

CRIMINAL RESPONSIBILITY AND  
THE QUANTUM OF PROOF

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The subject of the present paper may be illustrated by an American case, *Leland v. Oregon*.<sup>1</sup>

In the state of Oregon a man called Leland was convicted and sentenced to death for the murder of a 15 year-old girl, in spite of his plea that at the time of the act he was suffering from a mental abnormality which would exculpate him. He appealed to the United States Supreme Court. Under the law of Oregon insanity could lead to an acquittal only if such abnormality was proved "beyond a reasonable doubt". Leland claimed that this requirement was not in accordance with the "due process" clause of the 14th Amendment of the Constitution. The Supreme Court did not accept his contention. Although the Oregon rule seemed to have no parallel in any other state, it could not be considered to be contrary to "generally accepted concepts of basic standards of justice". Two justices, Frankfurter and Black, dissented from the majority ruling. They found that it was not "due process" to require full proof of the mental state which would lead to an acquittal.<sup>2</sup>

The legal problem involved is this: Who bears the burden of proof as regards questions of normality or abnormality? Or, to put it more adequately: What quantum of proof is required as to the sanity of the defendant? This again is but one aspect of a more general problem concerning all the so-called *general exemptions from liability*. By this concept the criminal law in Scandinavia and certain other European countries refers to some of the pleas which in English and American law are classified as defences against a criminal charge, or justifications.<sup>3</sup> As far as the objective

<sup>1</sup> 343 U.S. 790 (1952).

<sup>2</sup> In 1957 Oregon adopted a rule requiring proof of insanity by a preponderance of evidence.

<sup>3</sup> German legal language applies such terms as "Rechtfertigungsgründe", "Entschuldigungsgründe", "Straffreiheitsgründe", etc. There is no need here to go into detail on the various meanings attributed to these terms. It should be pointed out, however, that a distinction is normally made between cir-

elements of the crime are concerned, the principal instances of such defence are self-defence, necessity and consent. The voluntary abandonment of a criminal purpose has a similar position in legal theory. In some legal systems the plea of provocation may also be mentioned. On the subjective or mental side of the crime, insanity is the most important general exemption from liability.

Scandinavian criminal law is founded on the principle that the guilt of the defendant has to be proved "beyond a reasonable doubt". This is often expressed by means of the maxim *in dubio pro reo* ("in doubt, for the defendant"). This principle is applied whenever there is a doubt whether the accused committed an act (or acted under circumstances) covered by the definition of a particular offence, or whether he acted with a sufficient degree of criminal intention or negligence. However, Scandinavian legal theory has sometimes assumed that the principle of "reasonable doubt" does not apply—at least not without modifications—when the problem is one of considering a general exemption from liability.

The problem to be dealt with here is whether it can be assumed that the practice of Danish courts is based upon a distinction between, on the one hand, elements requiring a "full" proof and, on the other hand, elements which may be considered proved even where there is a smaller degree of probability.

As already indicated, it is possible to state this problem by speaking of a "burden of proof". It is common legal language to say that the principle *in dubio pro reo* is identical with a rule placing the burden of proof on the prosecutor: he has to prove the guilt of the defendant beyond a reasonable doubt. Normally it will cause no misunderstanding to speak of a burden of proof resting on the prosecutor. Nevertheless, it seems appropriate to point to some distinctions between the two ways of stating the problem.<sup>4</sup>

(1) The concept of a "burden of proof" often involves the idea that the party bearing this burden is the one who is required to produce some kind of *information* before or during the trial. However, this is a different problem. The rules as to the quantum of proof necessary for a conviction have no logical connection with an obligation on one or other of the parties to produce evidence. For instance, the problem of the relevant quantum of proof as to the

circumstances making the act *lawful*, and, on the other hand, circumstances which, though they do not affect the unlawfulness of the act, will exempt the accused from criminal liability (e.g. insanity). The application of the Anglo-American term *justification* seems to cover even the latter category.

<sup>4</sup> See Per Olof Bolding, "Aspects of the Burden of Proof", *Scandinavian Studies in Law*, 1960, pp. 11 ff.

sanity or insanity of the accused exists even where psychiatric reports are always presented at the request of the court itself and never by any of the parties.

(2) The concept of a "burden of proof" may easily lead to the assumption that there are *only two possibilities*: the burden is either entirely on one party, or entirely on the other. This is not a correct statement of the problem we are dealing with. The problem is what degree of certainty is required to warrant a particular result in the trial. Theoretically the quantum of proof may be placed at various points of a scale of probabilities, not only at the extreme ends of such scale. It is hardly possible to express this idea by means of the concept of a "burden of proof".

(3) The "burden of proof" is often defined as a *risk* of an unfavourable result and a corresponding chance of a favourable result for the party not bearing that burden. Although this definition may be adequate as regards most civil cases, it is hardly suitable for characterizing the position in criminal law. Prosecutors are not aiming at results favourable to themselves, nor should it, from their point of view, be considered an unfavourable result that the defendant is acquitted, if acquittal is the correct result of the substantive and procedural rules applicable to the particular case. It might be added that it is not necessarily a favourable result from the defendant's point of view that the prosecutor is unable to prove sanity beyond a reasonable doubt. We shall develop this problem later.

What are the principal solutions to be considered by legislators or courts in determining the quantum of proof which is needed? If we take the problem of mental abnormality, it is possible to distinguish between the following model rules. In order to reach an acquittal it is necessary: (1) that insanity has been proved beyond a reasonable doubt; (2) that insanity has been proved by a preponderance of evidence (i.e. insanity is considered the more probable of two alternatives); (3) that insanity has been proved on a balance of probabilities (i.e. insanity is at least as probable as sanity); (4) that there is a substantial measure of doubt as to the sanity of the offender, although not a probability of insanity amounting to 50 per cent or more; (5) that there is a small though "reasonable" doubt as to the sanity of the offender, i.e. a degree of doubt which would lead to an acquittal if the issue was one concerning the criminal act or its circumstances.

These five solutions can be placed on a scale of probabilities, ranging from one extreme to another. The more that legislation or court practice moves from the ordinary reasonable-doubt rule (model rule 5) towards the Oregon rule (model rule 1), the greater

will be the number of offenders who will be convicted and punished although they were insane at the time of their acts.

The classical Anglo-American formulation of the criterion for irresponsibility due to insanity, stated in the M'Naghten Rules (1843), contains the requirement that "to establish a defence on the ground of insanity it must be *clearly proved* that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong". This comes close to the rule applied in the state of Oregon. However, in the practice of English courts the requirement of the M'Naghten Rules is hardly carried out in strict accordance with the words of the old decision.<sup>5</sup> Similarly, most American states have departed from that requirement, usually applying one or the other of the solutions mentioned above under (2) and (5).<sup>6</sup>

In Danish legal literature Goos, Torp and Hurwitz have expressed the view that a "reasonable doubt" as to the responsibility of the accused has to be taken into account in his favour. The same rule is stated in relation to other general exemptions from liability than insanity. However, the authors mentioned have added a point of view which might conceivably lead to a modification in the principle of reasonable doubt. According to Goos, "there must be something which points to the possibility of an exemption from liability, before such exemption can be considered".<sup>7</sup> Similarly, Torp mentioned that the possibility of a general exemption from liability will not be considered if there is nothing in the case to suggest a doubt of this kind.<sup>8</sup> According to Hurwitz, the prosecutor normally does not bear the burden of proof as to the non-existence of circumstances exempting from liability. "Generally speaking, it must be for the defendant to establish a probability that such special circumstances, e.g. self-defence, consent, physical coercion or ignorance of law, have been present." Hurwitz further says, however, that as soon as some doubt has arisen the principle *in dubio pro reo* must be applied.<sup>9</sup>

<sup>5</sup> Glanville Williams, *Criminal Law. The General Part*, 2nd ed., 1961, p. 520.

<sup>6</sup> *Model Penal Code. Tentative Draft No. 4*, 1955, p. 193.

<sup>7</sup> C. Goos, *Den danske Strafferets almindelige Del* (Danish Criminal Law, General Part), vol. 2, 1878, pp. 7-8.

<sup>8</sup> C. Torp, *Den danske Strafferets almindelige Del* (Danish Criminal Law, General Part), 1905, pp. 199 and 370.

<sup>9</sup> Stephan Hurwitz, *Den danske Strafferetspleje* (Danish Criminal Procedure), 3rd ed., 1959, p. 326, *Den danske Kriminalret. Almindelig del* (Danish Criminal Law, General Part), 1952, p. 274.

Accordingly, the ordinary principle of reasonable doubt (model rule 5) is said to apply. But what is meant by saying that there must be something which points to the presence of an exemption from liability, something that creates a doubt? The reference to this point obviously arises from the fact that normally there will be no circumstances justifying the offence when first the *actus reus* and the *mens rea* have been proved. Consequently, lawyers do not expect them to be there. Only when the problem is raised in individual cases is there a need for applying a rule as to the quantum of proof; and, according to the authorities referred to above, that rule is the rule of reasonable doubt.

This is all very true. If only one could assume that exemptions from liability never remained totally unnoticed and that the issue was always raised and finally decided by means of the rule of reasonable doubt, then decisions of guilt would be based entirely on a uniform principle. The trouble is that the assumptions mentioned are hardly correct. (1) It is possible that the problem of a defence is not raised because nobody pays attention to, or has an interest in, the possible existence of a defence. This may especially be the case as regards the defence of insanity, particularly in countries or jurisdictions where few pre-sentence psychiatric inquiries are carried out. (2) A second problem is how much is required in order to regard the issue of a defence as having been "raised" in court. If it is sufficient that the issue has been *mentioned*, and if in that case ordinary rules on the quantum of proof are applied, then there will be no problem. However, it is possible that something more is required, e.g. that some degree of probability shall be shown in order to have the issue considered. This would be a deviation from ordinary principles of proof. The problem here mentioned is also relevant in connection with the objective defences of necessity, self-defence, abandonment of attempt, etc. Such circumstances are seldom completely overlooked. They are brought forward in court by the defendant, and the question is how well-founded his claim of impunity has to be in order to be taken seriously.

In English and American doctrine we find some concepts and distinctions corresponding to those mentioned above.

In English theory it has become common to distinguish between two aspects of the burden of proof: "evidential burden" and "burden of persuasion".<sup>1</sup> The "burden of persuasion" is the re-

<sup>1</sup> Glanville Williams, *op. cit.*, pp. 871 ff., Rupert Cross, *Evidence*, 2nd ed., 1963, pp. 65 ff.

quirement which is applied when the criminal case is decided. This burden of proof rests on the prosecutor. The guilt of the accused must be proved "beyond a reasonable doubt". Decisions on sanity are (perhaps) the only ones involving a "burden of persuasion" on the defendant. The concept of an "evidential burden" refers to the requirement as to whether an issue of fact should be presented to the jury (or, in trials without a jury, considered by the court). This evidential burden may sometimes be borne by the defendant. If so, he has to point to some kind of information which offers a basis for considering his claim. If he fails to do this, the court will not give the jury an opportunity to accept his claim. But if he discharges his evidential burden, his claim will be put to the jury, and the issue will be decided on the principle of reasonable doubt. There seems to be no generally accepted formula as to the amount of probability required for the discharge of the "evidential burden". However, some statements are to the effect that the accused must create a reasonable doubt, which means that theoretically the requirement will be the same as applies to the final decision, although the judge and the jury may of course have different views as to what is a reasonable doubt and as to the degree of doubt which the particular case presents.

The American "Model Penal Code" sets up some rules of evidence which by and large follow the same pattern, although the terminology is different.<sup>2</sup> These proposed rules do not correspond to existing law in all the American states, but they reflect the prevailing view in American criminal law. The principal rule on evidence is stated in the following way: "No person may be convicted of an offense unless each element of such offense is proved *beyond a reasonable doubt*. In the absence of such proof, the innocence of the defendant is assumed." This corresponds to the "burden of persuasion" of the prosecutor. But the principle here referred to is modified through the proposal's rules on "*affirmative defense*".<sup>3</sup> Where such requirement is set up, the defendant claiming a defence must refer to "evidence supporting such defense". This is a condition for letting his claim go to the

<sup>2</sup> *Model Penal Code, Proposed Official Draft*, 1962, p. 20. Cf. *Tentative Draft No. 4*, 1955, pp. 7 and 108 ff.

<sup>3</sup> A second and more severe modification is made by a reference to statutes requiring that the defendant must prove a point "by a preponderance of evidence". Such a rule applies to mistake of law, see *Model Penal Code, Official Draft* 2.04 (4).

jury. Only after supporting evidence has been produced will the prosecutor's burden of proof become effective.

The Model Penal Code does not define what is "supporting evidence". The framers of the proposal are aware of the fact that this type of evidence is sometimes taken as identical with an obligation for the accused to give actual proof. However, it is assumed that most courts will find it sufficient if the accused creates a reasonable doubt.

It seems evident that rules creating an evidential burden may imply a less favourable position for the defendant than he would otherwise enjoy. He cannot expect others to find out whether it is a reasonable hypothesis that he was not guilty. Nor can he by his mere claim obtain a jury decision on the issue. He has to accept a preliminary fact-finding made by a judge who, according to Anglo-American concepts, is not the highest authority on fact-finding. It is possible that this preliminary decision involves a tendency to move away from the principle of reasonable doubt. However, it is also possible that the courts are liberal in presenting to the jury even unsupported claims of impunity. On this point Glanville Williams says:

"In general, the judge will strive to leave to the jury any evidence that may at all help the defence. Moreover, where the burden of persuasion rests on the prosecution, the judge will deal with any doubts or hypotheses that have been raised on behalf of the defence, in so far as they relate to the evidence given, even though they are not themselves supported by evidence; for even mere arguments are relevant to the question that the jury has to decide, whether the charge has been brought home beyond reasonable doubt. The main importance of the evidential burden as resting on the accused is the practical one that he is likely to be in danger of conviction if he does not introduce evidence to divert the finger of suspicion that has been pointed against him."<sup>4</sup>

In Scandinavian law, where jury trials are much less frequent,<sup>5</sup> the problem takes on a different character. The problems of deciding the "evidential burden" do not present themselves at a separate stage of the trial. The decisive question is what requirement of proof is applied when the case is decided by the court. However, situations may occur where the court is faced with a problem of undertaking a preliminary evaluation of the facts,

<sup>4</sup> Glanville Williams, *op. cit.*, p. 880.

<sup>5</sup> In Sweden the jury system is unknown except in cases under the Freedom of the Press Act, 1949.



e.g. when it decides whether there is sufficient reason for requiring a mental examination of the accused.

## II

It is relatively rare to see the issues of *self-defence*, *necessity* or *consent* raised in criminal cases under Scandinavian law. Consequently, the courts have not had many opportunities to state general rules as to the requirements of proof.

In the Swedish General Code of Laws of 1734 it was expressly stated that the defendant had to prove the justification of self-defence. In the Criminal Code of 1864 this rule was not repeated. It is generally assumed that the practice of the Swedish courts has gradually settled the matter in favour of the normal requirement of reasonable doubt. This is probably the common view in Scandinavian theory as regards objective justifications, although, as we have seen, there are indications of an evidential burden on the defendant.

There are strong arguments in favour of applying the principle of reasonable doubt. Those circumstances which, from a systematic point of view, constitute a general justification, are highly relevant to the question of the "guilt" of the defendant. Normally they play the role of a concrete element within a complex of acts and accompanying circumstances on which the criminal character of the defendant's behaviour depends. This element, e.g. consent, may mean that the situation will be entirely different from what it would have been without this element. It might be a serious modification of the standard of proof if the defendant had to prove this particular element. How would it help the defendant that the court is ready to require a high degree of proof as to the identity of persons, the number, character and effects of the acts of violence for which he is indicted, etc., if the court is free to ignore the possibility that the "victim" of this behaviour had raised a gun or a knife against the defendant immediately before the latter committed his act?

In some respects there is no clear-cut distinction between elements relevant to the definition of the crime on the one hand and elements constituting a general justification on the other. This is particularly the case as regards consent. According to Scandinavian theory, there are some fields in which consent excludes respon-

sibility because the requirements of the particular definition of the crime are not fulfilled. This is the case, for instance, where the relevance of consent is mentioned in the statutory definition of the crime, or where consent has changed the ownership or other civil relationship which is intended to be protected through the rules of criminal law. In other cases, however, consent is regarded as a general justification exempting from responsibility for an act which fulfils the requirements laid down in the statutory definition of the offence. Obviously this distinction between consent as an element excluding the *actus reus* and consent as a general justification ought not to lead to the application of two different rules on the quantum of proof.

Another illustration may be taken from the rules on *mens rea*. In German and Scandinavian theory it is a well-established tradition to classify intention as part of the general conditions of criminal liability. In English and American theory, on the other hand, it is not uncommon to single out the negative aspect of criminal intention—mistake of fact—as a type of defence, like necessity or insanity.<sup>6</sup> It is clear that in this field, too, it would be unacceptable to let the rules on the quantum of proof depend on whether mistake of fact is a justifying defence, or intention (non-mistake, knowledge) is a positive condition of liability.

If a person was below the age of criminal responsibility when the act was committed, this may be regarded as a general justification, in Scandinavian theory often classified as “irresponsibility”, parallel to a state of insanity. But it is equally possible to state that a general condition of responsibility is not fulfilled. Whatever the systematical arrangement may be, it has to be clearly proved that the defendant had reached the age of responsibility.

In Sweden, according to the prevailing opinion, the defendant's claim for impunity due to self-defence is accepted, unless it can be considered to be contradicted by the evidence presented to the court.<sup>7</sup> His bare statement will, according to this view, create a reasonable doubt which can only be eliminated through evidence to the contrary. It is difficult to ascertain whether such a rule is actually applied by Swedish courts. As far as Danish courts are concerned, it can hardly be assumed that they require the same degree of proof of the defendant's guilt when the issue is one of justification as they do where a question of proving a criminal

<sup>6</sup> For an analysis of the term “defence” as related to the rules of proof, see Glanville Williams, *op. cit.*, pp. 909–10.

<sup>7</sup> *Förslag till brottsbalk* (Draft Criminal Code), 1953, p. 389.

act or the identity of a person is involved. The reported cases offer little basis for conclusions on this point. There are, however, a few Danish cases which do perhaps indicate a more general attitude to the problem. In the case 1960 U.f.R. 470 the defendant had strewn his fields with poisoned peas in order to protect them against pigeons. He claimed impunity under the Criminal Code, section 14, on the ground of necessity,<sup>8</sup> but he was convicted at the Eastern High Court, which stated that "according to the evidence, it cannot be considered proved with a sufficient degree of certainty that the method used by the defendant was necessary in order to avoid impending damage . . .". Almost the same words were applied by the High Court in the case 1934 U.f.R. 1110. A German citizen had succeeded in entering Denmark in 1933 by showing the immigration officers a forged passport. He was an active member of the leadership within a district branch of the Communist party, and he claimed that he had come to Denmark only for the purpose of saving his life. The court found that it had not been "sufficiently proved that the defendant's offence had been necessary to avoid impending damage to his person or property". Consequently his offence was not justified under section 14. No details are given as to the kind of danger to which the defendant might have been exposed in Germany. The words applied in the two cases seem to suggest that a state of necessity has to be "sufficiently proved", which perhaps refers to proof by a preponderance or a balance of evidence. That would be a rule very unfavourable to defendants. However, it is possible that on both occasions the court made a slip by formulating its reasons inaccurately. It should also be added that the 1960 case hardly presented a typical instance of the problem of proof, since the doubt in that case may have been less related to the historical facts than to the question whether the defendant might reasonably have applied other and less harmful measures in order to protect his property.

In Danish criminal law an attempt is not punished if the defendant *voluntarily abandoned his plan*. This raises a question of proof as to whether the defendant desisted from his criminal purpose "spontaneously and not because of extraneous or independent obstacles against . . . completing the wrongful action"

<sup>8</sup> Section 14 of the Danish Criminal Code reads as follows: "An act normally punishable shall not be punished if it was necessary in order to avert impending damage to person or property and if the offence can be regarded as only of relatively minor importance".

(section 22).<sup>9</sup> In legal theory the standard of proof has been stated in somewhat contradictory terms, but most of the comments seem to suggest that the criterion of reasonable doubt does not fully apply. Mr. Justice H. H. Holm, who for many years presided over a jury division of the Eastern High Court, expresses the view "that proof of a voluntary renunciation must be given by the defendant, not by the prosecutor, and that he has to produce evidence which gives reasonable grounds to assume that the renunciation was a voluntary one".<sup>1</sup> There are no reported cases from recent years touching on the problem. However, the decision in 1921 U.f.R. 431 is of some interest. In that case the issue of voluntary renunciation was not put before the jury because there was "no definite supporting evidence". The conviction was quashed, and at a new trial the question was considered and answered in the affirmative. This is one of the few reported cases in Danish court practice to illustrate the risk of placing an undue evidential burden on the defendant and not giving him a chance of obtaining a verdict of not guilty. Although the case does not state a rule on proof, it may nevertheless serve as a warning.

### III

The legal relevance of *insanity* is determined in Danish law by section 16 of the Criminal Code: "Acts committed by persons who are irresponsible owing to insanity or similar conditions or pronounced mental deficiency are not punishable." States of mental deficiency will not be dealt with in the present paper. So far as insanity and similar conditions are concerned, the author will distinguish between the risk of not detecting or considering such states (III), and the problem of defining the quantum of proof where the issue is raised (IV-V).

The word "insanity" in section 16 is generally taken as referring to the concept *psychosis*. This, again, is a psychiatric label covering a variety of mental abnormalities such as schizophrenia, manic-depressive psychosis, senile dementia, traumatic psychosis, reactive depression, etc., but *not* neurosis, psychopathy or low intelligence. There seems to be a fair amount of agreement among

<sup>9</sup> Cf. *Model Penal Code, Official Draft* 5.01 (4) where a voluntary renunciation is made an affirmative defence.

<sup>1</sup> *Politiet*, 1956, p. 37.

Scandinavian psychiatrists as to the delimitation of the concept "psychosis".

As will be seen from the words of section 16, a state of psychosis at the time of the offence does not automatically lead to impunity. It is a further condition that the defendant can be held "irresponsible". We need not here go into details on the meaning and function of this highly controversial concept, which, in this context, is intended only to reserve to the courts a right to punish a defendant even if a state of psychosis has clearly been present. Such decisions are given only in a limited number of cases, mainly where one of the less pronounced psychotic states has been diagnosed in cases of fraud, embezzlement, etc. In the large majority of cases psychosis will lead to an acquittal. However, it is relevant here to point out that when the issue of insanity is raised the courts have two ways of reaching a conviction. They may (a) refuse to accept the idea that the defendant was insane, or they may (b) hold the defendant responsible even though they accept the fact that he was insane. In some cases it is difficult to gather from the words of the court's decision which was the basis for a conviction. The concept of "irresponsibility" will rarely raise problems of proof. "Irresponsibility" is rather a legal concept referring to certain categories of mental states which, under certain circumstances, speak in favour of preferring a conviction to an acquittal. It is not a well-defined mental quality which could either be proved or disproved. Psychiatrists are not expected to state whether the defendant was "responsible" or not. To them the word is meaningless. On this point many lawyers would probably agree, but this does not prevent them from deciding, for reasons of penal policy, to hold certain insane offenders responsible.

Section 16 refers to the mental state at the time the defendant committed his act. This is the state which determines whether he can be convicted or not. His mental state at the time of the trial may be relevant to the choice of legal measures to be applied, and consequently there may be a separate question of proving his present state of mind. We shall return later to that distinction.

Obviously the main evidence concerning the mental state of the accused has to come from medical experts. Consequently, the legal practice as to the use of medical reports is a decisive factor when the question is asked: How well-founded are the decisions of courts as to the mental normality of defendants?

A Swedish psychiatrist, the late O. Kinberg, expressed the view that in numerous cases mental abnormality remained undetected

in Swedish court practice. As a consequence many criminal cases were decided contrary to the rules of proof.<sup>2</sup> It is difficult to judge the validity of Kinberg's criticism, but he certainly pointed to a problem which we have to take seriously.

A few decades ago, when pre-sentence inquiries were carried out less frequently than now, it was not uncommon for offenders to be punished even though they had been insane when they committed their offences. In some of the reported Danish cases a medical examination was carried out during an appeal or a new trial. In 1909 U.f.R. 568 the defendant was convicted of begging. After conviction a chief psychiatrist stated that the defendant "must be regarded as insane, both now and at the time of the offence with which he is charged". The Supreme Court decided that he was not criminally responsible. In 1917 U.f.R. 834 a man aged 70 was sentenced to four months' imprisonment for indecent behaviour. During the appeal a medical examination was carried out, and the psychiatric experts reported that the defendant was suffering from a senile psychosis. The Supreme Court assumed that this abnormality had existed at the time the offences were committed. In 1920 U.f.R. 328 a 78-year-old man was sentenced to eight months' imprisonment. The Court of Appeal reduced the sentence to two months. On a further appeal to the Supreme Court a medical examination was ordered. The psychiatrists reported that the defendant was insane, and he was then acquitted.

Even in more recent years it has occurred that a mental abnormality has not been disclosed till after a criminal conviction. The case 1941 V.L.T. 54 illustrates this. On January 11, 1939, the defendant was sentenced at the Western High Court to three months' imprisonment for embezzlement committed in 1937-38. Four months later a lower court sentenced him to four months' imprisonment for fraud and unlawful coercion. When the latter sentence was appealed, the defendant was examined by a chief psychiatrist. The Medico-Legal Council,<sup>3</sup> concurring with the examining psychiatrist, reported that the defendant suffered from a chronic brain infection which had brought about a mental impair-

<sup>2</sup> O. Kinberg, *Basic Problems of Criminology*, 1935, pp. 329 and 368.

<sup>3</sup> The Medico-Legal Council is an official advisory body in medical matters of legal relevance. As far as psychiatric issues are concerned, the report is normally given by three experts who have not themselves examined the accused person but base their opinion on the written materials of the case, including the report of an authorized doctor. In a number of cases the Council will also receive an additional psychiatric report as a result of observation in a mental hospital. Not all pre-sentence reports are submitted to the Council.

ment similar to a psychosis. At the Western High Court the defendant was acquitted under section 16, and he was placed under supervision pursuant to section 70 (dealing with the measures available in respect of mentally abnormal offenders). Permission was then given for a new trial on the embezzlement indictment. The Medico-Legal Council reported that the abnormal state had been diagnosed in a hospital in 1935 and stated: "Although there is no definite information as to the beginning of his disease, it must be assumed that it was present in November 1937 and March 1938." It was not possible to say with certainty whether at those times (i.e. when the offences of embezzlement were committed) the disease had taken such a form as to be "similar to a psychosis". It was possible that this was *not* the case and, on the other hand, it was reasonable to assume ("rather likely") that since 1935 the mental abnormality had been a state similar to insanity in the sense of section 16. The High Court then reversed its decision of January 1939 and ordered the defendant to be placed under supervision pursuant to sections 16 and 70. He was given damages for the time served in prison.

How should the risk of convicting an insane offender be considered? Is it the duty of the machinery of justice to arrive as far as possible at the substantive truth, or is it a matter for the defence to raise the issue of insanity?

In English law it is the general rule that only the accused and his counsel can raise the issue. Insanity is a defence which the accused may use if he wants to. Nobody has an obligation to see to it that the relevant medical evidence is brought before the court.<sup>4</sup> In recent years some modifications seem to have been made to this principle. The Homicide Act, 1957, introduced the concept of "diminished responsibility", which reduces murder to manslaughter. In a number of cases the courts have been facing the problem whether the prosecutor is entitled to raise the issue of insanity when the defence has claimed diminished responsibility. The difficulty in granting the prosecutor this right lies in the fact that technically the verdict of "guilty but insane" is an acquittal against which the defendant cannot appeal, although he may have an interest in being punished for manslaughter instead of being committed to a mental hospital as insane. The trend in court practice seems to have been to allow the prosecutor to raise in-

<sup>4</sup> We are not dealing here with the procedural problems concerning the defendant's fitness to stand trial. It should be pointed out, however, that this aspect of the criminal procedure is not likely to take care of those cases which are most relevant from the point of view of criminal guilt, namely those where there is a doubt as to the defendant's state of mind when he committed his act.

sanity when the defence has claimed diminished responsibility.<sup>5</sup> The Criminal Law Revision Committee recently proposed that this rule be laid down in statute, in connection with a change in the rules on appeal.<sup>6</sup> As a member of that commission Glanville Williams expressed the view that in all cases where a defence was raised related to some mental element (e.g., a mistake of fact), the prosecutor should be, and even under existing law is, entitled to raise the question of insanity.<sup>7</sup> However, even if this becomes statutory law, it does not involve a general right, still less an obligation, for the prosecutor to make psychiatric evidence available in all cases where the question ought to be considered. As the rules now stand, the prosecutor cannot even with the consent of the defence produce evidence on the mental state of the accused. The issue has to be raised through the evidence of the defence, e.g. on the basis of a prison doctor's report given to the defence counsel by the prosecutor.<sup>8</sup> The English Commission on Capital Punishment pointed out that the rules of evidence have a substantial influence on the results of a great many criminal cases: "In England cases not infrequently occur where the accused is insane, and was in all probability insane at the time of the offence, but does not put forward a defence of insanity. Sometimes he insists on pleading guilty; sometimes he, or his counsel, prefers to rely on another line of defence."<sup>9</sup> In this report it was suggested that the court (but not the prosecutor) ought to be entitled to raise the defence of insanity. In the American Model Penal Code such provision is found to be "too great an interference with the conduct of the defense".<sup>10</sup>

From a Scandinavian point of view, the English system seems strange and difficult to defend. When penal codes set up criteria for the legal relevance of mental abnormality, this is supposed to mean that accused persons should as far as possible be classified according to these criteria. It cannot be left to defendants to provide evidence as to their mental condition, or to choose which

<sup>5</sup> See *R. v. Kemp* [1956] 3 All E.R. 249, *R. v. Bastian* [1958] 42 Crim. App. R. 392, and *Bratty v. Att.-Gen. for Northern Ireland* [1961] 3 All E.R. 523. In the opposite direction *R. v. Price* [1962] 3 All E.R. 957, where Lawson, J., expresses the following point of view: "Prosecutors prosecute. They do not ask juries to return a verdict of acquittal. A criminal trial at common law is concerned with the proof of a charge; it is not an inquisition."

<sup>6</sup> *Criminal Law Revision Committee. Third Report*, 1963, pp. 16-17.

<sup>7</sup> Cf. Glanville Williams, *op. cit.*, p. 451.

<sup>8</sup> *R. v. Dixon* [1961] 1 W.L.R. 337.

<sup>9</sup> *Royal Commission on Capital Punishment. Report*, 1953, pp. 79 and 153.

<sup>10</sup> *Model Penal Code. Tentative Draft No. 4*, p. 194.



measure they want to be applied. Their ultimate interest in avoiding detention or treatment cannot take priority over the interests of society in an adequate choice of measures. This is especially obvious when the problem of avoiding danger is relevant. Therefore, according to the Scandinavian view, the court and the prosecutor must carry some responsibility for having the issue of mental abnormality considered.<sup>1</sup>

Generally, of course, it is a less serious mistake to overlook an exculpating abnormality than to convict a person who has not committed the act for which he is indicted. How grave a mistake it is will mostly depend on its consequences in terms of punishment or other measures. The most obvious mistake is to sentence a man to imprisonment although he was insane at the time of the act but is now cured, for in such a case the correct decision would be to impose no legal measure at all. It is particularly this type of case that points to the problems of proof with which we shall be dealing. In a number of cases, however, it may be in the interest of the accused to be convicted as mentally normal, e.g. if the sanction applied is a fine, a suspended sentence, a probation order or a short term of imprisonment. It would be unrealistic to maintain that such "wrong" decisions are in all cases equally regrettable, if the defendant would otherwise have risked committal to a mental hospital for an indeterminate period. Whether a decision is right or wrong must to some extent depend on what the defendant thinks of it. It is true that the positive or negative value of a legal measure does not entirely depend on the degree to which it deprives the offender of his liberty: its adequacy in serving the purpose of treatment must also be considered. However, even in this respect we cannot always be sure that a classification of offenders as sane and insane will lead to a correspondingly adequate choice of legal sanction. In the case of certain insane offenders a fine, suspended sentence, probation order or sentence of imprisonment may be harmless or even psychologically adequate sanctions, while the committal of insane persons to mental hospitals or other special institutions for mentally abnormal offenders is not always carried out according to the good intentions underlying the decision. There are psychiatric institutions which offer no treatment and in which the period of deprivation of liberty is determined by administrative decisions outside the control of the courts. If the consequence of a "wrong" decision is

<sup>1</sup> Cf. Glanville Williams, *op. cit.*, pp. 448-50.

a sanction which in itself is acceptable, and if the alternative would have been a committal to hospital under the conditions just mentioned, it is quite possible that the offender's opinion in terms of weeks, months and years is the only acceptable yardstick as to whether the decision was right or wrong.

This does not prove that the defendants ought to decide the course to be taken by the courts, or that evidence of mental abnormality ought not to be made available. The aim of the penal system must be to have psychiatric inquiries carried out and the results presented to the courts to a reasonable extent. What guidance the courts should take from this information, what measures should be available and how the choice between such measures should be made—all these are problems which have to find reasonable solutions in legislation and court practice.

Medical inquiries ought to be carried out not only where they are specifically indicated but also in categories of cases where, according to medical experience, there is a certain amount of probability that an abnormal state will be diagnosed, e.g. as regards old offenders or persons committing certain types of offences. Not only the number of inquiries but also their quality is relevant. A superficial or incomplete inquiry may neglect information which would have indicated a relevant mental abnormality.

#### IV

When the issue of insanity is considered in a particular case, the court has to assess the degree of probability demonstrated by the evidence and to clarify for itself what rule to apply as to the quantum of proof. It is by no means certain that the reasoning of the court will always follow this pattern of asking two different questions; but from an analytical point of view this is what the final decision involves.

What is the foundation for evaluating the strength of the evidence? And how is the strength of the evidence expressed in medical reports and in court decisions?

In Danish practice the medical expert is normally not examined in court. His report is presented to the court as written evidence (although the relevant parts of it are read aloud in court), and it is the wording of this report which constitutes the principal basis for the court's decision on psychiatric issues. If the expert has

stated his opinion with a sufficient degree of clarity, the court will normally have to accept this opinion. Generally the doctor will have had access to all the relevant information on the behaviour of the accused, on medical symptoms, on previous hospitalization, etc., and by applying his professional knowledge of the development and consequences of abnormal conditions, the doctor will be the best authority in forming an opinion as to the condition of the accused at a particular time. However, there are varying degrees of certainty. The mental condition of the accused at the time of the act cannot be directly observed; the available evidence may be incomplete; different abnormal states may have certain symptoms in common; and—most important of all—the general psychiatric experience is limited, and psychiatric classifications are not in all respects firmly established.

It happens that decisive pieces of evidence are not made available, or are not rendered susceptible of a final evaluation, until the defendant or witnesses have been examined in court. In other words, the court will have to judge to what extent the conclusions of the doctor were based on assumptions as to matters of fact which the court may verify.<sup>2</sup>

In a Danish case, 1950 U.f.R. 248, the following events had taken place. In the course of poaching the defendant T., together with two accomplices, had been discovered by a game-keeper S. This led to an incident during which T. uttered threats against S. In self-defence S. hit T. on the head with a wooden rod and ran away. At a distance of 35 and 52 metres T. fired two shots after S. and hit him, though not seriously. The problem was whether, as a consequence of the blow with the wooden rod, T. had been in an abnormal state which would result in impunity. There was at least some evidence of this. After the incident T. had been sent to a hospital and had spent ten days there. He stated that he had no recollection at all of what happened after he was beaten with the rod. Four doctors who had examined T. during the week after the incident found that there was a genuine loss of memory. The Medico-Legal Council was unable to decide with certainty whether

<sup>2</sup> The principal instance of this occurs in cases where the doctor is supposed to discuss the mental state of the accused without knowing whether he has committed the offence with which he is charged. The fact that the offence was committed may from his point of view be a substantial argument for a mental abnormality being present at that time, but how could he use this argument if the guilt of the accused has not yet been established? In Danish practice it is considered highly important that the doctor should not take the offence as a fact if there is a doubt at this point. He has to write: "If the defendant is found guilty of the offence of which he is charged, it may be considered probable that his mental state at that time was such and such".

the alleged loss of memory was genuine. T.'s account might be false, but it was not improbable. If his account was correct, then, according to the Council, there had probably been a temporary loss of consciousness between the blow and the shots, and after that an abnormal state of diffuse consciousness. In the opinion of the Council such a state could be considered similar to insanity. The district court found that there was an abnormal state falling under section 16, but the High Court reversed the acquittal on the following ground: "The report of the Medico-Legal Council is presented on the assumption that T.'s account may be considered correct, but there is nothing to indicate that it really is correct."

In this case the Council made it clear that a piece of information coming from the accused was an important basis for the medical hypothesis, and that the Council was unable to decide whether this information was correct. It is impossible to know how the court reached the conviction that the defendant was lying. However, even if the court had based its decision on the same degree of doubt as was accepted by the Council, it is not certain that this doubt would have led to an acquittal. We cannot be sure that in such cases the courts apply a rule of "reasonable doubt", or that the doubt would be considered "reasonable".

Courts do sometimes have an independent ground for evaluating the evidence of the mental condition. Consequently, there is no doubt that courts are entitled, nay obliged to evaluate the evidence of the mental state. Generally speaking, the greater the extent to which medical reports are based on medical observation and knowledge, the less likely is it that the court will have an objective foundation for reaching a different conclusion. Conversely, the more important are specific issues of fact as a foundation for the medical conclusion, the more likely is it that the final decision will depend on the opinion formed by the court. It is not desirable that the courts should enter into a criticism of the medical concept of insanity. However, there may be periods of development or controversy about psychiatric classifications during which the courts have to decide, as a matter of law, whether a particular state ought to be included under the concept of psychosis or not. In such situations the maxim of "reasonable doubt" is not likely to be applied. The court may find that it had better await further development in psychiatry before accepting a new category of psychosis, or it may find that the category in question is one which the legislator has expressly intended to be considered insufficient for an acquittal.

The psychiatric report ought to indicate what degree of certainty it claims to possess. A Danish official report of 1956 on psychiatric inquiries in criminal cases proposed the following instruction for doctors: "It is important that the report should express, as far as possible, such greater or smaller degree of doubt as the case may present."<sup>3</sup> Since the committee which drew up the report had among its members several psychiatrists, these words may probably be taken as an authoritative confirmation of the view that psychiatrists are able to grade their evaluation of the medical evidence. This is indeed a necessary condition if courts are to apply rules on the quantum of proof. As far as the present author can judge from Danish practice, the medical report will frequently make it possible to apply such rules. But not always. The words of the report may sometimes be too vague, or they may fail to consider possibilities which are relevant from a legal point of view.

In psychiatric and legal writing it is sometimes maintained that psychiatrists have to presume sanity and are entitled to certify insanity only when such a state may be regarded as proved. There is a risk that statements to this effect may cause misunderstandings. This occurred when a Norwegian law revision committee in a report of 1925 subscribed to the view here referred to, but made the following addition: "A certificate of insanity may not be issued unless there is a preponderance of evidence for such a conclusion. The maxim *in dubio pro reo* cannot change this principle."<sup>4</sup> There are two arguments against this view:

First, it is necessary to distinguish between certifying that a person is (or was) insane and, on the other hand, certifying the degree of probability of his being (or having been) insane. Both types of medical conclusion may be entirely justified. There is nothing to prevent a forensic psychiatrist from expressing a specified doubt as to the normality of the defendant. He is not limited to considering the alternatives of normality and insanity to have been fully proved.

Secondly, a distinction must be made between, on the one hand, issues related to the present condition of the accused and, on the other, questions as to his condition at the time of the act of which he is accused. As far as the mental condition at the time of the

<sup>3</sup> *Betænkning om de retspsykiatriske undersøgelser i straffesager* (Report on Psychiatric Examinations in Criminal Cases), 1956, p. 131.

<sup>4</sup> *Innstilling fra den av justisdepartementet 11. mai 1922 opnevnte komite til revisjon av straffeloven* (Report on Criminal Law Revision), 1925, p. 65.

trial is concerned, it is true that a person cannot be treated as insane unless there is sufficient evidence that he is insane, or at least in a state justifying his being submitted to continued psychiatric treatment and observation. Whatever the evidential requirements may be for dealing with a person as mentally abnormal at the time of the observation, the problem whether he was insane at the time of the offence must be considered separately, because the courts are obliged to decide whether the defendant should be acquitted on the ground of his earlier mental state. There are some degrees of doubt which will be taken into account in favour of the defendant. This is the reason why medical experts are expected to elucidate the degrees of probability.

The expressions that are most commonly used in matters of proof in the reports of the Danish Medico-Legal Council are the statements that "it can be assumed" or "it cannot be assumed". These expressions denote a fairly high degree of certainty that the defendant was or was not insane. Unless the courts have some special reason for reversing the medical opinion, they will probably accept as a matter of fact that which the doctors "assume". Conversely, if according to the medical report it "cannot be assumed" that the accused was insane at the time of his act, the courts are not likely to give further thought to a possible degree of doubt. They will regard the hypothesis of insanity as one which they are entitled to dismiss.

Medical reports also sometimes refer to a hypothetical fact as being "probable" or as being "the more probable alternative". In a criminal case, 1950 U.f.R. 749, there was some doubt whether the accused was mentally abnormal at the time of the trial or was merely feigning insanity. The psychiatric expert, Dr. G. K. Stürup, observed the peculiar behaviour of the defendant in court and expressed the view that it was impossible to state with absolute certainty whether the defendant was feigning insanity, but that it was more probable than not that he was doing so. Perhaps we are justified in assuming that by talking of something as being "probable", both medical and legal authorities normally mean that it is the "more probable" of two alternatives, i.e. that which is supported by a preponderance of evidence. However, there is some uncertainty in the meaning of the word "probable". It may be taken by some as referring to a degree of probability substantially exceeding 50 per cent.

From Danish court practice it is hardly possible to draw firm conclusions as to the relevant quantum of proof of sanity or in-

sanity. It is probably safe to say that insanity will be assumed where there is a preponderance of probability that such a state was present at the time of the offence. The problem is, however, how courts regard those degrees of possibility which do not amount to a preponderance of evidence. In a case of fraud and indecent behaviour, 1935 U.f.R. 414, the Medico-Legal Council reported that the accused was insane at the time of the trial but that it was impossible to decide whether such a state had existed at the time of the acts. The High Court did not assume that this had been the case. However, since the accused was now insane, punishment was remitted and he was ordered to be placed in a mental hospital.<sup>5</sup> In its Annual Report for 1952 the Council reported in a case of larceny that it could not quite exclude the possibility that the accused had suffered from a minor psychotic depression, but that it was more probable that there had only been a temporary development in a basic neurotic condition (i.e. a condition falling outside section 16).<sup>6</sup> The defendant was sentenced to one year's imprisonment. In its Annual Report for 1953 the Council stated with reference to a case involving indecent behaviour: "The defendant has on several occasions suffered from temporary insanity, but it is not likely that the offences of which he is charged were committed during such periods." On the other hand there was a marked epileptic change of character. The defendant was not acquitted under section 16 but was dealt with according to section 17, which concerns other states of abnormality (see below).<sup>7</sup> A similar result was reached in 1951 U.f.R. 557, where the Council had reported that the accused was now psychotic. "Whether this disease arose in jail after the murder was committed on August 19, 1950, and as a reaction to the act, or was present before that time, so that the murder should be regarded as the result of a depression, cannot be decided with certainty from the available

<sup>5</sup> This decision was not made under sections 16 and 70 but pursuant to section 71 of the Criminal Code, which reads as follows: "Where the perpetrator of a punishable act, after carrying it out but before having sentence passed on him, becomes more seriously affected by the conditions referred to in section 16 or section 17 of this Act, the court shall decide whether a penalty shall be inflicted or whether the penalty incurred shall be remitted. If deemed necessary, having regard to public safety, the court shall provide in the sentence that measures in conformity with the provisions of section 70 of this Act shall be applied in lieu of punishment or until the punishment can be carried out."

<sup>6</sup> *Retslægerådets Årsberetning* (Annual Report of the Medico-Legal Council), 1952, p. 36.

<sup>7</sup> *Retslægerådets Årsberetning*, 1953, p. 11.

evidence." In any case, the defendant was a psychopath, and so he was dealt with under section 17.

These rather randomly chosen instances show that a conviction may ensue even though there is some doubt as to the sanity of the offender. However, we are not entitled to conclude from these cases that defendants are never acquitted under similar circumstances, nor that courts will normally require a preponderance of evidence of the relevant abnormality.

The defence of *drunkenness* presents similar problems. Under section 18 of the Criminal Code, "Intoxication shall not preclude punishment being awarded, except where the perpetrator acted while in an unconscious condition". By its reference to "an unconscious condition" the code is generally assumed to allow immunity where a state of pathological intoxication has existed, i.e. a state of intoxication which is characterized by abnormal reactions (typically to small quantities of liquor), as distinguished from a high degree of "normal" intoxication.<sup>8</sup> Because of the special provision in section 18 the courts will not have to answer the question which would otherwise arise, namely whether some states of intoxication might be classified under section 16 as being "similar to insanity".

Cases involving serious doubt on the issue of exculpating intoxication are relatively rare in Danish court practice. Here, as well as in the field of insanity, both medical experts and courts probably pay too little attention to the importance of stating the amount of proof as accurately as possible.<sup>9</sup> There is some reason to believe that the defendants do not have the benefit of doubt to the same extent as in ordinary questions of guilt. In other words, the fact that neither medical experts nor judges can reasonably exclude the possibility of a pathological intoxication will hardly be sufficient to bring about an acquittal. However, the decision in 1941 V.L.T. 302 is an instance of acquittal under circumstances where the Medico-Legal Council did not find it "entirely excluded that the accused acted while in an unconscious condition".

<sup>8</sup> In Danish law the mental consequences of any kind of drunkenness may be relevant as far as the requirements of intention or knowledge are concerned. This is a question which is not governed by the rule in section 18.

<sup>9</sup> See the Council's report *Retslægerådets Årsberetning*, 1949, p. 38. According to the Council it could not be "considered proved that this was a case of a pronounced pathological intoxication".



## V

If Danish judges were asked on what requirements of proof they base their decisions on justifications like insanity, intoxication, etc., their answers would probably not present a clear or uniform picture. We may assume that a number of the judges would express the view—quite typical of the anti-dogmatic attitude of Danish lawyers—that it is impossible to state a general rule at this point, that the whole situation of the individual case must be taken into account, and that the court must make reasonable use of the information presented in medical reports. Most of them would probably add that in order to reach an acquittal the court must always ask for evidence that provides some reason for believing that an abnormal state is more than just a distant possibility.

In the absence of more precise information on this point, we may confine ourselves to a few remarks on circumstances which are likely to be of some relevance. Among such factors it seems justifiable to list the type of offence, the nature and degree of the abnormality in question, the relationship between that state and other types of abnormality that may be present, the degree of certainty which the court finds medical experts capable of achieving in their classification and diagnosis, the probable consequences of an acquittal in terms of legal sanctions, and the probable alternatives in terms of legal sanctions if the accused is not acquitted. Some of these considerations will be briefly dealt with here.

A factor which tends to give rise to modifications in the quantum of proof is the nature of psychiatric knowledge. In ordinary matters of criminal evidence it is normally possible to apply some kind of practical experience as to what may or may not have been the course of events. Judges and jurors are supposed to possess sufficient knowledge and imagination regarding human behaviour to qualify them for deciding whether they can or cannot exclude the possibility that a person X did not commit an act Y under circumstances Z. In matters of mental abnormality judges or jurors possess no expert knowledge, and even experts may have substantial difficulty in excluding the possibility of mental abnormality. What a psychiatrist might call a reasonable doubt, if he were asked to apply this legal concept, may not in all cases be considered a legally relevant doubt.

Secondly, judges are likely to act on the assumption that different types and degrees of psychosis have different effects on the behaviour of the individuals. This assumption is shared by some psychiatrists (though most of them would claim that no state of psychosis leaves the behaviour of the individual unaffected); and, whatever psychiatrists may think, it is an assumption which seems to underlie section 16 of the Danish Criminal Code and is sometimes expressed in courts' decisions. There are a few cases where insane offenders have been convicted and punished because the courts have not found a sufficient degree of causal connection between the abnormal condition and the criminal act.<sup>10</sup> If for instance the defendant is charged with theft, embezzlement, fraud or forgery, and the hypothetical mental abnormality is a temporary psychotic depression which has not prevented the accused from carrying on his daily work in lawful as well as unlawful ways, the judge will probably be less inclined to accept small degrees of doubt than where the issue is one of a more marked mental deviation at the time of the offence.

It might be argued that, since under section 16 Danish courts have the possibility of considering the offender "responsible" in spite of his having been psychotic at the time of the act, they need not set up unfavourable requirements as to the proof of insanity: they can avoid undesirable consequences of the "reasonable doubt" rule through the criterion of "responsibility", thus reaching a conviction by means of a legal concept instead of by way of a decision on matters of proof. It would not be surprising if legal systems applying the "purely psychiatric criterion" of impunity were more tempted than are Danish courts to avoid undesirable acquittals through decisions concerning evidence of medical facts, since they have no possibility of escaping it under the rules of substantive law if a psychotic state is assumed. However, we are unable to demonstrate that the mixed criterion of the Danish section 16 has tended to increase the courts' inclination to decide medical issues on the principle of reasonable doubt. This is understandable, since there is not much to be gained in the individual cases by giving the defendant the "benefit" of the doubt, if the court nevertheless intends to hold him responsible. It may even be advisable in such cases *not* to label the defendant as being possibly or probably insane. Some decisions show that the criterion

<sup>10</sup> In other words: a criterion which in the District of Columbia is applied as a means of extending the scope of impunity following from the M'Naghten Rules may in Danish law provide modifications to a general rule of impunity.

of "responsibility" is a means of evading a statement on the psychiatric issue. The courts may decide that the accused cannot be held irresponsible, no matter whether the abnormal state mentioned in the medical report was present or not.

In the case 1948 U.f.R. 158 there was, according to the Medico-Legal Council, a "great probability" that the defendant had been insane at the time of his act. In the lower court he was acquitted under section 16, but the High Court said: "On the basis of all the available evidence and in spite of the psychiatric report it cannot be assumed that the defendant was irresponsible owing to insanity (psychosis) at the time of the criminal acts." The Supreme Court confirmed a sentence of 10 years' imprisonment. As will be seen from the opinion of the High Court, it was not expressly stated whether the conviction was due to an absence of "insanity" or to an absence of "irresponsibility".

If the abnormality in question is not a psychosis but a state which might possibly be classified as being "similar to insanity" (section 16), the issue is not always a purely factual one. There may, of course, be a problem of fact as to whether the particular mental state was present or not. But in a number of cases the problem will rather be whether, as a matter of law, the abnormal state referred to should be classified as being "similar to insanity". Psychiatrists do not have a well-established category of this type. They apply the concept because their diagnosis has to serve the purposes of criminal law, but the final decision as to what is "similar to insanity" rests with the court.

A factor of some relevance to the requirements of proof is the court's opinion as to what would be the respective consequences of an acquittal or a conviction. The author has already touched upon this problem in pointing out (above under III) that in some cases an "acquittal" may, from the defendant's point of view, be considered the more unfavourable of two alternatives.

The author cannot here go into details as to the various ways in which this factor may affect the standards of proof. Generally speaking, the courts may tend to convict especially in cases (1) where they find that a complete acquittal, involving no legal sanction at all, would be too lenient a decision, or (2) where they find that by convicting the offender they could achieve a more adequate and less burdensome sanction (e.g. a fine, a suspended sentence or a probation order) than would otherwise be applied.

There are some categories of cases where it is particularly obvious that the issue of proof of insanity is influenced by considera-

tions of penal policy. We are referring to cases which do not simply involve a question of insanity or normality, but where there exists a doubt as to the kind of abnormality present at the time of the offence or a possibility that two different abnormalities were present at the same time. There may, for instance, be strong medical evidence of a substantial character deviation (psychopathy) and, in addition, the possibility of a temporary state of psychosis at the time of the offence. Whereas psychosis may lead to an acquittal under section 16, psychopathy will be classified under section 17.<sup>1</sup> Although the latter section does not involve an "acquittal", it gives the court authority to apply special measures under section 70, i.e. the same section which applies to offenders acquitted under section 16. In the cases here referred to it seems likely that, although there is some doubt as to whether the offender was sane at the time of the act, the court will decide on the basis of the more permanent character deviation and deal with the case under section 17.<sup>2</sup>

In a case referred to in *Retslægerådets Årsberetning*, 1955, p. 30 a 22-year-old man with no previous convictions was accused of theft and attempted rape. The Medico-Legal Council reported: "The psychopathological state in which he is now and was already at the time of the acts, *may be* an expression of psychopathy, but it is *more likely* that it is a result of a psychosis (schizophrenia) which has developed slowly over the last few years." The court decided the case in accordance with the more probable medical assumption and ordered the accused to be placed in a mental hospital. Two years later he was discharged from hospital. However, after another few years he was indicted on counts of indecency and forgery, and the Council reported that he was still mentally abnormal but that it was not possible to decide now whether his actual state was a pronounced psychopathy or the result of an earlier schizophrenic development. On this occasion the court sentenced the accused to psychopathic detention under section 17, in accordance with the Council's recommendation. The next year, after he had been paroled, a new case of indecency occurred. The Council stated: "Previously there was some reason to assume that the defendant was

<sup>1</sup> The Danish Criminal Code, section 17 (1), reads as follows: "If, at the time of committing the punishable act, the more permanent condition of the perpetrator involved defective development, or impairment or disturbance of his mental faculties, including sexual abnormality, of a nature other than that indicated in section 16 of this Act, the court shall decide, on the basis of a medical report and all other available evidence, whether he may be considered susceptible to punishment."

<sup>2</sup> Cf. the case reported in *Retslægerådets Årsberetning*, 1953, p. 11, referred to above on p. 266, and 1951 U.f.R. 557.

suffering from a chronic psychosis (schizophrenia), but this diagnosis has not been confirmed during the years, and it must now be assumed that he is a pronounced psychopathic personality...". He was once more sentenced to psychopathic detention under section 17.

In 1940 U.f.R. 1006, a case of murder, the Council reported that the defendant neither was nor had been psychotic but that he was a psychopath and sexually abnormal. Commitment to a special prison for psychopaths was recommended. However, before the case was decided in court, the defendant had to be sent to a mental hospital as insane, and the Medico-Legal Council was inclined to think that this was a reactive psychosis which could be expected to be cured within a reasonable time. Under this assumption the Council would adhere to its first opinion, but it pointed out that a conclusive diagnosis could not be established. The defendant was classified under section 17 and ordered to be placed in a mental hospital. The prosecutor appealed against the decision, demanding that the defendant be punished, with the modification that committal to a hospital be ordered under section 71 (on mental abnormality occurring after the offence) until punishment could be executed. This argument was in fact consistent with the opinion of the Medico-Legal Council, which, as we have seen, considered the psychosis to be recent and temporary. However, during the appeal the Council changed its opinion. After a second psychiatric observation had been carried out, the Council found it likely that this was a case of slowly developing schizophrenia of an incurable nature, and on that assumption it would be presumed that such a condition had been present at the time of the act. However, the Council could not altogether exclude the possibility that it was a reactive psychosis, and in that case it could not be assumed that the disease had been present at the time the act was committed. The Supreme Court confirmed the decision ordering the accused to be placed in a mental hospital under section 17. In other words, the decision of the High Court turned out to fit in quite well with the new psychiatric diagnosis. But if this diagnosis had been presented to the High Court, it would have been appropriate to apply section 16, since according to this diagnosis it was most probable that the defendant was psychotic (schizophrenic) at the time of the act.

Cases such as these are illustrative of the fact that in Danish law it is sometimes a matter of minor interest whether insanity is assumed or not. If there is some doubt whether the accused was insane at the time of the act or was suffering from a different type of pronounced mental abnormality (e.g. psychopathy), or if it is certain that such pronounced abnormality exists but it is doubtful whether, in addition, there was a psychotic state at the

time of the act, sections 16 and 17 will both lead to a choice of special measures under section 70. Under that section the choice of legal sanction may be changed by the court at a later stage in the light of the experience gained in a hospital or other institution. Although acquittal is involved only under section 16, not section 17, this distinction tends to be a nominal one, if under both sections, as covered by section 70, the courts have adequate means of reaching a reasonable decision on the legal measure to be applied and of changing that decision later on. It might be highly artificial if under such a system the court had to decide the issue of insanity under section 16 on the principle of "reasonable doubt". This is a principle of proof primarily applicable to cases where there is no basis for any legal measure whatsoever if the defendant was insane when he committed his act.

We may assume that there are certain advantages in letting the criminal courts, instead of administrative bodies, decide on the legal measures to be applied to mentally abnormal offenders. This permits the courts to make a realistic calculation of the alternatives at stake and to evaluate the positive and negative values which they represent, from the point of view of society and of the individual offender. Thus, the courts will also be able to know the consequences of the various standards of proof that may be considered. We have already touched upon the disadvantages of a system such as that obtaining in England, which submits insane offenders to an administrative regime.<sup>3</sup> The substantive truth about the defendant's mental state is not presented to the court, which is thus debarred from forming a correct opinion of the personality and the treatment needs of the accused. The prosecutor does not bring this evidence forward because he must not cause an "acquittal". The defendant does not bring it forward because he would then risk deprivation of liberty "during Her Majesty's pleasure", and he cannot know what Her Majesty has in mind. The result is: (1) If the accused is insane or otherwise in need of treatment or is dangerous at the time of the trial, he may put obstacles in the way of a legal course which ought to be preferred to a penalty. This defect can only be imperfectly met at the stage of the execution of sentence. (2) On the other hand, if he is sane at the time of trial he is punished, although the court ought to secure for him the impunity which should follow from his having been insane at the time of the act.

<sup>3</sup> See also on the District of Columbia Charles W. Halleck in *Georgetown Law Journal*, 1960-61, pp. 294 ff.

It is probable that criminal law will move in the direction of a system placing less emphasis on the idea of "acquittal" in cases of insanity. Criminal responsibility will depend mainly on the issues of *actus reus* and *mens rea* (intention or negligence), and mental abnormalities will, together with a number of other factors, be relevant to the choice of legal measures to be applied by the court at the sentencing stage. The Danish criminal code represents one step in this direction, although the "acquittal" (which actually is an "acquittal in respect of punishment") has been retained. The new Swedish code which came into force on January 1, 1965, is a further step in the same direction. However, even if this trend becomes more general, there will still be one aspect of the "acquittal" left. In cases where the offender was insane at the time of the act but is now cured, there must be rules on impunity. This is a result which follows from a moral evaluation of an insane person's behaviour rather than from considerations based on his actual mental state. Consequently, the legal scope for such impunity or "acquittal" will still present the problem of determining the quantum of proof as regards exculpating abnormality.

## VI

The illustrations here adduced are incomplete and the conclusions drawn from them are mainly of a tentative nature. However, it should be possible to relate the problems here dealt with to the general doctrine of proof in criminal law.

Legal authors have taken great pains to emphasize the high degree of certainty on which decisions of criminal guilt are founded. The requirements of proof are stated in terms intended to make it clear that even a very small degree of doubt will lead to an acquittal. Only if the court is facing a remote and theoretical hypothesis which it would be against all reason to take into account, is it entitled to enter a conviction. It is assumed that criminal courts would rather acquit 99 guilty persons than convict one innocent person. So if a hypothesis is of the kind likely to be correct in one out of a hundred cases, the doubt is a reasonable one and will lead to an acquittal.

Quite apart from the fact that we possess no means of assessing risks or possibilities in statistical terms (as far as most issues of guilt are concerned), it is unlikely that the degree of certainty in

criminal law is always as high as legal doctrine often seems to imagine. It should be remembered that maxims like "*in dubio pro reo*", "reasonable doubt", "presumption of innocence", etc., have to a large extent served the purpose of stating fundamental objectives of legal policy rather than that of characterizing the actual standards of proof. It has been, and still is, highly important that legal doctrine give expression to the need for a high degree of certainty in matters of criminal guilt. Too vague a doctrine might bring about a more general weakening of the standards followed by the courts. By stating that only "unreasonable doubt" can be disregarded, legal doctrine sets up a standard inviting courts to act with the utmost care. However, though this function of legal theory is important, it does not exempt lawyers from the responsibility of being realistic about the actual requirements of proof and of trying to establish to what extent and under what circumstances modifications occur.

What legal writers have in mind when stating the requirements of proof is predominantly issues related to the objective facts of the criminal case, the *actus reus*. Here, again, the main issue is whether or not the accused committed the offence with which he is charged. Few errors of justice could be as serious as convicting a man who took no part in a criminal activity. On the other hand, the statements of writers and judges are not limited to this aspect of criminal responsibility. The principle of "reasonable doubt" is stated to be equally applicable to issues of criminal intention or knowledge. Our brief survey of Danish, English and American legal literature seems to indicate that the "persuasive burden" is considered to rest on the prosecutor in matters of general justification also, although the defendant may sometimes be required to raise the issue and perhaps to advance some kind of evidence supporting his claim.

It is submitted here (and this is one of our tentative conclusions or hypotheses) that in Danish law the principle of reasonable doubt is not carried out without modifications where issues of self-defence, necessity, consent, abandonment of attempt, drunkenness or insanity are involved. It seems probable that there are some degrees of doubt that will not exclude a conviction, though they cannot be dismissed as being unreasonable.

If this is correct, it should be added that a tendency to lower the requirements of proof is hardly limited to issues of general justification. We have already pointed out that the distinction between positive conditions of criminal responsibility and ele-



ments excluding such responsibility is a matter of systematic classification, often arbitrary and not in itself suited to serve as a basis for different standards of proof. We should rather expect differences in this respect to be related to the substantive nature of the issues of fact that are involved.

It is of some interest to note what types of factual issues are included under the rules on "affirmative defence" in the American Model Penal Code. The Code requires "evidence supporting such defense" in a number of cases specified in the Code itself or in special legislation adopting the same rule. However, the Code also gives a broader reference to any "matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence".<sup>4</sup> It follows from these rules that "affirmative defence" is a type of evidential requirement which may be applied to a number of factual issues related to the elements of particular offences, or to the *mens rea* covering such elements.<sup>5</sup>

It may be argued that an affirmative defence (or an evidential burden) is not in itself a deviation from the normal requirements of proof but only obliges or invites the defendant to point to evidence showing that the facts may possibly have been in accordance with his contention. It seems likely, however, that the requirements of evidential burden or affirmative defence are indicative of an evidential situation that is typically less favourable to the defendant than is the one covered by the principle of reasonable doubt. More degrees of doubt will be considered unreasonable. This may be expected even in countries having no official basis for the category of affirmative defence. It is likely to be a more general judicial attitude towards the problems of evidence that in certain questions of fact, where an element of the crime is expected to be present because it is regularly connected with certain other facts, the hypothesis of a deviation will arouse scepticism. Courts are not always prepared to accept unusual circumstances, even though they be circumstances which can easily be reconciled with the rest of the factual information. They will want to know more about such possibilities, and they will, in particular, expect the defendant to inform them at this point if it is a matter "peculiarly within (his) knowledge".

The idea of a varying standard of proof is not a common one

<sup>4</sup> *Model Penal Code, Official Draft*, section 1.12 (3) (c).

<sup>5</sup> See on "claim of right" in property offences *Model Penal Code, Official Draft*, section 223.1 (3).

in legal literature. On the other hand, it is not universally rejected. In an old English case it was stated that "the greater the crime the stronger is the proof required for the purpose of conviction".<sup>6</sup> Denning, L.J., seems to have taken the same view: "In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard."<sup>7</sup> In a more special context of Danish law Hurwitz expresses the view that the quantum of proof of causation will inevitably be somewhat related to the gravity of the defendant's behaviour.<sup>8</sup> Glanville Williams, on the other hand, thinks that "the quantum of proof required in criminal cases is a uniform one" and that the idea of permitting the quantum of proof to vary with the crime "introduces undue complexity in stating the law".<sup>9</sup>

Dealing with the concepts of intention and knowledge in Danish law, the present writer has taken the view that, generally speaking, the courts will be more ready to convict in spite of a doubt as regards mental elements than in the case of objective factual issues. This is due partly to the difficulty of reaching a conclusion on mental elements otherwise than by inferring from external facts, and partly to the different roles of objective and mental elements in evaluating the gravity of the offence; it is normally the external behaviour that counts most.<sup>1</sup>

Assuming that there are variations in the quantum of proof, is it still appropriate to speak of a common requirement of "reasonable doubt"? It is difficult to answer the question, in the first place because we have scant possibility of determining what are the actual requirements in matters of insanity, self-defence, etc., and secondly because the concept of a "reasonable doubt" is in itself vague.

(1) Some might take the view that since the concept of "reasonable doubt" only refers to a standard of judicial reason, it is possible to accept that different degrees of doubt may be reasonable under different circumstances. This is the view held by Denning, L.J., but against it Glanville Williams has rightly pointed out that it would cause confusion and be an abuse of

<sup>6</sup> *Hobson* (1823) 1 Lew. C. C. 261.

<sup>7</sup> *Bater v. Bater* [1950] 2 All E.R. 458. See also Kenny & Turner, *Outlines of Criminal Law*, 1952, pp. 365 and 416.

<sup>8</sup> Hurwitz, *Den danske Kriminalret. Almindelig del*, p. 255. See also below on *Andenæs*.

<sup>9</sup> Glanville Williams in *Criminal Law Report*, 1955, p. 474, and *Criminal Law*, p. 871.

<sup>1</sup> Waaben, *Det kriminelle forsæt* (Criminal Intention), 1957, pp. 64-65.

language to describe proof by a preponderance of evidence as proof "beyond a reasonable doubt".<sup>2</sup>

(2) Williams' argument points to the conclusion that although the concept of a reasonable doubt is necessarily vague, it is nevertheless customary to associate it with a more narrowly defined problem. It is intended to indicate an evidential rule to the effect that even a small degree of doubt should lead to an acquittal, as long as the court can realistically (reasonably) imagine the possibility of circumstances or events which would exclude criminal guilt. The whole idea of a "reasonable doubt" concentrates on drawing a line between possibilities that practical experience would find conceivable (though they may be distant possibilities) and possibilities consisting merely of theoretical hypotheses which will not prevent a judge from forming a conviction of the defendant's guilt.

If this is a fair approximation of the normal meaning of a reasonable doubt, it still does not prevent us from speaking of a common criterion of reasonable doubt even though there may be variations in the quantum of proof. In Norwegian theory Andenæs has taken the view that the principle *in dubio pro reo* is applied to all aspects of criminal law but that this does not necessarily mean that the quantum of proof is always the same.<sup>3</sup> There is no decisive argument against this view. Indeed, it is extremely convenient to adhere to a general acceptance of the principle *in dubio pro reo* and at the same time to admit that there are variations in the quantum of proof. However, this may not be an entirely realistic picture of the standards set up by the courts.<sup>4</sup> There may be, and probably are, certain fields of criminal responsibility where the courts will convict, although it is possible to imagine a situation which is easily reconcilable with practical experience, but is not positively supported in the particular case.

It is desirable that both legal theory and lawyers on the bench and at the bar should consider these problems more systematically than they do at present. Of course it is extremely difficult to measure degrees of certainty and to explain under what circumstances judges or jurors are likely to reach a conviction. Most of

<sup>2</sup> Glanville Williams, *loc. cit.*

<sup>3</sup> Andenæs, *Alminnelig strafferett* (Criminal Law, General Part), 1955, pp. 92-93. *Straffeprosessen* (Criminal Procedure), 1962, p. 158. As an instance of modified requirements of proof Andenæs mentions petty offences; see also Bolding in *Sv. J. T.* 1953, pp. 313-14.

<sup>4</sup> See Bolding, *loc. cit.*, p. 320.

the legal theory in the field stops at a point where it simply expects courts to do the right thing.<sup>5</sup> On the other hand, experience shows that they do not always reach correct conclusions. Books on miscarriage of justice demonstrate this, and they tell where and why a mistake was made. Is it possible that gradually there will emerge a science of evidence which will be able to throw some light on the degrees of doubt or risk that are involved in matters of fact-finding?

<sup>5</sup> Cf. Wigmore, *Evidence*, 3rd ed., IX pp. 318-19: "when anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words...".