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Criminal Responsibility of the Insane and Feeble Minded

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CRIMINAL RESPONSIBILITY OF THE INSANE AND FEEBLE MINDED

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It is the theory of some philanthropists and insanity experts that a criminal offence is always a symptom of mental disease. According to their theory only the innocent could ever be punished. If a man robs or kills, the fault is not his; he is the victim of an hereditary taint or of his unfortunate environment, to be pitied, but not to be blamed or punished. Such ultra-pacifistic condonation of all crime unfortunately prejudices many practical persons against much needed reforms, such as the discriminating use of psychological tests of mental deficiency to guide our dealings with delinquents, young and old.

In nearly every capital charge when other defences appear hopeless, insanity is put forward as a last resort. The apprehension of abuse and fabrication of the plea of insanity, like that of drunkenness, reacts on the law to make it restrict the defence where theoretical justice would demand it. A majority of jurisdictions thus refuse to recognize uncontrollable impulse as a defence, unless the defendant was unable to distinguish right from wrong.[2] In 1911 a committee of the New York Bar Association recommended the statutory abolition of the defence of insanity, and drafted a proposal that insanity at the time of the act, regardless of the condition at the time of the trial, should be ground for confinement in an asylum for the criminal insane for a definite period.[3]

In the State of Washington in 1909 a statute was enacted, that it should be no defence in criminal cases that the defendant was unable by reason of his insanity, idiocy or imbecility, to comprehend the nature and quality of the act committed, or to understand that it was wrong or that he was afflicted with a morbid propensity to commit the act. This statute was held unconstitutional, because it takes from the jury the question of criminal intent, thereby violating the "due

[1]Dean of the College of Law. University of Illinois (Urbana), an address delivered at the meeting of the Illinois State's Attorneys' Association.

[2]*Smith* v. *Mississippi*, 95 Miss. 786, 49 So. 945, 27 L. R. A. (N. S.) 1461, note; Ann. Cas. 1912 A, 36 n. Compare *Hankins* v. *State*, L. R. A. 1918 D, 794 note.

[3]New York State Bar Association Reports, Vol. 33, p. 401; Vol. 34, p. 274, 278. 2 Jr. Crim. Law and Criminology, p. 531.

process" and trial by jury clauses, on the question of whether the mental element required by law was present.[4]

By the Trial of Lunatics Act (1883) in England, if at the trial for any offence, the evidence indicates that the defendant was insane, the jury must find specially that he was guilty of the offence charged, but was insane at such time. If they so find, the court is to order him kept in custody as a criminal lunatic until further order. The Act abolishes the verdict of acquittal on the ground of insanity and substitutes a special verdict. This prevents the plea of insanity from being set up upon any but capital charges.

In spite of the disrepute of insanity pleas and insanity experts, it is likely that there are many more insane, defective and irresponsible persons who are unjustly convicted of crime than there are guilty persons who succeed in escaping by pretended insanity. It requires a good actor to feign insanity, whereas there are common varieties of mental disease which may escape ordinary observation. This is shown in the Tenth and Eleventh Annual Reports of the Municipal Court of Chicago (December 1915 to December 1917), much of the space of which is given to the work of the psycopathic laboratory under Dr. William J. Hickson. The report of the laboratory is based on studies of 4,486 cases for mental abnormalities.[5]

Dr. Hickson's report emphasizes the wide prevalence of feeble mindedness among delinquents. Classified statistics are given with regard to offenders referred to the laboratory by the various criminal branches, showing the mental level of the offenders examined and the conditions of arrested development or insanity found. Among those examined were a certain number of average intelligence (p. 258). Below these come the so-called *"Sociopaths"* of different grades, ranging from a mental age of 12 to 15 years. Below these come the *Morons;* the high grade morons ranging in mental age from 9 to 11 years; middle grade morons from 8 to 9 years, and low grade morons from 7 to 8 years. Below the morons fall the imbeciles, who correspond with children 4, 5 and 6 years old; lastly, the idiots, who correspond with children not over three years of age.

Mental defectives fall into two great classes, viz., Amentia and Dementia; those with *"intelligence defect,"* subdivided into idiots and imbeciles, morons, sociopaths, and those suffering from paresis, senile

[4] *Strasburg* v. *State* (1910), 60 Wash. 106, 110 Pac. 1020, 32 L. R. A. (N. S.) 1216, 2 Jr. Crim. Law, p. 521, 529.

[5] A popular exposition of this report is given by Herbert Harley, in the Journal of the American Judicature Society for October, 1918 (Vol. 2, p. 69, entitled, "Understanding the Criminal").

dementia and the effects of alchohol and narcotics; *and secondly,* those with *"affective defects"* under which are included the insanities, such as dementia praecox, the progressive, incurable decay of the mind often showing itself in early youth. Dementia praecox is divided by Dr. Hickson into a number of varieties (p. 142), paranoid, katatonic, hebephrenic and schizophrenic.

Dr. Hickson employs extensions of the Binet-Simon and other intelligence tests, not only to evaluate intelligence *per se,* but also to diagnose the various disturbances of the intelligence function and differentiate the various psychoses, such as the different forms of dementia praecox, manic depressive insanity, hysteria, etc. (Report, p. 277). If these results prove reliable, this extension of the intelligence tests for differential diagnostic purposes in psycopathic cases is a remarkable achievement.

The feeble minded question is important, but not so important as the praecox. Dementia praecox is often found combined with feeble mindedness, and this combination results in a type of disorder designated by Dr. Hickson by the horrible name of *"Pfrophfhebefrenia."* This is a dangerous criminal type inclined to such crimes as homicide, robbery, rape, and sexual offences. In general dementia praecox may be regarded as an active instigator in contrast to feeble mindedness, which may be regarded as a passive instigator of crime, destroying the capacity for inhibition. Idiots and imbeciles exhibit early their mental defect and are easily detected, but the moron and the dementia praecox case whose mental defect appears later, are the dangerous types in need of expert attention, as the others are too low mentally to be dangerous.

Dr. Hickson criticises our present legal test of criminal responsibility in relation to mental disease on page 137 of this report. He says:

> "The right and wrong test, which is the legal criterion of mental responsibility, was promulgated in 1843 (McNaghten's case). It is applicable to but a few diseases, and these must be in such outspoken form in order to be applicable that the individual is incapable of perpetrating most any of the ordinary crimes; therefore this law, if rigidly interpreted, nullifies itself. The conditions to which it would apply would be those in which intelligence defect is primarily involved, such as 'paresis,' 'senile dementia,' 'feeble mindedness'; thereby omitting the large group of insanities in which the affective or emotional sphere is primarily involved, and the intellectual only secondarily. Most of the continental criminal codes are so drawn up as to include the affective or emotional insanities."

It is generally recognized that mere mental weakness or disorder, feeble mindedness, degeneracy, moral depravity, or even insanity, do not exempt from punishment where there is capacity to know that the

act is wrong.[6] The tests of criminal responsibility generally adopted in this country are (1) the right and wrong test (a) in the abstract, (b) as regards the particular act, and (c) as regards moral or legal wrong; and (2) the irresistible impulse test. The Supreme Court of New Hampshire denies the utility of any specific legal test, and leaves it to the jury as a question of fact whether the crime was the product of mental disease.[7] Another test which has been suggested is capacity to conceive the specific intent which constitutes one of the elements of the particular crime.[8] Delusion is not recognized by English or American courts as a special test, but is simply one form of aberration which destroys knowledge of right and wrong or creates mistakes of fact.

The right and wrong test may be applied in such a way as to convict almost any one except a total idiot or a raving manic, or in such a way as "to allow very considerable fish of the malefactor species to escape from the judicial net."[9] Juries exercise the actual, albeit unauthorized, power to mitigate the rigors of the law by refusing to convict and by dealing with cases according to what they feel to be right and just. It is desirable, however, for the law to formulate intelligently what it is driving at.

A committee of the American Institute of Criminal Law and Criminology has devoted much study to the problem of determining the relation of insanity to criminal responsibility. This committee was composed of four physicians and five lawyers, with Prof. E. R. Keedy of the University of Pennsylvania as Chairman. This committee after several years of study, reported a bill providing a test for determining criminal responsibility when the defence of insanity is raised, and a method for taking expert testimony.[10]

The test adopted in the proposed bill provides that the accused's mental disorder shall be a defence when "by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged." The bill does not attempt to define what is meant by *"the particular*

[6]16 Corpus Juris, 99; *Rogers* v. *State*, 128 Ga. 67, 10 L. R .A. (N. S.) 999, note; *People* v. *Spencer*, 264 Ill. 124; *Commonwealth* v. *Wireback*, 190 Pa. 138, 42 Atl. 542.

[7]*State* v. *Jones*, 50 N. H. 369, 9 Am. Rep. 242.

[8]Bishop "Criminal Law" sec. 381; *State* v. *Peel*, 23 Mont. 358, 75 A. S. R. 529. Keedy, 30 Harv. Law Rev. 585.

[9]F. W. Griffin, "Insanity as a Defence," Journ. Crim. Law & Crim. II, No. 2, July, 1910, p. 18.

[10]Journal Cr. Law and Crim., II. p. 521. This bill is discussed in a learned article by Prof. Keedy in the Harvard Law Review, XXX, pp. 535 and 724 (1917).

state of mind that must accompany such act." If this refers to the *specific intent,* then the proposal adds nothing to the existing law but subtracts from it. This would be the same as the present harsh rule in regard to intoxication.[11] Drunkenness or even temporary insanity produced by voluntary intoxication which renders a person unconscious of what he is doing, furnishes no excuse, except to negative specific intent.

If on the other hand *"the particular state of mind"* includes a mind that is sufficiently sane to be held accountable (in other words, *general intent*), then the proposed test comes down to the absurd truism that no person shall be convicted who by reason of mental disease did not have the proper degree of rationality that must accompany the act in order to constitute a crime. This simply begs the question and travels in a very small circle. As the Supreme Court of Illinois said in *Chase* v. *People,*[12] "Sanity is an ingredient in crime as essential as the overt act, and if sanity is wanting, there is no crime." The proposed test sheds no light whatever on the vexed question whether irresistible impulse destroys responsibility.

The excuse of insanity cannot be confined to absence of specific intent.[13] Take murder, for example; the specific intent would certainly be supplied by an intent to kill or to do grievous bodily harm. A raving maniac intentionally kills his keeper. How does the proposed test help to determine his responsibility? Insanity may not negative the specific intent to kill any more than intent to rape or to forge; yet it may negative "general intent," or *mens rea,* which includes a morally accountable and punishable mind.[14] All the elements of the particular crime, including the specific intent, may be present, but not the general conditions of criminal responsibility, which are the same for all crimes. This is the great difference between insanity and voluntary intoxication as a defence. Intoxication is no excuse except when it negatives specific intent, whereas, insanity affords an excuse even where the specific intent may be present. Prof. Keedy, in his article and report, practically ignores the subjective conditions of *general intent* as contrasted with the variable *specific intent.*

It is surprising to find so much confusion and uncertainty in the authorities on the most fundamental principle of the criminal law, that

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[11]*Upstone* v. *P.*, 109 Ill. 169; *Cheadle* v. *State* (Okla.), 149 Pac. 919; L. R. A. 1915 E 1031.

[12]240 Ill. 352, 358.

[13]Markby, Elements of Law, sec. 729.

[14]Stroud, Mens Rea, p. 18. Silas Alward, Mens Rea, 38 Canadian Law Times 646 (Oct., 1918).

every crime involves the joint operation of act and intent. The maxim is frequently quoted *"Actus not facit reum, nisi mens sit rea.*[15] This maxim has been said to be the foundation of all criminal justice.[16] The cases and text writers, however, fail to agree upon a clear cut, authoritative exposition of *mens rea.* In the great case of *Regina* v. *Tolson,*[17] Stephen, J., discusses *mens rea* but without his usual perspicacity. He seems to identify it with specific intent, which varies in different crimes. He denies that there is any such thing as a general criminal intent common to all crimes.

Wills, J., makes a statement in this same Tolson case, which more nearly represents the theory of the law. "It is, however, undoubtedly a principle of English criminal law that ordinarily speaking a crime is not committed if the mind of the person doing an act in question be *innocent.* * * * The guilty intent is not necessarily that of intending the very act or thing done and prohibited by common or statute law, but *it must at least be the intention to do something wrong.* That intention may belong to one or the other of two classes. It may be to do a *thing wrong in itself* and apart from positive law, or it may be *to do a thing merely prohibited by statute* or by common law, or both elements of intention may co-exist with respect to the same deed."[18] In other words a person must be blameworthy, in having either an anti-legal or anti-moral intention.

The point on which Justice Stephen apparently goes astray, is the difficulty of distinguishing motive from intent.[19] It is, of course, true that honest motives are no legal defence, where one consciously and knowingly violates the law, as in the case of anarchists and conscientious objectors.[20] Bad motive is not a necessary element of criminal intent. Conduct may be flagrantly illegal, and at the same time morally innocent or even heroic. But criminal intent, or accountable mind, involves the capacity to know the rightfulness or wrongfulness of the conduct, according to the law or the accepted moral standards of the community. This is the basis of the defence of mistake of fact, which is a defence not merely because it negatives specific intent, but also because it negatives guilt and the conscious choice of wrongful

[15]Broom's Legal Maxims, p. 256; 2 Pollock & Maitland, History of English Law, p. 474.

[16]Per Cockburn, J., in *Reg.* v. *Sleep,* 8 Cox C. C. 472, 477.

[17]23 Q. B. Div. 168.

[18]Beale's Cases, Crim. Law (3rd ed.) p. 237.

[19]See W. W. Cook, Act, Intent and Motive, 26 Yale Law Journal 645, 661.

[20]*Reynolds* v. *U. S.,* 98 U. S. 145; *U. S.* v. *Harmon,* 45 Fed. 414. Stroud, Men's Rea, p. 10.

conduct. According to *Reg.* v. *Prince,*[21] mistake of fact is no defence if the defendant knows he is doing an act immoral or evil in itself. Notwithstanding the mistaken belief there is a guilty state of mind.[22]

In the case of *Chisholm* v. *Doulton,*[23] Cave, J., says: "It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence, some *blameworthy condition of mind.* Sometimes it is negligence, sometimes malice, sometimes guilty knowledge, but as a general rule there must be something of that kind which is designated by the expression *mens rea.*" In other words, the general principle of the law is that a crime is not proved if the mind of the person doing the act is morally innocent. This involves knowledge of its wrongful or illegal character.

In *Sherras* v. *Rutzen,*[24] Wright, J., says: There is a presumption that *mens rea,* an evil intention, or a knowledge of the wrongfulness of the act is an essential ingredient in every offence."

In *Bank of New South Wales* v. *Piper,*[25] in the opinion of the Privy Council it is said: "The questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of *mens rea* in the accused, are questions entirely different, and depend upon different considerations. In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts, which, if true, would make the act charged against him innocent." This is a clear statement of the distinction between specific intent and *mens rea* in the sense of innocence or absence of moral blame. So in Hale's Pleas of the Crown, p. 42, it is said: "Ignorance of fact doth excuse for such an ignorance; many times makes the act itself morally involuntary."[26]

Prof. Keedy's proposed test would make insane persons criminally responsible for violating statutory prohibitions where no specific intent is necessary, and where fines are imposed as an incentive to compel persons to comply with the regulations at their peril. It is believed,

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[21]L. R. 2 C. C. 154 (1875), Beale's Cases, Cr. Law, p. 275, 280.

[22]Bishop, Stat. Const., sec. 490: Cp. D. Trowbridge, Calif. Law Rev. VII, p. 1; *Holton* v. *State,* 28 Fla. 303, 308: *Brown* v. *State,* 23 Del. 159, 74 Atl. 836, 25 L. R. A. (N. S.) 661; *Maguire* v. *People,* 219 Ill. 16.

[23]22 Q. B. Div. 736. Beale's Cases, p. 257.

[24](1895) 1 Q. B. 918, Beale's Cases Cr. Law, p. 260.

[25](1897) Appeal Cases, 383. Beale's Cases Cr. Law, p. 265.

[26]See also *Rex* v. *Ahlers* (1915), 1 K. B. 616, 625; Cp. C. Kenny, 31 Law Quar. Rev. 299.

however, that competent age, sanity and some degree of freedom from coercion are always presupposed in any case for criminality.

Prof. Keedy states,[27] "that the tests of irresponsibility now employed consist simply of a statement of certain mental symptoms, viz., inability to distinguish between right and wrong, irresistible impulse, and delusion, the existence of one or more of which is treated by the law as a defence. These symptoms," he says, "represent but a small portion of the phenomena of mental disease, and they bear no necessary relation to the ordinary legal rules for determining responsibility. They are simply obsolete medical theories crystallized into rules of law."

This appears to the writer to represent an absolute failure to understand the ethical basis of these rules of law, viz., that criminal responsibility rests upon moral accountability as in the case of children from 7 to 14. As pointed out by Somerville, J., in his notable opinion in *Parsons* v. *State*,[28] (probably the best exposition of the subject in the books): "There must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (1) capacity of intellectual discrimination; and (2) freedom of will." These are tests of responsibility in criminal cases because without such powers a man is not morally accountable.

Chief Justice Shaw's opinion in the famous case of *Commonwealth* v. *Rogers*,[29] is often quoted: "In order to commit a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if through the overwhelming violence of mental disease, his intellectual power is for the time being obliterated, he *is not a responsible moral agent* and is not punishable for criminal acts."

The right and wrong and irresistible impulse tests are, therefore, not based on obsolete medical theories or on arbitrary symptoms of insanity, but on the general conditions of legal responsibility. Insane persons, like intoxicated persons may have intent to kill, to set fire to houses, to steal, to rape, or to defraud; but the great question is whether the defendant is a responsible moral agent. Crime does not exist unless the actor can be regarded as morally responsible for his act. If not, he is not culpable and does not deserve punishment. As Stephen says, "Legal punishment connotes as far as possible moral infamy.[30]

[27] 30 Harvard Law Rev., p. 555.
[28] 81 Ala. 577, 2 So. 854; 60 Am. Rep. 193, Beale's Cases Cr. Law, p. 342.
[29] (1884) 7 Metc. 500.
[30] 2 Stephen "Hist. Crim. Law," p. 81, 91, 172, 183.

The general subjective conditions of criminality, presupposed as a general rule in addition to the particular state of mind, motive or intent included in the definition of various crimes, are then as follows: (1) competent age; (2) some degree of sanity; (3) freedom from overpowering coercion, and (4) a "punishable state of mind," i. e.,—some blameworthy form of intentionality, consisting either of intent to commit some crime or to do some serious wrong.[31] Gross or culpable negligence may in the case of a killing and perhaps of assault, take the place of intent to do wrong.[32] While a guilty mind or conscious wrong-doing is usually an essential ingredient of crime, yet this fourth element may be excluded in police regulations for the sake of practical enforcement, and persons may be held to act at their peril even where they labor under ignorance or mistake as to the circumstances and no intent to break the law or to do a forbidden act is proved. In such cases, a general correspondence between guilt and punishment will suffice.[33] This stringent rule of diligence or acting at peril, should clearly not be applied as against incompetent persons. *Mens rea,* or accountable mind to the extent of the first three conditions of criminality, is still required.

The doctrine of constructive intent, or criminal liability for the accidental consequences of attempts to carry out some criminal purpose, involves intent to do something wrong in itself. This is applicable only where the criminal intent is to do something *malum in se* and not where it is merely to do something *malum prohibitum.*[34]

The positivist school of criminologists, represented by the Italian writers Ferri, Garafalo and Lombroso, reject the postulate of the classical school embodied in our present law, that the basis of the right of punishment is an abuse of free choice or moral liberty. They are determinists and deny the freedom of the will. According to them, punishment should not be based on moral culpability. Physical imputability of the criminal act is sufficient to constitute penal accountability. For the positivists, every crime is the effect of irresistible forces, and is a mere symptom of its author's dangerous criminal tendency. Penal treatment should be governed by the characteristics of the agent, rather than by the gravity of the particular offence for which he happens to be prosecuted. Punishment should fit the criminal

[31]Cp. II Stephen Hist. Cr. Law, 91; Gen. View p. 68.

[32]See L. R. A. 1918 B, p. 954, note; L. R. A. 1917 D, 950, note.

[33]Tenement House *Dept.* v. *McDevitt,* 215 N. Y. 160; *Hobbs* v. *Winchester Corp.* (1910), 2 K. B., 461, 471.

[34]*Commonwealth* v. *Adams,* 114 Mass. 323; *State* v. *Horton,* 139 N. C. 588, Beale's Cases Crim. Law, p. 239; *Com.* v. *Mink,* 123 Mass. 422, Beale's Cases Crim. Law, p. 300.

rather than the crime. The justification of punishment is to be found in considerations of social defence. In fact all punishment as such, is unjust, since no action is good or bad, or worthy of praise or blame or repentance. The attitude of the law in dealing with crime should be the same as dealing with the insane.[35] The infliction of punishment is to be considered as a clinic designed to combat a social and individual malady, rather than the verification of a threat of retribution which hangs over wrong doers.

The positivist theory is neither practical nor convincing.[36] As a matter of metaphysics, the question of free will versus determinism may be worthy of speculative discussion, but for practical purposes the law must accept the common-sense postulate of free will upon which we all act. We assume in normal persons moral responsibility. They are acountable for their acts, and may justly be punished if they fail to control their conduct.[37]

In the case of *State* v. *Strasburg*,[38] an argument was made along the lines of the positivist theory. It was urged that the defence of insanity might be abolished now that the modern humane treatment of those convicted of crime practically removes them from the realm of punishment and places them in a position little different from the insane. The central idea upon which the whole fabric of criminal jurispudence was formerly built, was the idea that every criminal act was the product of a free will, possessing a full understanding of the difference between right and wrong, and full capacity to choose a right or wrong course of action. It was urged, however, that modern science shows that a dominant percentage of all criminals are not free moral agents, but as a result of hereditary influences and early environments are either mentally or morally degenerate, or their crimes are committed under the degenerating influence of intoxicating liquor. It is accordingly folly to punish, and further to debase the individual, as the element of free will is no longer to be taken into consideration.

These arguments were rejected by the Washington Court, which pointed out that the stern and awful fact still remains, that the status and condition in the eyes of the world and under the law of one convicted of crime is vastly different from that of one simply adjudged insane. The element of punishment still exists in our criminal law.

[35]Ferri, Criminal Sociology, p. 360, 362.

[36]See The Concept of Punishment, by Ugo Conti XIII Illinois Law Review, p. 234.

[37]See Responsibility and Crime, by E. S. Kite, Jour. Crim. Law & Crim., V, p. 63.

[38]60 Wash. 106, 32 L. R. A. (N. S.) 1216.

While it is true that punishment is largly an instinctive matter and various factors, social and individual enter in, yet it cannot be denied that it expresses the indignation and condemnation of society to an extent measured by the severity of punishment, which must be adequate to the shock which the offence gives to public feeling; otherwise mob violence may be resorted to. It must, therefore, be felt to be a just equivalent for what the offender has inflicted, and must consider the degree of moral guilt in the offender, not with misplaced tenderness but with discriminating severity. Insane persons are not punishable not only because punishment would not be beneficial to them but because it would not be just. In general, the justification of punishment is not to be found in its effects upon those whom it does not deter, but upon those to whom its threats may supply a motive of self-restraint. The capacity of distinguishing right from wrong is a test of responsibility, because without such power of discrimination there is no blame, and guilt determines liability to criminal punishment.[39]

In the case of children between 7 and 14, the test of responsibility is whether the child is capable of appreciating the nature of his acts and distinguishing between right and wrong.[40] Consciousness of guilt may be shown by hiding and concealment which evidence a capacity to discern between good and evil. Delinquency of a child on the other hand, is not regarded as guilt of crime, but indicates need for a change of custody for the protection of the infant and society, and not for punishment.[41]

We have thus far considered the theory and basis of the legal tests of criminal responsibility. It is necessary, also, to consider how they work out in practice. Is the knowledge of the right and wrong test a safe and satisfactory working rule? According to the leading authority, *McNaghten's case,*[42] the main test is: Did the accused at the time, know that he was doing wrong? If not, he cannot be convicted. How can this be directly proved to the jury? Dr. H. Oppenheimer suggests the following:[43] "Whilst the most definite proof should be required of the *existence* of mental disease, when once it has been established that the prisoner is a lunatic, the present pre-

[39]Markby, Elements of Law, sec. 730, p. 354; Kenny, Outlines Criminal Law, p. 37; Bishop, New Criminal Law, 8th ed., sec. 286; Ames, Law and Morals, 22 Harv. Law Rev. 97, 99.

[40]*R.* v. *Owen,* 4 C. & P., p. 236.

[41]*Juvenile Court* v. *State,* 139 Tenn. 549, 201 S. W. 771, Ann. Cases, 1918 D, 752.

[42]4 St. Tr. (N. S.) 847; 10 Clark & Fin., p. 200, Beale's Cases Cr. Law, p. 326.

[43]The Criminal Responsibility of Lunatics, p. 253.

sumption of law should be reversed; and those proved to be of unsound mind should be assumed until the contrary be shown, *not* to know the nature and quality of their acts and that that which they were doing was wrong." Thus it need not be positively proved that defendant was not able to distinguish right from wrong, or that his ignorance extended to the very act of which he is accused. If the evidence exhibits morbid impulses; if the will is weakened; if the intelligence is of low grade; if there are delusions, obsessions, or other symptoms of mental disease, this evidence may raise a presumption of such disturbance of the mental and volitional faculties as to exclude intelligent choice of conduct.

According to one of the rules of *McNaghten's* case, if the accused is subject to partial insane delusions, or monomania, he is to be treated as if his delusions were true. Thus if A kills B, the result is; (1) if A did not know that he was doing wrong, he cannot be held accountable; (2) if A thought that B was about to do him grievous bodily harm, A is not guilty, for assuming the delusion to be true; A is simply acting in self-defence; but (3) if A knew he were doing wrong, or (4) if A acted under some delusion which, if true, would not have justified his act, *e. g.*, that B had been intimate with A's wife; in both these cases A would be guilty of murder.[44] The delusion would, however, be available as evidence that A did not know that he was doing wrong, even if its truth would not create such mistake of fact as to justify the act.

If A kills B knowing that he is killing B, and knowing that it is illegal to kill B, but under the insane delusion that the salvation of the country or of the human race will be obtained by getting himself executed for the murder of B, and that God has commanded him to get himself sacrificed in this way, his action under this delusion will not be punishable, if knowledge of right and wrong refers to moral wrong rather than to conscious illegality. Our analysis shows that moral wrong is the test which should be adopted and this has been so held in New York.[45] Thus one acting under the insane delusion that God has appeared to him and ordered the commision of a crime by him, is not guilty, although he knows his act to be contrary to law, because he is incapable of understanding the wickedness of his deed and is not morally responsible.

McNaghten's case, however, seems to hold that in the case of partial delusions or monomania, guilt should be made to depend on

[44]Thwaite's Guide to Crim. Law & Proced., 9th ed. p. 20.

[45]*People* v. *Schmidt* (1915), 216 N. Y. 324, 110 N. E. 845, L. R. A. 1916-D, 519, 527.

whether the delusion was such, that if things were as he imagined them to be, he would be legally justified in the act. This idea has been much criticized on the ground that there is no such thing as partial insanity, and that one cannot be affected with insane delusions on one or more particular subjects without affecting the entire mind. If one screw is loose, the whole machine is affected. Accordingly the Supreme Court of Colorado has held that hallucinations, delusions and paranoia may relieve from responsibility, not only when the imaginary facts, if true, would excuse, but also, even if the supposed grievances or wrongs would not legally justify the act. The existence and nature of the delusion, is not the test of responsibility, but is evidence on the question whether the mind is so impaired, unbalanced and beclouded that defendant is not a responsible moral agent. If the defendant is laboring under delusion that he is redressing or avenging some supposed injury, or producing some supposed public benefit, the fact that he knew at the time that he was acting contrary to law, should not necessarily make him accountable.[46]

If A suddenly stabs B under the influence of impulse, caused by disease of such a nature that nothing but mechanical restraint would have prevented the stab, A is not punishable if absence of power of control is recognized as a defence, but would be punishable if a strong motive, such as fear of punishment, might have prevented the act. Only those ought to be punished, whom the threat of the law could or might have deterred from the act.[47] According to the theory of moral responsibility, both the right and wrong test, and the irresistible impulse test ought to be recognized. If free will and self-restraint be destroyed by mental disease, knowledge of right and wrong is entirely useless. Will is as necessary an element of criminal intent as are reason and judgment.[48] Nevertheless, in many jurisdictions uncontrollable impulse is not a defence unless the defendant was also unable to distinguish right from wrong.[49] Where a man's acts are automatic and mechanical, the explosive discharge of motor centers which the patient is helpless to prevent, the established legal test of right and wrong cannot be strictly applied without injustice. The controlling influence of the inhibitory centers is for the time being suspended, and the acts may be the mechanical reflex movements from internal or external

[46]*Ryan* v. *The People,* 60 Colo. 425, L. R. A. 1917 F, p. 646; *Hotema* v. *U. S.,* 186 U. S., p. 413.

[47]Oppenheimer, Criminal Responsibility of Lunatics, p. 129.

[48]*Parsons* v. *State,* 81 Ala. 577, 596, 2 So. 854, 60 Am. Rep. 193. See also *Hawkins* v. *State,* L. R. A. 1918 D, 784, 794 note. Prof. E. R. Keedy, 30 Harv. Law Rev. 546.

[49]*Smith* v. *State,* Ann. Cas. 1912 A, p. 36, note.

suggestions. The defendant is not their author, but their victim.[50]

The recognition of the principle that punishment should be in proportion to the gravity of the crime and the culpability of the criminal, indicates the basis of qualified responsibility as resting on the degree of guilt of the partly responsible persons. Feeble mindedness, for example, might well be admitted as a ground for discretionary reduction of penalty, even if not a full defence. Prof. Keedy's proposed test of absence of specific intent, seems to furnish no adequate guide to diminished responsibility for the feeble minded.[51]

The defendant may have some sense of right and wrong, he may be aware that punishment will follow detection, but he may have far less appreciation of the consequences of his acts and less self-control than normal men or even children. Can we say that some knowledge of right and wrong and self-control, however, poor and imperfect, are sufficient? Suppose they are less than in normal children of 7, 10 or 14 years of age? Want of judgment, lack of will, and weakness of character, make the feeble minded and defective persons an easy prey to their passions and impulses. The law has failed to take sufficient account of the possibility of different degrees of accountability of those not altogether innocent. At present, the jury fills up the gaps existing in the law of responsibility, and takes into consideration the moral elements and motives of crime. Those who as a result of hereditary taint and unfortunate environment, are mentally and morally degenerate, have not full penal accountability with normal men any more than little children, and if punishable at all, are punishable in a much less degree.[52]

It may be suggested in conclusion, that the main issue where the defence of insanity is raised, is whether the defendent is morally accountable for his act, and if so, to what degree? The inquiries to be submitted for the guidance of the jury in determining this question, should be in substance, these:—1. Was the defendant at the time of the commission of the act afflicted with a disease of the mind, or with defect of intelligence, comparable to that of a child under (say) 14 years? 2. Was the alleged criminal act so connected with such mental disease or defective intelligence as to be regarded as the offspring or product of it, either in whole or in part? 3. Is the defendant to be regarded as culpable or blameworthy, according to the two following tests:

[50]Dr. Alfred Gordon, Mental Deficiency, Jour. Crim. Law, IX, pp. 404, 410 (Nov. 1918).

[51]See 30 Harv. Law Rev. 551 to 554. Cp. Tarde, Penal Philosophy, p. 186, 187.

[52]*State* v. *Richards* (1873), 39 Conn. 591; Beale's Cas. Cr. Law, p. 333; Arnold, Psychology and Legal Evidence, p. 503.

(1) Did he know that he was doing wrong, something that he ought not to do? (2) Had he so far lost the normal power of volition, that he was not able to avoid doing the act in question? 4. Where his intelligence and volition so far below normal, that although dimly conscious that his act was wrong, he was only partially accountable? Should his mental condition be considered in mitigation of punishment?

This represents a modification of the questions proposed in the case of *Parsons* v. *The State*,[53] and differs from the suggestion of the New Hampshire court in *State* v. *Jones*,[54] in inquiring into the moral quality of the act, and not merely whether it was the direct product of mental disorder, without regard to the degree to which the disease had progressed, or to the extent to which it had deprived him of the knowledge of right and wrong, or of the capacity for self-control. If the defendant has only subnormal capability for controlling his actions, he may still be regarded as punishable in some degree, in spite of a somewhat low order of intelligence or a somewhat unbalanced mentality, which may also warrant custodial care.

The more corrupt the defendant's heredity and the more defective his mentality, the less his moral blame and punishability, but from the social viewpoint, the greater is the necessity for sending him to a proper institution. Neither imprisonment nor probation and parole are suited to defective delinquents who cannot become normal citizens. It is accordingly urged by Dr. Hickson, that farm and industrial colonies should be established so that dangerous morons, mental perverts and other degenerates may be placed under lasting restraint and supervision according to their needs. The establishment of suitable institutions for the feeble-minded, a half-way house between the penitentiary and the insane asylum, is a crying need in Illinois and in other states. In the alienist, the farm colony and the asylum lie society's protection against abnormal persons rather than in the criminal law. Any one who by reason of feeble mindedness, insanity or other disorder, mental or physical, such as leprosy or syphilis, becomes a menace to the safety or health of the public, should be confined for purposes of quarantine and treatment. This should be done on custodial principles rather than on principles of the criminal law, which deals with definite acts of wrongdoing rather than with general conditions of potential menace.

[53] 81 Ala. 577.
[54] 50 N. H. 369.