations, is a worn out hypothesis; it has served its day. It was of value in its time, but is now left behind in the progress of ideas.

It belongs to an age that believed that all brain disease with predominant mental symptoms was one affection. It is a generalization which thinks of general paresis and delirium tremens; of hysteria and dementia præcox; of the confusion due to a brain tumor, and that due

¹Read before the New York Psychiatric Society, April, 1913.

²Adjunct Professor of Diseases of the Mind and Nervous System, Post Graduate Hospital and Medical School; Visiting Neurologist, City Hospital; Managing Editor Journal of Nervous and Mental Disease, New York.

BAR ASSOCIATION QUESTIONNAIRE

to a septic kidney, as one and the same thing, because, forsooth, the "mind" is affected.

It was valid so long as we knew nothing of paresis; nothing of the mental results of exhaustion or infection; nothing about real causes; and nothing about clinical pictures with definite etiology, a consistent syndrome, a fairly accurate pathology, and an appropriate knowledge of outcome.

To those who have followed the gradual development of psychiatry from the time of Bayle, who first started the splitting process, which is segregating the psychotic conglomerate into fairly definite entities, to such a medical insanity has become an impossibility.

A still wider retrospect shows that even the Hippocratic psychiatrist recognized this; for although Hippocrates himself used the words "paranoia," "mania," "melancholia," in the widest of senses, yet he was careful to say that one could recognize an entirely different mental affection in phrenitis; and although paranoid kinds of thinking, i. e., mad, disordered, crazy thinking might be present in phrenitis, yet it was not to be confused with his mania, nor his melancholia—because it was not conditioned as they were by the passage of bile upward to the pituita, nor downward to the black gall of the liver.

It was the early Roman, with his great desire to systematize everything, who gave us the word "insanity." The Roman despised what he called Greek subtleties in those days—just as the law of to-day is stupid regarding medical concepts. It was the legal type of mind that produced this false medical generalization, and which even the early Greeks had avoided.

In the long periods of submerged culture and civilization, Roman ideas prevailed, and with it the idea that there was one mental disease and that was "insanity."

Let me call attention here to a similar state of things in general medicine, where I feel an illustration may serve further to illuminate my point. To a physician of several centuries ago there was but one disease of the lung. He called it pneuma. To such a one, a bronchitis due to the influenza bacillus, or to having breathed smoke was a pneuma. A pneumonia, tuberculous, syphilitic, streptococic was a pneuma. Imagine a twentieth century physician saying a patient had pneuma because he had a disease of the lung; and yet, physicians to-day speak of insanity.

Clinical psychiatry recognizes a number of different psychoses; it cannot and should not attempt to make a medical generalization to try

to fit a social need, if such a generalization must be farcical on the face of things.

Then our answer to the first question is—there is no such thing as a medical insanity. There are various and numerous psychoses, mental diseases, comprehensible as separate entities, but no one large disease, called insanity that, medically speaking, is capable of a definition.

2. The questionnaire now jumps to a legal definition—it calls it *the* legal definition—where a person is laboring under such a defect of reason as either not to know the nature and quality of the act he was doing, or not to know that the act was wrong. Is this a sound definition?

I answer emphatically it is nonsense; I am tempted to say rubbish. But why?

It becomes necessary to know what does the law mean by a “sound definition.” Does it mean that it defines a condition; does it ask, is it a workable hypothesis; or does it say this is a justifiable rule to apply?

From the answer given to our first question it is apparent that law and medicine must cut away absolutely from the old insanity concept, if they are to get together on common ground.

How much does a Beethoven symphony weigh? is the kind of a question that law and medicine are asking each other under the present order of things.

Law asks for a definition of a social status; not for a medical disease. It wishes to know as a protecting and regulating bit of machinery, how best to guide itself under certain circumstances, and desires as far as possible to put it in black and white and make it usable. Here again appears that Roman spirit that would reduce everything to form. This time the law is at fault in hanging on to old concepts long after they have outlived their usefulness. The law wishes to make one generalization upon a mental state as it relates to responsibility for an anti-social act, of the validity of a contract, as to the capacity to confer with counsel, as to the ability to handle one’s estate, etc., etc., they would envisage all of the situations under one term, and then their definition as given is supposed to cover it—true with later modifications known to lawyers themselves, but still all pigeon-holed in the one category “insanity.”

Certainly he who wrote:

“The owl and the pussy cat went to sea
In a beautiful pea-green boat”

must have had in mind the legal idea of the insanity *concept*.

BAR ASSOCIATION QUESTIONNAIRE

My answer to their question [2] is that the definition is an absurdity. The law, like medicine, must get away from a unitary concept of something that does not exist—i. e., insanity. As medicine has evolved definite and specific psychoses, so law should develop separate and different concepts; responsibility for acts; validity of contracts; testamentary capacity, and meet them on the ground of their own foundations—and not apply a clap-trap definition to cover all.

3. *In passing on the question of insanity, whether urged as a reason for depriving a man of his liberty for fear of anticipated injury to himself or others, or as a defense to a charge of a crime in respect of a past act, is it necessary to have any definition of insanity at all?*

This is a legal question solely. The law wants to know from medicine—Is this man a sick man? Has he a sickness which requires the intervention of restraint that society has determined desirable for itself? Law does not need from medicine a definition: It wants to know what the actual situation is. It can then frame its provisions to attempt to cover them. When it does so, I am tempted to add, every law passed along these lines should automatically carry with it its abrogation after a certain length of time, and the provision for its re-casting. The making of these provisions should be in the hands of lawyers and real psychiatrists (not general practitioners made into psychiatrists by judiciary favoritism.)

4. *Is not insanity, like fraud, elusive of precise definition? needs no further comment, save that "insanity," not being anything but a worn out medical and legal term, should not be defined. Something that does not exist can be elusive only to the minds of those who do not know of its non-existence.*

5. *As without defining fraud we still are able to say whether a given act was or was not fraudulent, so may we not say that certain acts and speech prove that a person is insane?*

Applying a syllogism to this we would ask: "As without defining a musical performance we are still able to say whether a given sound was or was not a musical performance, so may we not say that certain musical sounds prove that the person who wrote them has green hair?"

6. *Has not the question of a man's sanity, as generally passed on in the courts, been confused by refinements, which would have no materiality if the enquiry was directed along the line of the last question?*

My answer to this is that the word "refinements" should read "absurdities." The judicial handling of the "insanity" problem, from my

experience, is a farce and a crime. Inasmuch as the last question was nonsense, this one only makes confusion worse confounded.

7. *Does not the danger to the public welfare by reason of the acts of insane persons lie in the inability of the insane person to control his actions, rather than in his knowledge of the difference between right and wrong?*

This again is a medieval academic question, having no sense in view of actual experience. It is vitiated by the same lack of a proper concept of the psychoses as outlined in the answer to the first question.

"The acts of insane persons," means nothing. The acts may or may not be different from those of any one else. What one determines as a sick, a pathological, situation is not one that is different in kind from one that is called well or physiological; it is a question of degree rather than of kind. Many well people cannot control their actions—but it depends on what actions are not controlled, what is meant by control, over what periods, and how great is the loss of control whether psychiatry deals with them as sick individuals or not.

This question again illustrates the uselessness of attempting to establish relations in different categories: How long is a puff of air; or, how sweet is a falling star?

8. *While under the legal definition of insanity above quoted the term "criminal insane" is a contradiction in terms, is it not an apt phrase for the classification of insane persons, at least so far as amenability to the criminal law is concerned?*

The term "criminal insane" is a particularly unfortunate term. It is not an apt phrase. It is a very bad one. A sick man with a psychosis, let it be a paresis, a delirium tremens, an acute excitement in an epileptic, typhoid or pneumonia patient may commit an anti-social act among many others. This individual should never be treated in any other way than any other sick man. His place is in a hospital under medical treatment, not in a jail under the curse of the law, seeking, as the vengeful hand of the wounded social body, to extract from him the eye for an eye, the tooth for a tooth.

9. *If the term "criminal insane" is an appropriate one to determine certain phases of insanity, ought not the criminal insane to be amenable to the criminal law?*

10. *If so, should not the enquiry of a criminal court in a case where the defense of insanity is established, involving as it necessarily does an admission of the doing of the act as charged, be limited to a determination as to the kind of restraint to be imposed on the doer?*

These two questions are already answered. My own opinion is that both the law and the body politic for reasons largely due to sensation news-mongers have a false view point on this entire situation.

Now and then, here and there in a century, a particularly difficult and intricate situation will arise, which through motives best known through sensationalism, will be made the most of to push selfish financial and political interests. A false situation arises whereby thousands of sick individuals are treated not as sick persons, but as subjects for the revenge of an outraged society. The proper point of view is to care for the sick as sick—and if the right thing were done—lock up some of the newspaper writers as disturbers of peace, creators of false opinions, and producers of much mental sickness.

11. *Has society any basis for punishing crime, other than that crime is an offense against the public weal?*

What shall the law consider as a *crime*. This question is a large sociological one, and has little place in this questionnaire. It is too large to discuss. In general a society under certain forms of government called democratic does theoretically what it desires. How far this is from being true has been a theme for discussion for centuries. So far as the sick man is concerned—whether he may have committed an anti-social act or not—that is absolutely indifferent—he must always be regarded in the light of one needing medical and only medical treatment. Such medical treatment, if society so desires, may be under certain restrictive regulations, but the proper attitude of mind is that medical care and treatment is primary, legal restrictions secondary. The present system almost amounts to nothing but legal regulation and restriction. In New York State even the so called “Hospitals for the Criminal Insane” are bits of the political machinery of the “Department of Corrections.” In many other states there are even no decent hospitals. The sick man is locked up in jail. And this is an age that prides itself on enlightenment.

12. *On the assumption that the phrase, criminal insane, is a correct one, should not any differentiation between society's treatment of the criminal sane and the criminal insane be based on the idea that the differentiating line between them is in respect of sanity rather than criminality?*

We have discussed this assumption. “Criminal insane” is a bad term. “Criminal” itself is one of the law's misleading symbols. Fanatical populist demagogery may make the best elements of society “criminals,” and do such damage to a social organism that may require

years, or even centuries to remedy. Here the real criminals are the "will of the people," "mob rule." Witness, the French Revolution.

The only interest that society has in the so called criminal insane is his mental disease. He is to be treated solely from that point of view. He is not a "criminal" save from the standpoint of legal sophistry; he is a sick man, suffering from a psychosis.

13. *In the case of an indictment of a man for murder, whose defense is insanity, is there any need for any change in the statutory definition of murder, to wit, the killing of a man with intent to kill him?*

I cannot see that this question calls for medical comment. It is purely a legal question as to a definition of murder.

14. *Has not the main trouble in the administration of the criminal law, in respect of the insane, grown out of the judge-made definition of crime?*

The whole trouble has arisen because the legal machinery tries to do too many things at one time. The judge-made definition of insanity should stick to its categories and not make a mess of law and medicine, two entirely different types of situations. As for statute-made definitions of crime I can offer no suggestions.

15. *What, in your opinion, are the objections, if any, to a statute, which shall assimilate our criminal law in this respect to that which has been the law of England for a generation, namely, that where a jury is satisfied that when the accused committed the murder in question, he was insane at the time, it shall render a verdict of guilty but insane?*

The rationality of this proposition will repose upon the necessary legal correlation of guilty. Guilty of what? Of committing the deed? Well and good thus far.

The question now goes on to say "but insane." Why not, "but irresponsible because of mental disease," and therefore not to be punished in a prison, but treated in a hospital. Why retain the word "insane," which means so many things in different states and under varying conditions? "But insane." Does it mean not having testamentary capacity by reason of "insanity," of being in such a state of imbecility or idiocy as not to be able to confer with counsel, etc., etc., etc.

Imagine going to Park & Tilford's and requesting a clerk to give you some "food." Would he know whether you wanted a barrel of flour or a loaf of sugar? This to my mind is quite analogous to the "in-food," just as the latter is too general a term to use for the man who goes to a store to get *something*, so the former is a useless and pernicious abstraction.

BAR ASSOCIATION QUESTIONNAIRE

16. *If such an act were passed, would not those who do violence or other injury in epileptic fits, or other cases where mental aberration results in unconsciousness of the act in question, be amply protected against injustice?*

This question is medically incomprehensible. Many acts are committed by epileptics who at the time of their execution are not "unconscious," and yet these acts are the result of diseased mental activities, and the perpetrator is irresponsible at the time of the act. He, the epileptic, may even "know the nature and quality" of the act performed, and "know that it is wrong." This is an excellent illustration to show up the farcical character of the "test for insanity."

17. *If any insane person commits an act, which would be criminal if done by a sane person, is there any reason, other than a sentimental one, which should operate to prevent a jury from being required to find a verdict of guilty but insane—and if so, state it.*

This question has already been covered by the preceding discussion.

18. *If on a plea of insanity, which admits the doing of an act, which if done by a sane person would be criminal, a person charged with crime is found guilty but insane, would not justice be done to society on the one hand, and the insane on the other, by applying to him the same law of restraint as now exists in respect of the same, the only difference being as to the place of incarceration?*

This question is of much interest, and worthy of much discussion. The crux of the situation resides in the attitude of mind regarding the person who committed an anti-social act as a result of a mental disease. Is he to be punished as a criminal or treated as a sick man? He needs treatment for his psychosis so long as it lasts and society can only demand that the doctors know their business, will treat the disease as it should be treated, and if society needs protection at the same time, or at subsequent times, that the proper provision should be made.

The whole problem is really a very simple one after all. It has been made needlessly complex and confusing because of the unconscious and hidden motives of the clans—i. e. the legal and political clans. The formula of this latent content is, make a lot of fuss, kick up a terrible lot of dirt, call "experts" all kinds of bad names, frighten the people with all this hallabaloo and in the meantime the unnecessary machinery created to take care of the artificially constructed panic will keep a vast amount of political patronage busy, and idle at the same time; at the expense of the innocent, who believes himself in need of protection from a purely fictitious danger.

19. *Is not the abuse of our criminal law, whereby under our present practice of allowing verdicts of not guilty by reason of insanity a man can escape death or imprisonment by a plea of insanity, and afterwards escape further imprisonment by a plea of regained sanity, an abuse which ought to be stopped?*

If an abuse of this kind exists it is minimal. The greater abuse one thousand fold is the vast injustice and cost of treating mentally sick people by clumsy and antiquated legal machinery, which, interfering with their recovery, causes untold misery, and ceaseless struggle and strife. The real abuse is the legal abuse of furthering class interests, i. e. legal ones, at the expense of sick people and under the guise of protecting the community. The hypocrisy of the legal method of dealing with the medical problem of mental disease is to my mind one of the worst abuses which must be remedied in the near future.

The shoe should be put on the other foot, is my answer to question 19.

20. *Is there any better way of stopping the abuse, than by allowing juries to find a verdict of guilty but insane?*

Yes, there are countless better ways. Abolish the whole prolix, costly, medieval, cumbersome and corrupt structure of the "legal treatment of insanity." This is the first abuse that should be stopped. If the law is honestly looking for real abuses it should not look abroad for "motes;" there are "beams" much nearer home.

21. *In any just administration of criminal law, should there be any more stigma on a man or his family by reason of a verdict of guilty but insane, than by a verdict of not guilty by reason of insanity?*

The whole legal method of the treatment of mental disorders is responsible for the stigma. This creating of the stigma is one of the legal ways of retaining its octopus grip on the whole system. All legal methods of treating medical problems are bound to result in stigma. They mean publicity. The law needs this publicity to further its own interests; with less of it there would be less stigma, and less mental disorder incidentally.

22. *Does not the whole question of dealing with the criminal insane boil down to one point, what shall be done with a man, who, upon a trial for crime has been by a jury found to have done an unlawful act while in a state of insanity?*

With the comments on the words "criminal" and "insane" and "insanity" already made, yes. With the further note "how shall both the individual's and society's best interests be subserved?"

BAR ASSOCIATION QUESTIONNAIRE

23. *Is not that a question which must in each particular case be determined by its particular circumstances; that is to say, should not the criminal insane be placed in a different place of incarceration than the non-criminal insane, and should not the question of the continued incarceration of the criminal insane be directed solely to the likelihood of a recurrence of their disorder, this to be determined, not as a question of right under habeas corpus, as now, but one of mercy on an application for pardon?*

The mentally diseased individual should be taken care of in a hospital which is not under prison regime. The patient should be treated according to medical principles which always include not only the individual's, but society's best interests.

24. *And lastly, if verdicts of "guilty but insane" ought to be authorized, should not the state provide a special asylum for persons thus found guilty, where their individual cases can be more specially considered for the purpose of determining whether it would be safe to the community to give them freedom through a pardon?*

This question needs no further comment.

My final comment is that the questionnaire itself attempts too much. It could be limited to the question of so-called medical insanity and the so called legal tests—then discussion might be of profit.