Fordham Law Review

Volume 7 | Issue 1 Article 4

1938

Criminal Law- Insanity As a Defense

COMMENT

CRIMINAL LAW—INSANITY AS A DEFENSE.—The increasing prevalence of crime in our modern society has focused attention upon the criminal law.[1] The particular problem of insanity in the criminal law[2] has been brought to the fore, in part, because of the tendency of many psychologists and psychiatrists to attribute crime to mental disease. The study of psychology and psychiatry has led to a more complete understanding of the human mind, although it is still far from being well understood.[3] As a consequence much attention is given to the contention that the concept of mental responsibility, upon which our law is based, is outmoded.[4]

Introduction

To constitute a crime there must be an act accompanied by criminal intent.[5] Therefore, one, who is so insane as to be incapable of entertaining a criminal intent, cannot be held criminally responsible for his acts.[6] In the criminal

1. For treatises on this general subject, see Wechsler & Michael, *A Rationale of the Law of Homicide: I* (1937) 37 COL. L. REV. 701; POUND, CRIMINAL JUSTICE IN AMERICA (1930); Pound, *Towards a Better Criminal Law* (1935) 21 A. B. A. J. 499; Scanderett, *The Obsolescence of Criminal Guilt* (1937) 27 J. CRIM. L. 212. In his article at page 851, Scanderett, describing the enormous amount of comment on the criminal law, states, "A mere list of these contributions fills a volume of 635 pages, with 25 or more titles per page. Here, then, is a clamor of 15,825 voices. The words of the advertising sloganeer are appropriate: 'Such popularity must be deserved.'"

2. For exhaustive commentaries upon insanity in the criminal law see WHARTON & STILLÉ, MEDICAL JURISPRUDENCE (5th ed. 1905); GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925); WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW (1933); MERCIER, CRIMINAL RESPONSIBILITY (1926). Recently there has been a series of editorials upon *Insanity as a Defense to Homicide in New York,* in the New York Law Journal. N. Y. L. J., Oct. 5, 1937, p. 988, col. 1; *id.* Oct. 6, 1937, p. 1008, col. 1; *id.* Oct. 7, 1937, p. 1032, col. 1; *id.* Oct. 8, 1937, p. 1052, col. 1.

3. 1 WHARTON AND STILLÉ, *op. cit. supra* note 2, at 466, "Insanity is a disease. . . . Insanity is not a metaphysical affair, neither is it a matter of legal definition. Insanity is a fact, but it is not a fact, that is, as yet, thoroughly understood."

4. Cardozo speaking before the New York Academy of Medicine stressed the need for new laws of insanity which would be commensurate with the enlightened medical knowledge of insanity. CARDOZO, LAW AND LITERATURE (1931) 96.

5. This is the general rule, and the maxim is, *Actus non facit reum, nisi mens sit rea*—a crime is not committed if the mind of the person doing the act is innocent; Sayre, *Mens Rea* (1932) 45 HARV. L. REV. 974. At p. 1026 Sayre says, "An intensive study of the substantive law covering each separate group (of crimes) becomes necessary to reach an adequate understanding of the various states of mind requisite for criminality."

There are apparent exceptions to the rule in that there may be such negligence as to be equivalent to a criminal intent. State v. Anderson, 196 N. C. 771, 147 S. E. 305 (1929). So too, statutes may declare an act to be criminal, making intent immaterial. Armour Packing Co. v. United States, 153 Fed. 1 (1907); Commonwealth v. Murphy, 165 Mass. 66, 42 N. E. 504 (1896); Commonwealth v. Mixer, 207 Mass. 141, 93 N. E. 249 (1910); Greene v. Fankhauser, 137 App. Div. 124, 121 N. Y. Supp. 1004 (1st Dep't 1910); Commonwealth v. Weiss, 139 Pa. 247, 21 Atl. 10 (1891).

6. Parsons v. State, 81 Ala. 577, 2 So. 854 (1887); Commonwealth v. Rogers, 7 Metc. 500 (Mass. 1844); State v. Jones, 50 N. H. 369, 9 Am. Rep. 243 (1871); Flanagan v. People, 52 N. Y. 467 (1873).

law the mental capacity of the defendant may be in question: (1) at the time he committed the act alleged to be criminal; (2) at the time of the trial; or (3) during the stage of punishment. The first question is concerned with whether, at the time of the commission of the act alleged to constitute a crime, the defendant was suffering from such mental disorder as not to be punishable for the act. On the other hand the question of mental responsibility at the time of the trial or during the stage of punishment gives rise to a different legal problem. If the defendant is found to be insane at any stage of the proceedings or during punishment, such finding will put an end to the trial,[7] or preclude sentence[8] or further punishment.[9] However, if the defendant recovers his sanity, the proceedings will be carried out in their normal course.[10]

The test to determine the mental capacity of the defendant at the time the alleged criminal act was committed is different from the test to determine whether he ought to stand trial or be subjected to punishment.[11]

7. The general rule is that an insane person may not be tried, sentenced, or punished. People v. Gavrilovich, 265 Ill. 11, 106 N. E. 521 (1914); State v. Reed, 41 La. Ann. 581, 7 So. 132 (1889); State v. Peacock, 50 N. J. L. 34, 11 Atl. 270 (1887); Freeman v. People, 4 Denio 9 (N. Y. 1847). In Youtsey v. United States, 97 Fed. 937, 940 (C. C. A. 6th, 1899) the court declared, "It is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or after trial receive judgment, or, after judgment, undergo punishment."

The test to be applied before or during trial is, generally, whether the accused has sufficient understanding to comprehend the circumstances he is in, in order to advise his counsel of his defense if he has a just one. People v. West, 25 Cal. App. 369, 143 Pac. 793 (1914); People v. Geary, 298 Ill. 236, 131 N. E. 652 (1921); Freeman v. People, 4 Denio 9 (N. Y. 1847); Jordan v. State, 124 Tenn. 81, 135 S. W. 327 (1911).

The law is now regulated principally by statutory provisions. CAL. PEN. CODE (Deering, 1933) § 1367; NEV. COMP. LAWS (Hillyer, 1929) § 11183; N. D. COMP. LAWS ANN. (1913) § 11063; OKLA. STAT. (Harlow, 1931) § 3211; PA. STAT. (Purdon, 1936) tit. 19, § 1352.

N. Y. PENAL LAW (1909) § 1120 provides: ". . . A person cannot be tried, sentenced to any punishment or punished for a crime while he is in a state of idiocy, imbecility, lunacy, or insanity so as to be incapable of understanding the proceeding or making the defense . . . ."

When the issue of the defendant's insanity has been raised, various methods of determining his insanity are found in the different statutes. It may be tried by the court: ALA. CODE ANN. (Michie, 1928) § 4577; or it may be tried by the jury: IND. STAT. ANN. (Burns, 1926) § 2295; MASS. GEN. LAWS (1932) c. 123, § 100; MINN. STAT. (Mason, 1927) § 10722; or it may be tried by a special commission: CONN. GEN. STAT. (1930) § 6631; N. Y. CODE CRIM. PROC. (1910) § 658 (as amended by N. Y. Laws 1936, c. 460); WYO. REV. STAT. ANN. (Courtright, 1931) § 56-109-124. In regard to the recent procedure adopted in New York by the amendment to N. Y. CODE CRIM. PROC. § 658, see N. Y. L. J., July 1, 1937 p. 4, col. 1; also, (1937) 37 COL. L. REV. 151.

8. In WEIHOFEN, *op. cit. supra* note 2, at 377 *et seq.*, the subject is thoroughly considered.

9. WEIHOFEN, *op. cit. supra* note 2, at 385 *et seq.* It is noteworthy that a person serving a sentence, who becomes insane, will be released from jail and sent to the proper institutions.

10. WEIHOFEN, *op. cit. supra* note 2, at 375, 381.

11. People v. Geary, 290 Ill. 236, 131 N. E. 652 (1921); State v. Genna, 163 La. 701, 112 So. 655 (1927); Freeman v. People, 4 Denio 9 (N. Y. 1847); People v. Nyhan, 171

At the outset of this article it should be noted that the law is not concerned with insanity as a *disease*[12] but with the question of *legal responsibility* for crime. The question is not: Is the defendant insane? But, rather, does he suffer from such derangement of the mind as not to be criminally responsible for his acts? In other words, the law concerns itself not with medical insanity but with mental capacity. Illustrative of this is the New York Penal Law, Section 1120, which does not provide that every person who is found to be medically insane shall be relieved of criminal responsibility. The statute[13] rather provides that:

". . . A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such defect of reason as:

1. Not to know the nature or quality of the act he was doing; or,

2. Not to know that the act was wrong."

It has been authoritatively stated that in all probability, before the twelfth century in the English common law, mental disease, as such, constituted no general defense[14] to a criminal charge. However, the influence of Canon and Roman law upon the common law made the mental element in crime of increasing importance, for it was insisted that moral guilt was an essential element of the criminal act. This insistence upon the mental element in crime did not bring about any immediate change in the substantive law of criminal liability, but a procedural device was resorted to in order to relieve those who suffered mental derangement. The court would convict the defendant and recommend him to the king's pardon.[15] Before the courts established tests

N. Y. Supp. 466 (Sup. Ct. 1918); People v. Thayer, 121 Misc. 745, 202 N. Y. Supp. 190 (Co. Ct. 1923). See note 7, *supra*.

12. Insanity *per se* will not relieve one from criminal responsibility; to be excused from liability, the insanity of the accused must be such as comes within the tests laid down which free him from responsibility. People v. O'Connell, 62 How. Pr. 436 (N. Y. 1881); People v. Coleman, 198 N. Y. 166, 91 N. E. 368 (1910); *Ex parte* McKenzie, 116 Tex. Crim. 144, 28 S. W. (2d) 133 (1930).

So also, the legal tests determining the capacity of an individual to make a contract or a will are not wholly dependent upon medical science. In 1 WILLISTON, CONTRACTS (Rev. ed. 1936) 754, this test is given to determine whether one had sufficient mental capacity to make a contract, ". . . whether the alleged lunatic had sufficient reason to enable him to understand the nature and effect of the act in dispute."

In 1 PAGE, WILLS (2d ed. 1928) 231, in regard to the mental capacity of an individual to make a will it is said, ". . . a person who was not perfectly sane might possess sufficient mental capacity to make a will. Insanity in the medical sense, or an impaired or defective memory, or some degree of feebleness of mind, are consistent with capacity to make a will."

13. This section of the statute also provides that an insane person may not be tried, sentenced, or punished. See note 7, *supra*. N. Y. PENAL LAW (1909) § 34 provides: "A morbid propensity to commit prohibited acts, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor." This section eliminates an irresistible impulse as a possible defense. See note 53, *infra*.

14. Sayre, *supra* note 5, at 1004.

15. Sayre, *supra* note 5, at 980.

to determine what mental condition should excuse from criminal responsibility, several legal writers had dealt with the subject. In the middle of the thirteenth century Bracton defined an insane person as one who does not know what he is doing, is lacking in mind and reason, and is not far removed from a brute.[16] Bracton was writing under the strong influence of Canon and Roman law,[17] and he emphasized the mental and moral aspects of criminality.[18] Among the other early writers were Littleton,[19] writing in the fifteenth century, Fitzherbert[20] in the sixteenth and Coke[21] in the seventeenth century. Hale[22] has been accredited[23] as being the first authority who distinguished between insanity which relieved from criminal responsibility and that which did not. His test to determine responsibility was that "such a person as is labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony."[24] This came to be known as the "child-of-fourteen-years test." Hawkins laid down the test that one would not be criminally responsible if he were incapable of distinguishing between good and evil.[25] Although this test resembles our present day tests it is distinguishable. The ancient rule referred to good and evil in the abstract; whereas, our present law refers to right and wrong in relation to the particular act.[26]

The Arrival of M'Naghten's Case

The earliest case-made law on insanity as a defense appeared in 1724 in *Arnold's Case*,[27] which stated the rule to be that the defendant was not to be

16. See 1 WHARTON AND STILLÉ, *op. cit. supra* note 2, at 510, n. 13 (quoting Bracton).

17. In 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1927) 267 *et seq.* there is a brief survey made of the influence of the Roman law upon Bracton.

18. Sayre, *supra* note 5, at 985.

19. 2 Co. LITT. *405, Littleton gave this definition of an insane man. "Also, if a man which is of non sane memory, that is to say in Latine, *qui non est compos mentis.*"

20. In 2 FITZHERBERT, NATURA BREVIUM (9th ed. 1794) 233, this interpretation of insanity is given:

"And he who shall be said to be a sot and idiot from his birth, is such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc. . . ." This test of insanity came to be known as the "twenty-pence" test. Hale criticises this test saying, "These though they may be evidences, yet they are too narrow and conclude not always; for *idiocy or not* is a question of fact triable by jury, and sometimes by inspection." HALE, PLEAS TO THE CROWN (1736) 29.

21. 2 Co. LITT. *405, Coke commenting thus, ". . . in criminal causes, as felonie, etc., the act and wrong of a madman shall not be imputed to him, for that in those causes, *actus non facit reum, nisi mens sit rea,* and he is . . . , without his minde or discretion; . . . a madman is only punished by his madnesse." The influence of Bracton is readily seen in this definition of madness.

22. HALE, PLEAS TO THE CROWN (1736).

23. WEIHOFEN, *op. cit. supra* note 2, at 19.

24. HALE, *op. cit. supra* note 22, at 30.

25. "It is to be observed, that those who are under a natural disability of distinguishing between good and evil, . . . are not punishable by any criminal prosecution whatsoever." 1 HAWKINS, PLEAS OF THE CROWN (7th ed. 1795) 1.

26. See p. 81, *infra.*

27. 16 How. St. Tr. 695 (1724).

excused, unless he did not know what he was doing any more than a wild beast. This rule was followed until 1812,[28] when, in *Bellingham's Case,* the capacity to distinguish right from wrong was put forward as the test. The landmark in the law upon this subject is *M'Naghten's Case.*[29] At the time, it aroused great interest because the accused had killed Drummond, who was the secretary of Sir Robert Peel, believing him to be Peel. The defense raised by the prisoner was that he was not in a sound state of mind at the time of committing the act, and that he was laboring under morbid delusions.[30] The verdict was not guilty, on the ground of insanity. Thereafter by reason of the interest aroused, it was determined to take the opinion of the judges, whereupon five questions were propounded to them. The answers[31] of the judges are of especial interest, for they are the basis of our present-day law on the subject. In substance the rules as laid down were: (1) that the law presumes sanity;[32] (2) that to establish insanity as a defense the insanity must be

28. New Newgate Calendar, vol. 1, p. 527; see WEIHOFEN, *op. cit. supra* note 2, at 23.

29. 10 Cl. & Finn. 200, 8 Eng. Reprints 718 (1845).

30. The insane delusion was that M'Naghten believed Peel was an enemy of his and was hounding him. WEIHOFEN, *op. cit. supra* note 2, at 25. At the present time the delusions under which M'Naghten was labouring would be classified as a persecution delusion. Such a delusion is often pleaded as a defense.

31. The answers of the judges could not, at the time they were made, rightly be termed law, for they were not given by the court while it was sitting to try an issue; they were given *extra curiam.* The peculiar situation arising from this fact is that their answers were not binding as precedent upon English courts. Nevertheless they may now be dignified as law, for the answers were adopted by the English courts. *A fortiori,* they could not be binding on American courts as the American courts adopted the English Common law at the time of the Declaration of Independence. However, the answers have been grafted into our jurisprudence as law. See note 39, *infra.*

London and Westminster Bank Case, 2 Cl. & Finn. 191, 6 Eng. Reprints 1127 (1843) is cited for the proposition that the House of Lords has a right to require the judges to answer abstract questions of existing law. *Cf.* Tennessee v. Condon, 189 U. S. 64 (1903) where it is said, at 71, " 'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, not to give opinions upon moot questions or abstract propositions, or to declare principles or rules which cannot affect the matter in issue. . . .' " For an interesting discussion of this matter see Comment (1936) 5 FORDHAM L. REV. 94, at 103.

32. There is a presumption that every person is sane and therefore responsible for his acts. Davis v. United States, 160 U. S. 469 (1895); Cutcliff v. State, 17 Ala. App. 586, 87 So. 706 (1920); People v. Williams, 184 Cal. 590, 194 Pac. 1019 (1920); People v. Bacon, 293 Ill. 210, 127 N. E. 386 (1920); State v. Lewis, 20 Nev. 333, 22 Pac. 241 (1889); State v. James, 96 N. J. L. 132, 114 Atl. 553 (1921); People v. Egnor, 175 N. Y. 419, 67 N. E. 906 (1903); State v. Mewhinney, 43 Utah 134, 134 Pac. 632 (1913). In consequence thereof when the defense of insanity is raised, the burden of proving irresponsibility, is upon the accused. People v. Croce, 208 Cal. 123, 280 Pac. 526 (1929); Keener v. State, 97 Ga. 388, 24 S. E. 28 (1895); State v. Nelson, 36 Nev. 403, 136 Pac. 377 (1913); State v. Spencer, 21 N. J. L. 196 (1846); Commonwealth v. Kilpatrick, 204 Pa. 218, 53 Atl. 774 (1902).

However, some courts hold that the burden of proving sanity rests upon the state. Davis v. United States, 160 U. S. 469 (1895); State v. Joseph, 96 Conn. 637, 115 Atl. 85 (1921); Lilly v. People, 148 Ill. 467, 36 N. E. 95 (1894); Walters v. State, 183 Ind.

clearly proved;[33] (3) that it must be clearly proved that the defendant was laboring under a defect of reason caused by disease of the mind; (4) that this defect of reason must be such that the defendant did not know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing wrong;[34] (5) that where a person labors under partial delusions and is not in other respects insane, then, even though he was acting with a view of revenging some grievance, or producing some public benefit he is guilty, if he knew he was acting contrary to the law of the land; (6) and that where a person labors under partial delusions only, and is not in other respects insane, he must be considered in the same situation, as to responsibility, as if the facts with respect to which the delusion exists were real.[35]

M'Naghten's Case was not clear to what was meant by a knowledge of wrong, that is, whether wrong was intended to signify that the act was legally wrong—contrary to law—or, whether wrong meant wrong in the moral sense. In the fourth of the above rules the term wrong is used without qualification; and in the fifth, the wording is whether "he knew he was acting contrary to the law of the land." In the celebrated decision of *People v. Schmidt*,[36] Judge Cardozo discussed at length the definition of the word, finally deciding that the proper meaning of it was moral as well as legal wrong. Moreover, he pointed out that the knowledge of right and wrong did not mean right and wrong in the abstract, but rather in regard to the particular act alleged to be

178, 108 N. E. 583 (1915); Davis v. State, 90 Neb. 361, 133 N. W. 406 (1911). The reason for this rule is that since intent, and therefore a sound mind of forming an intent, is an essential part of a crime, the prosecution must prove this fact as it would any other material fact. The prosecution may first rely on the presumption of sanity, but when any evidence is introduced of the insanity of the accused, the state has the burden of proving his sanity

33. Some courts hold that where the burden is upon the defendant he must prove his insanity to the satisfaction of the jury. Davis v. United States, 160 U. S. 469 (1895); State v. Duestrow, 137 Mo. 44, 38 S. W. 554 (1897); Genz v. State, 58 N. J. L. 482, 34 Atl. 816 (1896); Brotherton v. People, 14 Hun 486 (N. Y. 1878); Commonwealth v. Kilpatrick, 204 Pa. 218, 53 Atl. 774 (1902). *Cf.* Others hold that he must prove it by a preponderance of the evidence. Parsons v. State, 81 Ala. 577, 2 So. 854 (1887); Bolling v. State, 54 Ark. 588, 16 S. W. 658 (1891); People v. Gilberg, 197 Cal. 306, 240 Pac. 1000 (1925); State v. Surrency, 148 La. 983, 88 So. 240 (1921); State v. Nelson, 36 Nev. 403, 136 Pac. 377 (1913); Commonwealth v. Berchine, 168 Pa. St. 603, 32 Atl. 109 (1895). Formerly some courts held that the defendant must prove his insanity beyond a reasonable doubt. State v. DeRance, 34 La. Ann. 186, 44 Am. Rep. 426 (1882); State v. Spencer, 21 N. J. L. 196 (1846). The DeRance case was overruled in State v. Scott, 49 La. 253, 21 So. 271 (1897); the Spencer case was overruled by Graves v. State, 45 N. J. L. 203 (1883).

34. Actually the complete statement of the judges is redundant, for if one did not know the nature and quality of the act he was doing, he certainly could not know it was wrong, therefore, all that the answer really means is that the accused will be excused from criminal responsibility if he did not have sufficient mental capacity to know that his act was wrong.

35. Medical men and psychiatrists are convinced that there is no such thing as partial insanity. "There is not, and there never has been, a person who labours under partial delusions only, and is not in other respects insane." MERCIER, *op. cit. supra* note 2, at 198.

36. 216 N. Y. 324, 110 N. E. 945 (1915).

criminal. For instance, one may know that murder is generally wrong both legally and morally. But the question is, did he, with reference to this particular act of killing, appreciate its moral quality. For example, let us suppose one knows that he is attacking a human being in a manner likely to cause death and that he knows that his assault is unprovoked. He understands the nature and quality of the act. Suppose also that he knows the law prohibits an unprovoked assault. He knows that the act is illegal—legally wrong. But he believes God has commanded him to kill every tenth person he meets. What God has commanded cannot be immoral; hence, he could not know the act was wrong. Therefore, in obeying the supposed command he would not be answerable to the law. But if he acts under the belief that he is serving the public good in that he has found a way to solve the problem of unemployment, he would be responsible whether or not his belief is due to a diseased mind, for he knows the nature and quality of the act, and he knows that it is wrong by both positive and Divine law. It will be perceived that the rule is limited to the capacity of the accused to understand. It omits any reference to volition;[37] it is based upon the cognitive element of the mind.

Present Status of the Law

The rules laid down in *M'Naghten's Case* are still the law[38] in England. They are also the law in most American states.[39] Most courts agree that if the defendant did not have sufficient mental capacity to know the nature and quality of the act,[40] *or,* if he did know the nature and quality of the act, but he did not know that it was wrong, then he should be held liable for the alleged criminal act. The only divergence of views is whether this "right and wrong" test is the sole test. The majority of American courts hold that it is.[41] The minority has instituted another test in addition thereto, to wit, the "irresistible impulse" test.[42]

37. Nowhere in the M'Naghten case is there any reference to an irresistible impulse. Its origin is American. See WEIHOFEN, *op. cit. supra* note 2, at 46.

38. Rex v. True, 16 Crim. App. 164 (1922).

39. WEIHOFEN, *op. cit. supra* note 2, at 32.

40. See p. 85, *infra.*

41. People v. Williams, 184 Cal. 590, 194 Pac. 1019 (1920); Hall v. State, 78 Fla. 420, 83 So. 513 (1919); State v. Hartley, 22 Nev. 342, 40 Pac. 372 (1895); People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915). In some states the test is set down by statute. MINN. STAT. (Mason, 1927) § 9915; N. Y. PENAL LAW (1909) § 1120; N. D. COMP. LAWS ANN. (1913) § 9204 (4). In others no tests are given, but the statutes declare that insanity shall be a defense. TEX. STAT. (Vernon, 1936) PENAL CODE Art. 34; PA. STAT. (Purdon, 1936) tit. 10 § 1351. See WEIHOFEN, *op. cit. supra* note 2, at 32 *et seq.*

42. Davis v. United States, 165 U. S. 373 (1897); Parsons v. State, 81 Ala. 577, 2 So. 854 (1887); Morgan v. State, 190 Ind. 411, 130 N. E. 528 (1921); Commonwealth v. Johnson, 188 Mass. 382, 74 N. E. 939 (1905); People v. Durfee, 62 Mich. 487, 29 N. W. 109 (1886); State v. Green, 78 Utah 580, 6 P. (2d) 177 (1931). WEIHOFEN, *op. cit. supra* note 2, at 16 says that seventeen states have adopted the irresistible impulse test. In (1936) 34 MICH. L. REV. 569 there is an interesting discussion of the defense. See note 13 *supra,* citing N. Y. PENAL LAW (1909) § 34 which eliminates an irresistible impulse as a defense.

It would be an impossible task to enumerate the numberless ways in which the "right and wrong" test has been explained in the cases. The following are some of the various wordings of the test: whether the accused had the use of his understanding so as to know he was doing a wrong act;[43] whether the accused had capacity to distinguish right from wrong as to the particular act and knowledge that the act is wrong and will deserve punishment;[44] whether the accused at the time of doing the act was conscious that it was an act he ought not to do;[45] whether the accused did not know the nature of the act or did not know that the act was wrong.[46] Despite the variations it is to be noted that in substance the tests adhere to capacity to distinguish between right and wrong as applied to the particular act. The New York law, as noted before,[47] is governed by statute which by its terms conforms to the principal rule of *M'Naghten's Case.*

As previously stated,[48] some states allow the irresistible impulse test to be interposed as a defense in addition to the *M'Naghten* rule. The test is based upon the recognition of the psychological theory that an individual may be overwhelmed to such an extent by an irresistible impulse to do something, that he no longer has the freedom of will to overcome that impulse. To constitute a good defense the irresistible impulse must be the product of mental disease as distinguished from the uncontrolled fury of a sane man.[49] An irresistible impulse has been declared to be an "irresistible inclination to kill or commit some offense" the result of which the mind can clearly foresee, but which "it is incapable of resisting."[50] In former and even in modern times, the diseases of the mind have been little understood by medical men and even less by laymen.[51] Consequently, there has been—and still is—doubt as to whether such a thing as an irresistible impulse exists, but most of the forensic psychiatrists believe that it does.[52] In New York it is expressly declared to be no defense by Section 34 of the Penal Law.[53] Where the defense is allowed, the defendant might know both the nature and quality of the act he was doing and that it was wrong, but nevertheless be excused from liability if he was so mentally diseased that he was impelled to commit the act by a power which overcame his reason and judgment and was irresistible to him.

43. Hall v. State, 78 Fla. 420, 83 So. 513 (1919).

44. State v. Hartley, 22 Nev. 342, 40 Pac. 372 (1895).

45. State v. Spencer, 21 N. J. L. 196 (1846).

46. People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915).

47. See p. 78, *supra.*

48. See p. 82, *supra.*

49. Parsons v. State, 81 Ala. 577, 2 So. 854 (1887); Woodall v. State, 149 Ark. 33, 231 S. W. 186 (1921); Ryan v. People, 60 Colo. 425, 153 Pac. 756 (1915). As was said by Hansen, J., in State v. Green, 78 Utah 580, 592, 6 P. (2d) 177, 185 (1931), cited *supra* note 42, "The only irresistible impulse recognized . . . is one arising solely from a mental disease."

50. WHARTON AND STILLÉ, *op. cit. supra* note 2, at 197.

51. 1 BISHOP, CRIMINAL LAW (9th ed. 1923) at 271.

52. *Id.* at 277.

53. See note 13, *supra.*

Regardless of whether a state exclusively employs the capacity to distinguish between right and wrong as a test or whether it includes in addition, the irresistible impulse test, the particular test in a given state will be applied to all types of insanity, whether feeblemindedness,[54] paranoia,[55] epilepsy,[56] or other forms.[57] However, some courts have made an exception to this rule in the case of insane delusions. That this form of insanity was not to be tested as other types of insanity was recognized in *M'Naghten's Case.*[58] "An insane delusion is an erroneous belief which is due to the fact that the patient's mind is deranged; and the delusion is of such a character as would not be entertained by him if he were in a normal state. In other words, the delusion is not the cause of the insanity, but the insanity is the cause of the delusion, and is shown by other symptoms besides the delusion itself."[59] Insane delusions will excuse from liability under some circumstances. The delusions must be the product of a diseased mind, not mere departures from the accepted moral standard. The special rules applied in cases involving insane delusions are various. Many courts adhere to the rule laid down in *M'Naghten's Case* that it is a defense, if the facts believed by the accused to exist would constitute a defense, if they were true;[60] and others use the same test with the addition of the "irresistible impulse" test.[61] A great many of the courts have not, however, adopted special rules for insane delusions, but apply in all cases the general test of capacity to know that the act was wrong with or without the "irresistible impulse" tests.[62] It has often been said by New York courts, for example, that the "right and wrong" test is the sole test of criminal responsibility and that there is no special rule for delusional insanity.[63] Wherever

54. Rogers v. State, 128 Ga. 67, 57 S. E. 227 (1907); Wartena v. State, 105 Ind. 445, 5 N. E. 20 (1886). Feeblemindedness, which will relieve from responsibility, should not be confused with feeblemindedness which will not. In Cox v. State, 60 Tex. Crim. 471, 473, 132 S. W. 125, 126 (1910) the court said, ". . . mere weakness of mind will not excuse an act that would be otherwise criminal, and that weakness of mind must reach the stage that the party does not know the difference between right and wrong of the act committed."

55. Hawkins v. State, 133 Ark. 38, 201 S. W. 832 (1917).

56. Genz v. State, 58 N. J. L. 482, 34 Atl. 816 (1896); People v. Magnus, 92 Misc. 80, 155 N. Y. Supp. 1013 (Gen. Sess. 1915).

57. WEIHOFEN, *op. cit. supra* note 2, at 84.

58. See p. 81, *supra.*

59. 1 WHARTON AND STILLÉ, *op. cit. supra* note 2, at 479.

60. Davis v. State, 44 Fla. 32, 32 So. 822 (1902); Morris v. State, 96 Tex. Crim. 63, 255 S. W. 744 (1923). The rule was adopted in State v. Lewis, 20 Nev. 333, 22 Pac. 241 (1889) although the court said, *id.* at 349, 22 Pac. at 251, "It may be that the definitions concerning an insane delusion were not the best that could be given."

This test has been subject to severe criticism because it is said that it applies the judgment of a sane man to an insane man. WEIHOFEN, *op. cit. supra* note 2, at 75; MERCIER, *op. cit. supra* note 2, at 195.

61. Woodall v. State, 149 Ark. 33, 231 S. W. 186 (1921); McHargue v. State, 193 Ind. 204, 139 N. E. 316 (1923); Commonwealth v. Rogers, 7 Metc. 500 (Mass. 1844); State v. Green, 78 Utah 580, 6 P. (2d) 177 (1931).

62. WEIHOFEN, *op. cit. supra* note 2, at 75.

63. People v. Silverman, 181 N. Y. 235, 73 N. E. 980 (1905); People v. Carlin, 194 N. Y. 448, 87 N. E. 805 (1909); People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915).

a separate test for insane delusions is provided, the alleged criminal act must be the outcome of the delusion.[64] If the accused was under an insane delusion that God had directed him to be a thief, he would be relieved of criminal responsibility for the act of stealing; but, if he murdered the victim of his thieving, he would be criminally responsible for the killing, if the insane delusion did not inspire the killing.

Although the New York Penal Law,[65] Section 1120, does not state that the defect of reason must be the result of mental disease, the New York courts have held that it must so result.[66] Other courts are in accord with this view.[67] However, a recent New York case, *People v. Sherwood*,[68] has raised doubt upon this point. The Court of Appeals reversed the judgment of conviction in that case because, in its opinion, the charge of the trial court to the jury was erroneous. The difficulty lies in determining what part of the charge the Court of Appeals considered defective. The trial court charged,[69] "that a mere false belief would not be sufficient to excuse her, 'unless it was the result of some mental *disease* which prevented her from knowing the nature and quality of the act and that it was wrongful'." Such charge using the conjunctive *and* instead of the disjunctive *or* would require the defendant to prove that he did not know the nature and quality of the act, *and* also that he did not know it was wrong. The correct charge should be that the defendant must prove that he did not know the nature and quality of the act, *or* if he did know this, that he did not know the act was wrong. Such a charge would conform with the statute[70] and cases.[71] On this point the court was correct in directing a reversal. The charge of the trial court also stated that the defect of reason must be the product of some mental disease. The Court of Appeals remarked that the statute required only a defect of reason. The natural inference arises that the court would require solely a defect of reason, not a defect of reason due to mental disease. If this is the meaning of the case, it changes the New York law as it has been heretofore understood. If only a defect of reason were required, a defendant would not need to be insane. Mere honest false beliefs as to what was right and wrong might constitute a defense. The most satisfactory conclusion to be reached would be that the statement in the *Sherwood* case is mere *dictum*, which it may well be.

It is interesting to note that the State of New Hampshire has rejected the

64. Guiteau's Case, 10 Fed. 161 (1882); Porter v. State, 140 Ala. 87, 37 So. 81 (1904); Allains v. State, 123 Ga. 500, 51 S. E. 506 (1905); State v. Spencer, 21 N. J. L. 196 (1846); Freeman v. People, 4 Denio 9 (N. Y. 1847); State v. Maier, 36 W. Va. 757, 15 S. E. 991 (1892); M'Naghten's Case, 10 Cl. & Finn. 200, 8 Eng. Reprints 718 (1843).

65. See p. 78, *supra*.

66. Freeman v. People, 4 Denio 9 (N. Y. 1847); People v. Carlin, 194 N. Y. 448, 87 N. E. 805 (1909); People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915).

67. Blume v. State, 154 Ind. 343, 56 N. E. 771 (1900); People v. Durfee, 62 Mich. 487, 29 N. W. 109 (1886); Duthey v. State, 131 Wis. 178, 111 N. W. 222, 10 L.R.A. (N.S.) 1032 (1907).

68. People v. Sherwood, 271 N. Y. 427, 3 N. E. (2d) 581 (1936).

69. *Id.* at 433, 3 N. E. (2d) at 583.

70. See p. 78, *supra*.

71. See note 66, *supra*.

idea that there is any definite test of mental capacity; the question of the defendant's insanity is an issue of fact triable by the jury. In *State v. Jones*,[72] the court says,[73] "It would doubtless be convenient to adopt some such test. It would, to some extent, save the trouble of trying each case, as it arises, on its own special and peculiar facts; . . . But in cases of this sort the argument of convenience is not to be admitted. No formal rule can be applied in settling questions which have relation to liberty and life, merely because it will lessen the labor of the court or jury." Professor Wharton[74] has criticised this New Hampshire rule on many grounds. The question in such cases, he says, is not whether the accused was mentally diseased but whether he is criminally responsible. Insanity *per se* should not relieve from criminal responsibility. "A slight departure from a well-balanced mind cannot be recognized as insanity in the administration of criminal law, though it might be pronounced insanity in medical science."[75] The jury is not "a body fit to lay down settled rules on this momentous subject. . . . It is system, uniformity, and consistency that penal law, in this respect, eminently needs." Leaving the issue to the jury would result in "a series of disjointed and conflicting edicts, from which no rule of action can be deduced."[76]

The New Approach

The basis of all criticism of the law relating to mental responsibility is that the law has failed to keep abreast of medical and psychological knowledge. The present tests, it is said, are based upon outmoded and outworn notions as to the operations of the human mind.[77] To illustrate one of the concepts of modern psychologists let us look, for example, to the school of Behaviorists —one of the most radical. The cornerstone of their hypothesis is that human beings lack free will and that their actions are predetermined.[78] In other

72. 50 N. H. 369, 9 Am. Rep. 242 (1871).

73. *Id.* at 391, 9 Am. Rep. at 258.

In the recent report of the Illinois Criminal Commission among other proposed changes in the law was the one that the existing legal tests with reference to insanity as a defense be discarded. The report recommended that the inquiry would be whether the accused at the time of the offense was insane, in the sense that the disease was a direct cause of the commission of the offense. 21 A. B. A. J. 269 (1935). This procedure would be analogous to that in vogue in New Hampshire.

74. 1 WHARTON AND STILLÉ, *op. cit. supra* note 2, at 179 *et seq.*

75. WHARTON AND STILLÉ, *loc. cit. supra.*

76. WHARTON AND STILLÉ, *op. cit. supra* note 2, at 180.

77. See Glueck, *Psychiatry and the Criminal Law* (1928) 14 VA. L. REV. 155. In 1 BISHOP, *op. cit. supra* note 51, at 280, it is said that even in the most degraded idiots, whenever there is any mental activity, the feeling of right and wrong may be said to exist.

78. See Beutel, *Some Implications of Experimental Jurisprudence* (1934) 48 HARV. L. REV. 169, where Behaviourism is defended as a possible means of correcting crime. For a criticism of this article see Kennedy, *Principles or Facts?* (1935) 4 FORDHAM L. REV. 53, 66. In ROBINSON, LAW AND LAWYERS (1935) the author's thesis is based on the belief that law will become one of the social sciences and that it will fall in line with psychological knowledge. WATSON, Part I, SCHOOLS OF BEHAVIORISM (1926) PSYCHOLOGIES OF 1925.

words, man has no choice, not any control over his acts; he is impelled to do them by external stimuli. Under such a theory the human mind is void of any power of volition; intent and purpose have no significance. If the extreme view of the Behaviorists were accepted, our present criminal law would suffer a crushing defeat, as it is based on the time-honored concept that the intent to commit the crime is as important as the criminal act itself. The present law relating to mental responsibility would be inapplicable. Sayre effectively answers the Behaviorists' contention that free will is no longer of significance; that intent loses caste; and that the act is the sole criterion of guilt.[79] No system of criminal administration could function based solely upon acts. "The man who while target-shooting kills a bystander may be an exemplary citizen horrified at the catastrophe, or a degraded ruffian glad of the convenient chance to destroy an enemy; in either case the act of pulling the trigger is the same, but the subjective state of mind makes all the difference. The intent is in reality more vitally determinative of criminality than the act."[80]

Without attempting to evaluate the theories of the Behaviorists or those of other psychologists, it does not seem unreasonable to state that no sweeping revision of the law would be feasible until psychologists and psychiatrists can reconcile their concepts and be in accord in their views.[81] The lawyers and legislators should not be criticized for their refusal to accept some unproved theory. As an example, let us consider the "irresistible impulse" test. As stated before,[82] most courts do not recognize that there is such a form of insanity, and consequently have rejected it as a test. If it is true, as many writers declare, that there is such a thing as an irresistible impulse, then it should be adopted as a test. Whatever may be one's personal conviction as to its existence, at the present time such a theory is largely a matter of conjecture not capable of proof. It is this very fact which makes the law hesitant and suspicious of change.

Rejection of all or any of the new concepts does not demand a continuance of the *status quo*. Enactments similar to that in vogue in Massachusetts would be an advance. The Massachusetts statute[83] is the so-called Briggs Law, which provides for psychiatric examination into the mental condition of a person indicted for a capital offense; or when a person is indicted for any offense who was previously indicted for any other offense more than once; or who was previously convicted of a felony. The examination takes place in advance of the trial, and is to be made with a view to determine the present mental condition of the accused or the existence of any mental disease which

79. SAYRE, HARVARD LEGAL ESSAYS (1934) 399.

80. *Id.* at 409.

81. See PSYCHOLOGIES OF 1925 (1926) and PSYCHOLOGIES OF 1930 (1930) for the conflicting and contradictory schools of psychology. Indeed, even a single school may be divided. PRINCE, PSYCHOLOGIES OF 1925 (1926) points out at 199 that there are several kinds of Behaviourist psychologies. ROBINSON, *op. cit. supra* note 78, at 97, while he defends the utility of psychology in the law, recognizes that it is in a disorganized and confused state.

82. See p. 32, *supra*.

83. MASS. ANN. LAWS (1933) c. 123, § 100 a.

would affect his criminal responsibility. The finding of the commission is not binding on the court. Its only effect "is to inform the court and counsel of the defendant's mental condition, and whether it is proper or wise to try him on the criminal charge."[84] The statute does not change the test to determine the defendant's responsibility, and in the end the jury still passes on the question of the defendant's insanity in the event of a trial. The advantage of the statute is that great weight is given by the jury to the report of this non-partisan body. Such an unbiased report naturally is preferable to the oft-times biased testimony of experts engaged by either side. Another advantage of the Briggs Law is that, as a result of the findings of the commission the government may determine not to prosecute the accused. The most serious defect of the statute is that the examination[85] is limited to the aforementioned persons. A statute broadening such examinations might be more efficacious.

Although an enactment similar to the Briggs Law is not regarded as an ultimate solution, it is an advance. The difficulties underlying the solution of the problem are many. The refusal of the law to accept unproven theories has already been noted. An additional difficulty is presented when the divergent viewpoints[86] of the problem are considered. The medical mind examines the problem from an aspect altogether different from that of the legal mind. The former considers the insane person, who has committed a criminal act, as a sick person in need of treatment. Undoubtedly, it is abhorrent to medical men to consider such an individual as a person subject to the punishments of the criminal law. On the other hand, the legal mind is not interested in his insanity *per se,* but examines his act in the light of his criminal responsibility. The law sets up a standard of conduct which it classifies as criminal. It will not allow slight mental aberrations to negative criminal responsibility.

Before coöperation between the professions can lead to anything constructive the objectives of the criminal law must first be agreed upon. Most of the forensic psychiatrists appear to believe that the retributive aim of punishment is a survival of an outmoded philosophy. Though the objectives of our law are essentially preventive and reformative in character, necessarily to be of any effect as a deterrent of crime, the retributive element must enter. It cannot be gainsaid that the criminal law in its embryonic days was essentially punitive in its objectives. That this element is still present, though to a less degree, will not be denied. But the reformative and preventive elements have in great measure supplanted the punitive. Further change can be practical, as Michael says,[87] ". . . only if we possess a great deal of knowledge. We must be able to distinguish between the corrigible and incorrigible offender; we must know the means by which actual offenders who are corrigible can be reformed and potential offenders can be deterred; and, if our goal is the maximum control of crime, we must know the relative values of deterrence and reformation as means to crime prevention, so that we can determine whether treatment should be planned exclusively with reference to reformation or to deterrence,

84. WEIHOFEN, *op. cit. supra* note 2, at 402.

85. Tulin, *The Problem of Mental Disorder in Crime* (1932) 32 COL. L. REV. 933, 960 *et seq.*

86. Michael, *Psychiatry and the Criminal Law* (1935) 21 A. B. A. J. 271.

87. *Id.* at 276.

or, if not, what combination of these means we should employ." It is his belief that this knowledge does not exist.

Therefore, our efforts towards the solution of the problem must first be directed towards reaching an agreement as to the proper objectives of the criminal law. Such an agreement will only be possible when we acquire that knowledge which Michael believes does not exist. When that knowledge is acquired and the agreement reached we may proceed to examine the law relating to criminal responsibility. If it is found that our present law does not attain those objectives, we can determine whether it should be amended. In the last analysis, whether it should or should not be changed so as to attain the proper objectives, it cannot be altered until the psychiatrists acquire a more thorough knowledge of the functioning of the human mind and the interrelation of its faculties. The solution of these problems: (1) agreement as to the proper objectives of the criminal law; and (2) scientific analysis of the mind, must precede any formidable reconstruction in present-day legal tests of criminal responsibility.