A PSYCHOANALYSIS OF THE INSANITY PLEA—CLUES TO THE PROBLEMS OF CRIMINAL RESPONSIBILITY AND INSANITY IN THE DEATH CELL*

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As a judge I used to feel ill at ease in criminal cases when the law tempted me to rely on a psychiatrist's opinion as to the "sanity" of an accused who had otherwise been proved guilty of a criminal act. I knew only too well that the psychiatrist, whom the law compelled to give an answer to my ambiguous question, found his comfort in the thought that it was I, not he, who ultimately passed judgment. Scholars and judges throughout the world, to whom this mutual "trust" has appeared as a frivolous game of ping-pong, have sought to improve understanding between the two professions in terms of new formulas of communication. But all these new formulas failed and, I submit, will continue to fail. The game played by judge and psychiatrist will continue because the question we lawyers seek to formulate for the psychiatrist is one we really do not mean to ask. We do not really want to learn whether the accused or condemned man was or is "insane" in any accepted or acceptable sense of the word. Rather, we hope the psychiatrist will resolve for us the question whether the offender's punishment is preferable to his release. But that question neither the lawyer nor the psychiatrist can answer until we know why we punish.

A rational answer to this question would require the weighing of such conflicting factors as the victim's, the offender's and, most important, society's conscious and subconscious wishes and interests. Neither the judge nor the psychiatrist is willing or indeed able to do that weighing. Since the judge is not prepared to forego the psychiatrist's help in this impossible task, the judge *must* misstate his question so as to make it acceptable to the psychiatrist. And since the psychiatrist is not prepared to refuse his help to the judge in this impossible task, the psychiatrist *must* misstate his answer so as to make it acceptable to the judge. While the judge phrases his insanity test in pseudo-medical language, the psychiatrist phrases his findings in pseudo-legal language. Inescapable reasons of mass psychology are likely to perpetuate this conundrum, for one of the factors determining the issue between punishment and release has always been, and is likely to remain, irrational: namely, society's urge for retributory vengeance.

To be sure, the intensity and visible impact of this urge have varied from time to time and crime to crime. Indeed, growing scientific insight and social

*Many thoughts expressed in this paper owe their present formulation to friendly disagreement with D. W. Louisell and Anton Ehrenzweig (of London) through many years.

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maturity have in limited areas—as in the treatment of juvenile delinquents and certain deviants—occasionally resulted in a planning of societal action relatively unencumbered by irrational factors, and have thus opened new fields of fruitful cooperation between the medical and the legal profession. But outside these limited areas, many measures, praised as progress toward greater rationality and kindness, have failed to take account of fundamental roots of social behavior by positing a capacity of self-denial which society does not possess. Consequently, many “progressive” measures have been either frustrated or re-formed into ancient patterns. Such revolutionary experiments as that of Mexico and early Soviet Russia, purporting to replace all criminal sanction by measures designed to reform the offender or to secure society, have been either expressly or impliedly abandoned. Yet, similar schemes continue to be offered as panaceas. Broad formulas that invite acquittal of “insane” criminals with a view to subjecting them to compulsory “cure,” and schemes for the “expert” curative sentencing of convicted offenders have been outgrowths of that trend.¹ Although such measures might avoid hardship in an individual case, more often they have proved or are likely to prove to be little more than new outlets for social aggression. Because of this overlap between “punishment” and “cure,” all references to “punishment” in this article must be understood as including acquittals followed by compulsory “cure.”²

Because of the irrationality inherent in all punishment, including convictions and such acquittals, the discrepancy between legal and medical concern and language is likely to continue. However possible and desirable collaboration between the professions be as to other common tasks, a reconciliation, let alone an alliance, between the lawyer and the physician is likely to remain impossible as to the formulation of the crucial question of legal insanity. Indeed, coordination of the lawyer’s and the physician’s judgment may not even be desirable. The sense of justice, like the feeling for beauty, is affected by many irrational factors. If the painter and his critic were able to analyze and to restate to the jury its subconscious reactions, the jury’s members would find it most difficult to guard their own responses against distortion. On similar grounds, we must protect the jury which is to pass on guilt and sanity against pseudo-rational distortions of its own responses. What we may and should strive for in this respect is an understanding of this fact in order to avoid such harm as may be caused by “scientific” delusions. This understanding will not be assisted by the use of any general formula. But it can perhaps be prepared by a “psychoanalysis” of the societal functions of the insanity plea itself.

The definition of legal insanity, like that of all legal concepts, depends on its specific purpose. We all recognize that legal insanity means different things

1. See text at notes 52-54 *infra*.

2. Cf. *Overholser v. Lynch*, 288 F.2d 388 (D.C. Cir. 1961), *rev'd*, 369 U.S. 705 (1962). See also *infra* notes 8, 52.

according to whether it relates to annulment or divorce,³ to contract⁴ or tort,⁵ to wills⁶ or criminal conduct. It will be shown that as to criminal conduct we must again distinguish according to the prevailing purpose of the desired definition, and that, therefore, legal insanity may mean different things in prosecutions for murder, rape and larceny, and at the various stages of the criminal process.

Legal insanity may be claimed as of the time of the deed, the time of the trial and sentencing, and the time of punishment. I shall not say much about insanity at the time of trial and sentence. Jury, psychiatrist and court will decide that question by the simple test of whether or not they consider the accused able to take part in the trial and reasonably to defend himself.⁷ Nor shall I say much about the treatment of the insanity problem when the man has been convicted and is serving a prison term. He can and often will be treated as a sick person the same way as if he suffered from some physical

3. See *Williams v. Williams*, [1963] 3 Weekly L.R. 215 (House of Lords); Goodhart, *Cruelty, Desertion and Insanity in Matrimonial Law*, 79 L.Q. REV. 98 (1963); Guttmacher & Weihofen, *Mental Incompetency*, 36 MINN. L. REV. 179, 202 (1952); Hayes, *Mental Disease and the Ecclesiastical Courts*, 16 JURIST 267 (1956); Annot., 24 A.L.R. 2d 873 (1952). Mezer & Rheingold, *Mental Capacity and Incompetency: A Psycho-legal Problem*, 118 AM. J. PSYCHIATRY 827-28 (1962), list 31 legal areas involving a potentially differing medical judgment of incompetency. See generally AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* (Lindman & McIntyre ed. 1961).

4. 2 WILLISTON, *CONTRACTS* § 256 (3d ed. Jaeger 1959); Guttmacher & Weihofen, *supra* note 3, at 186; Green, *Judicial Tests of Mental Incompetency*, 6 MO. L. REV. 141, 146 (1941); Notes, 35 CAN. B. REV. 205 (1957); 29 TENN. L. REV. 274 (1962); 29 TEMP. L.Q. 380 (1956).

5. PROSSER, *TORTS* 791 (2d ed. 1955); Guttmacher & Weihofen, *supra* note 3, at 209. See also Anderson, *Insanity as a Defense to the Civil Fraud Penalty*, 1963 DUKE L.J. 428.

6. Guttmacher & Weihofen, *supra* note 3, at 196; Green, *supra* note 4, at 152; Usdin, *The Psychiatrist and Testamentary Capacity*, 32 TUL. L. REV. 89 (1957). *But see, e.g.*, *Anderson v. Grasburg*, 247 Minn. 538, 78 N.W.2d 450 (1956) (criminal law test used in denying a constructive trust) and Note, 41 MINN. L. REV. 334 (1957).

7. See STATE OF CALIFORNIA, *SPECIAL COMMISSIONS ON INSANITY AND CRIMINAL OFFENDERS*, FIRST REPORT 57 (1962); Hess & Thomas, *Incompetency to Stand Trial: Procedures, Results, and Problems*, 119 AM. J. PSYCHIATRY 713 (1963). Future psycho-analytical research might discover that even at this stage our test of sanity cannot be wholly rational. We may find that society uses—or abuses—the trial in part as a curative, to strengthen the egos of both the accused and the spectator, and that the trial of an insane individual lacking a "fighting chance" would be without attraction and effect. For a significant example of medical ambivalence to the so-called Ganser syndrome, the deterioration of the accused's mental state prior to trial, see SZASZ, *THE MYTH OF MENTAL ILLNESS* 250-51 (1961). Perhaps the best recent analysis of the problem is Slovenko, *Psychiatry, Criminal Law, and the Role of the Psychiatrist*, 1963 DUKE L.J. 395, 410-16, an article that unfortunately appeared too late to be fully exploited in the present paper. On the psychological meaning of litigation in general, see Redmount, *Psychological Views in Jurisprudential Theories*, 107 U. PA. L. REV. 472, 510-11 (1959).

illness. Here our psychiatrists are free and welcome to use their own science and their own insanity test without interference by the law.⁸

But in two respects the problem of legal insanity is completely unsolved and here I believe our present efforts are unavailing because we have not sufficiently analyzed the job we have to do. What I am referring to is the defense of legal insanity at the time of the crime, most important and quite crucial for our administration of criminal justice and the execution of insane persons, perhaps less important, but even more dramatic.

The Ping-Pong Match: Court and Psychiatrist

Under the *M'Naghten* test as now generally applied, the accused is deemed to have been sane at the time of his alleged crime if he knew the nature and quality of his act, and also knew that his act was wrong. This formula, established by the House of Lords more than a century ago,⁹ has replaced a long series of others, such as Bracton's "wild beast" test¹⁰ of the 13th century, the "twenty pence" test of the 16th century (under which anybody who could count 20 pence and knew his father and mother was held criminally responsible), and the "child of fourteen" test of one hundred years later. We smile at these formulas, but are we doing better today? Psychiatrists do not think so. *M'Naghten*, they say, is based on "antiquated and outworn medical and ethical concepts." It is "hoary, old legal dogma," or at least "unintelligible."¹¹ And they are unhappy about being asked questions by the court to which their science has no answers.¹² Do we call insane one who fails to recognize as a

8. The problem seems to be a rare one in actual practice because prisoners are reluctant to seek commitment. "Apparently the terrors of bedlam exceed those of prison. . . ." Hazard & Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 U.C.L.A.L. REV. 381, 382 (1962). See *Lynch v. Overholser*, 369 U.S. 705, 712, 724 (1962); GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 414 (1952).

9. *The Queen v. M'Naghten*, 10 Cl. and F. 200, 8 Eng. Rep. 718 (House of Lords, 1843). For a history of the case, see CALIFORNIA REPORT, *op. cit. supra* note 7, at 74-75.

10. I am indebted to Dr. Bernhard Diamond, Berkeley, for his comment that this test was never part of the English law of insanity but, as now stated, is the result of a mistranslation of the Latin word "brutis" as referring to wild beasts rather than irrational beings.

11. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 472-74 (2d ed. 1960), quoting from writings of White, Overholster and Zilboorg. See also Ebaugh & Macdonald, *The Medicolegal Dilemma—An Interment of Truth*, 184 J.A.M.A. 131 (1963).

12. From the boundless literature on this subject, see AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* 330-47 (Lindman & McIntyre ed. 1961); GLUECK, *LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE?* (1962); BERGLER, *JUSTICE AND INJUSTICE* 117-22 (1963); Diamond, *From M'Naghten to Currens, and Beyond*, 50 CALIF. L. REV. 189 (1962); PERKINS, *CRIMINAL LAW* (1957); GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* (1925); ABRAHAMSEN, *CRIME AND THE HUMAN MIND* (1944); OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* (1953); WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* (1954); GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* (1952); Hall & Menninger, Book Review, 38 IOWA L. REV. 687 (1953); Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336 (1955). See also, e.g., Williams, *The Royal Commission and the Defense of Insanity*,

"wrong" what was wrong by the standards of his community, or only what was wrong by his own standards? If the latter, any error should negate criminal responsibility (which we make depend on the faculty not the fact of cognition). Or is it enough if the accused was aware of the ethical wrongness of his act, though he thought it legally unobjectionable?

But the psychiatrist would not be satisfied even if we could give him a definition of the "wrongness" in *M'Naghten*. For, he will ask, what does that wrongness have to do with his expert knowledge of mental disease? Moreover, regard for the accused's "total personality" requires inclusion in the test of elements other than those related to his intellect. The *Durham* test was devised in response to these and other complaints to replace *M'Naghten* which, it is generally agreed, has hardly ever been given more than lip service.¹³ Now the psychiatrist need tell us only whether a mental disease produced the accused's criminal act.¹⁴ Does this test solve our problem? Most courts do not think so.¹⁵ To be sure, great strides have been made in medical science as to the origin, diagnosis, and cure of mental illness. But how can, and why should, such new findings help us in determining the ultimate issue whether or not an accused should be punished? The sickest may most splen-

CURRENT LEGAL PROBLEMS 16 (1954); Morris, *Committee Report*, 21 MODERN L. REV. 63 (1958). For a bibliography, see TOMPKINS, *INSANITY AND THE CRIMINAL LAW* (1960).

13. CALIFORNIA REPORT, *op. cit. supra* note 7, at 24.

14. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). See, e.g., DONNELLY, GOLDSTEIN & SCHWARTZ, *CRIMINAL LAW* 739-810 (1962); Symposium, *Insanity and the Criminal Law—A Critique of Durham v. United States*, 22 U. CHI. L. REV. 317 (1955); Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond*, 41 A.B.A.J. 793 (1955); Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761 (1956). See also ME. REV. STAT. Ch. 149, § 38-A (Cum. Supp. 1961); Note, 15 ME. L. REV. 107 (1963). Cf. *Blocker v. United States*, 288 F.2d 853 (D.C. Cir. 1961); Raab, *A Moralistic Look at the Durham and M'Naghten Rules*, 46 MINN. L. REV. 327 (1961); Reid, *Criminal Insanity and Psychiatric Evidence: The Challenge of Blocker*, 8 HOW. L.J. 1 (1962).

15. On the near-general rejection of the *Durham* test, see CALIFORNIA REPORT, *op. cit. supra* note 7, at 79; PERKINS, *CRIMINAL LAW* 763-65 (1957); Notes, 45 CALIF. L. REV. 538 (1957); 45 GEO. L.J. 516 (1957); 15 ME. L. REV. 107 n.5 (1963). On August 12, 1963, the House of Representatives passed a bill that would abolish the test in the District of Columbia where it was created. 109 CONG. REC. 13948, 13957 (1963). On the probable psychological basis of this rejection, see Watson, *A Critique of the Legal Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 611 (1958). But see Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 IOWA L. REV. 485 (1956); Note, 11 VAND. L. REV. 218 (1957). On the modification of the *Durham* rule by the court of its origin in *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962), see Acheson, *McDonald v. United States: The Durham Rule Redefined*, 51 GEO. L.J. 580 (1963). On the ambiguity of the medical concept of insanity, see Swartz, "Mental Disease": *The Groundwork for Legal Analysis and Legislative Action*, 111 U. PA. L. REV. 389 (1963). See also Fox, *Physical Disorder, Consciousness, and Criminal Liability*, 63 COLUM. L. REV. 645 (1963); Ibanez, *Bridging the Gap on Concepts of Mental Illness*, *Crim. L.Q.*, Feb. 1963, p. 23; Slovenko, *supra* note 7, at 400-02.

didly respond to criminal punishment, while the sanest might not. Punishment of the sick may be a deterrent as effective as punishment of the sane. And most crucial, even if the existence of mental disease had a close relation to the impact of punishment, would society be able and willing to make its right to exact punishment depend on this impact?

The ultimate question—whether to punish or not—remains unanswered also in the most recent attacks on the problem: the *Model Penal Code* of the American Law Institute, which combines the “product” test of the *Durham* rule with a relic of *M’Naghten* (lack of “substantial capacity either to appreciate the criminality of his conduct or to conform his conduct”);¹⁶ and the *Currens* rule¹⁷ which, partly following the New Hampshire rule,¹⁸ omits “capacity to appreciate” and abandons the “product” test, but continues to look for the “result” of mental illness and for the accused’s “capacity to conform.” Our question remains equally unanswered under such older compromise solutions as the theory of partial responsibility,¹⁹ or the doctrine of irresistible impulse.²⁰ They cannot be given more credit than as expressions of a society whose bad conscience is anxious to mitigate at least some of the hardship it feels impelled to impose.²¹

16. MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962), almost literally identical with the rule of the German Penal Code. STRAFGESETZBRUCH, KOMMENTAR § 51 (11th ed. Schönke-Schröder 1963). See also ILL. REV. STAT. ch. 38, § 592 (Cum. Supp. 1962); VT. STAT. ANN. tit. 13, § 4801 (1958); Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 MARQ. L. REV. 494 (1962). Cf. Hall, *Mental Disease and Criminal Responsibility—McNaghten Versus Durham and the American Law Institute's Tentative Draft*, 33 IND. L.J. 212 (1958); Kuh, *The Insanity Defense—An Effort to Combine Law and Reason*, 110 U. PA. L. REV. 771, 796-801 (1962); Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 608, 624-27 (1963).

17. *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961). See generally CALIFORNIA REPORT, *op. cit. supra* note 7, at 17-19, 85-86; Slovenko, *supra* note 7, at 402-03.

18. See *State v. Jones*, 50 N.H. 369, 382, 393 (1871). See also Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367 (1960); Reid, *Companion of the New Hampshire Doctrine of Criminal Insanity*, 15 VAND. L. REV. 721 (1962); CALIFORNIA REPORT, *op. cit. supra* note 7, at 18-19, 77-78.

19. See GLUECK, LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE? (1962); Address by Hall, *The Purposes of a System for the Administration of Criminal Justice*, E. D. White Lecture, Georgetown Univ., Oct. 9, 1963; Diamond, *supra* note 12, at 203; PERKINS, CRIMINAL LAW 767 (1957); GLUECK, CRIME AND CORRECTION 159 (1952); Weihofen, *Partial Insanity and Criminal Intent*, 24 ILL. L. REV. 505 (1930); Note, 43 CORNELL L.Q. 283 (1957). Scottish law has long recognized “diminished responsibility.” See Smith, *Diminished Responsibility*, 4 CRIM. L. REV. (ENG.) 354 (1957). For continental law, see, e.g., WEGNER, STRAFRECHT 79-83 (1951). Under the English Homicide Act 1957, see *Regina v. Spriggs*, [1958] 2 Weekly L.R. 162.

20. PERKINS, CRIMINAL LAW 756-63 (1957); Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956 (1952); CALIFORNIA REPORT, *op. cit. supra* note 7, at 24-26.

21. Significantly, many psychiatrists, conscious of their roles as “thirteenth jurors” (note 55 *infra*), welcome the compromise. See Freedman, Book Review, 76 HARV. L. REV. 1104 (1963).

Is there an answer? Most of those who write or speak about the problem have tried to prove their opponents wrong. It may well be that they have all been right: the psychiatrist with his contempt for legal formulas; the lawyer with his distrust of medical science; and the man in the street with his suspicion that all this talk of lawyers and psychiatrists must ultimately endanger our system of criminal justice.²² Would it not follow that there is something wrong with the question? Indeed, the question of insanity put to the expert does not differ fundamentally from the question of justice put to God in the trial by ordeal and battle. *We do not really want to know whether the accused or condemned man is insane.* By asking this unanswerable question we seek to avoid the issue of whether or not to punish, an issue which we cannot face until we know, until we are willing to know, why we punish. If we find, as we shall find, that punishment is designed and imposed to serve conflicting aims, we shall be more willing to concede that insanity as a ground for the exclusion of punishment *cannot be uniformly and consistently defined; indeed that it cannot be defined at all except by a tautology.*

In most situations in which we are called upon to define insanity, the question being asked is obscured by the competition between such rational considerations as the need for deterrence or the wish to reform, and such irrational urges as the wish for retribution. However, at one stage in the administration of criminal justice, the real question cloaked in the terminology of insanity can be more readily discerned because a sole purpose of punishment can be most nearly isolated: where the prisoner in the death cell seeks or is granted temporary reprieve on grounds of insanity supervening his conviction.

Cat and Mouse: Stay of Execution

Henry Ford McCracken, 34, condemned Santa Ana sex murderer, has been given six electric shock treatments of the kind usually prescribed for insane persons . . . Warden Harley O. Teets . . . said that McCracken responded favorably to them. . . . Dr. David G. Schmidt, chief prison psychiatrist, and Dr. M. C. Wilcutts, chief prison medical officer, both [had] testified that McCracken was sane, but suffering from a "self-induced hypnotic condition caused by fear of his impending execution. . . ." McCracken was morose, slovenly and full of fantasies. He imagined he had rabbits and cats in his cell, and he made a mess in pretending to feed them. Since the treatments, the warden said, McCracken has again become neat in his personal habits, and he now plays the guitar and occasionally sings.

22. When, in 1957, the experts in Washington, D.C., decided to include sociopathic personality among mental diseases, acquittals on the ground of mental insanity in the District of Columbia increased tenfold. Diamond, *supra* note 12, at 192. LA PIERE, *THE FREUDIAN ETHIC* (1959), offers what is indeed a "lay version" (*id.* at 34) of psychoanalysis as the basis of the current trend toward an expanded legal irresponsibility. See, *e.g.*, *id.* at 157-58, 160, 165, 170. For a more balanced criticism of Freud's views, see Hall, *supra* note 19, at 3-4. Exclusion of habitual criminals from the new "humanitarian treatment" by the American Law Institute reveals society's true motivation.

Briefly, the prisoner was ready for the gas chamber and the judge so ruled.²³ This is not a parody of a medieval chronicle, or a tale of totalitarian sadism, or a demented fantasy, but a clipping from the San Francisco Chronicle dated San Quentin Prison, January 15, 1953.

At all times and in all countries there has apparently been agreement that an insane person may not be executed though he was found sane and responsible at the time of his deed and trial.²⁴ In the seventeenth century Sir Edward Coke had considerable difficulty in explaining this rule. To kill an insane man, he felt, was "cruell and inhuman . . . because by intendment of law the execution of the offender is for example . . . but so it is not when a mad man is executed, but should be a miserable spectacle. . . ."²⁵ Sir John Hawles, half a century later, rightly objected that "the terror to the living is equal, whether the person be mad or in his senses."²⁶ Thus, explanation has sometimes been sought in the thought that it is "against christian charity to send a great offender quick, as it is stiled, into another world, when he is not of a capacity to fit himself for it."²⁷ More acceptable seems to have been the argument that the killing of an insane man would deprive him of any "just defense" that might have been available to him had he remained sane.²⁸ Ever since Blackstone²⁹ this argument has been reiterated. But it proves too much: an illiterate "properly" executed while sane is similarly deprived of such legal remedies as would have been available to him had he remained alive and been taught how to read and write and think.³⁰

"Whatever the reason of the law is, it is plain the law is so."³¹ The insane man in the death cell may not be executed so long as he remains insane. But when is he insane enough to deserve the benefit of this rule—if it is a benefit? Justice Frankfurter has said that the problems of supervening insanity "happily do not involve" the conflict between a legal and a medical concept.³² Is this

23. On November 6, 1953, the Supreme Court of California held in *McCracken v. Teets*, 41 Cal. 2d 648, 653, 262 P.2d 561, 564 (1953), that "the stay of execution heretofore granted is terminated."

24. For an analysis of statutory and decisional law in the United States, see *Solesbee v. Balkcom*, 339 U.S. 9, 26-32 (1950).

25. COKE, *THIRD INSTITUTE*, chap. 1, p. 6 (1817).

26. Sir John Hawles, *Remarks on the Trial of Mr. Charles Bateman*, 11 *STATE TRIALS* 474, 476 (Howell ed. 1816).

27. *Id.* at 477.

28. *Id.* at 476.

29. 4 BLACKSTONE, *COMMENTARIES* § 24 (Jones ed. 1916). See also 1 HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 34 (1736).

30. If the possibility of a subsequently refreshed memory were enough to prevent the execution of an insane man, it would also render unconstitutional any capital punishment, since it is possible to speculate endlessly about the possibilities that would rescue a condemned man from execution provided it were delayed long enough.

Traynor, J., concurring in *Phyle v. Duffy*, 34 Cal. 2d 144, 158-59, 208 P.2d 668, 676 (1949), *cert. denied*, 338 U.S. 895 (1949).

31. Hawles, *supra* note 26, at 477.

32. *Solesbee v. Balkcom*, 339 U.S. 8, 14 (1950) (dissenting opinion).

really true? To be sure, we hear much less about this conflict in the proceedings about the condemned man than in the controversy about the accused's sanity. For due process does not protect the former against the governor's or warden's verdict which merely expresses society's "merciful dispensation."³³ But legally, supervening insanity is often subjected to the same test as that applied to the accused's earlier conduct. Like the accused, the condemned man has on occasion been said to be sane if he "knows right from wrong."³⁴

Attempts are under way to introduce such rational inquiries as whether the prisoner "is unable to confer or consult, or . . . to communicate knowledge of any fact that may have a bearing on his guilt or on the mitigation of his penalty."³⁵ But even these current attempts at rationalizing the ancient insanity rule remain burdened by such additional tests as whether the convict "is unaware of the fact of his conviction [or] of the penalty which has been imposed."³⁶ Based on such tests, the rule saving the insane prisoner from execution cannot be explained under that "official theory" which considers reform and deterrence as the purposes of all punishment. Capital punishment precludes "reform." And deterrence could be achieved whether or not the offender is capable of realizing the imposition of the penalty. The rule, therefore, can be understood only against the background of an irrational, retributory function of punishment. Before we attempt to examine the effect of this finding on the concept of supervening insanity, a general analysis of the purposes of punishment and their relation to the insanity concept is in order.

The Stake of the Game: Why Do We Punish?

Our age prides itself with having replaced a primitive criminal law of retribution by a legal order which, primarily at least, serves the purely utilitarian purposes of reforming the criminal and deterring those inclined to commit similar crimes. But even these two "rational" purposes allegedly governing

33. *Nobles v. Georgia*, 168 U.S. 398, 407 (1897). See also *Phyle v. Duffy*, 334 U.S. 431 (1948); *Caritativo v. California*, 357 U.S. 549 (1958); *Berger v. People*, 123 Colo. 403, 231 P.2d 799 (1951), *cert. denied*, 342 U.S. 837 (1951); *Wheeler v. State*, 219 Miss. 129, 70 So. 2d 82 (1954); *Leick v. People*, 140 Colo. 564, 345 P.2d 1054 (1959). *But see*, e.g., *Frankfurter, J.*, dissenting in *Caritativo v. California*, 357 U.S. 549, 552 (1958), and in *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 570, 571 (1953); *Schauer, J.*, dissenting in *People v. Riley*, 37 Cal. 2d 510, 519, 235 P.2d 381, 386 (1951); and generally, *Hazard & Louisell*, *supra* note 8, at 396-99.

34. See, e.g., *Caritativo v. Teets*, 47 Cal. 2d 304, 306, 303 P.2d 339, 340 (1956), *aff'd*, 357 U.S. 549 (1958), containing two psychiatrists' testimonies to this effect. See also GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 436 (1952); ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 102 (1953).

35. CALIFORNIA REPORT, *op. cit. supra* note 7, at 58. *Cf. In re Smith*, 25 N.M. 48, 59, 176 Pac. 819, 823 (1918), where the question whether the convict has "a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information," was at least added to traditional tests. See also *People v. Geary*, 298 Ill. 236, 131 N.E. 652 (1921); *In re Grammer*, 104 Neb. 744, 178 N.W. 624 (1920); *Commonwealth v. Moon*, 383 Pa. 18, 117 A.2d 96 (1953). See also GUTTMACHER & WEIHOFEN, *op. cit. supra* note 34, at 436.

36. CALIFORNIA REPORT, *op. cit. supra* note 7, at 58.

our criminal law to the exclusion of others, are often irreconcilable. "[I]f you are to punish a man . . . you must injure him. If you are to reform him, you must improve him."³⁷ And, we may add, if we are to punish a man in order to deter others, we may inflict any measures which will repel responsible persons, without regard to his own responsibility, while, if we wish to reform him, we must choose our course chiefly in terms of his responsibility. We shall, in the first case, be inclined to define insanity as a defense narrowly so as to permit imposition of punishment in as many cases as possible. Gang crimes, from petty thievery to homicides, are perhaps the most obvious examples. And, in the second case, we shall draw our definition broadly to avoid the imposition of ineffective punitive measures. Certain sex crimes at certain times in certain communities offer rare instances of this latter type.

If the relevance and thus the definition of insanity must vary even under our two official theories of punishment, this relevance and definition become multifarious if we admit, as we must, that a third function of punishment, the satisfaction of the ancient urges of retribution, has always remained with us. We have isolated the insanity problem regarding the prisoner in the death cell because as to him theories of reformation and deterrence are clearly meaningless; retribution is left as the sole determinant of his treatment. But the retributory function of criminal law pervades its entire administration. Indeed, those very crimes with which the public is most concerned are those as to which this function is clearly predominant, *i.e.*, the crimes of homicide. Those who wish to know do know that both deterrence and reformation matter little to one about to commit a passion murder.³⁸ Those who wish to know do know that punishment of the murderer, far from serving the official doctrines of deterrence and reformation, follows prevalently those irrational impulses which we usually call retributory.³⁹

Whether insanity is invoked at trial or in the death cell, these impulses react to the plea differently than the desire for deterrence or reformation; moreover, the retributory reaction itself may differ according to the prevalence of one of the various facets of retribution. A comprehensive analytical study revealing the many and complex facets of the urge for retribution is still lack-

37. SHAW, *THE CRIME OF IMPRISONMENT* 10 (1924). See also Frym, *Past and Future of Criminal Rehabilitation*, 3 J. PUB. L. 451, 453 (1954); Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 386 (1952).

38. See, *e.g.*, Watson, *A Critique of the Legal Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 611, 619-20 (1958); WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 203-21 (1958). On the victim-offender relationship see Dession, *Justice after Conviction*, 25 CONN. B.J. 215, 223 (1951); REIWALD, *SOCIETY AND ITS CRIMINALS* 170-72 (1950); KOESTLER, *REFLECTIONS ON HANGING* 48-61 (1957). On the need for a general psychoanalytical approach to law, see Schoenfeld, *Law and Unconscious Motivation*, 8 HOW. L.J. 15 (1962).

39. "Many policies set forth in the name of deterrence appear to be social rationalizations in the service of retributive impulses." Watson, *supra* note 38, at 621. On the meaning of retribution, see, *e.g.*, De Grazia, *Crime without Punishment: A Psychiatric Conundrum*, 52 COLUM. L. REV. 746, 755 (1952); Kaplan, *Barriers to the Establishment of a Deterministic Criminal Law*, 46 KY. L.J. 103 (1957); ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 69-88 (1954).

ing. However, three of these facets are particularly important and immediately apparent. We need retribution as an outlet for that "moralized aggression" which elsewhere is met in moral condemnation or in the enjoyment of trials and executions.⁴⁰ We need retribution as "revenge" for harm done to us to help us bear the blow.⁴¹ And most important, we need retribution to counteract our own temptations. We must prove to ourselves that crimes which we may have wanted or may yet want to commit "do not pay." Insofar as these wishes are conscious, the function of retribution is at least partly analogous to the rational objective of deterring others. But that function appears wholly irrational as a demand for "atonement," where, as is usually the case as to homicide, our wishes remain subconscious.

Each one of these facets of retribution may engender a different attitude toward the insane criminal. We may assume that the exercise of aggression or vengeance was not at first related to the "guilt" of the victim,⁴² and that this accounts for the practice of mechanical talion prevailing in all earlier legal systems, a practice which condoned the lunatic's punishment as that of the devil inhabiting him.⁴³ It was deeper understanding of human psychology that induced kings, judges, and juries, first as a matter of grace, then as a matter of the accused's right, partly at least to repress the retributory urge against the guiltless. But we are far from having completed that repression, and retribution will probably always remain with us in its third and most important form—our need for atonement. There have been many dialectic and moral explanations of this need.⁴⁴ Modern psychology has helped us to be franker with ourselves.

[T]he failure to punish an offender means to us a threat to our own repressive trends [i]n the case of every violation of the law, our

40. REIWALD, *op. cit. supra* note 38, at 206, 246-61; FLUGEL, MAN, MORALS AND SOCIETY 169 (1947); BERGLER, *op. cit. supra* note 12, at 130, 141. Repression of such aggression creates anxiety. Money-Kyrle, *Psycho-analysis and Philosophy*, in PSYCHOANALYSIS AND CONTEMPORARY THOUGHT 102, 110 (Sutherland ed. 1958). Resulting unconscious guilt "remains a secret motive for a demand for scapegoats." *Id.* at 111. See also generally Bienenfeld, *Justice, Aggression, and Eros*, 38 INT. J. PSYCHOAN. 1 (1957).

41. 1 SIMPSON & STONE, LAW AND SOCIETY 132 (1948). "When the Areiopagos pronounced a capital sentence on a murderer it was carried out by the public executioner in the presence of the relatives of the deceased." 2 VINOGRODOFF, HISTORICAL JURISPRUDENCE 180 (1922).

42. Although it may be more accurate psychologically and historically to conceive of early "liability without fault" as a liability based on an irrebuttable presumption of fault. See Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NW. U.L. REV. 855 (1953).

43. Guttmacher & Weihofen, *supra* note 3, at 380.

44. See generally BELING, DIE VERGELTUNGSDIEE (1908), with an analysis of Kant's categorical imperative. To others "the idea of punishment in its essence and value presupposes indispensably the idea of God . . . so that in an atheist system punishment has no function. . . ." HILDEBRAND, ZUM WESEN DER STRAFE 71 (1932). On Hegel's conception of "punishment as only the manifestation, the second half of crime," see, *e.g.*, SEN, FROM PUNISHMENT TO PREVENTION 19 (1932). The use of the term "atonement" is burdened by our own moral or theological reverence. But no neutral substitute seems available.

Ego makes an appeal for the atonement of the transgression; it does this in order to enforce the opposition of the Superego against the pressure of its instincts.⁴⁵

None of the current tests of sanity does, in any way, respond to this predominant motivation of our punitive practices. If it were possible to obtain an answer to the question whether the accused knew right and wrong, and thus defied society on an intellectual level, or the question whether he was free from a causative mental disease, and thus defied society on an emotional level (presence of guilt feelings), those answers would relate to our urge for atonement only in so far as those factors happened to play a part in our identification with the criminal. And, accordingly, our definition of legal insanity would have to vary with the basis and intensity of this identification, from crime to crime.⁴⁶

[T]he greater the pressure coming from repressed impulses, the more aware becomes the Ego that it needs the institution of punishment as an intimidating example, acting against one's own primitive world of repressed instinctual desires. . . . In other words, the louder man calls for the punishment of the lawbreaker, the less he has to fight against his own repressed impulses.⁴⁷

And, we might add, the stronger our own inhibitions against the commission of a particular crime, the less insistent we will be on seeing the lawbreaker punished for our own satisfaction, the more willing we will be to permit his treatment on a genuinely curative basis after his acquittal on grounds of insanity.

Earliest and therefore strongest repression is implanted against the child's Oedipus wish to kill one parent and to commit incest with the other. So strong is this repression that our own temptation remains totally subconscious and we are inclined to assume insanity where the temptation is overcome in murder or incest. We do not need the offender's punishment to refrain from these crimes ourselves—if we should ever feel compelled to commit them, such punishment would not deter us. Where we nevertheless impose a penalty of death or imprisonment, we do so because of remaining retributory urges of aggression and vengeance. A plea of insanity that is to prevail against these urges must be made to respond to their function: only he is insane whose punishment fails to offer society the satisfaction of aggression or vengeance.

Next in time in the child's early education is the repression of sexual satisfactions other than incest. Occurring at a more advanced age and being there-

45. ALEXANDER & STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 214-15 (rev. ed. 1956). See also BERGLER, *op. cit. supra* note 12, at 134. Freud, *Dostojewski und die Vätertötung*, 12 *GES. SCHRIFTEN* 7, 22 (1934), stresses our feeling of gratitude for the atoning murderers. "One need not kill oneself now he has killed. . . ." For a genealogy of the guilt complex, see REIK, *MYTH AND GUILT* (1957), particularly 216-17.

46. See Andenaes, *General Prevention—Illusion or Reality*, 43 *J. CRIM. LAW, CRIMINOL. & POLICE SCIENCE* 176, 182 (1952): "Psychological attitudes vary markedly in the different categories of law breaking . . . it should be . . . obvious that a study of the general-preventive effect of punishment must also be differentiated."

47. ALEXANDER & STAUB, *op. cit. supra* note 45, at 215.

fore less effective than the repression of murder and incest, this later repression leaves us subject to temptation all through our lives. Insofar as this temptation remains subconscious owing to the intensity of repression (as with respect to most perversions), the urge for punishment will, almost as easily as in the case of murder and incest, yield to pleas of insanity. But where the temptation, owing to a less effective repression (as with regard to "forbidden" normal sexual relations), reaches the surface of our minds, we need the punishment of those who have succumbed; we become unwilling to concede to them an irresponsibility in which we ourselves would have liked to indulge.

The relation between time and intensity of repression, on the one hand, and the effect and meaning of the defense of legal insanity, on the other hand, becomes quite obvious as we reach lesser types of criminal behavior. Property crimes are last to be prohibited in the child's education and our temptations to commit such crimes, typically, remain wholly conscious. Here, with little or no concern for the offender's motivation, we demand his punishment to deter ourselves and others. A plea of "insanity"⁴⁸ will be rarely successful except where, as in the case of pyro- or kleptomania, the property crime is tinged with (lower level) perversity. And the same is true *a fortiori* with respect to that group of crimes exemplified by violation of police regulations. "Here nearly all of us are potential criminals"⁴⁹ and unwilling to forego punishment of the law-breaker under any circumstances. In summary, the insanity plea will quite generally fail where, as in the case of gang crimes, punishment is determined prevailingly or exclusively by the purely rational aim of general deterrence.

Where retribution enters, we have seen, the defense of insanity is most likely to succeed, because insanity takes on its broadest meaning, where the retributory urge is one primarily determined by a desire for atonement to counteract subconscious temptations and those temptations are securely repressed. Be it under *M'Naghten*, *Durham* or *Currens*, the passion murderer has a better than even chance to escape punishment as having been insane when committing a crime that we consciously do not wish to copy. In contrast, the plea of insanity will usually fail as to those crimes where punishment is a function of a retributory urge grounded in our conscious temptations. *M'Naghten* will quite effectively assist the trier of facts in finding the thief or rapist sane and ready to go to his reward. Finally, the plea of insanity is wholly unavailing as to those crimes where punishment acts as an outlet for a retributory urge of aggression or vengeance. Here none of our current or conceivable formulas for the definition

48. "[I]nsanity as a defence is an exception in crimes other than murder, and almost the rule where murder is concerned." KOESTLER, REFLECTIONS ON HANGING 70 (1957). Significantly, no discussion of insanity is found in HALL, THEFT, LAW AND SOCIETY (2d ed. 1952). For an illustrative burglary case see *Rogers v. State*, 222 Miss. 690, 76 So. 2d 831 (1955).

49. Andenaes, *supra* note 46, at 182. On transitional types of crimes, only partly restrained by "non-legal social taboos," such as tax cheating or gambling, see Dession, *supra* note 38, at 224-25.

of insanity will and should induce the jury to deprive society of its primitive satisfaction. The mass murderer and sex "fiend" will go to his death however "insane" he may have been at the time of his act, trial or execution. Where aggression or vengeance are thus involved, we must be on our guard when "humanitarians"⁵⁰ attempt to expand the defense of insanity by a progressive identification of crime and sickness. They are asking society to forego its primitive satisfactions and may thus open the door to new expressions of powerful urges. "For if crime and disease are to be regarded as the same thing, it follows that any state of mind which our masters choose to call 'disease' can be treated as crime; and compulsorily cured."⁵¹ Indeed, now that *Durham* has shown its ugly face threatening indeterminate commitment of the "innocent," the accused has come to shun the "mercy" of a finding of insanity. We should not "be deceived by those humane pretensions which have served to usher in every cruelty of the revolutionary period in which we live."⁵² When the California Adult Authority replaced the judge by a board of "experts" to have the convict sentenced according to his needs rather than his deeds, the mercy of a determinate sentence, however severe, was replaced by the cruelty of an indeterminate sentence, however mild.⁵³ "Naturam expellas furca, tamen usque recurret."⁵⁴

Even if we could and were willing to isolate the predominant purposes of punishment in each case, our expert would fail us where we need him most. He could perhaps, in a procedure permitting such expertise (as perhaps in juvenile delinquency cases), tell us that a particular case required a finding of insanity because the prescribed penalty would not reform the offender, or a finding of sanity because the prescribed penalty would be effective. Our expert might even be able to tell us in another case in which we are primarily concerned with general deterrence (*e.g.*, the case of a gang murderer or thief) that from his knowledge of social psychology a finding of insanity would be inadvisable because deterrence could be expected without regard to the accused's state of mind. But once retribution enters, and it nearly always does where the expert is now consulted, his task becomes hopeless. He would have to make his finding depend not on his professional evaluation of the actual or potential criminal, but on his own theory as to society's likely reaction to an acquittal—a forfeiture of subconscious urges of aggression and revenge or of

50. See, *e.g.*, ROCHE, *THE CRIMINAL MIND* (1958). Cf. Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963); Impromptu Remarks, Fried, 76 HARV. L. REV. 1319 (1963); Hakeem, *A Critique of the Psychiatric Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 650 (1958).

51. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 225 (1953). See also Waelder, *supra* note 37.

52. Lewis, *supra* note 51, at 230. See *Overholser v. Lynch*, 288 F.2d 388 (D.C. Cir. 1961), *rev'd*, 369 U.S. 705 (1962).

53. See Pfersich, *Strafzumessung im Lichte der modernen amerikanischen Schule*, 17 RECHTSVERGLEICHENDE UNTERSUCHUNGEN ZUR GESAMTEN STRAFRECHTSWISSENSCHAFT (1956). See also Hall, *supra* note 19, at 4-6.

54. 2 Horatius Flaccus (ed. Orellius 1844) *Epistolarum liber primus*, epist. X, 24.

the retributory need to counteract temptation. But we certainly are not willing now and never should be willing in the future to entrust such judgments to the psychiatrist. Only the jury, which for this reason will remain indispensable, can be hoped to interpret for us society's subconscious needs. And the best we can expect from the expert is that he will consciously and conscientiously attempt to act as a thirteenth juror.⁵⁵

Much patient research will yet have to be done so as to make such tentative findings fruitful for the treatment of legal insanity's irrational foundations. But perhaps the principle and direction of these findings can be made more readily acceptable if we recall that situation in which they seem self-evident because of the absence of any rational byplay, namely the case of "supervening" insanity of the man in the death cell.

The Mouse: Toy or Sacrifice

This much is certain: we can use neither *M'Naghten* nor *Currens*, neither a right and wrong test nor a "product" test, to determine supervening insanity. To be sure, we may be tempted to do so by a desire, conscious or subconscious, to remedy extrajudicially an obvious miscarriage of justice against one insane at the time of his deed. But other means are available for this purpose. If we are truly concerned only with testing the supervening insanity of a man sane at the time of his crime, neither *M'Naghten* nor *Currens* can be of help, but only a formula which takes account of the purpose of our rule against the execution of one who turned insane in the death cell. There is much to be said for the distressing conclusion that since the decision to postpone an offender's execution cannot stem from the objectives of reform or rational deterrence, reluctance to execute an insane man is based on no nobler and more humane feeling than our lack of retributory satisfaction.⁵⁶ This lack may be due to our feeling that the lunatic is beyond the grasp of mankind or sufficiently punished by God or Devil,⁵⁷ or simply to the absence of the victor's primitive enjoyment of his victory.⁵⁸ A Mississippi court has reasoned, with disarming frankness, that the insane man in the death cell has "lost awareness of his precarious situation," and that therefore "amid the darkened mists

55. See Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 COLUM. L. REV. 182, 194 (1958). See also Leifer, *The Competence of the Psychiatrist to Assist in the Determination of Incompetency: A Sceptical Inquiry into the Courtroom Functions of Psychiatrists*, 14 SYRACUSE L. REV. 564 (1963); Scher, *Expertise and the Post Hoc Judgment of Insanity or the Autognosticia, and the Law*, 57 NW. U.L. REV. 4 (1962).

56. Thus we may probably explain also the law's insistence on confession and repentance. See, e.g., ALEXANDER & STAUB, *op. cit. supra* note 45, at 216. For a side-glance at the basic rationale of capital punishment, compare the treatment accorded the body of a condemned man who deprives society of retributory satisfaction by suicide. 1 RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* 197 (1948).

57. See Scher, *supra* note 55, at 5.

58. Where more rationalistic policies underlie the prosecution, as in the case of treason, early law expressly includes the insane in its sanctions. The person "attainted and convicted of high treason" was subject to execution sane or insane. 33 Hen. 8, c. 20, II.

of mental collapse, there is no light against which the shadows of death may be cast. It is revealed that if he were taken to the electric chair, he would not quail. . . ."⁵⁹

We do not seem to be prepared to accept any one of these "rationalizations." If, on the other hand, we were able to agree with the often repeated assertion that the rule aims at giving the condemned man his last chance to say his prayer or to prove his innocence, our test would have to be whether the symptoms of insanity do actually deprive the prisoner of his chance. And this would have absolutely nothing to do with whether he can distinguish right from wrong, whether he can act according to this knowledge, or whether he suffers from a mental disease; or with any other formulation of the insanity test devised for the determination of criminal responsibility.⁶⁰ But as we have seen, treatment by the "last-chance" rationale must be rejected on other grounds,⁶¹ and in any event, electric shock to restore a state of sanity, however defined, can produce nothing but a distressing travesty of justice. Perhaps we shall learn either to be truthful enough to abolish the defense of supervening insanity altogether and send the condemned to the chair, be he sane or insane, or to be courageous enough to do away with a law of capital punishment⁶² devised to let us watch a fellow human "quail" before his executioner.

To sum up: Like insanity in the death cell, legal insanity in general must be related to the underlying issue. Thus, in trying to define that concept we must not replace the quasi-moral, quasi-legal, quasi-medical formulas of the *M'Naghten* rule which force relevant answers (punishment or release) to unanswerable questions (knowledge of right and wrong),⁶³ by new quasi-moral, quasi-legal, quasi-medical formulas which induce irrelevant answers ("irresponsibility" on medical grounds) to answerable questions (causation by men-

59. *Musselwhite v. State*, 215 Miss. 363, 367, 60 So. 2d 807, 809 (1952).

60. See *supra* note 35.

61. See text accompanying notes 27-30 *supra*.

62. See WEIHOFEN, *THE URGE TO PUNISH* 146-70 (1956). Most other countries have chosen this solution. JOYCE, *CAPITAL PUNISHMENT: A WORLD VIEW* (1961). See KOESTLER, *op. cit. supra* note 48, at 54, 171. For a history of capital punishment in England, see RADZINOWICZ, *op. cit. supra* note 56, at 611 *passim*. See generally Cardiner & Curtis-Raleigh, *The Judicial Attitude to Penal Reform*, 65 L.Q. REV. 196 (1949); Sellin, *Correction in Historical Perspective*, 23 LAW & CONTEMP. PROB. 585, 586-88 (1958).

63. See Mueller, *M'Naghten Remains Irreplaceable: Recent Events in the Law of Incapacity*, 50 GEO. L.J. 105 (1961). See also HALL, *op. cit. supra* note 11, at 500-18; Weintraub, *Criminal Responsibility: Psychiatry Alone Cannot Determine It*, 49 A.B.A.J. 1075 (1963); Cavanagh, *Problems of a Psychiatrist on Operating under the M'Naghten, Durham and Model Penal Code Rules*, 45 MARQ. L. REV. 478 (1962); Ward, *The M'Naghten Rule: A Re-evaluation*, 45 MARQ. L. REV. 506 (1962); CALIFORNIA REPORT, *op. cit. supra* note 7, at 63 (dissenting opinion); CANADIAN ROYAL COMMISSION ON THE LAW OF INSANITY AS A DEFENSE IN CRIMINAL CASES, REPORT (1956). For an unusual attempt at defending *M'Naghten* on the basis of Protestant Ethics, see LA PIERE, *THE FREUDIAN ETHIC* 176 (1962).

tal disease or ability to conform). Rather, following the purpose of the insanity test, the definition of legal insanity must vary from crime to crime—in the same manner as it varies in other fields of the law—according to the purpose for which the concept is used. If one may be sane for the purpose of executing a valid will and yet be insane enough to supply his spouse with a ground for divorce—one may be sane to deserve punishment as a thief and yet be insane enough not to be “responsible” for a passion murder. Concern with punishment as a deterrent prevails with regard to property and gang crimes sufficiently to diminish our interest in the thief’s or the gangster’s motivation. But with regard to most homicides, need for punishment is predominantly determined by our retributory urge which in the case of a killing committed in passion (in contrast to a gang murder) recedes with our own subconscious temptation to kill likewise.

If thus the varying purpose of punishment is revealed as the true determinant in our search for the definition of legal insanity, none of the prevailing or suggested formulas can produce a general answer. Our definition would have to follow our sole concern about whether and how the defendant ought to be punished, and would have to vary from crime to crime, as it varies at every stage of the criminal process from deed to execution. But since we do not know why we punish, we conceal an irrational search in a pseudo-rational question which cannot be one for medical science to solve. If we nevertheless insist on shifting the responsibility for a necessarily irrational decision to the psychiatrist, that “expert” can have no other function than that of a thirteenth juror. Unaided by his professional knowledge he must ultimately follow his emotions as an individual member of society and speak his “sane” or “insane,” his “guilty” or “non-guilty,” according to whether or not he feels that, on grounds unexpressed and inexpressible, the accused should be punished. And this decision is far less concerned with the defendant than with the reaction of society: will the public rightly or wrongly expect his punishment to deter other potential criminals, or, discounting this quasi-rational test, will the public be willing to forego retributory satisfaction without elsewhere and elsewhen taking a grimmer toll? Law and psychiatry will continue to share the blame and the shame. And they will do so, to complete Professor Glueck’s apt metaphor,⁶⁴ neither in cold war nor in *entente cordiale*, but in uneasy coexistence—until, in utopia, both the creed and the need of punishment have been forgotten.

64. GLUECK, LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE? (1962).

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