

1916

## Criminal Responsibility

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### Recommended Citation

Philip Coombs Knapp, Criminal Responsibility, 6 J. Am. Inst. Crim. L. & Criminology 571 (May 1915 to March 1916)

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## CRIMINAL RESPONSIBILITY.<sup>1</sup>

PHILIP COOMBS KNAPP.<sup>2</sup>

It is somewhat amusing today to glance at the treatises on geology published up to the sixth or seventh decade of the last century and note how the authors strove to harmonize the Laurentian period with Archbishop Usher's sacrosanct 4004 B. C., and to fit Devonian, Carboniferous, Jurassic and Eocene into the evening and the morning of the six days of the Babylonian cosmogony. It is equally amusing to compare the diatribe of Williams<sup>3</sup> on the pernicious influence of the geologist's skeptical notions as leading to downright infidelity and atheism, "and as being nothing less than to depose the Almighty Creator of the universe from His office," or even the gentle Cowper's<sup>4</sup> condemnation—

"Some drill and bore  
The solid earth, and from the strata there  
Extract a register, by which we learn  
That He who made it, and revealed its date  
To Moses, was mistaken in its age."

with the recent admission of a former Andover professor,<sup>5</sup> "The testimony of the rocks had to be taken rather than the testimony of the primitive cosmogony, and it was taken. It is of little consequence."

And yet—

*"Quid rides? Mutato nomine de (nobis)  
Fabula narratur."*

All our discussions of criminal responsibility today seem based, not on the question of the criminal's control of his actions, but on the decisions of the judges in the MacNaughten case, of Chief Justice Shaw in the Rogers case, of Chief Justice Doe in the Pike case and the like, even though we remember that time has shown that the decisions of the learned judges, notably the Lord Chief Justice Hale's pronouncements concerning witchcraft, or Sir J. Nicholl's, that

<sup>1</sup>Read at a meeting of the Boston Society of Psychiatry and Neurology, Feb. 18, 1915, and at a meeting of the American Association of Medical Jurisprudence, May 22, 1915.

<sup>2</sup>A. M., M. D., Visiting Physician for Diseases of the Nervous System, Boston City Hospital.

<sup>3</sup>Williams. Natural History of the Mineral Kingdom. p. 59.

<sup>4</sup>Cowper. The Task. Book iii, 150.

<sup>5</sup>Harris. A Century's Change in Religion. p. 58.

"the true criterion—the true test — of the absence or presence of insanity, I take to be the absence or presence of what used in a certain sense of it is comprehended in a single term, namely, delusion,"<sup>6</sup> or even the remarkable discovery of the judges in the MacNaughten case, "that a man may have insane delusions in respect to particular persons, but is not in other respects insane,"<sup>7</sup> have not that inspired authority once attributed to the Hexateuch. No matter what the degree of imbecility or dementia, no matter how dominant the delusions, we must square them with the ability to distinguish between right and wrong, to know the nature and quality of the acts and the other stock phrases of the judicial decisions, and make the distinction whether the defendant is legally or medically insane.

Instead, therefore, of trying to make the facts fit the various judicial decisions, as the geologists used to try to make them fit the theological dogmas, let us consider for a little just what the facts are, and in just what way we may estimate the responsibility of the criminal.

In the first place let us consider for a moment the conduct and actions of the ordinary inmates of our hospitals for the insane and our institutions for the feeble-minded. There is no question but what, in all but a few extreme cases, these patients have a certain knowledge of the nature and consequences of their acts, an ability to make choice between two or more lines of conduct, to apply proper means for the accomplishment of the desired end, to manifest a certain restraint and control over their actions, and to show more or less intelligence in carrying out their desires. The intelligence, of course, may be limited. The patient may be able merely to go in the right direction and through the right door to get to the dining room, to fill and light his pipe and to keep from burning his own fingers with the match, but he may be so demented as to throw the burning match into a pile of hay. Comparatively few patients are so absolutely demented or idiotic that they can do no more than breathe and swallow. Among the inmates of every large hospital we can note almost every degree of intelligence, until we encounter the patient with keen memory, quick wit, marked capacity and industry, good judgment and apparently normal mentality, perhaps exercising control over some large business, who only after long observation shows his inability to meet the obligations of modern life and to take his place in the world outside. These patients, moreover, are amenable to various influences which affect other men; they can be persuaded

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<sup>6</sup>Nicholl. *Dew v. Clarke*. Quoted by Maudsley. *Responsibility in Mental Disease*, p. 113.

<sup>7</sup>Maudsley. *Op. cit.* p. 96.

by rewards and punishments to adopt a certain line of conduct, to learn certain new things, sports, occupations and the like. It is all a question of degree. Every patient is the victim of a disease which has an influence on his conduct, in one case to an extreme and in another to a very limited degree. All may be regarded as responsible, in the ordinary use of the term, to a certain degree; none of them can be regarded as fully accountable for his acts.

The plea of irresponsibility on account of mental disease is rarely made except in capital cases. If the offense be a mild one, the State rarely inquires into the mental state of the accused, unless the disorder be evident, and the delinquent himself will usually prefer a short prison term to the possibility of permanent confinement in a hospital for the insane. Even if he be accused of a greater crime with a long term of imprisonment, the chances for pardon or escape make the jail more desirable than the constant association with those of unsound mind. Only when he is liable to the death sentence will he seek the hospital as a desirable substitute.

The unjustifiable slur of cheap attorneys and yellow journalists that the plea of insanity as an excuse for crime is merely a fabrication of the experts hired at great expense by rich delinquents to enable them to escape the penalty of their deeds, is one of the strong arguments with the general public against the plea that criminals are not always fully responsible for their acts. This argument has no force, however, if the question of responsibility be studied, not in the case of the delinquent before his trial, but in the case of the criminal already undergoing his sentence in jail. Here the question becomes merely a scientific inquiry, uninfluenced by personal compassion or by any hope of pecuniary gain.

To one who has day after day watched the long files of prisoners marching across the prison enclosure to their meals, or studied them more closely as they come up for the sick call in the morning, the conviction gradually grows that the average prisoner, especially in the county jails, is below the average standard of the normal man. He is in some way defective or a deviate from that standard. To such a one the doctrines of Lombroso will meet with a ready acceptance. I am aware that it has been the fashion, particularly in this country, to treat Lombroso's teachings with little consideration and even to hold them up to ridicule. This is not remarkable when we consider that America has been behind almost every country but England in the knowledge of criminal anthropology. Lombroso's works were published in a language even less familiar to the American than French or German, and his investigations were undertaken in a city somewhat out of the ordinary routes of medical travel. The

*odium theologicum* which they naturally aroused favored the superficial criticism that picked out some of his more untenable hypotheses, and, ignoring his careful research and painstaking collection of facts, held the whole up to ridicule. It may be that *l'uomo delinquente* cannot be accepted as a special morbid entity, that Lombroso's distinction between *delinquenti nati* and *delinquenti d'occasione* is too finely drawn, or that his affiliation of crime with epilepsy is fantastical, but nevertheless the number of his scientific anthropometric observations and his close study of the psychology of the criminal can not be laughed away. Lombroso's theories may be rejected as unwarranted, but his facts, which show that the average criminal is different from the normal, both mentally and physically, still remain, and the careful scientific study which determined those facts was apparent to every one who visited his laboratory or followed him through the prison at Turin. He failed to recognize that the criminal was often merely a high grade imbecile and tried to make of him a special morbid type. That this type was not a separate and distinct one does not prove that the criminal is normal.

Of late years, with the increase in our knowledge of feebleness of mind, and in our ability to recognize the high-grade imbecile, or moron, the constitutionally inferior psychopathic and the earlier stages of the more familiar mental disorders, a study of considerable collections of criminals in our jails, and of delinquents awaiting trial, has led to interesting results which have caused a certain enlightenment of the general public. I need merely refer to the investigations of Drs. Guy<sup>8</sup> and Walter Fernald,<sup>9</sup> Spaulding,<sup>10</sup> Healy,<sup>11</sup> Bridgman<sup>12</sup> and others, which have shown that from thirty to nearly ninety per cent of the inmates of our institutions for delinquents and of prostitutes are defective, and to recall Goddard's comment<sup>13</sup> that "the more expert is the examiner of these groups, the higher is the percentage of feeble-minded found."

It is somewhat apart from the special subject of this paper to report individual cases showing the mental status of these delinquents. The papers presented to the Boston Society of Psychiatry

<sup>8</sup>G. G. Fernald. American Journal of Insanity, April, 1912. In a personal letter he writes. "The last figures (at the Massachusetts Reformatory) were as follows, normal 45%, subnormal, 39% and those of segregation grade, 16%."

<sup>9</sup>W. E. Fernald, et al. Report of the Commission for the Investigation of the White Slave Traffic, so-called. Massachusetts House Document, No. 2281, Boston, 1914.

<sup>10</sup>Spaulding. Journal of Criminal Law and Criminology. v, 704, Jan., 1915.

<sup>11</sup>Healy. The Individual Delinquent.

<sup>12</sup>Quoted by Goddard. Feeble-mindedness. p. 8.

<sup>13</sup>Goddard. Op. cit. p. 8.

and Neurology by Drs. Beckley<sup>14</sup> and the two Fernalds<sup>15</sup>, and Healy's recent work have already made us familiar with the characteristics of such persons. It is also hardly necessary to call attention again to the fact that both the imbecile and the moron may show varying degrees of intelligence, and consequently variable appreciation of the nature and consequences of their acts and varying powers of self-control. Goddard<sup>16</sup> has made an industrial classification of the inmates of the Vineland Training School which seems of practical value. He classifies them by their mental age as determined by tests, making thirteen grades, one for those whose mental age is under one year and one for each year after, up to twelve. Three grades are allotted to the idiot, five to the imbecile and five, with mental ages from eight to twelve, to the moron. A more meticulous classification could probably make fifty-seven varieties out of each one of these, each showing some slight differentiation. The essential point, however, is this, that the moron of the lower mental age is incapable of doing the same work or acting in the same way as the moron of a higher mental age. Goddard<sup>17</sup> has justly said of these unfortunates that people in general have assumed that they could act like normal persons if they would, but have not recognized that they were fundamentally incapable of so doing. Some acquaintance with the real nature of such persons has of late been evident in the minds of the general public. The "defective delinquent" is talked about and the possibility of his existence is admitted, but it is only in a few communities and only when his offenses are of a minor order that the law has taken any cognizance of his peculiarities as tending to lessen his responsibility.

There is, however, another and still larger class in the community, with which we are only too familiar, but which is not recognized and clearly differentiated. Tredgold,<sup>18</sup> in his classification, gives one as the lowest grade of mental development among the normal (i. e., non-defective) population, the condition of mental dullness, the dullards. He estimates that the dull and backward children comprise about ten per cent of the public school population, while Goddard<sup>19</sup> found fifteen per cent backward and three per cent actually defective in 2,000 American school children.

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<sup>14</sup>Beckley. Boston Medical and Surgical Journal, April 8, 1915.

<sup>15</sup>W. E. Fernald. American Journal of Insanity. April, 1909. G. G. Fernald. Art. cit.

<sup>16</sup>Goddard. Op. cit. p. 581.

<sup>17</sup>Goddard. Op. cit. p. 5.

<sup>18</sup>Tredgold. Mental Deficiency. 2d Ed. p. 383, Table p. 464.

<sup>19</sup>Quoted by Tredgold. Op. cit. p. 383.

Even if we have never tried to teach school we know the dullard only too well in daily life and we constantly recognize the truth of Schiller's line—

*“Mit der Dummheit kämpfen Götter selbst vergebens.”*

It is, of course, pathetic when a mother insists that if you would only cut the fraenum of her idiot child's tongue because it is tongue tied and if it could only talk it would be all right because it is brighter than most children, but it is often a tragedy to see the money and effort wasted in educating a boy who is hopelessly stupid, in trying to make a lawyer or a doctor out of a youth who has aspirations but no brains and is just capable of working for the city. We are ready to admit that by no effort can a myope ever make a lookout man, or a Daltonist ever be a great artist in color; we will perhaps allow that no gymnastic training can make a boy a Sandow, or that even the best musical training will not necessarily produce a second Paderewsky or Caruso, but we still have faith that “education” ought to make any child intelligent.

Paton,<sup>20</sup> however, has lately shown in his investigations of the development of the nervous system that structure precedes function, and that without structure it is impossible to hope for the performance of the function. The dullard is a dullard because he is incapable of anything else. He may, like the idiot savant, show a remarkable capacity in some special line, but he can take only the humblest part in the work of the world. He may lead the simple life without exhibiting his stupidity to any alarming degree, but he will write himself down an ass if he tries to deal with any of the more complicated problems of life. As Binet<sup>21</sup> has said, “A French peasant may be normal in a rural community but feeble-minded in Paris.”

Although the dullard is only too familiar to us in every walk of life, comparatively little has yet been done to demonstrate the true nature of his condition. Tredgold<sup>22</sup> puts him among the normal population, and he is so far normal that he can “maintain existence without external support” (Tredgold's criterion), so that he may get on without special remark on a low intellectual plane of existence. The teacher notes his dullness with a feeling akin to despair, but if the dullness is not so great as to put him in the moron class the physician may never be consulted. Goddard's highest class of morons have a mental age of twelve years, but there are many in the community maintaining their own existence, whose mental age is fourteen, sixteen or more, who perhaps show pronounced ability in some special line, but they are incapable of further advance and of

<sup>20</sup>Paton. Trans. Amer. Neurol. Assn., 1915. Unpublished paper.

<sup>21</sup>Quoted by Goddard. Op. cit. p. 573.

undertaking any complicated intellectual task requiring good initiative and good adaptability. Such a one is often a useful person and like Branca d'Oria, "*mangia e bene e dorme e veste panni*," but he can never reach the average mental plane of his fellow men.

We meet hundreds of such cases every year, not only in the hospital clinics but possibly in private practice. They come to us for headaches and indigestions, coughs and rheumatisms, but we are apt to overlook their mental condition and, instead of making a clinical study of their mental dullness, we fight hopelessly against it in the effort to make them understand that lying on the back does not mean lying on the belly, or that corned beef and cabbage is not the ideal food for the lately weaned child. It may be that some time in the future the school physician, whose attention must often be called to the fact that the child is unable to keep up with the rest in his school work, will undertake a study of such cases and will point out the clinical manifestations which may serve to distinguish them. Pathologically, too, little is known of them, but from the cases which occasionally become available for special study, it is safe to assume that the various factors—heredity, brain injury, intoxications and infections—which are of such importance in the aetiology of feebleness of mind or imbecility, may have a similar but less damaging action in producing these conditions. It is certainly not an extravagant assertion to say that mental dullness in many cases, if not in all, is due to some definite pathological change in the brain.

In dealing with all these folk—the insane, the idiot, the imbecile, the moron and the dullard—we are dealing with persons incapable, by reason of disease or malformation of the brain, of attaining the normal mental plane of healthy persons; they can not be educated beyond a certain amount, most of them cannot maintain existence without external support, or take any independent position in the social structure. Incapable of, but not unwilling to fulfill the duties of the average citizen, they can hardly be held fully accountable for their failure to do so. They are seldom profitable workers. They can earn little, and are the first to be discharged in time of stress. They have little foresight and make no provision for the rainy day. Hence, if they do not actually steal, they readily become beggars and tramps. They are easily influenced by their environment, and, if circumstances favour, readily resort to drugs and alcohol. Their self-control is too weak to resist their sexual desires. In a word, they yield to all the evil influences of life, and form a very large proportion of the alcoholics, drug "fiends," paupers, tramps, prostitutes, ne'er-do-wells and criminals of all but the higher class. Lack

<sup>22</sup>Tredgold. Op. cit. p. 3.

of intelligence alone keeps them from certain crimes which require high intelligence for success. They have little capacity to recall past recollections and thus yield to the impulse of the moment. They cannot initiate or plan, and what work they do is either of the simplest or is carried out successfully only under supervision.

It is rather late in the day to try to argue, as was once the fashion, that those unfortunates could do better if they only would, that they prefer idleness, theft, debauchery and drunkenness, rather than to live a decent, well ordered life. It was the argument of the old-time Calvinistic theologian, that the human heart was deceitful above all things and desperately wicked, and that Satan was ready to allure every man into sin. In spite of his doctrines of total depravity and the imputation of Adam's sin, even in spite of his belief in predestination, he insisted on the wilful iniquity of the sinner, who might, if he would, triumph over all the evils of the world, the flesh and the devil. Thus the greatest of New England's theologians once wrote,<sup>23</sup> "Every act of the will whatsoever is excited by some motive. \* \* \* There is no such liberty in the universe as Arminians insist on. \* \* \* The acts of the will cannot be free unless they are necessary and yet cannot be free if they be necessary." But he also wrote,<sup>24</sup> "If you will not come to a determination, how just will it be, if God shall wait no longer upon you, if he shall, by his unalterable sentence determine the case himself." The decay of faith, beside removing the contradictions in Jonathan Edwards' theology, has brought greater charity. Today we are inclined to say with Omar—

"Thou wilt not with predestined evil round  
Enmesh, and then impute my fall to sin,"

and the "predestined evil" certainly has much to do with the case of these unfortunates. The genealogical tables of the Jukes, the Nams and the Kallikaks show us an heredity compelling its victims to a doom as inevitable as that of Oedipus. Repeated experiments and repeated educational efforts have shown the hopelessness of their condition, that they are physically incapable of mental progress by reason of malformation or disease of the brain, just as the blind man is incapable of sight by reason of malformation or disease of his eyes. Individuals vary; they are like defective bars, each of which gives way under its own breaking weight, two, five, ten, twenty or fifty pounds, as the case may be, but each giving way under a breaking

<sup>23</sup>Edwards. A careful and strict inquiry into the modern prevailing notions of that freedom of the will which is supposed to be essential to Moral Agency, Virtue and Vice, Reward and Punishment, Praise and Blame. Works V. 101, 116, 157.

<sup>24</sup>Edwards. The Unreasonableness of Determination in Religion. Works VII, 437.

weight much less than is required to break a sound bar of the same dimensions.

Thus far probably all will agree, namely, that there is a large class of the mentally defective—insane, feeble-minded or dullards—who, by reason of their diseased or malformed brains, are incapable of sufficient control of their actions to permit them to take an independent or active part in the social economy, although they may be able to do useful work under direction; but their mental capacity varies greatly in the different individuals of the class, so that the estimate of responsibility for his conduct must be made for each individual, after careful study of the degree of his defect, and can not be regulated by any one general requirement or any one opinion of the courts.

Beyond this point, however, when we come to deal with the man who is mentally normal, we enter upon the old and still unsettled theological controversy as to that "untenable fiction<sup>25</sup>" of the freedom of the will. The scientific observer usually holds that human actions are controlled by as definite and fixed laws, could we but discover them, as are chemical reactions or physical phenomena, and many of the philosophers agree. The ordinary man, however, although he recognizes that mankind in general is irresistibly swayed by certain motives, and that the novelist or dramatist is in error, if he makes his characters act in a way not in accordance with such motives, firmly maintains that he himself can do whatever he desires, ignoring the point raised by Herbert Spencer<sup>26</sup> that his desires are directly influenced by certain definite laws. With his views, theologians—even the followers of Calvin—legislators and jurists agree, for a recognition of the absolute determinism of human actions would, in their minds, "break up the whole plan of salvation." It is perhaps unnecessary, however, to attempt to discuss this phase of the question, since discussion has thus far led nowhere, but "*stare contenti al quia*." There is much field for consideration in the problems raised by the question of responsibility with these defectives, and much room for reform in our methods of dealing with them when they become delinquent, without venturing upon the field of metaphysical speculation or theological controversy.

How has society, under the guidance of the law, dealt with this large class of defectives who form so great a percentage of those who have committed crimes? As long as the madman was regarded as possessed of the devil and left in the hands of the priest or the

<sup>25</sup>Aschaffenburg. *Allgemeine Symptomatalogie der Psychosen*. Handbuch der Psychiatrie. Allg. Th. iii, 380.

<sup>26</sup>Spencer. *Principles of Psychology*, i, 500.

exorcist, or treated by the dark house and the whip, his affliction was hardly regarded as an extenuation of his crime. Since then the jurists have tried to make a sharp line of division between the insane who are irresponsible, and those other insane who were wholly responsible, and have brought forward various criteria of insanity, from the inability to distinguish between right and wrong, in England, through the various ruling decisions of the different states in this country, to the simpler and more intelligent regulations, with a recognition of partial responsibility, of France and Italy. Sharp lines of demarcation are seldom satisfactory or feasible—even the division of animals into male and female has to encounter the problem of the hermaphrodite—and the judicial line of division has left many insane to be regarded as wholly responsible and has led to many “judicial murders,” such as those of Bellingham, Guiteau and Shortis. This has led to various interpretations of these same decisions which have distorted the manifest meaning of the words into something quite different, just as certain advanced theologians have maintained their orthodoxy by interpreting the “lake which burneth with fire and brimstone” as a pleasant summer resort near a sulphur spring.

It may have been in Laputa or Erewhon that visual instead of mental incapacity was made a defense against a criminal accusation. In that event the judges probably first decided that a man was not legally blind unless he was unable to distinguish between light and darkness. If he could do that he had no visual incapacity, but could be punished for running by railway signals or for similar offenses, just the same as the man who had 20-20 vision. In course of time the criteria grew less stringent in various states; some regarded him as blind if he could not do better than count fingers at four feet, others if he had only 5-200 or 10-200 vision; the more enlightened states perhaps held him responsible if his vision was over 20-200; none were ready to admit that a man with 20-50 or 20-30 vision could not see everything as distinctly as the man with 20-20 vision, and therefore could not be blamed for any lapse.<sup>27</sup> Fantastical as this may seem it is exactly parallel with the legal way of considering mental incapacity. The judges hold to a fixed standard and reject any incapacity above that standard; only when a person is “legally insane,” that is, insane enough to be below that standard, can he receive any consideration on account of his mental incapacity. No matter how “medically insane” he may be he is fully responsible.

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<sup>27</sup>Only a few days after writing this paragraph I received the proceedings of the Royal Society of Medicine for January, 1915, containing a discussion on the necessity for an exact definition of blindness—naturally not as absurd as the above paragraph assumes.

It is true that a beginning has been made toward a better method of procedure. The movement in Massachusetts toward a more intelligent consideration of the question of "defective delinquents," the work of the juvenile courts, the gradual education of the public by the discussions of the peril of the feeble-minded and the like, are leading to a better understanding of the whole vast problem of crime. Nevertheless, in spite of the interest that has recently been awakened in the subject and the few bits of creditable work that have been done, this country is far behind in the study of criminology the other leading countries of the world, except England, just as our ruling decisions are, for the most part, far more antiquated than those of any other country, except England, which is still dominated by the opinion of the judges in the MacNaughten case, the most benighted of all the decisions still in effect. The recent innovations in regard to defective delinquents, however, are hardly in accord with ruling decisions, as is at once manifest when the defective is accused of murder instead of petty larceny. The question of whether the accused was "medically" or "legally" insane at once comes to the fore. The jury is solemnly instructed as to the ruling decision in the case without any qualifying interpretations, and, if the ruling interpretation be sufficiently mediaeval, another "judicial murder" is committed. This was fairly well shown in a recent murder case tried in Worcester, Mass. The accused, Daniel Cooper, was found guilty of murder in the first degree, for shooting Alfred Bradish, both men being alleged to be the paramours of a Mrs. Balcom. An incomplete inquiry into Cooper's heredity showed a family tree worthy to be put by the side of those of the Jukes and Kallikaks. Three experts for the government and three for the defense argued and testified that the man was mentally defective, although, according to the decision in the Rogers case, all of them admitted that he was not "legally insane." The man's apathy in regard to everything in life and to the immediate prospect of the chair, and his intense interest in everything touching upon his sexual relations with Mrs. Balcom were in striking contrast. A seventh expert, called in later, came to the same conclusion as the others. Nevertheless the jury were duly instructed that the man was "legally sane" and thereby fully accountable, and the Supreme Court<sup>28</sup> upheld the instruction. The pardoning board agreed and the Governor's Council was divided. At last, by the decisive vote of the weakest member of the Council, his sentence was commuted to life imprisonment.

Whether we admit or not that the opinions and actions of all men

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<sup>28</sup>Massachusetts Reports, v. 219, p. 1.

are subject to as definite a determinism as are liquids under the law of gravitation, and that we are but "impotent pieces of the game He plays," there is little doubt but that the majority of criminals are mentally defective and that their criminal acts are simply the manifestation of their tendency to gratify certain natural desires, undeterred by the fears and restraints of the normal man, and that they are mentally incapable of duly appreciating those restraints and fears or of being controlled by them. Accepting this fact, can it be said that our methods of dealing with crime are satisfactory?

The old ideas of vengeance and retaliation which once dominated the treatment of the criminal have little influence except in the court of Mr. Justice Lynch, and the ideas of punishment as retribution for moral guilt are passing away. The chief justification for punishing the criminal today is that it is a measure of social defense. The prospect of inevitable punishment is supposed to deter him from committing an act detrimental to the social welfare, or prevent him from committing subsequent acts. As a matter of fact it does neither. In a few cases, if a criminal be put to death, or confined for the rest of his life, it is effectual. If he be given a definite sentence of imprisonment for a fixed term, the usual result is that, with his defective mentality, he is a ready subject for further training in crime, and is sent out a far worse and more dangerous criminal than before, or at least, being handicapped for useful work by the stigma of imprisonment and untrained for any skilled labor, he continues to commit petty crimes for which he alone has the ability, and becomes the prison rounder or the tramp. Even the imbecile learns not to put his finger in the flame because it will inevitably get burned, but the defective delinquent can not learn a similar lesson because the chances that he will not be punished are the greater. Thus our present method of punishment is usually futile.

I have often wondered why the Mikado (Gilbert's, not Mutsuhito or Yoshihito) looked upon his "object all sublime" of "making the punishment fit the crime" as an affair of future attainment, whereas it is the foundation of English and American penology. The punishment, however, should fit not the crime but the criminal; just as the object of medical treatment is not the disease but the patient. Only by the scientific study of the individual criminal, together with all the circumstances of his crime, can the full knowledge of the motives for his act, his understanding of the deed he has committed, and his future development be attained.

The old penal code of Draco, which prescribed death as the punishment for every offense, although revolting to the modern sentimental attitude toward the criminal, did, if it were ever carried into

effect, act as a measure of social defense. Under it no question could be raised as to recidivists or to sterilization of criminals. Our modern methods, however, are of less avail. If the delinquent does receive a sentence, the working out of that sentence is of little value in protecting society. He is kept for a time under conditions which tend to make him a greater delinquent than before, and then he is turned loose to practice his newly acquired knowledge on the community. The inefficiency of the police may prevent his detection for his next offense; the chicanery of the law may prevent his conviction, and a shrewd appeal to the sentimentality of the public may secure either a light sentence or a speedy pardon, so that his prison sentences often serve as pleasant vacations at the State's expense between the times when he works. The success of our penal methods may be shown by the fact<sup>29</sup> that in 1910 in England 104,171 out of 168,260 convictions were for at least the second time, and 12,133 had been previously convicted over twenty times apiece, and by the 280 commitments of Jane Cakebread.

Since our present penal methods do not seem to give any very encouraging results, and since in spite of the judicial decisions as to responsibility, it hardly seems fair play to subject to full and complete punishment the man who is mentally incapable, what is there to be done? Any criticism or suggestion of a change in legal procedure inevitably meets with the outcry from the legal profession that the palladium of our liberty is imperiled, and we are threatened, to use the words of a fair but frail nun to a young novice, another mistress of her diverting but graceless lover, Jacques Casanova de Seingalt, with "*l'excommunication du Saint-pere de damnation eternelle et autres bagatelles pareilles.*"<sup>30</sup>

Our present method of determining the mental responsibility of a delinquent by the testimony of medical experts of more or less intelligence, who get no chance to give a frank opinion or tell the whole truth, but who answer such specious and confusing questions as counsel may put to them, by the decision of a body of twelve men of limited intelligence who have been skillfully influenced by the attorney's appeals to sympathy or prejudice, and by the decisions of dead-and-gone judges whose opinions were ridiculous when first given and are still more absurd in the light of our present knowledge, is hardly one that appeals to anyone but a lawyer. The commission of physicians which sometimes proves of service, is often condemned by attorneys on the ground that the accused is entitled to the decision of a jury on all points, including his mental status. Nevertheless,

<sup>29</sup>Healy. Op. cit. p. 10.

<sup>30</sup>Casanova. Memoirs ii, 473.

if every delinquent were subjected to a mental examination by a single competent expert or by a commission of experts before his trial, there can be little doubt but that the percentage of mental defectives would be as great as has so often been found among criminals after their trial and sentence. It is a method which is sometimes employed in capital cases and is in frequent use in our juvenile courts. If such a custom were universal, in dealing with adult as well as juvenile delinquents, what would be the result? It is probable that many murderers would escape the extreme sentence of death, but the lesser delinquents would be put under much more protracted restraint than they are now. If the mental defect were determined, as it would be in many cases, the experts could decide upon the degree of defect and the accountability of the delinquent. Every case would receive careful study and the proper treatment could be readily determined. If the delinquent were mentally defective, he could be placed under suitable surveillance for the rest of his life, and not be set at liberty in a year or two to return to the criminal life. He could be kept under oversight and put in some position where he could do productive work under proper guidance and direction. If his tendencies proved too dangerous to the social regime, he might be kept in closer restraint in some institution. Under proper treatment he might be given larger and larger liberty, and gradually become independent and self-supporting. He would never be given such freedom that he could again prey on the community or reproduce his kind. It would mean a very formidable task for the State to undertake such care and management of so large a number of persons, but it would mean a corresponding reduction in the expense of dealing with criminals, and the results of such undertaking would lead to better results than our present penal methods.

Such a scheme is of course Utopian and would meet with much opposition, especially on the part of the legal profession. Only until they are educated to accept more modern views—some months after the Greek Kalends—would it seem possible to win acceptance for such a project.

"Now I saw in my dream that at the end of this valley lay blood, bones, ashes and mangled bodies of men, even of pilgrims that had gone this way formerly; and while I was musing I espied a little before me a cave where two giants, Pope and Pagan, dwelt in olden time, by whose power and tyranny the men, whose bones, blood, ashes, etc., lay there, were cruelly put to death. I have learned since that Pagan has been dead many a day, and as for the other, though he be yet alive, he is, by reason of age, and also of the many shrewd brushes that he met with in his younger days, grown so crazy and

stiff in his joints that he can now do little more than sit in his cave's mouth, grinning at pilgrims as they go by, and biting his nails because he can not come at them."

The giants in the way of the pilgrims of criminal reform today have not yet fallen into that state of innocuous desuetude of Bunyan's giants. Giant Priest, it is true, can do but little in the way of dictation as to the course of modern criminology, but there are other giants, stiff in their decisions, which are sometimes crazy, but not stiff in their joints, who are a menace to every pilgrim of reform who comes their way.