THE TREATMENT OF MENTAL DISORDERS AND MENTAL DEFICIENCY IN CONTINENTAL CRIMINAL LAW.*

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IN availing myself of the invitation kindly extended to me by the Institute for the Scientific Treatment of Delinquency of speaking to you on " The Treatment of Mental Disorders and Mental Deficiency in Continental Criminal Law ", I have no intention to abuse this privilege by criticizing the corresponding English law or by making suggestions for its improvement. For the latter task I feel myself neither competent nor authorized, as I am only too well aware that every important legal change is dependent upon many considerations which the foreign observer—though possibly conversant with the external facts—can appreciate only inadequately. What I may safely do, however, is to summarize some outstanding features of modern continental law and to add a few personal experiences concerning the legal system under which I worked for nearly a quarter of a century. I intend to deal first with problems of *insanity* (including temporary insanity caused by drunkenness), secondly with *other forms of mental disorders* and with *mental deficiency*.

INSANITY.

There is between the English law and most of the continental criminal codes an essential difference as to the legal definition of the conception " insanity "—a difference all the more important since it concerns just the most disputed part of the English law of insanity. According to the McNaghten rules of 1843, which dominate the law in England, as well as in the majority of the United States,† at least in theory, " 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 accused party 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 he was doing what was wrong ". The struggle against these McNaghten rules which started in this country as early as the middle of the nineteenth century, is based upon the opinion that the rules are too narrow, since they take into account only the knowledge, the conscious part of the intellect of the individual, not his

* Read before the Institute for the Scientific Treatment of Delinquency.

† See, e.g., the latest account given in 34 *Michigan Law Review* 569 (1936).

subconscious mind or his emotional life, or will power. As early as 1864 Maudsley wrote: "The fundamental defect in the legal test of responsibility is that it is founded upon the consciousness of the individual—the most important part of our mental operations takes place unconsciously."* And sixty years later Lord Atkin's Committee proposed that, in addition to the McNaghten rules, "it should be recognized that a person charged criminally with an offence is irresponsible for his act when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of any power to resist".

Most of the continental codes acknowledge this irresistible impulse test either explicity or by implication. Let me begin with the German Code of 1871. Its famous §51—the only section of the Code the number of which is almost generally known to old and young in Germany—contained the following provision: "There is no punishable act if at the time of commission the actor was in a state of unconsciousness or of morbid disturbance of the mental faculties which excluded free determination of the will." The Code thus adopts the so-called mixed or biological-psychological method shared by the majority of the continental codes (except the French Code) as well as by the McNaghten rules; there must be a mental disease, and this disease must produce certain psychological consequences. This mixed method, by the way, does not mean that the psychiatrist may decide independently the question of mental disease, and that, on the other hand, he has nothing to do with the question of what psychological consequences the disease had produced. In German as in English law the principle is valid that the court is never bound to follow the opinion of the expert, even in purely medical questions, but, on the other hand, the German expert had further to answer the question whether the mental disease had reached such a degree as to exclude the free determination of the will.† Now this latter question is really a little strange when put to a psychiatrist, whose belief in the existence of freedom of will, even among mentally normal people, is perhaps not very strong. As has been said‡: "In choosing a criterion which involves the most abstruse problems concerning the human soul, the Teutonic genius has but proved faithful to itself; no other eye could look into the metaphysical abyss without turning dizzy." The volitional element, excluded in the McNaghten rules, was here introduced in a form the crudeness of which could not fail to evoke opposition. Interpreted literally, the law might have become wholly impracticable. A few psychiatrists, as, for instance, the famous E. Mendel in Berlin, simply refused to answer this question.§ The majority of German psychiatrists and jurists, however, discovered a better method of overcoming this difficulty. The

* *Insanity and Crime*, 1864, p. 39.
† See R. Frank, *Kommentar zum Strafgessetzbuch*, fn. 3 *ad* §51.
‡ H. Oppenheimer, *The Criminal Responsibility of Lunatics*, 1909, p. 156.
§ See Bumke, *Lehrbuch der Geisteskrankheiten* (2nd ed., 1924), pp. 364–5.

wording of the legal provision—it was said—is so unreasonable that the intention of the legislator must have been different. It cannot be supposed that the legislator wanted to interfere with the philosophical struggle between determinism and indeterminism. Criminal responsibility must rather be dependent upon the "normal ability of the individual to be determined by normal motive",* an ability which must be assumed in every normal human being. The practical difficulties which are presented even by this formula, particularly those of distinguishing between the insane lawbreaker and the habitual criminal, have never been overlooked. Sometimes, the psychological requirement of §51 has been watered down, even so far as to indicate merely that the mental disease, in order to exclude criminal responsibility, should have lessened the intellectual power or emotional restraint to a considerable degree.† All these attempts to transform an impracticable metaphysical into a practicable psychological element—a mainly qualitative into a mainly quantitative requirement—have, step by step, been accepted by the German courts, especially by the Supreme Court of the Reich, at least during the last thirty years.† The following words used by Dr. Sullivan‡ with regard to the McNaghten rules can, therefore, be applied also to the former German Code: "In practice," he writes, "the legal doctrine of responsibility has been innocuous; it has not produced its logical consequences, because it has never been fully applied."

"The free determination of the will," said the German Supreme Court in 1929,§ "is excluded when, as a consequence of mental disturbances, certain ideas and feelings or influences dominate the will to such a degree as to exclude the possibility of determining the will through reasonable considerations. When there are present incentives towards a certain action as well as counteractive considerations, in such a case the will of the actor is free only if he is capable of weighing the two elements against one another. . . . If there is present a morbid impulse of such a power that the counteractive considerations, although existent, are unable to prevail, free determination of the will within the meaning of §51 is excluded." This example may suffice to show how strongly the emotional element has been emphasized in the practice of the German courts. In order to justify punishment it is not sufficient that counter active considerations did exist at all; the offender must also have had the possibility to carry them into effect. This is the defence of irresistible impulse in its purest form, and in this form it has now become written law in Germany. It was the law concerning juvenile offenders that served, in this case as in so many others, as the forerunner of general legal reforms. Whilst the Code of 1871 provided that juveniles were not punishable when they had no capacity

* See Frank, fn. 3 ad §51.
† See Lobe in *Kommentar der Reichsgerichtsräte zum Strafgesetzbuch*, fn. 2 ad §51.
‡ W. C. Sullivan, *Crime and Insanity*, 1924, p. 230.
§ *Reichsgerichtsentscheidungen in Strafsachen* (Official Collection of the Judgments of the Supreme Court in Criminal Cases), lxiii, p. 48 (author's translation).

for understanding that their action was contrary to the law, the Act of 1923 dealing with the establishment of juvenile courts has enacted that juveniles between fourteen and eighteen years of age are not punishable when, " in consequence of their intellectual or moral development, they are incapable of understanding the unlawfulness of their action or of acting in accordance with this understanding ". The same test is now, by an Act of November, 1933,* applied to the insanity problem. The first part of §51 of the Penal Code, in its new formulation, runs as follows : " An act is not punishable when the actor, at the moment of his action, in consequence of mental disturbance, of mental disorder or imbecility is incapable of understanding the unlawfulness of his action or of acting in accordance with his understanding ". It is commonly accepted that this provision is nothing but a re-statement of a law that has already been in force for several decades.† The psychiatrists, supported by the courts, have succeeded in improving a rather unfortunately formulated legal provision, with the result that their view became first unwritten and finally written law.

The defence of irresistible impulse has also been explicity accepted by all the other modern continental codes, the Italian Code of 1930 (art. 85–88), the Russian Code of 1926 (§11), the Yugoslav Code of 1929 (art. 22), the Polish Code of 1932 (art. 18), the Turkish Code of 1926 (art. 46), the Belgian Act of April 9, 1930 (art. 1, 7, 10), as well as by several continental draft codes. The Italian Code (art. 90) makes the reservation that " conditions of emotion or passion do not exclude, nor do they lessen, responsibility ".‡ This reservation is partly nothing but a matter of course ; it is a self-evident principle of probably every legal system that emotion and passion, being at the bottom of the majority of criminal actions, are, as such, i.e., if they are not an outcome of mental disease—unable to exempt the offender from responsibility.§ It must, however, be acknowledged that emotion and passion have sometimes to be taken into consideration as mitigating circumstances, and the Italian Code itself contains a few provisions of this kind.‖ The prohibition contained in art. 90 is, therefore, probably intended chiefly as a safeguard against the excessive leniency of lay judges—although it must be borne in mind that Italy abolished the jury system in 1931 in favour of the German " Schöffen-System " which greatly restricts the powers of the lay judges.

Of a type other than the majority of continental codes is the French Code Pénal of 1810. Its art. 64 runs as follows : " Il n'y a ni crime ni délit lorsque le prévenu était en état de démence au temps de l'action ou lorsqu'il a été

* As to this Act, see the author's essay in *Journal of Criminal Law and Criminology*, xxvi, pp. 517 *et seq.*

† See, e.g., the decision of the Supreme Court of January 29, 1935, lxix, p. 112.

‡ Official English translation.

§ See, e.g., Garraud, *Précis de criminel droit*, pp. 666 *et seq.*; Vidal and Magnol, *Cours de droit criminel* (7th ed., 1928), p. 309.

‖ Art. 62, Nos. 1–3.

constraint par une force à laquelle il n'a pu résister." The latter part of this provision would seem, at the first glance, to contain the irresistible impulse test. Among French criminologists, however, the view prevails that this part is not concerned with mental disease at all, but refers to compulsion by external forces.* The problem of mental disorders is to be solved exclusively by means of the term "démence". What, then, is the meaning of "démence" in French criminal law? Jurists and psychiatrists agree that this term is extremely vague (in fact, French psychiatrists and jurists seem to be just as pleased with the vagueness of the term "démence" as many English with the vagueness of the McNaghten rules).† Moreover, it is commonly acknowledged that the legal meaning of "démence" is much wider than the medical meaning, and that it covers not only intellectual, but also emotional defects.‡ That, in spite of its vagueness, French jurists are, on the whole, quite satisfied with the present legal position, is proved by the fact that in the French *Avant-projet* of the General Part of a new Penal Code, published in 1932, the term "démence" has been retained without any interpretation.§

Another important contrast between English and French law, on the one hand, and German, Swedish, etc., law, on the other, concerns the *question of proof*. According to the McNaghten rules, every man is presumed to be sane until the contrary is proved,‖ and the same principle is valid in French law,¶ although the attitude of French law may be somewhat doubtful.** Some other continental countries, however, feel a little reluctant as to such a general presumption of sanity. In German law, e.g., the question of insanity does by no means constitute an exception to the principle that every man is presumed to be innocent until his guilt is proved; the presumption of innocence refers also to insanity. That may seem strange to those who believe that the presumption of innocence is not accepted at all in continental criminal law. As far back as 1890, however, the German Supreme Court†† upheld the rule that a conviction is possible only when the prisoner's sanity has been proved beyond any doubt. "The contrary," said the Court, "would be inconsistent with the idea that only a guilty person should be punished". That, of course, does not mean that in every criminal case the prisoner must be examined by a

* Garraud, *op. cit.*, pp. 690 *et seq.*; the opposite view seems to be supported by Vidal and Magnol, p. 289.

† See, e.g., Henry Verger, *L'Evolution des idées médicales sur la r'sponsabilit' des délinquants*, 1923, pp. 15, 89; Garraud, *op. cit.*, pp. 622, 625–6; and, on the other hand, Humphreys, *Cambridge Law Journal*, i, p. 312.

‡ See Verger, *op cit.*, pp. 23, 89, etc.; Garraud, pp. 621–2.

§ Art. 122 of the Avant-projet runs: "Est exempt de peine le prévenu qui était en état de démence au temps de l'action". Professor Donnedieu de Vabres, however, recommends a provision similar to the present German law (see his remarks in *La Giustizia Penale*, 1933, Part II, pp. 3 *et seq.*).

‖ See now the interesting case Sodeman *v.* King (*The Times* Law Report, May, 28, 1936).

¶ See Garraud, *op. cit.*, p. 608; Roux, *Droit criminel* (2nd ed., 1927), i, p. 170.

** See Oppenheimer, *op. cit.*, p. 250.

†† Vol. xxi, p. 131. As to the Swedish practice see Kinberg, *Basic Principles of Criminology*, pp. 346, 368.

psychiatrist that his sanity may be proved. It means merely the so-called risk of non-persuasion, i.e., if the court having heard the evidence is still doubtful as to the prisoner's state of mind at the time of the crime, the court, according to German law, just as in about twenty of the North American States,* must decide in favour of the prisoner, whilst in this country and in France the prisoner must be convicted. And when we bear in mind how frequently the question of insanity cannot be answered with absolute certainty, the importance of this difference becomes evident.

Let me for a moment anticipate another point that refers to the method of treatment: In English law, a successful plea of insanity invariably leads to detention in a lunatic asylum during His Majesty's pleasure, i.e., usually for a very long period or even for life. According to the English Criminal Statistics for 1933, for instance, there were detained in institutions on December 31, 1933, 21 lunatics charged with manslaughter. Out of these 21 there were 7 at that time detained for more than five years, and 11 for twenty years and over. The *punishment* for manslaughter, however, is, according to the same source, usually imprisonment for a comparatively short term, and only very seldom penal servitude, particularly penal servitude of more than three or four years. The same relation is to be found in the case of many other offences. In many continental countries, however, the setting up of the defence of insanity means, or meant, only the small risk of being detained by the administrative authorities for a comparatively short period.† The prisoner, even if charged with a minor offence only, is under such a system obviously much more than in this country tempted to take refuge in the defence of insanity. This was the position in Germany until 1933, and is still the position in France.

What may be the practical consequences of such a state of affairs? There are two principles of great importance—acceptance of the irresistible impulse test and absence of a presumption of sanity—both working in favour of the prisoner and sometimes even being combined with a particularly lenient treatment of insane offenders. Is not such a combination inevitably bound to create an extremely dangerous weakening of criminal law?‡ When answering this question two aspects of the matter ought to be distinguished: every failure to deal efficiently with prisoners acquitted on the ground of insanity involves consequences of the most serious kind, and the majority of continental countries have, therefore, during the last years, improved their criminal legislation in this respect by empowering the courts to send to institutions for mental diseases—if necessary for life—every person who commits a crime

* See Henry Weihofen, *Insanity as a Defence in Criminal Law*, 1933, pp. 148 *et seq.*; Sheldon Glueck, *Mental Disorders and the Criminal Law*, 1925, pp. 41 *et seq.*

† See as to the former German law the author's remarks, *op. cit.*, p. 518; as to French law R. Garraud, *op. cit.*, p. 617, esp. fn. 11.

‡ American courts have sometimes maintained that the acceptance of the irresistible impulse test would mean the end of civilization, although this defence is actually accepted in a small minority of American states (see *Michigan Law Review* 34, p. 569).

in a state of insanity, if the protection of society requires such a measure.* But we are here first concerned with the question of how to define and how to prove insanity. And in so far as these questions are involved, I do not think that the admission of the defence of irresistible impulse and the shifting of the burden of proof to the prosecution have led to results that may constitute a danger to society. We cannot, it is true, prove this statement by means of statistical data. In most countries there are, unfortunately, no figures available that might show accurately the number of prisoners acquitted or otherwise discharged on account of insanity. Moreover, even if such figures were available, they could be used for international comparison only with the utmost caution, since so much depends upon the particulars of the criminal procedure in the various countries.† With this reservation, I should like to draw your attention to the following figures concerning such offences as, most frequently of all, give rise to the setting up of the defence of insanity, murder and indecent exposure. Out of 122 persons tried for murder in Germany in 1932, 100 were convicted, 21 were acquitted—insanity being only one among the possible reasons for acquittal—and one case was otherwise disposed of. In England, however, out of 53 persons tried for murder in 1932, only 19 were convicted, 5 were found insane on arraignment, 10 were acquitted and 18 found guilty, but insane (one case: no bill), and still higher is the percentage of persons found insane on arraignment or guilty but insane according to the statistics given by Lord Atkin's Committee in 1924.‡ Now consider the example of indecent exposure: out of 3,521 persons tried in Germany in 1931 for this offence, 3,100 were convicted, 400 acquitted, whereas in England in 1933 out of 1,575 persons proceeded against only 1,093 were convicted (228 were discharged, whilst in 242 cases the charge was proved and order made without conviction). These figures seem to prove that the chances of escaping punishment on account of insanity were in Germany at least not greater than in England.

I would like to bring to your notice—without laying too much weight upon the results—an interesting private inquiry held in Berlin in 1931 among a few thousand juvenile workers of 14 to 17 years of age, on problems of guilt and punishment.§ Although many of these boys and girls criticized rather severely the sometimes excessive leniency of the penal methods of that period, as they regarded it, especially the fact that the death penalty was in their opinion too seldom executed, no one complained about the leniency of §51 of

* See, e.g., §§ 42*b* and 42*f* of the German Act of November 24, 1933; art. 222 of the Italian, §§ 11 and 24 of the Russian, art. 60 of the Polish, §53 of the Yugoslav Penal Code, the Swedish Abnormal Delinquents Act of 1928, the Belgian Act of April 9, 1930, art. 72 of the French *Avant-projet* of 1932.

† In England, it is not lawful for magistrates to refrain from committing an accused for trial on the ground that the evidence has sufficiently proved his insanity (Halsbury, *Laws of England*, ix, p. 20, fn. 10; Stone, *Manual*, 68th ed., 1936, p. 182). In German and French law, however, such a course is not unusual.

‡ See Report, p. 25.

§ Mathilde Kelchner, *Schuld und Sühne im Urteil jugendlicher Arbeiter und Arbeiterinnen*, 1932, Beiheft 63 zur Zeitschrift für angewandte Psychologie.

the Penal Code. There is a still more convincing fact to disprove the view that the wide formulation of the conception of insanity and the absence of a presumption of sanity must undermine the protection of society against crime: I am referring to the fact already mentioned that even the present régime in Germany has not only not changed, but in November, 1933, expressly confirmed the previous legal position. Moreover, during the present discussions about the new German Penal Code, the idea of abolishing the defence of irresistible impulse has, as far as I am aware,* never occurred to the legislators. And the same may be said of the position in Italy and Russia.

The most serious objection against the irresistible impulse test is certainly that it may sometimes be impossible, even for an experienced psychiatrist, to say whether or not an impulse was really irresistible. In his *Psychology of the Criminal*,* Dr. M. Hamblin Smith even said: "It is impossible to say, in any particular case, that an impulse was irresistible; all that can be said is that the impulse did not appear to have been successfully resisted." Difficulties of this kind have certainly very often been experienced by the German psychiatrists, but they as well as jurists have always duly considered that legal formulations of psychiatric terms must not be taken too literally. Dr. W. C. Sullivan† was certainly right in saying: "Criminal responsibility is a purely legal question. . . . The law may fix whatever limits it thinks fit". But, on the other hand, we must bear in mind the warning which a famous German jurist,‡ nearly a century ago, expressed in the following words: "It is a pity that no legislator will ever succeed in finding a formulation which may truly express the right principle. The lawmaker can use his powers to prohibit certain actions and to impose punishments. But his authority ends when he interferes with the realm of science by regulating matters which the most accomplished psychologist may hardly be able to describe so that his formulation is neither too narrow nor too wide." It seems that every legal system creates the type of psychiatrist that it requires. If the law adheres to a narrow formulation of insanity, the psychiatrist will do his best to strip off the legal fetters; if the law is elastic and wide, the psychiatrist will be reluctant to use the opportunities offered to him lest he endanger the vital interests of the state. I should like to emphasize that during the course of my work in the German criminal courts I found only very few cases in which the psychiatrist experts took a view that did not duly consider the protection of society.

In spite of this, I am afraid it would not be advisable to follow a recommendation which has sometimes been made§ to renounce every legal definition and

* 2nd ed., p. 179.

† *Crime and Insanity*, 1924, p. 233.

‡ C. I. A. Mittermaier, in his foreword to the 3rd edition of Feuerbach's *Aktemmässige Darstellung merkwürdiger Verbrechen*, 1849.

§ E.g., by the Medico-Psychological Association of Great Britain in their proposals to Lord Atkin's Committee, or by Dr. Prideaux in his Cambridge address—otherwise most admirable and convincing (*Cambridge Law Journal*, i, p. 321).

to leave the question of insanity as a question of fact entirely to the jury.* The French law, which inclines in this direction and has been followed by, among others, the law of New Hampshire† and recently by the Chinese Penal Code,‡ is apparently too vague. And it may perhaps be added that a country which still preserves trial by jury in its pure form may be even more in need of some legal buttresses than the majority of continental countries which allow the lay assessors to discuss the whole matter secretly, in some form or other, with the learned judge.

There is still another feature of continental criminal law that acts also somewhat as an antidote against possible dangerous effects of the defence of irresistible impulse. It is the idea that the offender, although insane at the time of committing the crime, may nevertheless be legally responsible because he had got himself intentionally into a state of temporary insanity knowing that he might, in this state, later commit a crime. This idea of the so-called *actio libera in causa* has been accepted by some continental codes, the Italian and the Norwegian for instance. In France and Germany, however, the idea has been mainly developed by doctrine,§ and the courts have accepted it with great reluctance and in exceptional cases only. In some of the numerous cases of mass murder which occurred in Germany after the war, the sanity of the murderer at the time of his crimes might have been doubtful. Nevertheless, he was held fully responsible, since—according to the view of the experts—he must have known after the first murder that, if he put himself in a state of sadistic emotion, he would lose his self-control and probably commit more murders.‖ Or, another example: I had sometimes to deal with kleptomaniacs who had a dozen or more times appeared in court charged with theft and had been alternately convicted and acquitted. Both methods, the imposition of short sentences of imprisonment as well as acquittal, had obviously been likewise unsuccessful. The psychiatric experts, according to the circumstances of each charge, gave their opinion for or against responsibility at the time of the crime. On being asked, however, whether the prisoner herself had been aware before the crime that she was prone at certain periods to indulge in shoplifting at favourite shops, the answer was usually in the affirmative. In such cases, the prisoner could be held responsible, since it had been her duty to take all possible steps to prevent herself from visiting shops of a certain type during the critical periods. If she wilfully neglected this duty, the fact that the stealing itself was committed in a state of temporary insanity could not serve as an excuse. Comparatively long sentences of imprisonment were

* See *Report on Insanity and Crime*, 1923, p. 4; Dr. W. Norwood East, *Forensic Psychiatry*, 1927, pp. 63 *et seq.*

† See Sheldon Glueck, *Crime and Justice*, 1936, p. 100; Oppenheimer, *op. cit.*, p. 85.

‡ See art. 19 of the Code of 1935.

§ See Garraud, *op. cit.*, pp. 671 and 665; von Liszt-Schmidt, *Lehrbuch des Strafrechts* (26th ed., 1932), §37 V.

‖ See, e.g., the description of the Kürten case by Margaret Seaton Wagner, *The Monster of Düsseldorf*, pp. 191 *et seq.*

imposed in such cases, but the execution was usually postponed,* as far as possible on condition that the prisoner accepted supervision and underwent medical treatment. As a special duty the condition was sometimes imposed that the prisoner should stay at home during the critical periods—an obligation the fulfilment of which seemed not impossible for many housewives.

Temporary Insanity During Drunkenness.

The same idea lies, to a wide extent, at the bottom of the continental law on *drunkenness*. It cannot be denied that a high degree of intoxication represents a state of temporary insanity which, from the standpoint of pure logic, would make the offender legally irresponsible. It is only the fact that he has usually put himself voluntarily in this position that justifies a different method of treatment. The French Code Pénal, to begin with, does not explicitly take cognizance of crimes committed in a state of drunkenness. It is, however, recognized in French law that voluntary drunkenness does not constitute a defence, if it was caused with the intention of committing a crime. If this latter condition has not been fulfilled, then French jurists are inclined to treat the offender as a person who is merely guilty of criminal negligence.† The Italian Code takes a more severe attitude: "Drunkenness not arising from an accidental event or from *force majeure*—says art. 92—shall not exclude or diminish responsibility. If the drunkenness was preordained for the purpose of committing an offence, or for providing an excuse, the punishment shall be increased."‡ The Russian Code (art. 11) limits itself to the laconic footnote that its provisions dealing with insanity are not applicable to crimes committed in a state of drunkenness, and similar provisions are to be found in the Turkish Code and the French *Avant-projet*.

Of special interest is the development of the German law. The German Code did not deal at all with the problem of drunkenness before 1933. Therefore, a person who had committed a crime in a state of complete drunkenness was punishable only if he had intentionally produced this condition, although he knew (or ought to have known) that he might, in his drunkenness, commit an offence of such a kind as he later actually did commit.§ This, of course, was very difficult to prove; consequently, there frequently occurred acquittals that roused public indignation. Drunkenness as such was not punishable. Detention in reformatories for inebriates after acquittal was the business not of the courts, but of administrative authorities who were often afraid to run

* This is the German form of probation; the English system of placing on probation without conviction and sentence is not accepted in German Law.

† See Vidal and Magnol, *op cit.*, p. 301; Garraud, p. 660; Roux, *Cours de droit criminel*, (2nd ed., 1927), i, p. 170.

‡ Official English translation.

§ See the author's remarks in *Journal of Criminal Law and Criminology*, xxvi, pp. 528–9.

their communities into too high expenses. I may be permitted to illustrate the previous position by referring to an extremely unfortunate case of this type with which, in my capacity of examining magistrate, I had to deal about twelve years ago: A man killed a boy of fourteen whom he did not know at all, without any reason and without a quarrel, in a fit of raving frenzy after having drunk comparatively small quantities of beer and cognac. Immediately after his arrest he fell into a profound sleep, and later, when informed of his crime, he attempted suicide. When I examined him some days after his arrest, he maintained that he knew absolutely nothing about the whole affair, and, after several examinations, the psychiatrists agreed that this statement seemed to be true. It was obviously a case of pathological drunkenness—if I may use this not commonly approved term*—as the serious effect could be explained not by the quantity of alcohol consumed, but by a special susceptibility to its action. The problem was whether, under such circumstances, it was possible to punish the man according to German law, since he had acted in a state of temporary insanity. He was punishable only in the case when he had wilfully produced his drunkenness, although he knew or ought to have known that he might in this state commit a crime of such a character as he later did actually commit. It was, therefore, necessary to investigate the whole life of the prisoner. What I discovered was that he had never committed a crime in a state of drunkenness, or otherwise, but several years before the homicide in question, he had, whilst in a state of drunkenness, been involved in a brawl in the course of which he had been thrown from a bridge and badly injured. After this misfortune, so he stated, he had never had any alcohol until the day of the homicide when a friend enticed him to drink. These facts were, in the view of the Attorney-General, not sufficient to prove that the prisoner knew or ought to have known that he might himself kill another person in a state of drunkenness. Therefore, as a conviction could not be expected, he had to be released, without being committed for trial at all; and, since he was neither insane nor a habitual drunkard, the administrative authorities refused to send him to an institution. A few weeks later he called at my office and asked me for protection, because, as he told me, the relations of the dead boy, who lived in his neighbourhood, were threatening to beat or even to kill him. This example shows in a striking manner how dangerous it may be when the law is too logical or considers only one aspect of the matter; it may provoke self-help even in the form of lynch justice. Nevertheless, the solution of punishing a crime committed in a state of complete drunkenness exactly as in the case of a sober person has not been favoured in Germany, either by the former or by the present régime. It has always been maintained that such a method does not sufficiently take into consideration the fact that the guilt of the offender does not consist in the commission of the particular crime, but only in his drunkenness. Take the case of three friends who have

* See East, *Forensic Psychiatry*, p. 251.

put themselves wilfully in exactly the same condition of drunkenness. On their way home, one of them smashes a window, the second commits an assault against a policeman, and the third has the misfortune to kill a person who crosses his path. The guilt of these three men, it has been said, may be exactly the same. How can it be justifiable—asked the German jurists—to deal with them in a completely different way according to the gravity of the external consequences which, by chance, they have brought about? It has, therefore, at least during the last three decades, been suggested that there should be introduced a special offence of aggravated drunkenness, according to which every person who, wilfully or negligently, puts himself in a state of drunkenness, is to be punished with imprisonment not exceeding two years or with a fine, when he commits a crime in this condition. The penalty, however, must not exceed the limits set by the statute which is actually violated. Although even under such a law there will certainly be a difference in punishment between the man who smashes a window and the man who kills a person, this difference will be comparatively small, and the offender will not be punished for murder, manslaughter, etc., but for aggravated drunkenness only. This method has been adopted by the German Statute on November 24, 1933, and, with little modifications, by the new German Draft Code. It may not be without interest to quote some remarks from the Report of the Official Committee, as they show the contrast between the National Socialist and the Fascist penal theories: "It may be possible" —says the Report— "to provide roughly and harshly, as does the Italian Code, that such an action is to be treated as if it were committed in a state of full responsibility. That, however, would be a *fictio juris et de jure* which would harmonize neither with a law that is based upon the idea of guilt nor with the unaffected common opinion that regards a person who kills another in a state of voluntary drunkenness as punishable, but not as guilty of murder or manslaughter".* I may add that this method is not entirely without supporters even outside Germany.†

Minor Mental Disorder and Mental Defect.

What, however, is the legal consequence of an act committed in a state of drunkenness that did not exclude, but merely *weakened* the intellectual power or the emotional restraint of the offender? This question leads to the general problem of mental disorders of a somewhat lesser degree than complete insanity—a problem which, at least from a numerical point of view, is of far greater importance for the administration of criminal law than is the legal

* See *Das kommende deutsche Strafrecht, Allgemeiner Teil*, 1934, pp. 42–3.

† E.g., Dr. J. F. Sutherland, then Deputy Commissioner in Lunacy for Scotland, in his book on *Recidivism*, 1908, p. 17, writes: "There is something, indeed much, to be said for this view, in any rational system of jurisprudence", and Vidal-Magnol, *op. cit.*, p. 302, fn. 1, also approves of this method.

treatment of insanity. Here, too, continental law seems, at the first glance, to differ considerably from the English conception. English law is dominated by the contrast between insanity and mental deficiency, which latter conception, according to the Mental Deficiency Act of 1927, refers only to conditions of "arrested or incomplete development of mind existing before the age of 18 years".* If a person suffering from such a defect commits a crime punishable with penal servitude or imprisonment, the court may, instead of passing a sentence, place him under guardianship or send him to an institution for mental defectives. There is in English criminal law as yet no corresponding provision for similar abnormalities that have arisen after the age of eighteen, although, according to Kenny,† "in English practice the lessened capacity of self-control is often treated as a mitigating circumstance".‡ However, this age-limit has been criticized by English experts.§

In continental law, the conception of lessened responsibility is, in theory, by no means restricted to cases of oligophrenia Every intermediate stage between insanity and complete mental health—provided only that the defect is not merely of a slight degree—can be brought under the legal category of "lessened responsibility". Pregnancy, menstruation, nervous breakdown in consequence of war service, and so on, may come under this group. All the various German Draft Codes since 1909 up to 1930 as well as the Prevention of Crime Act of 1933 used this dualistic conception, and the Report of the Official Commission for Penal Reform, published in 1934, goes even so far as to apply the term "lessened responsibility" only to those persons whose defects are not congenital, but represent a transient stage in later life.‖ It is easy to understand how this last-mentioned suggestion may have come about. On the one hand, it is true, it has been more and more recognized among German psychiatrists and criminologists that the domain of these criminal types for whom the idea of "lessened responsibility" is intended is to be found among the individuals who are mentally defective from birth. I may be permitted to mention in this connection the name of the psychiatrist Karl Wilmanns-Heidelberg¶ and of the jurist Edmund Mezger,** both of whom have repeatedly emphasized that the conception of lessened responsibility is mainly intended not for the commencing stages of genuine mental diseases, which later develop to complete insanity, but for conditions of congenital mental deficiency. And according to my personal experiences, the protection of this term has in fact been invoked mainly on behalf of persons whose lack of self-restraint, although

* See, moreover, the *Report on Sterilization*, 1934, p. 7.

† See Kenny, *Outlines of Criminal Law* (14th ed., 1933), pp. 59–60.

‡ See Cicely M. Craven, *Journ. of Criminal Law and Criminology*, xxiv, p. 236.

§ The Report of the Mental Deficiency Committee, 1929, also restricts itself to an investigation of "imperfect or incomplete mental development".

‖ *Das kommende deutsche Strafrecht, Allgemeiner Teil*, 1934, pp. 41, 45.

¶ *Die sogenannte verminderte Zurechnungsfähigkeit*, 1927, pp. 32 *et seq.*

** *Strafrecht*, p. 502; *Zeitschrift für die gesamte Strafrechtswissenschaft*, xlix, p. 175; Frank-Festgabe, i, p. 534.

aggravated by real, fictitious or imagined war experiences, etc., was certainly due to congenital defects. The vital problem, however, and a problem almost decisive for the whole administration of criminal justice, in Germany and probably in all countries which suffered from the moral, mental and economic consequences of the war, was how to deal legally with these huge masses of mentally defective or subnormal or psychopathic law-breakers who were neither insane nor entirely normal. The German Penal Code of 1871 paid no attention whatever to these intermediate stages; it was believed, even till the end of the last century, that the judge was able to deal adequately with such cases by admitting mitigating circumstances. The two shortcomings of this system, however, became more and more recognized: first, that the Code often did not contain the possibility of admitting mitigating circumstances or that the minimum sentence even in case of mitigating circumstances was sometimes too severe; on the other hand, however, that this special type of lawbreaker very often requires not so much a more *lenient* treatment, but, above all, a treatment of a kind *other* than that given to the normal criminal. The successive German Draft Codes attempted to solve this double task, but, owing to the retardation of the whole German penal reform, they never became law. As a consequence, in practice only that part of their proposals was carried out, as far as possible, which implied greater leniency. Sentences of short-term imprisonment were imposed upon mental defective persons without any measures of a constructive kind. It must be noted that the majority of the Draft Codes proposed that, in cases of lessened responsibility, the court should be *bound* to reduce the sentence, and this compulsory character was in practice more or less adopted. The only possible result was that these mentally defective persons, having quite openly learned in court from the medical expert as well as from counsel for the defence and from the judge that, owing to their mental defects, their sentences had to be reduced, immediately hastened to repeat their offences at an alarming pace. This fact furnishes the explanation for the present tendency of German law: As the first stage, the Prevention of Crime Act, 1933, made the reduction of the sentence only optional, and—what is more important—it empowered the court to send a mentally defective lawbreaker for an indefinite period to a medical institution, either before or after his having served his term of imprisonment.* The proposals made in 1934 by the Official Commission for Penal Reform, however, go even further: "The attitude of the National Socialist State towards mental defectives—says the Report (p. 40)—differs fundamentally from the previous methods. The new penal law emphasizes the interests of the community much more than those of the individual. An individual who, as a consequence of his defective intellectual and volitional capacities, represents an abnormal danger to the community, is bound to compensate for this danger by the

* See the new §42*b* of the Penal Code and the new §456*b* of the Code of Criminal Procedure.

exercise of greater precaution. If he neglect this duty, . . . he must be held fully responsible". The Reform Commission, therefore, propose to distinguish between two groups of defectives: First, the mental defectives whose intellectual or volitional capacities are, from birth, below the average; this, since the idiot and the imbecile obviously will be treated like the insane,* covers the English conception of feeble-mindedness. This group, according to the new proposals, shall be fully responsible; the Commission even raise the question whether it may be advisable to prohibit the court explicitly from treating criminals of this type more leniently, but this is regarded as going too far. Only the second group, composed of persons whose intellectual or volitional powers, owing to acute exhaustion after an illness, pregnancy, etc., are temporarily weakened—only this group may be treated more leniently, with the exception, however—and this brings us back to our starting-point—of lessened responsibility caused by voluntary drunkenness.

Let us for a moment consider how such a system would work in practice. It would probably mean that the offender would have to spend at first a fairly long time in prison and, afterwards, another, in most cases still longer, period in a mental institution. It is a double-track system, like the present English system of preventive detention for habitual criminals, added to a sentence of penal servitude—a system which has been adversely criticized, for instance, in the Report on Persistent Offenders of 1932, and will shortly be abolished. The shortcomings of such a method of combining two different types of treatment are still more obvious in the case of the mental defective than in that of the habitual criminal. If it is recognized that such a mentally defective person is in need of treatment, why keep him at first for a long time in prison instead of sending him straight to an institution for mentally defective delinquents? "It is of course self-evident—writes Mr. L. W. Fox in his book on *The Modern English Prison*†—that prison is not the place for an offender who is either insane or mentally defective. . . . But even when the clearly insane and defective have been eliminated, there remains a considerable number of 'mental' or 'psychopathic' cases, not certifiable under any existing legislation, who are nevertheless unsuitable for prison discipline and environment."

If such a person remains in an ordinary prison, not only will his own mental condition frequently be impaired, but he will also constitute a permanent danger to the mental balance of his fellow-prisoners. Should, however, special prisons be established for psychopathic prisoners—a solution, by the way, which has had many opponents among German psychiatrists‡—the difference

* The Draft of the Commission (p. 44), in contradistinction to the Act of 1933, does not explicitly mention the "Geistesschwäche", but the Report says (p. 39) that this conception is covered by the term "krankhafte Störung der Geistestätigkeit" (morbid disturbance of mental activity).

† 1934, pp. 109–10.

‡ In England also; see the *Report of the Prison Commissioners for England and Wales*, 1925–26, pp. 44–5.

between such a prison and an ordinary institution for mental defectives would be so insignificant that it might not be worth while to transfer the prisoner from the one to the other. And the opposite course of sending the mentally defective offender first to an institution and afterwards to an ordinary prison is open to the objection that the wholesome effect of the institutional treatment would often be rendered futile by the subsequent imprisonment. This double-track system, which, by the way, is not an invention of the present German penal reformers, but formed part and parcel of the ideas of the old Classical School,* can only be explained as a consequence of the doctrine that punishment must be independent of measures which aim at the protection of society, the purpose of punishment being retaliation according to guilt, while the purpose of detention in institutions is the protection of society according to the dangerousness of the offender. Hence arises the aversion from any attempt to sacrifice punishment in favour of preventive detention and of treatment.

How do the other continental codes deal with the problem of lessened responsibility? According to the Italian and Turkish Codes, the penalty of such offenders *must* be more lenient, whilst the Jugoslav Code makes a mitigation only optional. The French and Russian Codes do not deal explicitly with the problem, but it has been recognized in French and Russian law that there may be a possibility of reducing the penalty by negativing a specific intent or by admitting mitigating circumstances. The Russian Code (art. 26), however, contains also the general clause that, instead of or supplementary to, punishment, measures of a medical-educational character may be applied if the court considers it appropriate in a particular case.† The Belgian Law of April 9, 1930, quite deservedly, enjoys a particularly good reputation. It renders the detention of mentally defectives in separate psychiatric departments of the larger prisons not only possible, but compulsory. On the other hand, however, not even this progressive Act has entirely rid itself of the old idea of the Classical School; it makes the maximum length of detention in the psychiatric department dependent not upon the mental condition of the prisoner, but upon the severity of his crime (art. 19).‡ This inconsequence, however, is, to a certain extent, made good by the provision that the court may order a prolongation of the original period of detention (art. 22). In practice, therefore, Dr. Vervaeck may be right in saying that this Belgian Act has introduced the principle of indeterminate sentence for abnormal delinquents.§

I may perhaps be permitted to conclude this—necessarily very incomplete—

* See the author's remarks, *Journal of Criminal Law and Criminology*, vol. xxvi, pp. 519 *et seq.*

† The majority of French criminologists are not at all satisfied with the bare system of mitigating the sentence (see, e.g., Vidal-Magnol, *op. cit.*, pp. 304–5; Garraud, *op. cit.*, pp. 632 *et seq.*; Verger, *op. cit.*, p. 209).

‡ See the criticism by two Belgian experts, Charles Didion and Maurice Poll in the *Recueil de documents en matière penale et pénitentiaire*, 1931, i, p. 18.

§ *Journal of Criminal Law and Criminology*, xxiv, p. 202.

report with a few remarks of a more general character. Continental criminal law, with very few exceptions, shows, in spite of many differences, one distinct feature which harmonizes with the tendencies now prevailing in this country. This is the growing conviction that, in deciding the fate of the insane, mentally defective or subnormal lawbreaker, the jurist as well as the general public must be prepared to sacrifice some of their traditional principles and prejudices and to give precedence to the medical and penological expert. This sacrifice is not easy, and the process takes time; but it is always advisable to resign oneself to the inevitable.