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SOME UNUSUAL ASPECTS OF MENTAL IRRESPONSIBILITY IN THE CRIMINAL LAW*

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If a doctor were to bleed his patients with leeches today, or if a psychiatrist were to attribute insanity to the moon, the hue and cry would be tremendous. And yet instance after instance may be pointed out wherein the law has remained, sometimes for hundreds of years, curiously rigid, despite the changes in scientific opinion upon which that law was based. Many rules in the criminal law are still affected by early views concerning psychology, which views are now outmoded or repudiated by newer discoveries through experimentation. A large number fail utterly to take cognizance of advances in education and educational methods.

Illustrative of this inconsistency is the treatment of mental inferiors, of deaf-mutes, and somnambulists before the bar. It is the purpose of this article to trace the rules relating to criminal irresponsibility of these unfortunates as they are affected by or diverge from advances made in the various other fields relating to human conduct. There are comparatively few reported cases concerning the second and third classes¹ mentioned above. Cases concerning the first class are common but usually considered under the general heading of insanity.

I. *Idiocy and Imbecility*

The term "insanity" might well be called a word with a changing content, varying in color or meaning according to the circumstances in which it is used. It would not serve here any useful purpose to trace the development of that term down through history. It has already been done in more detail than the limits of propriety here permit.² For our purposes, however, it should

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¹ In 1931 it was estimated that there were about 53,000 deaf-mutes in the United States. 5 *Ency. of the Social Sciences* 19 (1931).

² S. Glueck, *Mental Disorder and the Criminal Law* (1925) 123 *et seq.*; Cook, *Insanity and Mental Deficiency in Relation to Legal Responsibility* (1921) 1 *et seq.*

be noted that the term *non sane memorie* was originally used to describe those suffering from unsound mind, from whatever cause. Littleton used the term *non compos mentis* as explaining the true sense of the ailment much better than *non sane memorie*.³ Coke used the term in a generic sense to include all persons of unsound mind, subsuming under that heading four types of persons, among whom were: 1. An idiot who had no understanding from birth. 2. One who once had understanding but because of some cause had wholly lost it. 3. A lunatic who was sometimes of understanding and sometimes not.⁴ Dalton⁵ and Hale⁶ maintained the distinctions between idiot and lunatic, the first being a "*foole naturelle*," the second, one suffering from some disease. Indeed the term "lunacy" means, as Hale pointed out, some affectation caused by the moon.⁷ This distinction between mental defect or amentia and mental disease or dementia probably came from the Roman Law,⁸ and in the English law it affected the right of the Crown, as a natural guardian, to take the goods and chattels of idiots.⁹ Our courts have not always made a distinction between amentia and dementia, and as a result they have been forced into some difficult positions as will later appear.

For present purposes we are interested only in mental defect and the legal effect of it in criminal cases. The term is used in a generic sense. Under it were originally made the subdivisions of idiocy and imbecility. The courts are not agreed upon the meaning of the term "idiot" using it in several senses. Complete ignorance was a mark of idiocy according to Fitzherbert¹⁰ who said that an idiot was one who could not number twenty pence, nor tell who his father or mother were, nor how old he was. This, however, is not a test for idiocy in the criminal law, but is rather a factor to be considered in determining idiocy.¹¹ Fitzherbert used

³ Coke, Littleton f. 247.

⁴ *Ibid.*

⁵ Dalton, *The Country Justice* (ed. 1643) Cap. 95.

⁶ 1 Hale, *Pleas of the Crown* (folio ed. 1736) 29 *et seq.*

⁷ Compare the statement of Hale where he considered accidental dementia of a partial nature: "... the latter (partial dementia) is that, which is usually call'd *lunacy*, for the moon hath a great influence in all diseases of the brain, especially in this kind of dementia; such persons commonly in the full and change of the moon, especially about the equinoxes and summer solstice, are usually in the height of their distemper." 1 Hale, *Pleas of the Crown* (folio ed. 1736) 31.

⁸ Ray, *Medical Jurisprudence of Insanity* (4th ed. 1860) 4, 5.

⁹ Fitzherbert, *New Natura Brevium* (ed. 1652) 581, 583.

¹⁰ *Ibid.*

¹¹ 1 Hale, *Pleas of the Crown* (folio ed. 1736) 29. "These though they may

this illustration mentioned above in connection with his explanation of the writ *de idiota inquirendo*.¹² At common law an idiot was not responsible criminally for his acts.¹³

The term "imbecility" does not appear in the earliest cases. Only those who were demented and those who were idiots were excused from criminal responsibility because of mental disorder. One court stated recently that the term "imbecile" has no fixed meaning in the law.¹⁴

Both these terms are used in statutes of various types. They do not appear to be defined by many legislatures, however, and the courts are in great confusion on the matter.¹⁵ This confusion is increased by the use of expert medical testimony on the question of mental disorder, because the medical profession does make a distinction between the insane, whom they consider demented, and those suffering from mental defect or weak-mindedness.¹⁶ Hence, it sometimes happens that when an expert comes to the witness stand to testify, he is unable to do anything for a feeble-minded defendant because he cannot testify that the latter is "insane" in the sense that he is suffering from some *disease* which affects his mental ability to discern right from wrong, or, if he is in a more liberal jurisdiction, his volitional control.¹⁷

Feeble-mindedness as a generic term is applied today by psychologists in this country to all persons of weak mentality. This term is divided into three subdivisions: 1. Idiot. 2. Imbecile. 3. Moron. Prior to 1910 there was no authoritative definition here of each of these terms, and it is clear that the courts did not, and indeed still do not, use them with any degree of consistency.¹⁸ In England the term "feeble-mindedness" has been reserved for the highest group which we term moronic.¹⁹ In 1910 the American

be evidence, yet they are too narrow, and conclude not always; for *ideocy* or *not* is a question of fact triable by jury, and sometimes by inspection."

¹² *Supra* note 9.

¹³ 1 Hale, Pleas of the Crown (folio ed. 1736) 29.

¹⁴ *State v. Kelsie*, 93 Vt. 450, 108 Atl. 391 (1919).

¹⁵ *Infra* note 34.

¹⁶ Maudsley, *Responsibility in Mental Diseases* (3d ed. 1876) Chap. III, p. 66; Cook, *Insanity and Mental Deficiency in Relation to Legal Responsibility* (1921) 1 *et seq.*; Goddard, *The Criminal Imbecile* (1915) 1 *et seq.*

¹⁷ *State v. Tapie*, 173 La. 780, 138 So. 665 (1931); *State v. Kelsie*, 93 Vt. 480, 108 Atl. 391 (1919). *Semble*, *State v. Schlaps*, 78 Mont. 560, 254 Pac. 858 (1927). Cf. *People v. Osnam*, 170 Cal. 211, 149 Pac. 165 (1915); *People v. Norton*, 138 Cal. App. 70, 31 P. (2d) 809 (1934); *People v. Kimball*, 55 P. (2d) 483 (Cal. 1936); *Christwell v. State*, 171 Ark. 255, 283 S. W. 981 (1926).

¹⁸ 12 Ency. Brittanica (14th ed. 1929) 387; Cook, *Insanity and Mental Deficiency in Relation to Legal Responsibility* (1921) 11 *et seq.*

¹⁹ 3 & 4 Geo. V, c. 28 (1913).

Association for the Study of Feeble-mindedness, which is the authoritative body on that subject in the United States, adopted a definition for these terms. It provided:

"RESOLVED: 1. That the term, feeble-minded, be used generically to include all degrees of mental defect due to arrested or imperfect mental development as a result of which the person so affected is incapable of competing on equal terms with his normal fellows or managing himself or his affairs with ordinary prudence. 2. That the feeble-minded be divided into three classes, viz.: Idiots—Those so deeply defective that their mental development never exceeds that of a normal child of about two years. Imbeciles—Those whose mental development is above that of an idiot but does not exceed that of a normal child of about seven years. Morons—Those whose mental development is above that of an imbecile but does not exceed that of a normal child of about twelve years."²⁰

These terms are defined by statute in England and it is interesting to note that the definitions are based upon social considerations. An idiot is one "so deeply defective from birth or an early age as to be unable to guard against common physical dangers." Imbeciles are those whose mental defectiveness exists from birth or an early age not amounting to idiocy but which is so pronounced that they cannot manage their own affairs, or, if children, that they cannot be taught to do so. Feeble-minded persons, the next step in the ascending scale, are those who are mentally defective, but not imbeciles, yet who are, because of the mental defect, in need of supervision either for their own good or for the protection of the public, or in the case of children, those who are permanently incapable of receiving proper benefit from instruction in ordinary schools.²¹ This statute deals with administration, but provides also for the proper care of criminals suffering from these types of mental defect so that conceivably it could be applied in the criminal law. As England does not, by statute, make idiocy or imbecility a defense to criminal responsibility, the problem does not arise there that is present in some states in this country.

Many jurisdictions in this country have provided, by statute, exemptions from criminal responsibility in favor of certain persons.²² While they differ in their wording, the statutes provide in

²⁰ 9 Ency. Britannica (14th ed. 1929) 140.

²¹ *Supra* note 19.

²² Ariz. Rev. Code (1928) §4489; Digest of the Stats. of Ark. (1937) §§2924, 2928; Cal. Penal Code (1935) §26; 2 Courtwright Mills Anno. Stat. of Colo. (1935) c. 48 §§5, 6; Georgia Penal Code (1926) Art. 2, §§35, 36; Rev. Laws of Hawaii (1925) Ch. 217, §3914; Ill. Rev. Stat. (1937) Ch. 38, par. 591, §14; Minn. Gen. Stat. (1923) §§9913, 9915; Mont. Rev. Code (1921) §10729; N. Y. Pen. Law (1935) §1120; Nev.

substance that all persons are capable of committing crimes except—and there follows an enumeration usually embracing infants—and then typically appear the words, “idiots, lunatics, and insane persons.” This would tend to show that the words mean different things and that the term “insanity” should not be considered generic when used in this sense. Further, it is interesting to note that the usual method of raising the defense of idiocy is by the same plea or method by which the defense of insanity is raised.²³ Washington is a possible exception to this by statute, where mental irresponsibility as well as insanity is a defense. By construction, however, it would appear that the court has made them practically interchangeable.²⁴

A New York statute provides that a person is not to be excused from crime as an idiot, imbecile, lunatic, or insane person unless the proof shows that he did not know the nature and quality of his act, or that he was doing wrong.²⁵ Some other jurisdictions have statutes somewhat similar.²⁶ This savours of the rule in *McNaghten's* case²⁷ but it is the general interpretation that is applied to such statutes by the courts where there are no such statutory definitions.²⁸ It is submitted that such interpretations are incorrect, especially when they base the test of irresponsibility in mental defect cases upon the test of insanity in general, when in turn that test is based upon *McNaghten's* case. It must be remembered that

Comp. Laws (1929) §9952; Okla. Stats. Ann. (1937) §152; Philippine Rev. Pen. Code (1933) Art. 12; Utah Rev. Stats. (1933) 103-1-20; 103-1-40; 4 Rem. Rev. Stat. of Wash. (1932) §2173.

²³ At least upon the plea of insanity, counsel have requested charges dealing with mental defect. *State v. Schilling*, 95 N. J. Law 145, 112 Atl. 400 (1920); *Woodruff v. State*, 164 Tenn. 530, 51 S. W. (2d) 843 (1932); *People v. Moran*, 246 N. Y. 100, 158 N. E. 35 (1927); same, 249 N. Y. 179, 163 N. E. 553 (1928); *Cryder v. State*, 101 Neb. 85, 161 N. W. 1045 (1917); *People v. O'nam*, 170 Cal. 211, 149 Pac. 165 (1915); *Wartena v. State*, 105 Ind. 445, 5 N. E. 20 (1886); *Commonwealth v. Stewart*, 255 Mass. 9, 151 N. E. 74, 44 A. L. R. 579, anno. p. 584 (1926); *Commonwealth v. Belenski*, 276 Mass. 35, 176 N. E. 501 (1931).

²⁴ 4. Rem. Rev. Stat. of Wash. (1932) §2173; *State v. Schafer*, 156 Wash. 240, 286 Pac. 833 (1930), for the previous opinion in the case see *State v. Schafer*, 154 Wash. 322, 282 Pac. 55 (1929).

²⁵ N. Y. Penal Law (1935) §1120.

²⁶ Rev. Laws of Hawaii (1925) Ch. 217, §§3914, 3915; Minn. Gen. Stat. (1923) §9915; Okla. Stats. Ann. (1937) §152; Rev. Stat. of Utah (1933) 103-1-40.

²⁷ 10 Cl. & F. 200 (1843). This case is popularly supposed to have settled the law of England with reference to the legal test of insanity. For a critique of the case see Glueck, S., *Mental Disorder and the Criminal Law* (1925) 161 *et seq.*

²⁸ *Christwell v. State*, 171 Ark. 255, 283 S. W. 981 (1926); *People v. Kimball*, 55 P. (2d) 483 (Cal. 1936); *People v. Norton*, 138 Cal. App. 70, 31 P. (2d) 809 (1934); *People v. O'nam*, 170 Cal. 211, 149 Pac. 165 (1915); *Stodstill v. State*, 7 Ga. 2, 12 (1849); *Battle v. State*, 105 Ga. 703, 32 S. E. 160 (1898); *Rogers v. State*, 128 Ga. 67, 57 S. E. 227 (1907); note 10 L. R. A. (N. S.) 999; *Bridges v. State*, 43 Ga. App. 214, 158 S. E. 358 (1931); *State v. Schlaps*, 78 Mont. 560, 254 Pac. 858 (1927).

McNaghten was suffering from insane delusions, was a paranoiac, and the entire decision in that case was based upon disease of the mind and not feebleness of mind.

In Georgia is found a statute which provides that an idiot shall not be found guilty or punished for any crime or misdemeanor with which he may be charged.²⁹ In an early case the court rejected the evidence of a defendant's weak-mindedness on the ground that it was admitted that such evidence would not show the defendant to be an idiot, lunatic, or insane. The court thought that to engraft an exception on the law would "lead to endless metaphysical discussions on the philosophy of the mind."³⁰ A later Georgia case adopted the old definition of an idiot as one "who hath no understanding from his nativity."³¹ The question in this case arose on a motion for a new trial on the ground of newly discovered evidence. Four persons deposed that the defendant was "stupid, idiotic, and simple-minded." The court said that it was not probable that the persons who made the affidavits in behalf of the defendant intended to swear that he was an "idiot" in the real sense of the term. The difficulty into which such constructions and rulings may finally lead a court is aptly shown in a recent Georgia case. In *Bridges v. State*,³² where no facts are given in the opinion, but which was a charge of unlawfully shooting at another and the defense insanity, the court said: "If a man has reason sufficient to distinguish between right and wrong in relation to a particular act about to be committed, he is criminally responsible. . . . The accused was convicted of unlawfully shooting at another. The evidence amply authorized a finding that he was an idiot (and a dangerous one at that); but under all the facts of the case as disclosed by the record, this court cannot say that the jury were not authorized to determine from certain parts of the evidence, and the legal inferences arising therefrom, that the accused had reason sufficient to know that the act he was about to commit . . . was wrong; and, the finding of the jury having been approved by the trial judge and no error of law upon the trial being complained of, this court is without authority to interfere."³³

²⁹ Georgia Pen. Code Art. 2, §36 (1926).

³⁰ *Studstill v. State*, 7 Ga. 2, 12 (1849).

³¹ *Battle v. State*, 105 Ga. 703, 32 S. E. 160 (1898).

³² 43 Ga. App. 214, 158 S. E. 358 (1931).

³³ A Georgia Appellate Court was confronted with a case of assault with intent to rape, and insanity was the defense. The court said: "Of course, I am not including in this discussion idiots or lunatics; for the law of no civilized country holds these unfortunates responsible for their acts, either civil or criminal. Our

From these cases it is apparent that in Georgia there is a distinction between mental defect and insanity. By statute idiocy is a defense to crime, but when affiant swears that a defendant is "stupid, idiotic, and simple-minded" it appears that the court need not construe it to mean that he is legally an idiot. Further, it appears that, despite the statute, the court may find that a person is an idiot and still hold him responsible for his act. Just what the court in *Bridges v. State* meant when it said that the defendant was an idiot is not clear. From the early Georgia cases it appears that one who can distinguish right from wrong is not to be classed as an idiot, yet here it appears that the defendant was legally an idiot, if the opinion of the court is correct, and yet they could not say that he did not know right from wrong. Consequently the conviction was affirmed. Factually and logically the case seems to be anomalous. The defendant was either an idiot or not an idiot. If the former, he was not guilty by statute. If the latter, he could be guilty. But logically it is difficult to see how he could be an idiot, as the court says he is, and still be guilty without a complete disregard for the statute. It is to be regretted that more of the facts were not given in the report of the case. If the defendant were an idiot in the psychological sense, how could he know right from wrong? Under the Georgia decisions, if he did know right from wrong, he was not an idiot.

In some jurisdictions, as previously shown, it is provided by statute that an imbecile shall not be held criminally responsible for his acts, and it is quite usual for the statute to contain a provision to the effect that no one shall be excused from criminal liability as an imbecile unless it appears that at the time of committing the act charged he did not know right from wrong, or understand the nature and quality of his act, or both. Such a provision nullifies the use of the word "imbecile" and merely provides for the usual "right and wrong" test of insanity to be applied. It is submitted that the same result would be reached at common law without the use of any such statute. California does not have such a statute on imbecility; yet its courts consistently refuse to allow the jury to consider testimony which tends to show that a defendant is weak-minded unless it will show legal insanity, which

Penal Code expressly declares that an idiot shall not be found guilty or punished for any crime or misdemeanor with which he may be charged" *Wilson v. State*, 9 Ga. App. 274, 70 S. E. 1128 (1911).

in California is an inability to know right from wrong with respect to the particular act committed.³⁴

Another situation presents itself in those states having statutes making it rape for any male person over a specified age to have illicit carnal knowledge of an idiot. The Iowa statute contains the expression "... idiot or female naturally of such imbecility of mind or weakness of body as to prevent effectual resistance. . . ."³⁵ The courts take a much broader view of the terms "idiot" or "imbecility of mind" in these cases than in those where it is interposed by the defendant as a defense. The rape cases hold that the idiocy of the prosecutrix to warrant a conviction is not idiocy in the sense of a state of mental defect which is nearly absolute; that "it is not necessary to constitute . . . or even generally held that the person should have been wholly destitute of mind from infancy or totally deficient in intellectual powers;" that imbecility is scarcely separable from idiocy and in many cases it is difficult to draw a line between them with any degree of precision.³⁶ Where the expression "imbecility of mind" was used with reference to a female in defining statutory rape, the courts have said that they are not confined to cases of complete or "absolute imbecility" but include those who have some degree of understanding but who are so far below normal in mental strength that they can offer no effectual resistance to the advances of those who would violate their persons. Then usually the courts add that this will include those "who by reason of mental inferiority are incapable of knowing or realizing the moral quality of their act and are therefore incapable of giving rational consent."³⁷ In a case where the prosecutrix was a girl of fourteen — thirteen being the statutory age of consent — the court said that: "Her answers to questions show that she is almost an imbecile, unless she was feigning imbecility . . . The . . . judge and the jury . . . saw and heard her while she was on the witness stand . . . we think it is not proper for this court to interfere with the verdict."³⁸ The court mentioned that the jury were undoubtedly influenced by the fact that she was

³⁴ *People v. Kimball*, 55 P. (2d) 483 (1936); *People v. Norton*, 138 Cal. App. 70, 31 P. (2d) 809 (1934); *People v. Oxnam*, 170 Cal. 211, 149 Pac. 165 (1915); *People v. Keyes*, 178 Cal. 794, 175 Pac. 6 (1918); *People v. Troche*, 206 Cal. 35, 273 Pac. 767 (1928).

³⁵ *State v. Enright*, 90 Iowa 520, 58 N. W. 901 (1894); *State v. Haner*, 186 Iowa 1259, 173 N. W. 225 (1919). Cf. *Sandefur v. Commonwealth*, 143 Ky. 655, 137 S. W. 504 (1911).

³⁶ *Ibid.* *Jones v. Commonwealth*, 154 Ky. 752, 159 S. W. 568 (1913).

³⁷ *State v. Haner*, 186 Iowa 1259, 173 N. W. 225 (1919).

³⁸ *State v. Enright*, 90 Iowa 520, 58 N. W. 901 (1894).

a girl past the age of consent. In *Jones v. Commonwealth*³⁹ in Kentucky, where the facts were the same as in the preceding case, it was urged that the trial court should have charged the jury on the definition of an idiot as it was defined in the probate code relating to administration and custody of idiots. The court refused to apply the probate statute in the criminal case, although it contained the old common law definition of "one who has been destitute of mind from infancy." The court relied upon the fact that the criminal statute was passed with a different purpose in mind, i. e., the protection of idiotic females from lewd advances.⁴⁰ Under the statute in Kentucky, an idiotic female is one who is not necessarily destitute of all understanding or totally deficient in intellectual powers; but if she is sufficiently weak-minded so that she is "incapable of knowing right from wrong, or, if knowing it, have not the power to resist the temptation" the jury should be so instructed, and such an instruction is correct.⁴¹ In connection with this definition it should be noted that Kentucky follows the "insane irresistible impulse" test of insanity; consequently the test of "idiocy" is practically the same as that of insanity.⁴²

Two other cases merit brief comment. In *State v. Jewett*⁴³ there was no statute giving mentally defective women protection. The prosecutrix, thirty-two years of age with a mental age of seven years, consented to illicit intercourse with the defendant. She became pregnant and he was charged with rape. On the trial the prosecutrix testified that she knew that intercourse was wrong and that she shouldn't have consented to it. The only question on the trial was whether or not she had the mental capacity to consent. The Supreme Court of Vermont held that there was insufficient evidence to take the case to the jury and a motion for a directed verdict for the defendant should have been granted. In *People v. Boggs*,⁴⁴ the California court had before it a rape case in which the prosecutrix was twenty-two years of age, with a mental age of ten to twelve years. The same question of mental capacity of the prosecutrix was raised in this case. Yet the court said that it could not hold as a matter of law that the prosecutrix was capable of

³⁹ 154 Ky. 752, 159 S. W. 568 (1913).

⁴⁰ *Ibid.*

⁴¹ *Sandefur v. Commonwealth*, 143 Ky. 655, 137 S. W. 504 (1911).

⁴² *Smith v. Commonwealth*, 5 Duv. 224 (Ky. 1864); *Howard v. Commonwealth*, 224 Ky. 224, 5 S. W. (2d) 1056 (1928).

⁴³ *State v. Jewett*, 192 Atl. 7 (Vt. 1937).

⁴⁴ *People v. Boggs*, 107 Cal. App. 492, 290 Pac. 618 (1930) hearing denied by the Cal. Sup. Ct. Aug. 28, 1930, note (1931) 22 J. Crim. L. & Crim. 116.

giving consent and affirmed the conviction. The cases are inconsistent in result upon similar factual bases. The fact that a statute was involved in the California case does not influence the result, for the statute is declaratory of the common law governing consent.⁴⁵ In neither case was the prosecutrix an idiot or imbecile within the psychological definition of the term.

There is another difficulty in the cases dealing with mental defect. As pointed out, the defense is raised generally in the same manner as the defense of insanity. The general rule in the states following the "insane irresistible impulse" test for insanity is that such impulse must be the result of a diseased mind. Medically there is a distinction between amentia or mental defect, and dementia or a diseased or injured condition causing unsoundness of mind; therefore, an expert cannot go on the witness stand and testify that the defendant is suffering from a mental disease when he is only mentally deficient. In some jurisdictions the courts have held it not error to exclude testimony showing mental defect or weak intellect of a defendant when such testimony "will not establish insanity"—that is the inability to know right from wrong (if that is the test) with respect to the particular act committed.⁴⁶ Yet in the rape cases the evidence of mental defect usually is admitted to show idiocy or imbecility. It is only logical and practical that here a much more relaxed view of mental defect be taken. In cases where it is the mental condition of the defendant that is being inquired into, such evidence should go to the jury on the question of idiocy, or "insanity" where that is the defense, for it would appear that the ability to distinguish right from wrong is a fact question for the jury.

With the development of intelligence tests, some modification of the criminal law might have been expected concerning responsibility of those of low mentality. There have been many advances in intelligence testing since Galton devised what was probably the first test about 1885.⁴⁷ Any number of tests have been used by psychologists and they have been revised and modified to conform

⁴⁵ Cal. Pen. Code (1935) §261.

⁴⁶ *Rogers v. State*, 128 Ga. 67, 47 S. E. 227, note 10 L. R. A. (N. S.) 999 (1907); *Studstill v. State*, 7 Ga. 2 (1849); *State v. Kelsie*, 93 Vt. 450, 108 Atl. 391 (1919). *Semble*, *State v. Schlaps*, 78 Mont. 560, 254 Pac. 858 (1927); *People v. Oznam*, 170 Cal. 211, 149 Pac. 165 (1915).

⁴⁷ For a discussion of the history of intelligence tests see, 12 Ency. Britannica (14th ed. 1929) 461; 10 Ency. of the Social Sciences (1933) 323. See also M. Hamblin Smith, *The Psychology of the Criminal* (1922) ch. II.

to different situations.⁴⁸ While their use in the criminal law for the purpose of determining the mental capacity of offenders has been both praised and condemned,⁴⁹ it would appear that the results of intelligence tests, taken with some other corroborative evidence, would tend to show the relative "intelligence" of the subject tested.⁵⁰ At least it would seem to be a better method of determining whether a person were an idiot, imbecile, moron, or of "weak intellect" than by common reputation in a community, or the appearance of the defendant on the witness stand in court where he is at the disadvantage of cross-examination by a skilled interrogator. Yet the courts have not given mental tests much consideration in the trial of cases. In a recent case, where an alienist was on the stand and had testified to the mental development of a defendant, the appellate court said: "A jury of laymen are not likely to attach much weight to the opinions of a psychoanalyst⁵¹ with respect to the degrees of mental development as affecting responsibility for crime."⁵² Expressions such as the following are common: "Low mentality is not, in law, insanity, and does not excuse one who otherwise is able to distinguish between right and wrong."⁵³ "Imbecility is no defense against crime unless its existence deprives the individual of the power to distinguish between right and wrong."⁵⁴ It is clear that the courts generally refuse to consider low mentality as a mitigating factor in criminal cases. It must be either a complete defense or nothing.

There are a few notable exceptions to this view.⁵⁵ In *People v. Moran*,⁵⁶ the New York Court of Appeals held that feebleness of

⁴⁸ Healy, *The Individual Delinquent* (1920) Chap. VI, pp. 68-103; Terman, *The Measurement of Intelligence* (1916) 51 *et seq.*

⁴⁹ Ballantine, *Criminal Responsibility of the Insane and Feeble-Minded* (1919) 9 J. Crim. L. & Crim. 485; Wallin, *Who Is Feeble-Minded* (1916) 6 J. Crim. L. & Crim. 706; Kohs, *Who Is Feeble-Minded* (1916) 6 J. Crim. L. & Crim. 860; Wallin, *Who Is Feeble-Minded, a Reply to Mr. Kohs* (1916) 7 J. Crim. L. & Crim. 56.

⁵⁰ Doll, *On the Use of the Term "Feeble-Minded"* (1918) 9 J. Crim. L. & Crim. 217. I have discussed at some length the use of "mental ages" as a test of criminal responsibility in my paper, "Physical and Mental Infancy in the Criminal Law," 87 U. of Pa. L. Rev. 426 (1939).

⁵¹ The facts of the case do not show that the expert was a *psychoanalyst*.

⁵² *Woodruff v. State*, 164 Tenn. 530, 51 S. W. (2d) 843 (1932).

⁵³ *People v. Norton*, 138 Cal. App. 70, 31 P. (2d) 809 (1934).

⁵⁴ *People v. Keyes*, 178 Cal. 794, 175 Pac. 6 (1918).

⁵⁵ *People v. Moran*, 249 N. Y. 179, 163 N. E. 553 (1928); *Demaree v. Commonwealth*, 26 Ky. L. Rep. 507, 82 S. W. 231 (1904); *Mangrum v. Commonwealth*, 19 Ky. L. Rep. 94, 39 S. W. 702 (1897); *Farris v. Commonwealth*, 8 Ky. L. Rep. 217, 1 S. W. 729 (1886); But compare *People v. Koehn*, 207 Cal. 605, 279 Pac. 646 (1929).

⁵⁶ 249 N. Y. 179, 163 N. E. 553 (1928), for the case on a previous hearing, 246 N. Y. 100, 158 N. E. 35 (1927). *Contra: Commonwealth v. Devereaux*, 257 Mass. 391, 153 N. E. 881 (1926).

mind or will, even though not so extreme as to justify a finding that the defendant was irresponsible under their statute, might be considered by the jury in determining whether there was sufficient "deliberate and premeditated design" in the killing to make it murder in the first degree, or some lesser degree. It is submitted that this court is taking the correct approach to the problem, although it is decidedly in the minority.⁵⁷ In the *Moran* case the defendant was a "psychopathic inferior" which condition appeared to be complicated by low mentality, although how low does not appear.⁵⁸ In the cases which hold to the contrary appears the spectre of *stare decisis*. At the time of Coke, Hale, and other early writers on the criminal law, upon whom the courts like to rely today, murder and manslaughter only were recognized in the homicide cases. In the common law that situation still prevails. In

⁵⁷ *Christwell v. State*, 171 Ark. 255, 283 S. W. 981 (1926); *People v. Keyes*, 178 Cal. 794, 175 Pac. 6 (1918); *People v. Norton*, 138 Cal. App. 70, 31 P. (2d) 809 (1934); *People v. Troche*, 206 Cal. 35, 273 Pac. 767 (1928); *Bridges v. State*, 43 Ga. App. 214, 158 S. E. 358 (1931); *People v. Marquis*, 344 Ill. 261, 176 N. E. 314, 74 A. L. R. 751 (1931); *State v. Tapie*, 173 La. 780, 138 So. 665 (1931); *Commonwealth v. Devereaux*, 257 Mass. 391, 153 N. E. 881 (1926); *State v. Paulsgrove*, 203 Mo. 193, 101 S. W. 27 (1907); *Commonwealth v. Wireback*, 190 Penn. 138, 42 Atl. 542 (1899); *Woodruff v. State*, 164 Tenn. 530, 51 S. W. (2d) 843 (1932); *Rodgers v. State*, 28 S. W. 685 (Tex. Crim. App. 1894); *Hogue v. State*, 65 Tex. Crim. App. 539, 146 S. W. 905 (1912); *State v. Schafer*, 154 Wash. 322, 282 Pac. 55 (1929); same, 156 Wash. 240, 286 Pac. 833 (1930); anno. 44 A. L. R. 584 (1926).

⁵⁸ The record of the case shows that the defendant refused to submit to intelligence tests (pp. 493 and 601 of the record of the case on the second appeal). One alienist testified that, so far as he could ascertain from the history of the defendant, he had a "rather pretty good degree of intelligence" (p. 669 of the record). The same alienist had previously testified that he had administered intelligence tests to the defendant but their results were not shown in the record (p. 601 of the record). The charge of the court dealt, in part, with weak-mindedness. The court charged, in part:

"... a weak or even disordered mind is not excused from the consequences of crime" (p. 1083 of the record).

Concerning the weight of the evidence, the court said, in part:

"On this question of insanity the question is did he know the nature and quality of the act and did he know that it was wrong. That is the sole question as to insanity in this case, gentlemen. Did he know the nature and quality of his act? That is the only kind of insanity that the law recognizes. He may have been eccentric, or peculiar, or of a low grade of mentality, or suffering from epilepsy or a psychopathic personality. That would not and does not excuse him unless it produced such a defect of mind as to render him incapable of understanding the nature and the quality of his act and that it was wrong . . ." (p. 1088 of the record).

In its opinion, the Court of Appeals mentioned that the defendant was "a man of law and unstable mentality," as well as a psychopathic personality, and probably a sufferer from epilepsy. The record shows that he completed the eighth grade in grammar school at the age of fourteen or fifteen years. He did not attend school after that time. (Record, pp. 169, 170, 410.) It may be doubted whether the decision in the case necessitated a consideration of feeble-mindedness. *People v. Moran*, 249 N. Y. 179, 180, 163 N. E. 553 (1928).

many of our jurisdictions today there are, however, by statute, several degrees of homicide. It would seem that the very purpose of providing for degrees of homicide would be to mitigate, in certain cases, the former rigours of the common law. Yet these same courts in states which do recognize degrees of homicide still hold that mental defect must be either a complete defense or nothing and often cite the old authorities in support of their holding. This would appear a too close adherence to precedents which, in the light of subsequent developments in both law and psychology, should no longer apply. Further, it would seem, that when "heat of blood" and drunkenness may go to the jury to determine whether a defendant "premeditated or deliberated" over his crime, the question of the relative "intelligence" bearing upon the mental capacity of the defendant should be material in determining the same thing. Certainly "stupefaction by nature," for which the defendant is not responsible, should be as important as voluntary drunkenness in the determination of the degree of offense committed. It is a matter of common knowledge that a person of weak mind may be more susceptible to impetuosity, to lack of remembrance, and to inability to weigh facts, than is one of normal mind. It is difficult to understand, apart from the doctrine of *stare decisis*, why mental defect should not be submitted to the jury along with the other evidence as bearing upon the mental element required, at least in homicide cases.

II. Deafness and Dumbness as Idiocy

As has been mentioned, idiocy has from the earliest times been a complete defense to crime. Total ignorance and lack of understanding from birth were indications of idiocy.⁵⁹ The social implication seems to have been that one who was unable to care for himself could not manage his own property and was not criminally responsible for his acts.⁶⁰ Hence it was only logical to suppose that

⁵⁹ Dalton, *The Country Justice* (1643) Cap. 95; 1 Hale, *Pleas of the Crown* (ed. 1736) 29, 30; Coke's *Littleton* 247a; Brydall, *Non Compos Mentis or the Law Relating to Natural Fools, Mad Folks and Lunaticke Persons* (1700) 6.

⁶⁰ Fitzherbert, *The New Natura Brevium* (ed. 1652) 581, 583. "And he who shall be said to be a Sot and Idiot, from his birth, is such a person, who cannot accompt or number twenty pence, nor can tell who was his Father, or Mother, nor know how old he is, etc., so as it may appear, that he hath no understanding or reason what shall be for his profit, or what for his losse: But if he have such understanding, that he know and understand his letters, and to read by teaching or information of another man, then it seemeth he is not a Sot nor a naturall Idiot." Note that here Fitzherbert was not considering the criminal law, but rather the *Writ de Idiota Inquirendo*. 1 Blackstone's *Comm.* 303 (1765); cf. *In re*

anyone who could not be taught to do things for himself, and to converse with others, should be included in this category. Thus the common law considered that one who was deaf or dumb from birth was in the same position as an idiot.⁶¹ The reason given was that he could not be taught to understand others, and they could not understand him. He would "have no understanding from nativitate," and would fit in well with the mediaeval meaning of a "foole naturall."⁶² If he were dumb only, and killed another, it was felony in him. The question of how he would be arraigned was troublesome, however.⁶³ Also, if a man were not born deaf and dumb, but became so after his birth, he could be held criminally responsible for his acts. Probably the reason for this was that he could have learned to distinguish good from evil by hearing others and speaking to them before he became deaf or dumb.⁶⁴

The exact origin of the rule of criminal irresponsibility of natural born deaf-mute seems to be uncertain. The late Mr. Justice Holmes said that it arose from Roman law where, because of the extreme formal requirements of the question and answer, a deaf and dumb person could not enter into the *stipulatio*, the early Roman contract.⁶⁵ It appears in the early Anglo-Saxon law at least as far back as the ninth century. In the laws of Alfred is a provision that, "If anyone is born dumb or deaf, so that he can neither deny nor confess his wrongdoings, his father shall pay compensation for his misdeeds."⁶⁶ This at least indicated that the responsibility of a deaf or dumb person at this time stopped short

Lindsley, 44 N. J. Eq. 564, 15 Atl. 1 (1888). Obviously "intelligence" and criminal capacity are not synonymous, but a measure of the intelligence of a defendant should be a factor to aid the trier of fact in determining whether the defendant had capacity to formulate or entertain the intent required in the particular act with which he is charged.

⁶¹ Pulton, *Pace Regis e Regni* (1609) f. 126; Lambard, *Eirenarcha* (1619) 232; Dalton, *The Country Justice* (1643) 299; 1 Hale, *Pleas of the Crown* (folio ed. 1736) 34; 1 Blackstone's *Comm.* 304 (1765).

⁶² Brydall, *Non Compos Mentis*, or the Law Relating to Natural Fools, Mad-Folks, and Lunatick Persons (1700) 6, 7; Beverley's Case (1603) 4 Coke 124.

⁶³ Dalton, *The Country Justice* (6th ed. 1643) 299.

⁶⁴ "A man borne deafe and dumbe, killeth another, that is no felony; for he cannot know whether he did evill or no; neither can he have a felonious intent, . . . Otherwise if he were not so borne, but becometh so afterwards. See Br. *Coro.* 101 & 217. That a man which can neither heare nor speake may commit felony, and shall be imprisoned, &c." *Ibid.*

⁶⁵ Leage, *Roman Private Law* (1906) 272; Holmes, *Law in Science and Science in Law* (1899) 12 *Harv. L. Rev.* 443; same, Holmes, *Collected Legal Papers* (1920) 210. But cf. 5 Bracton, *De Legibus* f. 375-7. Gaw, *Legal Status of the Deaf* 10-41 (1907) traces the development of the legal capacity of deaf-mutes in Roman Law.

⁶⁶ Laws of Alfred 14, Attenborough. *Laws of the Earliest English Kings* (1922) 71.

with the payment of compensation. It seemed at that time that if a wrongdoer were deaf or dumb, he should not be charged with crime, but his father would be held to pay the "bot" which was assessable according to the deed. This view of absolute non-liability seemed to prevail at least until 1609. Writing in that year, Pulton said that a man who "is franticke though he kill another man, cannot commit murder, for he hath not a felonious intent, nor doth carrie within him malice prepenced to any, neyther doth know what he doth. And therefore he is not to be arraigned for the killing of a man in his lunacie . . . neither shall he be inforced to sue for his pardon. And the same law is of a man that is deafe and dumbe, who cannot commit murder, for he hath not a felonious intent, neither doth he know what he doth. And therefore if he kill a man he shall not be arraigned thereof, nor driven to sue for his pardon."⁶⁷ Thus, at this time, the fact of deafness or dumbness was an absolute defense to crime, and not merely a ground for pardon. This view was undoubtedly influenced by the development of the rule, prior to this time, that insanity was a defense to crime, and not merely a ground for pardon after the conviction of the insane person.

Lambard, writing in 1619, however, thought that deafness and dumbness would create only a presumption that such person had no mind or will to "doe the harme" unless it may "by some evident token appeare, that he had understanding of good and evill: for then, in him *Malitia supplebit aetatem*."⁶⁸ This view seemed to prevail in the law and the rule came to be well established in England that in these cases there was a presumption of incapacity of the defendant to entertain the requisite intent as an element in a criminal act. Later, Sir Matthew Hale, with his usual perspicacity, stated the rule much as Lambard had done about seventy-five years before, but added that such a person would be guilty if he "hath the use of understanding, which many of that condition discover by signs to a very great measure. . . ."⁶⁹ He said that while such a person could be made to suffer judgment and execution, great caution should be used in their trials.

Such views naturally gave rise to other problems in the criminal law. After the trial by ordeal had been abolished and that of inquest by jury substituted, the extreme ritualism of the early

⁶⁷ Pulton, *Pace Regis e Regni* (1609) f. 126.

⁶⁸ Lambard, *Eirenarcha* (1619) 232.

⁶⁹ 1 Hale, *Pleas of the Crown* (folio ed. 1736) 34.

law required that a formal plea be entered by the defendant, and in answer to the question, "Culprit, how will you be tried," the answer had to be "By God and my Country."⁷⁰ Now it was obvious that a deaf-mute could not plead and make answer to such questions, and the courts could not proceed without such a plea, for it appeared to them hardly proper to try a defendant before a jury when he had not requested it. They could not convict and execute him without an inquest, hence arose the custom of impaneling a jury to determine whether the defendant stood mute "of malice or by visitation of God." If he stood mute of malice, he was subjected to the terrible *peine forte et dure* which is so graphically depicted by Stephen.⁷¹ Many who were guilty and would be executed, would stand mute so that they would be killed by the *peine forte et dure* without a conviction in order that there would not be a forfeiture of their goods, and consequently that their heirs could inherit.⁷² By way of digression it might be pointed out that the *peine forte et dure* was abolished in 1772 when it was provided by statute that one standing mute of malice should be considered guilty.⁷³ This was made to apply also to "his Majesty's colonies and plantations in America." In 1827 another statute provided that in such cases the court should enter a plea of not guilty and the trial should proceed.⁷⁴ If the jury found, on the preliminary inquest, that the defendant stood mute "by visitation of God" the jury then would be sworn to determine whether he had sufficient understanding to comprehend the nature of the trial. If the defendant had such understanding, and could be communicated with, the trial proceeded. Several interesting cases illustrate this procedure.

In *King v. Jones*⁷⁵ in 1773, the defendant, a deaf-mute, was indicted for stealing five guineas. The jury found that he stood mute by "visitation of God." But it appeared that he could com-

⁷⁰ 1 Stephen, *History of the Criminal Law of England* (1883) 297 *et seq.*

⁷¹ If a person refused to plead to an indictment, a jury was impaneled to determine whether he stood mute by malice or by visitation of God. If the former, he was taken to have pleaded guilty and dealt with accordingly. "If he was accused of felony, he was condemned after much exhortation, to the *peine forte et dure*, that is, to be stretched naked on his back, and to have 'iron laid upon him as much as he could bear and more,' and so to continue fed upon bad bread and stagnant water on alternate days, till he either pleaded or died" 1 Stephen, *op. cit. supra* note 70 at 299.

⁷² 2 Pike, *History of Crime in England* (1873) 387.

⁷³ 12 Geo. 3, c. 20 (1772).

⁷⁴ 7 & 8 Geo. 4, c. 28, §2.

⁷⁵ 1 Leach C. C. 102 (1773).

municate his ideas to a witness, and be communicated with; consequently he was placed upon trial, convicted of simple larceny, and sentenced to be transported. In *John Ruston's case*⁷⁶ in 1786, Ruston, a man *mutus et surdus a nativitate*, was a crown witness. When it appeared that he could communicate with his sister by signs, he was held a competent witness. The leading case on the point, however, is *The King v. Steel*.⁷⁷ The defendant was charged with simple larceny, refused to plead, and was found to stand mute by "visitation of God." She complained that she could not hear and refused to plead on a second arraignment. The court, after saying that such cases should be tried with "great diligence and circumspection" and every right of the defendant protected, ordered the trial to proceed. The defendant was convicted of simple larceny and sentenced to transportation for seven years.

Since 1800, however, the results of the cases appear to have changed and it was very seldom that such a person was tried. The reason for this seems to have been the statutory provision made in 1800 for the care of mentally disordered persons charged with crime. It will be remembered that in *Hadfield's Case* (1800)⁷⁸ the defendant had shot at King George III in the Royal Theatre in Drury Lane and was charged with high treason. It was obvious on the trial that he was insane due to severe injuries suffered in the wars. The defendant's lawyer, Sir Thomas Erskine, did not want him acquitted and sent back into the community but there was no provision made for the incarceration of insane persons who were charged with crime or acquitted of criminal responsibility because of insanity. As a result of that case, a statute was passed which provided for the safe custody of such persons.⁷⁹

The cases of deaf-mutes who were charged with crime and stood mute on arraignment, being found mute by "visitation of God" and then being tried, show that after 1800 very few of them ever went to trial on the merits, rather the jury found that they were incapable of communicating to others or of being communicated with, or of unsound mind, and they were ordered, under the statute, to be "detained until his Majesty's pleasure be known."⁸⁰

⁷⁶ 1 Leach C. C. 408 (1786).

⁷⁷ 1 Leach C. C. 451 (1787).

⁷⁸ 27 How. St. Trials 1282 (1800).

⁷⁹ 40 Geo. 3 Ch. 93, 94 (1800) amended by Trial of Lunatics Act, 47 & 48 Vict. c. 64 (1884).

⁸⁰ For example see *Rex v. Tyson*, 7 Car & P. 305 (1831); *Rex v. Pritchard*, 7 Car. & P. 303 (1836). But see *Rex v. Thompson*, 2 Lewin C. C. 137 (1827) where

Undoubtedly the progress of education of the deaf and dumb has had some influence upon this phase of the law. The first attempt at education of the deaf was in 700 A. D. but it was not until the sixteenth century that any serious attempt was made. A Spanish monk taught the deaf to speak during the sixteenth century.⁸¹ A book was published by another monk in 1620 dealing with the subject. In England the first efforts were made in 1648 by Dr. John Bulwer. In 1760 a school for the deaf was opened in Edinburgh by Thomas Braidwood. He moved his school to London in 1783, and in 1792 the London Asylum for the Deaf and Dumb was founded. This was the first English Institution for the deaf and dumb. It is interesting to note that in *Rex v. Pritchard* (1836)⁸² the court mentioned that the defendant, who was deaf and dumb, had been educated in the Deaf and Dumb Asylum in London. While there was some attempted education of deaf-mutes in this country at the end of the seventeenth century, the first school was opened in 1817.⁸³

It appears to be generally recognized in the United States that persons deaf, dumb, and blind may be educated and may possess as much or more intelligence than the average, and it would seem that the law should reject the old dogma that a person deaf or dumb from birth be considered an idiot, or at least that there should be a presumption to that effect. The courts are not in accord in their views upon the subject, however, although most of the cases have been decided since the education of the deaf and dumb has been a matter of common public knowledge. *Brower v. Fisher*⁸⁴ was a civil suit regarding the capacity of the defendant to make a deed. It appeared that he was deaf and dumb. A commission to determine his sanity was appointed, and it was found that he was sane unless the fact of deafness and dumbness were a deciding factor. The court held that it was not, and dismissed the bill, but held that the bill was not filed vexatiously, and did not award costs. Later, in a suit in equity to set aside a deed on the ground of incapacity of the grantor because she was deaf and dumb, the North Carolina court⁸⁵ refused to follow the common law rule and said that the capacity of a deaf-mute was to be

it appeared that the deaf and dumb defendant could read and write. He was tried and acquitted.

⁸¹ 7 Ency. Britannica (14th ed. 1929) 101.

⁸² 7 Car. & P. 303 (1836).

⁸³ *Supra* note 81; 5 Ency. of the Social Sciences (1931) 18 *et seq.*

⁸⁴ 4 Johns Ch. 441 (N. Y. 1820).

⁸⁵ *Barnett et al v. Barnett et al*, 1 Jones Eq. 221 (N. C. 1854).

measured by what he has, and not by what he has not. The court took judicial notice of the methods of educating such persons, and said that their legal ability to make a contract is placed on its proper ground—their mental capacity. Later, in Delaware,⁸⁶ the court, in a murder case, applied the common law rule that there was a presumption that a deaf and dumb person was incapable of committing a crime and the burden was on the state to show capacity. The court in this case was undoubtedly influenced by the fact that the defendant was a poor, uneducated negro who had been deaf and dumb from birth. The jury, however, found him not guilty by reason of insanity, or want of criminal responsibility. Two of the latest cases on this point are particularly interesting. In *State v. Howard*,⁸⁷ the Missouri court was faced with the question whether two deaf-mutes were competent witnesses for the state in a murder trial. The defendant objected to their competency on the ground that they were presumed to be idiots. The court said that the presumption that a person deaf and dumb from birth should be deemed an idiot does not seem to obtain in modern practice—at least in the United States—and if it did, the circumstances of the present case forbade its application. Historically, the court is incorrect in its statement so far as the common law is concerned, and there had been previous cases on the point in the United States applying the common law rule. In 1915 the Kentucky court in *Belcher v. Commonwealth*⁸⁸ had to decide whether a defendant who had become deaf and dumb at the age of four years because of fever, could be held responsible for homicide. The defendant insisted that as he was a deaf-mute the trial court should hold him incapable of committing the crime with which he was charged. This the trial court refused to do, and charged generally upon the question of the mental capacity of the defendant to know right from wrong and the ability to control his actions. The Court of Appeals of Kentucky very candidly said, with reference to the presumed incapacity of a deaf-mute at common law: "We are not aware that such a doctrine has ever been announced by the courts. The fact that the defendant is a deaf-mute is simply a circumstance to be considered in connection with the other evidence in determining whether or not he was mentally capable of committing the crime. On this phase of the case the evidence was

⁸⁶ *State v. Draper*, 1 Houston Crim. Cas. 531 (Del. 1868).

⁸⁷ 118 Mo. 127, 24 S. W. 41 (1893).

⁸⁸ 165 Ky. 659, 177 S. W. 455, note, Ann. Cas. 1917 B. 240 (1915).

conflicting and the question was one peculiarly for the jury." While the court was incorrect with reference to the existence of the doctrine, it is submitted that it reached the most desirable conclusion of any case considered. It is a matter of common knowledge that deafness or dumbness, or deafness *and* dumbness is no insurmountable barrier to learning, nor does it *per se* show a mental incapacity to entertain an intent. The life of Helen Keller is an outstanding example of the ability to overcome even greater handicaps;⁸⁹ yet the early authorities on the criminal law would have presumed that she had no mental capacity whatever.

The new Italian Penal Code has provided specifically for this phase of the law. It provides that a deaf and dumb person, who, at the moment he committed the act had not the capacity of intention or volition, by reason of his infirmity, should not be charged with the crime. And if the capacity of intention or volition is largely diminished but not excluded, the punishment should be reduced.⁹⁰ In Germany it was originally provided that a deaf and dumb person would be found not guilty if he did not possess insight necessary for the comprehension of the punishability of an act committed by him.⁹¹ This was changed in 1933 when the statute was amended to provide that a deaf-mute would not be punished for a deed if he were backward, or retarded in his mental development and therefore not in a position to have insight into the forbiddenness of the deed, or to act according to his insight.⁹² This would seem to indicate that if a deaf-mute had sufficient intelligence to know that his act was forbidden by law he would be punished. However, if for any reason he could not act according to his insight, he would not be punishable. This would seem to reach the same result as the Italian Penal Code with the exception of partial responsibility. Of all the law considered, the provisions of the Italian Code appear to be the most humane.

We are told that the justification of a law cannot be found in the fact that our fathers have followed it, but must be found in the social end which the law subserves.⁹³ Some laws are mere

⁸⁹ See her latest book, *Helen Keller's Journal*, Doubleday Doran & Company (1938).

⁹⁰ Italian Penal Code (1931) Title IV, Ch. I, Art. 96.

⁹¹ *Strafgesetzbuch* §58. I am indebted to Dr. Anton Chroust, Research Fellow, Harvard Law School 1937-38, for the translation of the various sections of the German Code which are cited in this and the following footnotes.

⁹² *Reichsgesetzblatt*, 1 P. 995 (November 24, 1933).

⁹³ Holmes, *Law in Science and Science in Law* (1899) 12 Harv. L. Rev. 443; Holmes, *Collected Legal Papers* (1920) 210.

survivals. History alone shows their origin. The law here considered, as has been previously mentioned, probably arose in the Roman law at a time of strict formalism whence came the rule that if a person were either deaf or dumb, he was incapable of making a contract.⁹⁴ This was possibly carried by analogy into the Anglo Saxon laws which provide that if a person were either deaf or dumb he was not responsible, beyond the payment of compensation by his father, for the consequences of wrongful acts.⁹⁵ The courts now use the expression deaf *and* dumb without a consideration of the two-fold requirement they are exacting, and without reference to modern conditions. The unsoundness of the rule is further apparent in England, which still recognizes it. In 1893 Parliament passed the Elementary Education (Blind and Deaf Children) Act⁹⁶ providing for the compulsory attendance of deaf children between the ages of seven and sixteen years at suitable schools to be provided by the local authorities. Curiously enough the second section of this act provides that it shall not be the duty of a school authority to provide such schools to children who are idiots or imbeciles, among others. Yet the criminal courts of England still continue to indulge in the presumption that deaf and dumb persons are idiots.⁹⁷

In this country, as already shown, the courts are divided. Those which consider the historical setting of the rule refuse to follow it, as do the courts which operate in ignorance of the rule. Those which pay lip service, through the doctrine of *stare decisis*, to the old cases, without viewing them in their historic setting, seem to prefer the ancient rule.

III. *Somnambulism and Somnolentia*

Somnambulism has been defined as: "A sleep or sleeplike state in which walking and other acts are performed. These acts are, typically, not remembered in the subsequent waking state, but may be recalled in a later attack; also the actions characteristic of this state."⁹⁸

⁹⁴ *Supra* note 65.

⁹⁵ *Supra* note 66.

⁹⁶ 56 & 57 Vict. Chap 42 (1893).

⁹⁷ "A person deaf and dumb from birth is by presumption of law an idiot, but it may be shown that he has the use of his understanding." Harris & Wilshire, Criminal Law (16th ed. 1936) 32; Archbold's Criminal Pleading, Evidence & Practice (28th ed. 1931) 14; *Rex v. Gov. of His Majesty's Prison at Stafford, Ex. Parte Emery* [1909] 2 K. B. 81, 16 Am. & Eng. Ann. Cas. 442, note 444.

⁹⁸ Webster's New International Dictionary (2nd ed. 1934) 2397.

Somnolentia apparently means sleepyness, drowsiness, inclined to sleep or marked by or inducing drowsiness.⁹⁹ It would seem to be that state wherein sleep overlaps into wakefulness, the period of time when one is "apparently awake but still asleep." In Germany this state is referred to by commentators as *Schlafrunkenheit* or sleep-drunkenness.¹⁰⁰ It should be distinguished from somnambulism which is essentially sleep-walking or performing other acts in one's sleep. Somnolentia covers the period between apparent waking-up and the time when the senses are actually awake. The courts and counsel in these cases seem to have lost sight of the fact that a somnambulist may not suffer from somnolentia, nor necessarily does one suffering from somnolentia have to be a somnambulist or sleep-walker. A normal person may, from fatigue, intoxication, or constitutional make-up, be difficult to awaken, hence may suffer from somnolentia without ever having walked in his sleep. Cases involving true somnambulism are very rare; cases involving somnolentia appear only occasionally.

The courts and some commentators are not consistent in their use of these terms, apparently using them interchangeably. For instance, the court said in *Fain v. Commonwealth*,¹⁰¹ where the defendant, while being awakened shot and killed the deceased, that modern writers on medical-legal subjects treated a species of mental unsoundness connected with sleep under the general head of somnambulism. The court later mentioned somnolentia and somnambulism and recognized the distinction between the two terms, without applying either term specifically to the case. Although this case has been cited as authority for somnambulism as an excuse for crime,¹⁰² it clearly is a case of somnolentia. The result in each type of case should be the same, that is acquittal if the defense is made out properly, but there might be a difference in theory upon which the defense could be based. For instance, in the true somnambulist cases, i.e., sleep-walking, it is clear that there would be no criminal intent and the defendant not guilty.¹⁰³ In the somnolentia cases, the defendant could predicate his defense upon either: 1. mental unconsciousness at the time of the act, similar to insanity, and thus show the inability to form the requisite

⁹⁹ *Ibid.*

¹⁰⁰ Wharton & Stille, *Medical Jurisprudence* (4th ed. 1882) p. 393. Many interesting cases are cited at this point.

¹⁰¹ 78 Ky. 183, 39 Am. Rep. 213 (1879).

¹⁰² Smoot, *Law of Insanity* (1929) §105.

¹⁰³ *Supra* note 101.

criminal intent, or 2. a mistake of fact, which was suggested in the *Fain* case by the Court of Appeals of Kentucky.¹⁰⁴ Of course it must be remembered that a mistake or ignorance of fact exempts a person from criminal liability only when the act done would be lawful if the facts were as the accused believed them to be and as a reasonable person under the same circumstances would have believed.¹⁰⁵ It is difficult to see how, "under the circumstances of somnolentia," any person could act other than "reasonably" under such conditions. Hence it does appear that a mistake or ignorance of fact should be a good defense in such cases.¹⁰⁶

While many cases of somnambulism are referred to in works on medical jurisprudence,¹⁰⁷ only one case has been found officially reported that clearly came under that specific head. That is the case of *H. M. Advocate v. Fraser* from Scotland.¹⁰⁸ In this case, the defendant was a confirmed somnambulist. He had been known to arise from his bed and, while asleep, go about his farm and do chores, such as cutting wood. On the night of the murder he went to bed as usual. His wife and child were sleeping in the same

¹⁰⁴ *Fain v. Commonwealth*, 78 Ky. 183, 39 Am. Rep. 213. In a similar case in Texas the court did charge upon mistaken identity, which would be equivalent to a mistake of fact, but refused to charge upon somnambulism. The court of criminal appeal reversed the conviction for the failure to charge upon somnambulism. This case indicates the two-fold nature of the defense that may be available in the somnolentia cases as distinguished from the cases of true somnambulism. *Bradley v. State*, 277 S. W. 147 (Tex. Crim. App. 1925); for the final word in the Bradley case see *Bradley v. State*, 295 S. W. 606 (Tex. Crim. App. 1927); cf. Levet's case, Cro. Car. 538, 1 Hale, 42, 474; Wharton & Stille, *Medical Jurisprudence* (4th ed. 1882) 394 *et seq.*; Ray, *Medical Jurisprudence* (4th ed. 1860) Chap. XXIV.

¹⁰⁵ Miller, *Criminal Law* (1934) p. 156; Levet's Case, Cro. Car. 538, 1 Hale, Pleas of the Crown, 42 474 (1778); *semble*, *Bradley v. State*, 277 S. W. 147 (Tex. Crim. App. 1925).

¹⁰⁶ "With regard to knowledge of fact, the law, perhaps, is not quite so clear, but it may, I think, be maintained that in every case knowledge of fact is to some extent an element of criminality as much as competent age and sanity. To take an extreme illustration, can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. A multitude of illustrations of the same sort might be given. I will mention one or two glaring ones. Levet's case (1 Hale, 474) decides that a man who, making a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar to be, killed a person who was not a burglar, was held not to be a felon, though he might be (it was not decided that he was) guilty of killing *per infortunium*, or possibly, *se defendo*, which then involved certain forfeitures. In other words, he was in the same situation as far as regarded the homicide as if he had killed a burglar." *Regina v. Tolson*, 23 Q. B. D. 168, 187 (1889); see also Meredith, *Insanity as a Criminal Defense* (1931) 95.

¹⁰⁷ Wharton & Stille, *op. cit. supra* note 104; Ray, *op. cit. supra* note 104.

¹⁰⁸ (1878) 4 Coup. 70; mentioned in Meredith, *Insanity as a Criminal Defense* (1931) pp. 93-5; 1 Wharton & Stille's *Medical Jurisprudence* (5th ed. 1905) p. 903.

room. The defendant began to suffer from nightmares during the night and thought he was struggling with a wild beast which was coming in to kill his child. He picked the child up and dashed its head against the wall. His wife could not prevent it. When he awakened he was distraught over what he had done. He was acquitted of the murder charge on the ground that "he was guilty in his sleep" but "not guilty in his senses." Thus the court avoided the troublesome question whether, legally, somnambulism and somnolentia cases should be considered in the same category as insanity cases.

The few American cases on the subject seem to indicate, either by inference, as in the *Fain* case, or directly, as in the later case of *Tibbs v. Commonwealth*,¹⁰⁹ that they should be considered as equivalent to insanity cases. The latter case embraced approximately the same factual situation as the *Fain* case. Somnambulism was relied upon as a defense, and the court instructed the jury on insanity. The defendant complained of this instruction but the court said that, "We fail to see how these facts would constitute any defense other than that embraced in a plea of insanity. Certainly the appellant cannot complain that he was given the benefit of such defense."¹¹⁰ *Dictum* in one other case is to the same effect.¹¹¹ In view of the scarcity of cases on this point it is submitted that this *dictum* is unsound, when one considers the effect of the verdict of "not guilty by reason of insanity."¹¹² Many states, when such a verdict is returned, require that the defendant be committed to an hospital for the criminally insane, there to be held either for a definite length of time before habeas corpus proceedings may be had, or until such time as he is "restored to sanity." The courts evidently did not have this consequence in mind when considering these cases. With reference to a similar case in England, an English commentator remarked: "The case ought not, we suggest, to be cited in support of a general proposition that somnambulists are insane. Sleepwalking denotes some abnormality of the nervous system no doubt; but we have all known somnambulists whom we should certainly have regarded as quite sane."¹¹³ Dr. Wharton thinks that this is a type of insanity and that the patient should be committed to an insane hospital. He thinks that the only dif-

¹⁰⁹ 138 Ky. 558, 128 S. W. 871, 28 L. R. A. (N. S.) 665 (1910).

¹¹⁰ *Ibid.*

¹¹¹ *Bradley v. State*, 277 S. W. 147 (Tex. Crim. App. 1925).

¹¹² Weihofen, *Insanity as a Defense in the Criminal Law* (1933) 266 *et seq.*

¹¹³ Editorial, *Somnambulism and Crime*, 93 *Just. of Peace* 765 (1929).

ference between this and the other forms of paroxysmal insanity is that this occurs while the patient is asleep.¹¹⁴ It will be noted that the court in *Fraser's* case avoided deciding the point. It would appear, therefore, that the question is an open one in Scotland and England; that the courts in this country seem to favor considering it as a form of insanity, but without a mention of the attendant consequences of a verdict of acquittal by reason of insanity.

In California it appears that the situation is covered by a statute obviating the difficulty that some of the other courts in this country will some day experience in deciding the question. In 1872 California adopted, as part of its Penal Code, a provision that: "All persons are capable of committing crimes except those belonging to the following classes: . . . 5. Persons who committed the act charged without being conscious thereof."¹¹⁵ Subsections 2 and 3 of this section of the code mention idiots, lunatics, and insane persons. Hence, it is obvious that subsection 5 was intended to provide for a different situation. In *dictum* the California court has said that this section does not contemplate "persons of unsound" but comprehends only "cases of sound mind such as those involving somnambulism or persons suffering with delirium from fever or drugs."¹¹⁶ Thus this paradoxical situation has developed in this phase of the criminal law. In California, and possibly in England, a somnambulist, who commits a crime while in a somnambulist state may be considered legally sane and acquitted. In Kentucky and Texas, under exactly the same circumstances, such a defendant would be acquitted but would undoubtedly be considered legally insane. Texas has no statutory provision for the detention of a defendant acquitted on the ground of insanity. In Kentucky it would appear that when such a verdict is returned, the court may, if satisfied, after hearing evidence, that he is insane, order him confined to the state hospital.¹¹⁷

SUMMARY

From the foregoing it appears that mental defectives, idiots, imbeciles and morons are, before the criminal law, considered

¹¹⁴ Wharton & Stille, *Medical Jurisprudence* (5th ed. 1905) p. 904.

¹¹⁵ California Penal Code §26; enacted February 14, 1872, effective January 1, 1873; Cal. Penal Code Annotated (1935) §26.

¹¹⁶ *People v. Methever*, 132 Cal. 326, 64 Pac. 481 (1901); *People v. Rothrock*, 68 P. (2d) 364 (Cal. App. 1937).

¹¹⁷ Kentucky Crim. Code §268 (Carroll, 1927).

on the same plane as normal persons and their criminal responsibility with reference to their defect is based upon the prevailing legal test of insanity in the respective jurisdictions.

Deaf-mutes under the criminal law in England are still influenced by the presumption that such a person is presumed to be an idiot, but the English Parliament, through its Elementary Education Act, has recognized that deaf and dumb persons are not idiots. On the continent of Europe the fact of deafness or dumbness is one of the factors to consider in determining whether to charge a person with crime, or in determining his penal treatment. In this country, due to our federal organization, some jurisdictions follow the common law rule, some operate in ignorance of it and merely allow the evidence of deaf-mutism to be considered by the trier of fact as one fact bearing upon criminal capacity; and some jurisdictions have expressly repudiated it.

In the somnambulism cases the English courts have decided merely that somnambulism is a defense to a criminal act. Some of the courts in this country have failed to consider the distinction between somnambulism and somnolentia and have grouped such cases with the insanity cases, without considering, evidently, the ultimate consequences such a grouping might have. *Dictum* in a California case suggests that the situation is covered in that state by a statute, hence the consequences of finding a somnambulist or one suffering from somnolentia 'not guilty by reason of insanity' will not arise there.