

January 1924

History of Insanity as a Defence to Crime in English Criminal Law

Homer D. Crotty

Follow this and additional works at: <http://scholarship.law.berkeley.edu/californialawreview>

Recommended Citation

Homer D. Crotty, *History of Insanity as a Defence to Crime in English Criminal Law*, 12 CAL. L. REV. 105 (1924).
Available at: <http://scholarship.law.berkeley.edu/californialawreview/vol12/iss2/3>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38TV4F>

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

The History of Insanity as a Defence to Crime in English Criminal Law

NO topic in the criminal law has aroused more discussion than the question of the responsibility of the insane for crime. The discussion breaks out with renewed violence every time that this defence is raised in a criminal case. It has long been the cause of a war of great feeling between the medical and legal professions. The doctors refer to the bench and bar as judicial murderers. In reply, the lawyers shift the blame to the medical profession. In all of these discussions the chief difficulty seems to lie in the fact that there is either a failure to recognize at all, or at least to recognize sufficiently, the fundamental principle underlying mental incapacity. The question of insanity is really not a question of law; it is essentially a question of fact. The legal question is responsibility. From a survey of the history of insanity as a defence in the earlier law, if we may draw a deduction from the scant evidence, insanity is apparently a question of fact not gauged by strict rules. This changes, however, and later we find insanity gauged by inflexible legal tests. Recent tendencies indicate a development towards a recognition of insanity not as a question of law, but as one of fact.

It was not until the late eighteenth and early nineteenth centuries that the medical profession began to study insanity with any degree of thoroughness. Before that time but few of the psychoses were known and recognized. The medieval notions that insanity was a visitation from the Almighty, or that the insane were possessed with demoniacal influences, were not confined to the laymen alone, but were generally current among all classes. Insanity as a disease, known and treated as such, did not get recognition until the last century. It seemed absurd to all but a few medical men that the insane person should be treated as a sick person.¹ Mr. Justice Doe in *State v. Pike*² gave a striking example of this, quoting a declaration of the Lord Chancellor, made in the House of Lords in 1862:

“The introduction of medical opinions and medical theories

¹ *Relazione sul Progetto Preliminare di Codice Penale Italiano* (1921) I, 446-7.

² (1870) 49 N. H. 399, 437, 6 Am. Rep. 533, citing Hansard, CLXV, p. 1297.

into this subject has proceeded upon the vicious principle of considering insanity as a disease."

In commenting on this statement, Mr. Justice Doe said:

"This remark indicates how slowly legal superstitions are worn out, and how dogmatically the highest legal authorities of this age maintain, as law, tests of insanity, which are medical theories differing from those rejected by the same authority, only in being the obsolete theories of a progressive science."

All this is perhaps not so striking when we consider that even at the present time the average person would regard a visit to an insane asylum in much the same light as a visit to the Zoological Gardens.³

The subject of mental aberration may be grouped under two great heads; mental insufficiency and mental perversity.⁴ The first term comprehends those whom the law knows as idiots,⁵ and the second, those whom the law knows as lunatics. The difference between these is that in the first group there is a lack of something in the mental make-up, whereas in the second there is a disorder of that mind which the subject possesses.⁶

Just what persons should be included in these groups ought to be left solely to the psychiatrist for determination. His determination must change necessarily with the increased progress and knowledge of medical science in the study of mental conditions.⁷

³ Maudsley, *Responsibility in Mental Disease*, ch. 1; for a historical summary of the history and treatment of insanity, see Jacoby, *The Unsound Mind and the Law*, ch. 1.

⁴ These terms are used by du Fursac and Rosanoff, *Manual of Psychiatry* (1916).

⁵ The Mental Deficiency Act of 1913, 3 and 4 Geo. V, c. 28, § 1.

"1. The following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of this Act:

(a) Idiots; that is to say, persons defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers;

(b) Imbeciles; that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs, or, in case of children, of being taught to do so;

(c) Feeble-minded persons; that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision, and control for their own protection, or for the protection of others, or, in the case of children, that they by reason of such defectiveness appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools;

(d) Moral imbeciles; that is to say, persons who from an early age display some permanent defect coupled with strong vicious or criminal propensities on which punishment has had little or no effect."

⁶ White, *Outlines of Psychiatry* (1919) p. 275.

⁷ A classification of mental disorders has been published by the Bureau

The distinction between idiots and lunatics was important in early times after the *Statute de Praerogativa Regis*,⁸ for by this statute the king was given the lands of the idiot, and was to take the profits without waste or destruction to these lands, and was to provide necessaries for the idiot. In the case of lunatics, however, the king takes the profits of the lunatic's lands and maintains the lunatic and his family, but does not reserve any part of the profits for the royal revenues.⁹

One of the most striking things about the early law is the number and variety of terms used to describe the mentally abnormal. These terms are in Latin, Law French and English, and may be divided into two classes; those denoting the idiot, and those denoting the lunatic. Those denoting the idiot are apparently used as equivalents for the terms which we today apply to the lower grades of mental defectives, and would therefore, include the idiot and the imbecile. Of the terms denoting idiot, we find "idiot"¹⁰ in its various forms, "*fatuus*",¹¹ "*stultus*",¹² "fool" or "foole natural",¹³ and "sot."¹⁴ All these denote a mentally deficient condition that existed from birth.¹⁵ Fitzherbert gives a definition of idiot in *Novel Natura Brevium*:

of Statistics of the National Committee for Mental Hygiene; see Statistical Manual for the Use of Institutions for the Insane; see also Kidd and Ball, The Relation of Law and Medicine in Mental Disease, 9 California Law Review, 1, 16, n. 29.

For works on psychiatry, see Grasset, *The Semi-Insane and the Semi-Responsible* (1907 trans. by Jelfiffe); du Fursac and Rosanoff, *Manual of Psychiatry* (1916); Jacoby, *The Unsound Mind and the Law* (1918); Kraepelin, *Psychiatrie* (1914-1920); White, *Outlines of Psychiatry* (1919); White, *Insanity and the Criminal Law* (1923). On feeble-mindedness, see Goddard, *Feeble-mindedness*. Maudsley, *Responsibility in Mental Disease*, (3d ed. 1876) is still used a great deal in England.

⁸ The date of this statute is usually put at A. D. 1324, Stat. 17 Edw. II, Stat. 1, c. 10. The date is uncertain. Pollock and Maitland, *History of English Law*, 481; Plucknett, *Interpretation of Early 14th Century Statutes* (1922) p. 12, n. 8.

⁹ Staundford, *De Praerogativa Regis* (1607) ch. 9 and 10; Blackstone's *Commentaries*, 304.

¹⁰ Bracton, *De Legibus* etc., f. 375b (Twiss ed., vol. V, p. 454); *Terms de la Ley*, "*Ideot*" (Rastall, 1602); Fitzherbert, *Novel Natura Brevium* (1616) p. 233; *Registrum Brevium*, f. 266; Co. Litt. 246b; Staundford, *De Praerogativa Regis*, ch. 9.

¹¹ *Registrum Brevium*, f. 266; Fleta, Bk. 6, ch. 40; Fitzherbert, *Novel Natura Brevium*, 232b; *Stat. de Praerogativa Regis*, supra, n. 8; Staundford, *De Praerogativa Regis*, ch. 9, p. 33.

¹² Bracton, *De Legibus* etc., f. 375b (Twiss ed., vol. V, p. 454).

¹³ Fitzherbert, *Novel Natura Brevium*, 232b; Brooke's *Abridgment*, title "*Ideot*" pl. 2., citing 50 Lib. Ass. pl. 2.

¹⁴ Britton, f. 62b, (Nichols, I, 158) f. 167b (Nichols, II, 20).

¹⁵ *Terms de la Ley* defines idiot as a natural fool from birth. *Registrum Brevium*, f. 266, in writ number three, speaks of "*Ideota et fatuus a natiuitate*"; Pollock and Maitland, *History of English Law*, 481.

"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 how old he is, &c. so as it may appear that he hath no understanding of Reason what shall be for his Profit, or what for his Loss: But if he have such Understanding that he know and Understand his Letter, and do read by Teaching or Information of another Man, then it seemeth he is not a Sot, nor a natural Idiot."¹⁶

Other definitions equally helpful are given by Staundford¹⁷ and Swinburne.¹⁸ Hale recognized that the tests given by these writers showed merely evidences of idiocy, and that whether or not a person was an idiot was a question of fact to be tried either by the jury or by inspection.¹⁹

Those terms denoting the idiot are always sharply distinguished from those denoting the lunatic. While it is easy to distinguish terms relating to lunacy from those denoting idiocy, it is almost impossible either to determine the meaning of the terms denoting lunacy as they were used in early times, or to give any more than a very general meaning to them. In this second group we find the terms, "lunatic"²⁰ in its various forms, "*amens*,"²¹ "*furiosus*,"²² "*mente captus*,"²³ "*insanus*,"²⁴ "*arrages*,"²⁵ "*frenetycs*,"²⁶ "*non sane memory*," "*non bon memory*" and "*non compos mentis*," as used

¹⁶ From the 1616 edition of *Novel Natura Brevium*.

¹⁷ *De Praerogativa Regis*, 35, "That if hee bee able to beget eyther sonne, or daughter, hee is no foole natural."

¹⁸ Wills, pt. II, ch. 4, p. 72, (1728) "Unless he [the idiot] be yet more foolish and so very simple and sottish, that he may easily be made to believe Things incredible or impossible; as that an Ass can fly, or that Trees did walk, Beasts and Birds could speak, as it is in Aesop's Fables. For he that is so foolish cannot make a Testament, because he hath not so much Wit as a Child of Ten or Eleven Years old, who is therefore intestable, namely, for Want of Judgment. I do read, that if one have so much Understanding as he can Measure a Yard of Cloth, or rightly name the days in the Week, or beget a Child, Son, or Daughter, he shall not be accounted an Idiot or Natural Fool by the Laws of the Realm."

¹⁹ Pleas of the Crown, I, p. 29.

²⁰ *Registrum Brevium*, (1687 ed.) Appendix f. 19; Stat. 33 Henry VIII, c. 20, § 1; Britton, 62b (Nichols, I, 159); Staundford, *Plees del Corone*, 16b.

²¹ Co. Litt., 246b; Maitland, Bracton's Note Book, III, p. 660, case 1878, A. D. 1226, "*amens et extra sensum*."

²² Bracton, *De Legibus* etc., f. 12 (Woodbine, II, 51), f. 100 (Woodbine, II, 286), f. 375b (Twiss, V, 454); Fleta, Bk. 6, ch. 40.

²³ Bracton, *De Legibus* etc., f. 12 (Woodbine, II, 52), f. 375b (Twiss, V, 454).

²⁴ *Leges Hen. Primi*, LXXVIII, No. 7, see Liebermann, *Gesetze der Angelsachsen*, I, 595; Beverley's Case (1603), 4 Co. Rep. 123b, 128a, 76 Eng. Rep. R. 1118, "*Insanus qui abjecta ratione omnia cum impetu et furore facit*."

²⁵ Britton, 62b (Nichols, I, 159), f. 90 (Nichols, I, 227); Mirror of Justices, 7 Seld. Soc. p. 73.

²⁶ Britton, 62b (Nichols, I, 159).

before Coke's time.²⁷ Another term placed under this group is "*lucida intervalla*", denoting those periods of apparent normality in the insane which we call lucid intervals.²⁸ This term occurs as early as Bracton,²⁹ and the *Statute de Praerogativa Regis*.³⁰ Coke gives the term "*non compos mentis*" a new meaning and uses it to include all kinds of the mentally abnormal, idiots, lunatics and others.³¹ This term has been used also to denote those of the insane who cannot be called idiots or lunatics in the strict sense.³²

Many of these terms were used interchangeably in the early law. From the use and context of the matter in which they occur we can distinguish some of them, as "*furiosus*",³³ "*frenetycs*",³⁴ "*amens*",³⁵ and "*madman*",³⁶ as describing the violently insane. "*Lunatic*" is almost always used to describe those of the insane who have lucid intervals.³⁷ Most of the insane in early times were apparently known as "*non compos mentis*" and "*non bon memory*."³⁸

The Roman law has furnished some of these terms but, owing to the conflict in authorities as to their meaning in Roman law, it

²⁷ Staundford, *Plees del Corone*, 16b; Statham, Abridgment, "Entry Congeable," No. 19; Littleton's Tenures, ch. 405; *Stat. de Praerogativa Regis*, supra, n. 8; 17 Lib. Ass. pl. 17; 25 Lib. Ass. pl. 4; 35 Lib. Ass. pl. 10; Y. B. Mich. 17 Edw. III (R. S.) pl. 5; Y. B. Mich. 18 Edw. III, pl. 41; Y. B. Easter 12 Edw. IV, f. 8, pl. 21; Y. B. Mich. 21 Hen. VII, f. 31, pl. 16. 2 Hall, Formula Book of English Official Documents, 86, gives an inquisition of *non compos mentis*, with a return made. (55 Hen. III).

²⁸ This term was evidently taken from Roman law. Salkowski, Roman Private Law, gives texts in which it occurs (at p. 296). See Jacoby, The Unsound Mind and the Law, pp. 11, 248.

²⁹ Bracton, *De Legibus* etc., f. 12 (Woodbine, II, p. 51).

³⁰ Supra, n. 8.

³¹ Co. Litt. 246b, gives the following classification of *non compos mentis*. "1. *Idiota* which from his nativity by a perpetual infirmity, is *non compos mentis*;

2. He that by sickness, grief, or other accident, wholly loseth his memory and understanding;

3. A Lunatick that hath sometime his understanding, and sometime not. *Aliquando gaudet lucidis intervallis*, and therefore he is called *Non compos mentis*, so long as he has not understanding.

Lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken."

See Brydall, Law of Non Compos Mentis.

³² Ex parte Cranmer (1806) 12 Ves. Jr. 445, 33 Eng. Rep. R. 168; Shelford, Law of Lunacy, 5; Pope, Law of Lunacy, 19.

³³ Supra, n. 22.

³⁴ Supra, n. 26.

³⁵ Supra, n. 21.

³⁶ Staundford, *De Praerogativa Regis*, ch. 10; Hale, Pleas of the Crown, I, 31.

³⁷ Hale, Pleas of the Crown, I, p. 30, gives an exposition of the early idea that lunacy was dependent on the phase of the moon, and that it was especially violent during the summer solstice.

³⁸ Supra, n. 27.

would be impossible to say what meaning was carried over, or to derive help from the Roman terms.³⁹

The insane offender has been dealt with from the earliest times in English law. Probably the earliest authority is Theodoric, Archbishop of Canterbury (668-690 A.D.). In his *Capitula et Fragmenta*,⁴⁰ he declares that it is lawful to say masses for the insane man who had killed himself while insane, but in other cases of suicide, it is not lawful to do so. Under the Anglo-Saxon system of buying off vengeance by paying compensation, or *bot*, to the kinsmen of the deceased, the insane slayer seems to be treated in this respect as any other slayer, and consequently *bot* must be furnished because of his act. His kinsmen must also secure him from further outbreaks.⁴¹

From the earliest times up to the end of the sixteenth century, the instances found of insanity as a defence to crime are little more than—to use the terms of Sir James Stephen—"antiquarian curiosities." The law laid down by them seems to be that where an insane person, during his madness, commits what would amount to murder or other felony, he is not punished, because of such insanity, with the awful punishment which the common law meted out to felons.⁴² The reasons assigned for this were: (i) that as the punishment of a felon is so severe, giving that punishment to an insane person would not only be cruel, but also it would not be an example to others;⁴³ (ii) that as a murder or other felony requires a *mens rea*, an insane person could not commit such felony, since he did not have capacity to have a *mens rea*;⁴⁴ (iii) "a lunatic is punished by his madness alone."⁴⁵

³⁹ Girard, *Manuel de droit romain* (1911) p. 224, n. 3, and Cuq, *Institutions juridiques des Romains, droit classique* (1902) p. 163, n. 7, favor the theory advanced by Accarius, *Précis de droit romain* (1886) I, p. 167, that the *furiosi* were those who had lucid intervals, whereas the *mente capti* had not. Audibert, *Études sur l'histoire de droit romain* (1892) pp. 15, 53, believes the *furiosi* were those totally bereft of reason, while the *dementes* or *mente capti* were but partially bereft. Cuq says that the texts invoked in support of this distinction are not decisive. He says also that the words, *furiosus*, *demens*, and *mente captus*, were used as synonymous in a great number of texts.

⁴⁰ 2 Thorpe, *Ancient Laws*, 65.

⁴¹ 2 Thorpe, *Ancient Laws*, 237, *Poenitentiale Ecgberti Arch. Ebor.* (735-766 A. D.), *Additamenta* No. 29.

⁴² Bracton, *De Legibus*, f. 136b (Woodbine, II, p. 384); Staundford, *Plees del Corone*, 16b; 3 Coke's *Institutes*, 4; Beverley's Case, *supra*, n. 24.

⁴³ Co. Litt. 247b.

⁴⁴ *Mirror of Justices*, 7 Seld. Soc. 138; Fitzherbert, *Nov. Nat. Brev.*, 202; Staundford, *Plees del Corone*, 16b, "*Homicide, volontairement fait*,"—"Ceo est quant un tua auter ove felonious volunte ou intente quel chose home de non sane memoria, ne peut faire."; 3 Coke's *Institutes*, 54.

⁴⁵ Co. Litt. 247b, "*Furiosus solo furere punitur*."

Though the early law excused the insane offender from the punishment of the felon, it did not in all cases let him go free. There are some cases where he was acquitted and allowed to go home.⁴⁶ Another case allowed a release on pledges until more should be known.⁴⁷ The usual practice, however, was similar to the treatment of those who had committed homicide by misadventure or in self-defence.⁴⁸ In these cases the man was imprisoned and stayed in prison until the king gave him a charter of pardon. Whether or not the lands and chattels of the insane offender were forfeited appears to be doubtful.⁴⁹ The common law provided that where a felon had committed a crime, and had become insane before trial, he would not be called upon to answer, or if after judgment he became insane, he would not be executed.⁵⁰ In the case of high treason the insane person, while originally not held liable, was held liable for it by the statute of 33 Hen. VIII. c. 20 (1542), but this act was soon repealed,⁵¹ and so finally the lunatic could not be held liable even for high treason.⁵²

The treatment of this defense by the early institutional writers is very fragmentary and unsatisfactory. Bracton devotes merely a couple of sentences to it.⁵³ Fitzherbert discusses it in connection with the writs of *Dum non fuit compos mentis* and *De Idiota inquirendo et examinando*.⁵⁴ Coke's treatment is brief and scattered

⁴⁶ Maitland, Bracton's Note Book, III, p. 678, Case 1908, A. D. 1227. This case concludes with the words "*Idio custodiatur*" which may mean, "let her be guarded" by her relatives, Y. B. Mich. 21 Hen. VII, f. 31, pl. 16.

⁴⁷ (1200-1225) Select Pleas of the Crown (Selden Society) 119.

⁴⁸ Maitland, Bracton's Note Book, III, p. 660, Case 1878 (1226); Fitzherbert, Abridgment, "Corone" No. 351; 26 Lib. Ass. pl. 27; 1 Seld. Soc. p. 66, (Trinity Term 1212) "The king is to be consulted about an insane man who is in prison because in his madness he confesses himself a thief, while really he is not guilty."; Hale, Pleas of the Crown, I, p. 35; 2 Stephen, History of the Criminal Law, 151, n. 1, citing Rot. Parl. p. 444b, 3 Edw. II (1310) where the king promises that he will pardon felony only in those cases where pardon was anciently granted, viz., homicide through misadventure, self-defence, and lunacy.

⁴⁹ Fitzherbert, Abridgment, "Corone" No. 412, gives a case of forfeiture of chattels where a lunatic wounded himself, and later recovered his sanity, and then died of the wound. In "Corone" No. 244, under a similar state of facts, the lunatic not only had the rights of the church, but his chattels were not confiscated. See Fitzherbert, *Novel Natura Brevium*, 202; Staundford, *Pleas del Corone*, 19b, gives several situations, some in which the chattels of the lunatic were forfeited, and some in which they were not.

⁵⁰ 3 Co. Inst. 4.

⁵¹ 1 Ph. & M. c. 10 (1554); 3 Co. Inst. 6.

⁵² 4 Blackstone's Commentaries, 24.

⁵³ *De Legibus* etc., f. 136b, "*De homicidio per infortunium et casuali*." (Woodbine, II, 384).

⁵⁴ *Novel Natura Brevium*, 202, 232b.

throughout his works.⁵⁵ His classification of *non compos mentis* is his most interesting contribution to the law on this subject.⁵⁶

In 1700, Brydall's *Non Compos Mentis*, or the Law relating to Natural Fools, Mad-Folks and Lunatick Persons was published. This seems to be the first treatise devoted exclusively to the law relating to insanity. Brydall's treatment of the defense of insanity in crime is taken mainly from the works of Coke, with occasional references to Plowden, Staundford and Bracton, and adds nothing new to the subject.

Sir Matthew Hale's treatment of the defense of insanity and idiocy to crime, which he gives in his *Pleas of the Crown*,⁵⁷ is probably the best treatment of the subject up to its time. Hale divided those coming under the incapacity into three classes: (1) idiocy; (2) *dementia accidentalis vel adventitia*; (3) *dementia affectata*, or drunkenness. Those in the second class he divided into two groups: first, where there is a partial insanity of mind, and, second, a total insanity. Those in the latter group are excused from the guilt of felony or treason, but as to those in the former group Hale says:

"The former is either in respect to things *quoad hoc vel illud insanire*; some persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects, or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless most persons that are felons of themselves, and others are under a degree of partial insanity, when they commit these offences: it is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest on circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes: the best measure that I can think of is this; such a person as 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."⁵⁸

⁵⁵ 3 Co. Inst., pp. 4, 6, 54; Co. Litt. 247b; Shelley's Case (1579) 1 Co. Rep. 88b, 99b; Beverley's Case, supra, n. 24.

⁵⁶ Co. Litt. 246b. See supra, n. 31.

⁵⁷ Vol. I, pp. 29-37.

⁵⁸ Pleas of the Crown, I, 30; 2 Stephen, History of the Criminal Law, 150, says: "Surely no two states of mind can be more unlike than that of a healthy boy of fourteen, and that of a man 'laboring under melancholy distempers.'"

Hale reached the result that whenever the madness was such as to deprive the offender of his use of reason, he was excused from capital crimes. "And it is all one, whether the phrenzy be fixed and permanent, or whether it were temporary by force of any disease, if the fact were committed while the party was under that distemper."⁵⁹ At this time there were two sorts of trials to determine idiocy, lunacy, or madness. The first was by inquisition which was taken especially in reference to whether the idiot's or lunatic's lands should be taken by the king. The other was on the trial of a lunatic for a capital offense. Upon the defendant's plea of not guilty, the jury considered his incapacity and whether it was of such a degree as to excuse him.⁶⁰

When we consider the general ignorance of the professions as to the nature of insanity, at the time of Hale, his treatise can be considered as remarkable. He apparently recognized the main divisions of the subject and defined them fairly well. Expressions in some of the later cases might even force a conclusion that Hale was in advance of his time.

The next great treatise on the criminal law was *The Pleas of the Crown* by Hawkins. Hawkins' treatment of insanity as a defence is not confined to a definite chapter as is Hale's, but is scattered under various heads.⁶¹ It is interesting to notice the test he lays down for such disability:

"Sect. 1. As to the first point (in respect of their want of reason) it is to be observed that those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, idiots and lunatics, are not punishable by any criminal prosecution whatsoever."⁶²

In this text apparently lies the beginning of the famous "right and wrong" test.

The one is healthy immaturity, the other diseased maturity, and between these there is no sort of resemblance."

⁵⁹ *Pleas of the Crown*, I, 36.

⁶⁰ Hale, *Pleas of the Crown*, I, p. 33, where Hale gives a case of 1668, where a woman temporarily insane at childbirth killed her child. She was imprisoned, and while in prison recovered her sanity. She was then tried for murder. The jury were given the direction, "that if it did appear, that she had any use of reason when she did it, they were to find her guilty; but if they found her under a phrenzy, though by reason of her late delivery and want of sleep, they should acquit her;" The jury found her not guilty.

⁶¹ In discussing suicide, Hawkins says (*Pleas of the Crown*, I, 102): "Sect. 2. But here I cannot but take notice of a strange notion, which has unaccountably prevailed of late, That every one who kills himself, must be *non compos* of course; for it is said to be impossible, that a man in his senses should do a thing so contrary to nature and all sense and reason."

⁶² *Pleas of the Crown*, I, p. 1.

Blackstone in his Commentaries devotes a chapter to the treatment of persons capable of committing crimes.⁶³ He speaks of the defect of idiocy and lunacy as follows:

"The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, *viz.*, in an *idiot* or a *lunatic*." "In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself." ". . . . a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses;"

While Blackstone's treatment of the subject is meager and taken over largely from Coke and Hale, it is by no means so unsatisfactory as later tests.⁶⁴

The cases in which insanity was offered as a defence to crime, which were tried in the eighteenth and early nineteenth centuries, are interesting from two standpoints. We are able to learn from the reports a good deal about the prisoner's mental condition and in addition they illustrate the tests by which the incapacity was determined. Of these cases, the first of importance is Arnold's Case.⁶⁵ Arnold was indicted for feloniously shooting and wounding Lord Onslow. The prisoner had been known as a madman for years. He was suffering from a delusion that Lord Onslow was the author of all tumults, noises and disturbances in the country. Mr. Justice Tracy, in the course of his charge to the jury, said:⁶⁶

"When a man is guilty of a great offence, it must be plain and clear, before a man is allowed such an exemption; therefore it is not every kind of a frantic humour or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing; no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment; therefore I must leave it to your consideration, whether the condition this man was in, as it is represented to you on one side, or the

⁶³ Bk. IV, ch. 2, pp. 24, 25.

⁶⁴ In a note to 2 Jones' Blackstone, 2182, Professor A. M. Kidd gives a very able criticism of Blackstone's exposition: "The chief criticism of Blackstone's exposition is that for a successful defense on this ground there is required 'absolute insanity,' as to which Erskine, counsel in Hadfield's Case (27 How. St. Tr. 1281) said, 'No such madness ever existed in the world.' Apart from this there is nothing in the law laid down by Blackstone to prevent the courts and juries following the advancement of knowledge on the subject."

⁶⁵ (1724) 16 How. St. Tr. 695.

⁶⁶ *Ibid.*, at p. 764.

other, doth shew a man, who knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did:"⁶⁷

The next case of importance is that of *Rex v. Lord Ferrers* in 1760.⁶⁸ Lord Ferrers was indicted for murder, and set up the defence of partial insanity, and showed by witnesses and medical testimony that he was occasionally insane and at those times incapable of knowing what he did. He appeared to be suffering from several unfounded delusions with respect to the deceased. The murder was carried out with coolness and deliberation. It appeared from the evidence that the prisoner at the time he committed the crime had sufficient capacity to form a design and know its consequences. The prosecution argued that complete possession of reason was unnecessary to warrant judgment of the law, and that it was sufficient if the party had such possession of reason as enabled him to comprehend the nature of his action, and discern the difference between good and evil. The prisoner was found guilty and executed.

Collinson gives several interesting early cases where insanity was urged as a defence.⁶⁹ In one of them, *Parker's Case* in 1812, the prisoner, a feeble-minded person, was indicted for high treason because of his desertion from the British army. The jury found that at the time of the desertion he had enough intelligence to distinguish between right and wrong, and so found him guilty.

In *Bowler's Case*,⁷⁰ the defendant set up the defence of insanity occasioned by epilepsy to an indictment charging wilful shooting and wounding, under circumstances which disclosed considerable ill will by the prisoner in the shooting. A commission two weeks before the trial had found the prisoner to be a lunatic, and that he had been such for several months prior to the shooting. Mr. Justice LeBlanc in his charge to the jury asked them to consider whether the prisoner was or was not incapable of distinguishing right from wrong, or whether he was under the influence of any illusion in respect to the prosecutor which rendered his mind insensible of the nature of the act he was about to commit, since in that case he would not be legally

⁶⁷ Arnold was found guilty and sentenced to death, but execution was respited, and he continued a prisoner for thirty years. He was undoubtedly a lunatic, laboring under an overpowering delusion, quite as much as Hadfield, who shot at George III, but under the charge as given, the jury could hardly have found otherwise. See, Everest, *The Defence of Insanity in Criminal Cases*, 23.

⁶⁸ (1760) 19 How. St. Tr. 885.

⁶⁹ Collinson, *Law of Lunacy* (1812) 447, 636, 673 (note).

⁷⁰ Collinson, *Law of Lunacy*, 673 (note).

responsible. The jury found the prisoner guilty. Everest⁷¹ says this case is the most barbarous instance of legal cruelty found in all the reported cases.

The most famous case of this time was Hadfield's Case.⁷² Hadfield was indicted for high treason in shooting at King George III. He had been a soldier and was severely wounded in the head in battle. He was discharged from the army on the ground of insanity. Lord Erskine, his counsel, in his address to the jury said that Hadfield had been suffering from delusions:

"that, like our blessed Saviour, he was to sacrifice himself for its [world's] salvation; and so obstinately did this morbid image continue, that you will be convinced he went to the theatre to perform, as he imagined, that blessed sacrifice; and, because he would not be guilty of suicide, though called upon by the imperious voice of Heaven, he wished that by the appearance of crime his life might be taken away from him by others."⁷³

The defence was stopped by Lord Kenyon, who said that the facts showed the prisoner to have committed the offence when he was in a very deranged state of mind. As the prisoner was deranged immediately before the act, it was improbable that he had recovered his senses in the interim. The jury found Hadfield not guilty on the ground of insanity. The case gave rise to the statute of 39 and 40 George III c. 94 (1800), which provided that where the jury, in the case of any person charged with treason, murder or felony, find that the prisoner was insane at the time of the commission of the offence, they shall declare whether the prisoner was acquitted by them on account of insanity, and the court shall order him to be kept in custody till his Majesty's pleasure be known.

The interesting thing about Hadfield's Case is the way in which the right and wrong test was slighted. Stephen, in commenting on the case, says:

"In this case Hadfield clearly knew the nature of his act, namely, that he was firing a loaded horse pistol at George III. He also knew the quality of his act, namely, that it was what the law calls high treason. He also knew that it was wrong (in the sense of being forbidden by law), for the very object for which he did it was that he might be put to death so that the world might be saved; and his reluctance to commit suicide shows he had some moral sentiments."⁷⁴

The result of the case would seem to be that where delusions dis-

⁷¹ Everest, *Defence of Insanity in Criminal Cases*, 33.

⁷² (1800) 27 How. St. Tr. 1281.

⁷³ *Ibid.*, at p. 1321.

⁷⁴ 2 Stephen, *History of the Criminal Law*, 159.

place realities, and in doing so, overmaster the faculties, the defendant should not be held responsible.⁷⁵

Another early case, *Regina v. Oxford*,⁷⁶ is interesting from the standpoint of evidence received in the trial. In this case Oxford was indicted for treason in shooting at Queen Victoria with a loaded pistol. He defended on the ground of insanity. Evidence was received of insanity on the part of the prisoner's grandfather, the prisoner's father, as well as of insane acts on his own part.

The landmark in the history of insanity as a defence to crime comes with *M'Naghten's Case*.⁷⁷ This case arose on questions put to the judges by the House of Lords as to the existing state of the law with reference to insanity as a defence to crime. The immediate cause for the questions was the general dissatisfaction over an acquittal of Daniel M'Naghten on the ground of insanity pleaded to a charge of murder of Edward Drummond, whom he had mistaken for Sir Robert Peel. M'Naghten was laboring under an insane delusion that Sir Robert Peel had injured him. These judges were asked five questions relating to insanity as a defence; the first and fourth with reference to delusions, the second and third with reference to questions to be submitted to the jury, and the fifth with reference to testimony of a medical man at the trial. The combined answers to the second and third questions contain the famous "knowledge of right and wrong" test. The judges said:

"we have to submit our opinion to be that the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong."⁷⁸

In explaining what was meant by "wrong," it was said:

"If the accused was conscious that the act was one that he ought

⁷⁵ *Ibid.*; Everest, *Defence of Insanity in Criminal Cases*, 26; Russell, *Crimes*, 66; Collinson, *Law of Lunacy*, pp. 480 ff; Shelford, *Law of Lunacy*, 593; Kidd and Ball, *Relation of Law and Medicine in Mental Disease*, 9 *California Law Review*, 1.

See also, *Rex v. Offord* (1831) 5 *Car. & P.* 168. Murder committed by defendant suffering from a delusion.

⁷⁶ (1840) 9 *Car. & P.* 525.

⁷⁷ (1843) 10 *Cl. & Fin.* 200, 8 *Eng. Rep. R.* 718—Maule, J., did not join with the majority.

⁷⁸ *Ibid.*, at p. 210.

not to do, and if the act was at the same time contrary to the law of the land, he is punishable."⁷⁹

With regard to delusions in question one, the judges answered that if a person were laboring under "partial delusions only" and were not in other respects insane, "notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land."⁸⁰

These questions were asked by the House of Lords under its power to require the opinions of judges on abstract questions of law, and although they would not be binding on them should a later case arise, yet in this instance the answers, which were supposed to be a complete statement of the law as then existing, have become firmly established as law.⁸¹

Many objections have been offered to these propositions, and of these Stephen's are perhaps the most exhaustive.⁸² From his analysis, we find the answers to deal with a special class of insanity, and as a statement of the existing law, they totally ignored Hadfield's Case. Hadfield, under the law as stated, would certainly have been convicted. These tests have been applied to all types of the insane. Again, with reference to the test about delusions, Dr. Morton Prince says:⁸³

"The inadequacy of this formula or test will be seen when it is remarked that it is based upon a conception of insanity that is a myth—a condition of mind that never exists."

He also quotes Dr. Mercier as saying:

"There is not, and never has been, a person who labors under a partial delusion only and is not in other respects insane."

The "right and wrong" test began to derive its authority—if we assume that of themselves the answers had no binding authority—

⁷⁹ *Ibid.*, at p. 210.

⁸⁰ *Ibid.*, at p. 209.

⁸¹ Oppenheimer, *The Criminal Responsibility of Lunatics*, 24.

⁸² 2 Stephen, *History of the Criminal Law*, 154 ff.

⁸³ Dr. Morton Prince's discussion of Keedy's Report on Insanity and Criminal Responsibility, in 2 *Journal of Criminal Law and Criminology*, 538; see Kidd and Ball, *The Relation of Law and Medicine to Mental Disease*, 9 *California Law Review*, 1, 4; Keedy, *Insanity and Criminal Responsibility*, 30 *Harvard Law Review*, 535-560, 724-738; Everest, *Defence of Insanity in Criminal Cases*, 34 ff. Oppenheimer, *Responsibility of Lunatics*, 20 ff., and Stroud, *Mens Rea*, 69 ff., favor the M'Naghten tests.

from actual decisions, immediately after the questions were answered,⁸⁴ and since then has become firmly established in the law of England.

Within the next few years, there was an attempt to establish the proposition that an act done under an "irresistible impulse" was an excuse for crime, but without success.⁸⁵ Sir James Stephens, in drafting a Criminal Code for England in 1878, submitted a test to allow the jury to determine whether:

"the impulse to commit a crime was so violent that the offender would not be prevented from doing the act by knowing that the greatest possible punishment permitted by law for the offence would be instantly inflicted, the theory being that it is useless to threaten a person on whom by the supposition your threats will have no influence."

His test was rejected by the Commission.⁸⁶ Down to the present time irresistible impulse has not been admitted as a defence unless it occurs under conditions which would excuse under the M'Naghten tests.⁸⁷ The result reached in Canada has been the same.⁸⁸

⁸⁴ Reg. v. Higginson (Aug. 9th, 1843), 1 Car. & K. 129 (Answers given in M'Naghten's Case in June, 1843) murder by a feeble-minded person whom the jury found to know the difference between right and wrong; Reg. v. Vaughan (1844) 1 Cox C.C. 80.

⁸⁵ Reg. v. Stokes (1848) 3 Car. & K. 185, Rolfe, B. (at p. 188): "It is true that learned speculators, in their writings, have laid it down that men, with a consciousness that they were doing wrong, were irresistibly impelled to commit some unlawful act. But who enabled them to dive into the human heart, and see the real motive that prompted the commission of such deeds?"

Reg. v. Barton (1848) 3 Cox C.C. 275, Parke, B., said: (at p. 276) "The excuse of an irresistible impulse, co-existing with full possession of reasoning powers, might be argued in justification of every crime known to the law—for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse." The prisoner was found guilty, sentenced and reprimanded.

Reg. v. Haynes (1859), 1 F. & F. 666; In Reg. v. Burton (1863) 3 F. & F. 772, Wightman, J., described it as a most dangerous doctrine to allow no responsibility where there is moral insanity, defined as "a state of mind, under which a man, perfectly aware that it is wrong to do so, killed another under an uncontrollable impulse."

A crime is said to have been committed under an irresistible impulse, when the defendant by reason of the duress of mental disease had so far lost the power to choose between right and wrong, and to avoid doing the act in question, that his free agency was at the time destroyed, Parsons v. State (1886) 81 Ala. 577, 596.

⁸⁶ 2 Stephen, History of the Criminal Law, 171.

⁸⁷ Rex v. Thomas (1911), 7 Cr. App. R. 36, Darling, J., "Impulsive insanity is the last refuge of a hopeless defence."; Rex v. Holt (1920) 15 Cr. App. R. 10; Rex v. Quarmby (1921) 15 Cr. App. R. 163.

⁸⁸ The King v. Creighton (1908) 14 Can. Cr. Cases 349, Riddell, J., "The law says to men who say they are afflicted with irresistible impulses: 'If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help.' No man has a right under our law to come before a jury and say to them, 'I did commit that act, but I did it under

The course of decisions in England after the M'Naghten case has followed the "right and wrong" test very consistently. Stephen has perhaps thrown the greatest doubt on it by his chapter in his *History of the Criminal Law*,⁸⁹ Article 27 in his *Digest of Criminal Law*,⁹⁰ and by his remarks in *Regina v. Davis*.⁹¹ The "right and wrong" test came before the Court of Criminal Appeal in *Rex v. True* (May, 1922).⁹² In this case, counsel submitted that there was a trend of cases⁹³ showing that the old rigor of the rule in M'Naghten's Case had been relaxed. In answering this, Lord Chief Justice Hewart said:

"In the opinion of the Court that proposition is not accurate. It is true—if one looks at certain cases it is apparent—that an extension of the rule has at different times been suggested or indicated; but, curiously enough, when one looks at the facts of the cases relied upon, it appears nowhere that the proposed extension of the rule has been acted upon and approved." "It is enough to say that in the view of this Court there is no foundation for the suggestion that the rule derived from M'Naghten's Case has been in any sense relaxed."⁹⁴

The most striking development in the nineteenth century was the Trial of Lunatics Act (1883).⁹⁵ This act provided that when, in the trial of a person charged with an offence, evidence was offered to show that the person was insane, so as not be responsible according to law at the time when he did the act, then, if it appears to the jury

an uncontrollable impulse,' leave it at that, and then say, 'now acquit me.'"; *The King v. Jessamine* (1912) 1 Dom. L. Rep. 285.

⁸⁹ 2 Stephen, *History of the Criminal Law*, ch. 19.

⁹⁰ Article 27. "No act is a crime if the person who does it is, at the time when it is done, prevented (either by defective mental power or) by any disease affecting his mind

(a) from knowing the nature and quality of his act; or

(b) from knowing that the act is wrong; (or

(c) from controlling his own conduct, unless the absence of the power of control has been produced by his own default.)" Stephen states, in note 4 to this article, that the parts of the article bracketed are doubtful.

⁹¹ (1881) 14 Cox C.C. 563, Stephen, J. (at p. 564): "As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action—any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason may be fairly said to prevent a man from knowing that what he did was wrong."

⁹² (1922) 16 Cr. App. R. 164.

⁹³ *Reg. v. Davis* (1881) 14 Cox C. C. 563; *Rex v. Jones* (1910) 4 Cr. App. R. 207; *Rex v. Hay* (1911) 22 Cox C.C. 268; *Rex v. Fryer* (1915) 24 Cox C.C. 403; *Rex v. Jolly* (1919) 83 J. P. 296; *Rex v. Holt* (1920) 15 Cr. App. R. 10; *Rex v. Quarumby* (1921) 15 Cr. App. R. 163.

⁹⁴ *Supra*, n. 92, at pp. 169, 170.

⁹⁵ 46 & 47 Vict. c. 38, amended in 47 & 48 Vict. c. 64, § 2, See Strachey, *Queen Victoria*, pp. 375-379.

before whom he is tried that he was insane when he did the act, they shall return a special verdict to the effect that the accused was guilty of the act, but insane at the time. "Where such special verdict is found, the Court shall order the accused to be kept in custody as a criminal lunatic, in such manner as the Court shall direct till Her Majesty's pleasure shall be known."⁹⁶ Though in some cases this may result in having a sane man confined as a lunatic, still in a large number of cases it is a very sensible thing to require. It has curbed the use of this defence in practically all cases except for those of murder.⁹⁷

In the United States, the early tendency was to follow the law as laid down by the English cases. The early textbooks cited few American cases, but were concerned in great part with the law as it was in England.⁹⁸ The first great case in the United States was that of *Commonwealth v. Rogers*⁹⁹ in 1844, in which Chief Justice Shaw of Massachusetts gave instructions to the jury which practically amounted to the "right and wrong" test, but held that this test was satisfied and the defendant excused if he acted because of an irresistible impulse and was therefore not a free agent.¹⁰⁰

The jurisdictions in the United States have divided into four groups on the question of insanity as a defence to crime. The largest group is the one which holds to the M'Naghten tests. In this group the most celebrated case is that of *United States v. Guiteau*,¹⁰¹ where Guiteau was indicted for the assassination of President Garfield. Mr. Justice Cox in charging the jury said:

"If you find from the whole evidence that, at the time of the commission of the homicide, the prisoner, in consequence of disease of mind, was laboring under such a defect of his reason that he was incapable of understanding what he was doing, or that it was wrong—as, for example, if he was under an insane delusion that the Almighty had commanded him to do the act, and in consequence of that he was incapable of seeing that it was a wrong thing to do—then he was not in a responsible condition

⁹⁶ See Acts of 39 & 40 Geo. III, c. 94 (1800); Acts 1 & 2 Vict. c. 14, §§ 2, 4. (1838).

⁹⁷ Everest, *Defense of Insanity in Criminal Cases*, 9, gives statistics for the period of twenty years prior to the passage of the statute. See 2 Stephen, *History of the Criminal Law*, 163, n. 1.

⁹⁸ Wharton, *Criminal Law* (1st ed. 1846); Ray, *Medical Jurisprudence of Insanity* (1838).

⁹⁹ (1844) 7 Metc. (Mass.) 500.

¹⁰⁰ Discussion by Dean Pound on the recommendation of the Committee of the American Institute of Criminal Law and Criminology on the question of criminal responsibility. 2 *Journal of Criminal Law and Criminology*, 544.

¹⁰¹ (1882), 10 Fed. 161.

of mind, and was an object of compassion, and not of justice, and he ought to be now acquitted."¹⁰²

Guiteau was found guilty.¹⁰³

A second group, following *Commonwealth v. Rogers*,¹⁰⁴ while following the "right and wrong" test, holds the defendant excused where he acted under an irresistible impulse, saying the test is satisfied, and the defendant is not a free agent.

A third group discards the "right and wrong" test and allows irresistible impulse as an excuse, though the knowledge of right and wrong existed.¹⁰⁵ The fourth group starts from the New Hampshire and Alabama courts which say there is no legal test of insanity.¹⁰⁶ In *State v. Pike*, Mr. Justice Doe, in his dissenting opinion said: "The whole difficulty is that courts have undertaken to declare that to be the law which is a matter of fact."¹⁰⁷

In recent years there has been an effort to find a test of insanity that will accord with present and future scientific opinion with regard to mental disorders. This task was given to a committee of the American Institute of Criminal Law and Criminology, headed by Professor Keedy. This committee in 1916 submitted a proposed bill relating to criminal responsibility, section one of which reads:

"When Mental Disease a Defence. No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering from mental disease and by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged."¹⁰⁸

This report invoked much dissatisfaction and adverse criticism.¹⁰⁹ A new committee of the Institute reported a program which pro-

¹⁰² *Supra*, n. 101, at p. 186.

¹⁰³ See note p. 349, *Beale's Cases on Criminal Law*. See also *U. S. v. Shults* (1854) 27 Fed. Cas. No. 16, 286; *People v. Hoin* (1882) 62 Cal. 120, 45 Am. Rep. 651; *Brinkley v. State* (1877) 58 Ga. 296; *State v. Mowry* (1887) 37 Kas. 369; 15 Pac. 282; *Flanagan v. People* (1873) 52 N. Y. 467, 11 Am. Rep. 731.

¹⁰⁴ *Supra*, n. 99.

¹⁰⁵ *Beale's Cases on Criminal Law*, note p. 349, citing *Dacey v. People* (1886) 116 Ill. 555, 6 N. E. 165; *Plake v. State* (1889) 121 Ind. 433, 23 N. E. 273; *State v. Felter* (1888) 25 Ia. 67; *Dejarnette v. Com.* (1882) 75 Va. 867.

¹⁰⁶ *State v. Jones* (1871) 50 N. H. 369, 9 Am. Rep. 242; *State v. Parsons*, *supra*, n. 85. In *State v. Pike*, *supra*, n. 2, Mr. Justice Doe gives an exhaustive review of the cases on the subject both in England and America up to that time.

¹⁰⁷ *Supra*, n. 2.

¹⁰⁸ Keedy, *Insanity and Criminal Responsibility*, 30 *Harvard Law Review*, 535-560, 724-738.

¹⁰⁹ Ballantine, criticism in 9 *Journal of Criminal Law and Criminology*, 485. See Keedy's reply in 12 *Journal of Criminal Law and Criminology*, 14.

vides that in all cases of felony or misdemeanor punishable by a prison sentence, the question of responsibility is not to be submitted to the jury. The jury would then be called on to determine the question whether or not the offence had been committed by the defendant.¹¹⁰

It is to be hoped that, in the future, progress in this field will be toward treating insanity, when it is urged as a defence to crime, strictly as a question of fact, and away from the present prevailing idea of gauging the question by inflexible legal tests. It is submitted that some means should be devised for leaving the question of insanity to the determination of experts, and thus the question would be considered in the light of increasing progress and learning in psychiatric fields.

Homer D. Crotty.

Los Angeles, California.

¹¹⁰ Report of Committee "A", on Insanity and Criminal Responsibility, 10 *Journal of Criminal Law and Criminology*, 184, 188. For a compilation of foreign laws on this subject see Oppenheimer, *Criminal Responsibility of Lunatics*, ch. III. p. 37 ff.