THE LEGAL CONCEPTION OF CRIMINAL RESPONSIBILITY IN VIEW OF MODERN THEORIES OF CRIMINOLOGY.

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A. THESIS for the DEGREE of Ph.D.

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EDINBURGH. 1924.

Degree conferred: 19th December, 1924.
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To the question "Under what conditions and in what measure is an individual to be held responsible for his actions", the Criminal Law of practically all civilized countries has replied by maintaining what is known to Criminologists and others as the Classical Criterion or Solution founded more or less on the belief in Free Will. By some it is recognised that this Criterion or Solution is untenable, but by the majority it is thought that if it is not entirely satisfactory, it is at least workable, and that in the long run there is little injustice resulting from its application. It is observed that Society on the whole is well served by the Criminal Law erected upon its present basis, and that on that account no successful attack on its foundation is conceivable on the score that a few members of society may suffer apparent injustice from its administration. The general opinion prevails that any attempt at the discussion of the merits and demerits of the classical criterion, not to mention the substitution of another criterion therefor, is so much unprofitable dialectic speculation and waste of time. Amongst the civilized nations of the world, the British cannot justly complain if they are accused of adopting this attitude, for a search through our literature will reveal little discussion
on the subject. It must be admitted that we have in Britain a few excellent works on the Principles of Criminal Law dealing with our own legal system in particular, and that no little attention has been, and is being, paid to the matter of the Responsibility of the Insane, but little is said of the actual basis of Responsibility.

A very different state of affairs has existed and does exist on the Continent, and in the United States of America, where philosophers, doctors, jurists, and criminalists have given and are giving this most controversial question of Penal Responsibility their closest study, recognizing fully the difficulty and complexity attending it. As a result of their labours and researches, many have alleged that the Classical Solution is impossible in the light of modern scientific knowledge, and a few have evolved theories calculated to solve the whole problem of Penal Responsibility and to oust the Classical Criterion.

In this study we shall pass in review these rival Theories and we shall endeavour to decide to what extent the claims for them are justifiable and we shall attempt to indicate wherein, in our opinion, the true solution of the question lies.

The problem of greater magnitude - and alike unsolved - Criminality - shall not escape our attention, and we shall dare to voice the conviction that it is to the conjoined efforts of our scientists and
jurists that we must look for any substantial contribution towards its solution. The positive inductive methods of Lombroso and his disciples, although now far from being regarded as scientifically infallible, nevertheless indicate whence the data for the solution must be sought, namely the criminal himself, and that by means of what has been called by Professor Garçon of the Faculty of Law in Paris "The Experimental Method".
II. THE LEGAL CONCEPTION OF CRIMINAL RESPONSIBILITY
IN SCOTS AND ENGLISH LEGAL SYSTEMS.

It behoves us in the first place to give a definition to the term 'Criminal Responsibility'. Fully recognizing with Dr Oppenheimer, who in his excellent treatise, "The Criminal Responsibility of Lunatics", lays particular stress on the point,\(^{(1)}\) that the term 'Criminal Responsibility' is solely a legal one, we are convinced that an adequate definition is: "Liability to Punishment for Crime."

Still confining ourselves entirely to the legal aspect, and without any attempt at discussing the many others which have been devised, we accept the commendable definition of Crime created by Dr C. S. Kenny, namely, 'Crimes are wrongs whose sanction is punitive and are remissible by the Crown, if remissible at all.'\(^{(2)}\)

So much has already been written on the subject of the purpose of Criminal Punishment that it is not our intention to discuss the Theories on the aims thereof. We are certainly, however, of opinion that although Prevention of Crime would appear to be the prevailing motive ascribed by most judges and legislatures to Criminal Punishment, yet Retribution and Reformation cannot be totally ignored. These latter

\(^{(1)}\) The Criminal Responsibility of Lunatics. Oppenheimer. p. 5.

are factors which without doubt are borne in mind by many judges when dispensing Justice. This can readily be observed from the phraseology adopted by them when passing sentence.

In order that the liability to punishment may be established, it is not sufficient only that the crime be committed, but it must be referable to the accused. As Dr E. C. Clark, when speaking of the essentials of Criminal Liability, aptly remarks:

"...The basis...of enquiry is the occurrence of a certain event and the referability of that event to some human being............"

and again later:

"the list of essentials of Criminal Liability...... fall......into two groups. First, an Event which is Criminal if a consequence of human conduct and a Connection, not too remote, of that event with the conduct of some person, henceforth called the offender...............Second, certain mental conditions or capacities of the offender, namely, Volition, Knowledge of the consequences of his conduct, and Knowledge that his conduct was wrong. These last are recognized essentials to criminal liability, with more or less distinctions in all civilized systems of Justice............."

We see therefore that every crime has both a physical and a mental element. An absence of either element excludes the possibility of founding Liability to Punishment.

Dr D. Aitkenhead Stroud in his work, "Mens Rea, or Imputability under the Law of England", says:

"the guilt of an act charged against a prisoner must always depend upon two conditions:

"(1) that the act in question was prohib-
"(ii) that, when he did the act, the prisoner knew or ought to have known, that it was within such prohibition."

"These two conditions may be called the condition of Illegality (actus reus) and the condition of Culpable Intentionality (mens rea)." (1)

*Actus non facit reum nisi mens sit rea*

The act itself does not make a man guilty unless there be guilty intention. The intention is the test of criminality. The act may be wholly innocent or criminal according as the intention is present or absent.

In Erskine's Principles of the Law of Scotland (19th Ed., p. 10) we find the following:—

"It is of the essence of a crime that it is a dolus act inferring punishment. Therefore there must be in the first place an intention in the actor to commit it; for an action in which the will of an agent has no part is not a proper object either of rewards or punishments" (2)

This "Dole" or evil state of mind of the Scots Lawyers is synonymous with the "mens rea" to which we have just referred.

That the guilty mind is an essential ingredient of Crime is in both Legal Systems undoubtedly one of the most important general rules of the Criminal Law but it must however be observed that it is a maxim which has not universal application. There are exceptional cases in which a defence of want of intention would be of no avail. Whereby Statute, for instance, a penalty or punishment attends the commission of a prescribed act, the perpetration of that act may possibly entail the infliction of the punishment or penalty upon the actor although he can be proved to (1) Mens Rea, or Imputability under the Law of England.
have had no guilty intention. The law presumes the evil intention.

Intention must of course be distinguished from Motive.

Dr. S. S. Huda in a treatise on the Principles of the Law of Crimes in British India observes that:

"Every movement is a weariness to the flesh. We do not move unless we will it, and we do not will a movement unless we have a motive for willing it. Intermediate between the Motive and the Will is the Intention to cause a particular consequence by a particular act. The motive is either near or remote." (1)

In the tenth edition of Harris' "Principles of the Criminal Law" we find the following:

"To will an act is to go through that inward state which as experience informs us, is always succeeded by action. And will is to be distinguished from a mere wish not carried into execution. A man does an act wilfully when he knows what he is going and is a free agent; (per Bowen, L.J., re Young and Hariston, 31 C.D. at p. 174), his act is done deliberately and intentionally, not by accident or inadvertance but so that his mind goes with it (per Lord Russell, C.J. R.W. Senior (1899) 1 Q.B. at p. 290) If the act be not willed, it is said to be involuntary, and does not render its owner amenable to the Criminal Law.

"Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. (Fitz. St. 69)....."

"...........but to make a person criminal the intention must be a state of mind forbidden by the law ......it is the character of the intention that determines the character of the act, though other considerations, for example, motives, are taken into account in order to discover intention." (2)

(2) Principles of the Criminal Law - S.F. Harris - 10th Edn. (1904) by C.L. Attenborough C III. p. 10
To further Dr. E.C. Clark, when speaking of the Volition of the Offender, he says:—

"An Agent is presumed to will what he does, or his action is presumed to be voluntary unless he is in one of the predicaments hereafter considered; which may be roughly classed under the two heads of unconsciousness or constraint; suggested by the two homely questions:—

"(a) Did he know what he was doing? 
"(b) Could he help it? (1)

It therefore appears quite clearly in the constitution of a crime there must be a voluntary act, and that this act must have been the result of an intention, such as recognised by the Criminal Law as criminal. The accused, for his part, must possess Free Will, Intelligence and Knowledge.

Free Will may be said to be the fundamental basis of Responsibility. Where this is non-existent there is no crime. With regard to the other two elements of Intelligence and Knowledge, so far as the former is concerned, there exists, of course, the presumption that every human being has sufficient intelligence to distinguish between what is right and what is wrong, and anent the latter we have the presumption that every one knows the law.

Embodying these elements we have the general presumption that everyman is responsible for his acts until the contrary is established.

We feel that the Analysis of the Legal Conception of Criminal Responsibility, does call for, and perhaps

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(1) An Analysis of Criminal Liability by E. C. Clark 1880 page 27.
ought to have received from us, a treatment much more full, but as so much excellent work has been produced on this subject and as the aim of this Study is rather more Criminological than Juridical, the cursory manner in which our preliminary task has been accomplished may be excused, and we may be permitted to maintain that sufficient proof has been adduced to justly and logically conclude that the corner stone of the conception of Criminal Responsibility in the legal systems just dealt with is the presumption of, or belief in, Free Will.

In the Introduction to this Study, allusion has been made to the fact that the question of the Responsibility of the Criminal Insane is perhaps the only one in the whole domain of Criminology which has attracted any degree of active attention in these Islands. In view of this, it had been originally our intention to refrain from augmenting the already exhaustive treatises on the matter. A perusal of Dr. Oppenheimer's Work on the Responsibility of Lunatics will readily impress the reader to what extent, he, for one, has given this much vexed subject his careful attention and labours.

During the past few months, however, we have not only had the opportunity of learning the opinions of some of the most distinguished Members of the Medical Profession but we have also had following upon the Report of the "Committee on Insanity and Crime" appointed by the Lord High Chancellor of Great Britain a Bill presented by Lord Darling to the House of Lords giving
effect to the recommendations of that Committee. Finally we have had the withdrawal of that Bill by the initiator on account of the lack of support accorded by the other Members of the House of Lords.

The aim of this Study being as it is, to attempt to review modern criminological thought it is difficult to see how we could justifiably adhere to our original resolution and thereby appear to ignore or shun these recent events of undoubted criminological importance. We shall accordingly depart from our original intention and devote some space to their consideration. As such a resume did not enter into the preliminary scheme of this Study we shall reserve it for an Appendix.
III. THE CLASSICAL THEORY OF RESPONSIBILITY.

I. THE THEORY.

Dr Heinrich Oppenheimer in his work already mentioned says:

"I most emphatically concur in the opinion of the German legislator that Freedom of Will is a fundamental postulate of all existing systems of penal law, and the only possible justification for the infliction of punishment, stricti sensu. Act 45 of the Criminal Code of the Swiss Canton of Aragau declares in as many words that 'a crime presupposes the free will of the actor', and Blackstone seems to do no more than express the same idea if he tells us that a wrong is the effect of a wicked will. But whether it is wise, nay, whether it is merely practicable to make that which is a necessary assumption a practical test is quite a different matter." (1)

Von Krafft Ebing finds the elements of the Free Will, and therefore the conditions of Responsibility, to be two in number:

"(i) The power of discrimination (libertas judicij), i.e., the capacity of an individual to understand the nature, relations, and consequences of his acts. This involves a knowledge of the utility and necessity of a political organisation for the accomplishment of the objects of society, of the consequences of a transgression of the laws to the individual transgressor and to the community at large."

"(ii) The faculty of choosing between act and forbearance in accordance with these motives, (libertas consilii). Whilst libertas judicij presupposes a certain standard of experience, intelligence, and aptitude to learn, libertas consilii requires an unimpeded association of ideas and a clear power of reflection, so as to be able to give regular and prompt effect to the motives supplied by the faculty of discrimination.

"Unless both of these conditions are ful-

"filled, the subjective substrata of a criminal act are wanting." (1)

Dr Oppenheimer remarks that the libertas judicii and libertas consilii are apparently but other names for a knowledge of good and evil, and the faculty of choosing between them, which, according to Mittermaier, constitute that freedom of Will that is essential to responsibility.

We have made this lengthy quotation with a view to indicating at the outset, that, although there are alleged differences between the requisites of Responsibility demanded by our legal system and by Continental systems, for example, the German Penal Code, these differences are more apparent than real, and that, although the latter named code would maintain, as the criterion of Responsibility, Freedom of Will, there is little difference in the Will test as indicated by Von Krafft-Ebing, and our own knowledge test as indicated by Dr. E.C. Clark when he resolved the English criterion into:

"(i) Did the accused know what he was doing?

(ii) Could he help it?"

Certain other codes have founded responsibility on La Volontarité. In order to be responsible it is necessary that the act should have been committed voluntarily.

The act is reputed voluntary if the agent, in committing it, really willed it. Here again, there is little divergence from the traditional criterion. Responsibility based on voluntariness (La Volontarité) is nothing more than responsibility based on Free Will.

In his introduction to Professor Lucchini's work, entitled: "Le Droit Pénal et les Nouvelles Théories", M. Jules Lacointa says:

"The certainty of Free Will is the foundation of Criminal justice. All the codes declare in the preface to their dispositions that there is no delict without perverse will. The aim of all modern laws is to have more and more accentuated the affirmation of this principle." (1)

Again, Dr Michael N. Stefanesco in his work, "De la Responsibilité Partielle", when dealing with the Classical School, says:

"The Classical School recognizes as the criterion of responsibility the Free Will: the acts of an individual are the result of his free volition. The latter is nothing else than the internal faculty of willing, or of not willing, of determining to do an act without being forced to accomplish it, and the external faculty of acting or of not acting, of doing or abstaining; to have acted freely is to have willed the intentioned act, and to have accomplished it freely - Ortolan - "Élément de droit pénal." "(1. p.103.)"

"To impute an act to someone is to affirm that he is in the first place the efficient cause, and, in the second place, the enlightened cause on the justice or injustice of the act.

"The first condition of imputability is liberty, and the second is the moral reason or the knowledge of the right or wrong of the action." "(Garraud - Précis de droit pénal - No. 113)" (2)

(1) "Le Droit Pénal et les Nouvelles Théories", par Luigi Lucchini. Introduction by M. Jules Lacointa.
(2) "De la Responsibilité Partielle" - M.N. Stefanesco.
Dealing with the same subject in his treatise On Criminalità Infantile, Dr Paul Tuscher says in the Introduction to his work:-

"The legal theory of penal responsibility is still at the moment that of the classical theory ....... Alongside of it, other theories have arisen seeking to define in a manner more perfect the idea of responsibility."(1)

Dr A. Bellanger in his thesis, "Les Théories Nouvelles de la Criminalité", in describing the Classical School, says:-

"The School which has presided at the execution of our codes, the Classical School, above all, to fix punishments, has neglected almost completely the criminal himself .......... Moreover, according to this School, every man is free, equally free, absolutely free. Placed by destiny, as Hercules of old, at the crossways of vice and virtue, it depends on himself alone whether to advance to the right or to swerve to the left....."

"To sum up - righteous reason and entire liberty, not only amongst an elite, but among every one always: consequently total responsibility: obligatory punishment: such are the essential elements of the doctrine called classical."(2)

And Professor Lucchini, in his work already referred to, says:-

"Following prevailing philosophy, opinion and sentiment, it is admitted, that it is true that imputability taken abstractly rests on the hypothesis of Free Will. To convince oneself of this, it is sufficient to take up one of the innumerable orthodox treatises from C. Renan to Pessina. Enquire from the first person you come across, no matter how little he may be imbued with juridical science, and he will reply without hesitating: - 'Certainly an action, and consequently a delict, is imputable to a man only in so far as he possesses Free Will and he has determined to commit the action.........'

"It seems that there is here an axiom of which it

(1) "Criminalità infantile" - Paul Tuscher - Introduction.
(2) "Les théories nouvelles de la Criminalité" - Dr A. Bellanger, p.l.
"is perfectly useless to seek the proof." (1)

Professor A. Mairet of the University of Montpellier, in "La Responsabilité", which he describes as a psycho-physiological study, says:-

"Is man free, is man responsible? "Yes", replies...... the Free Willist, man is free, and, accordingly responsible, because, he has in himself a free will, a cause of itself, permitting him to will outside of all other consideration. When we make a decision relative to any question whatever we only make it after having studied the question, having placed the arguments for and against, and, consequently, it would seem that our decision ought to be the result of this deliberation. Such is not the case according to the Theory of Free Will, one depends...... on this Free Will. If the Will judges it good, it accepts the result of our deliberation; in the contrary case, it rejects it, and wills otherwise."

But this Free Will has in it the knowledge of good and bad; when man finds himself in presence of a decision involving this knowledge and decides on the bad, the fact is he willed it, although he is free to will otherwise, hence his responsibility. It can be said that it is on this theory that our social state and our laws are based." (2)

Professor Mairet from certain psycho-physiological data concludes that man is responsible. These data being somewhat without our province we cannot voice any opinion thereon.

DR Pierre Burnier in "Le Crime et les Criminels", a study of the Lombrosian Theories, says:-

"It will suffice us to say that our personal experience has convinced us of the reality of "Free Will" but, nevertheless, the absence of this "Free Will" amongst a great number of individuals, such as mad-men and cretins to cite just these is a fact which we admit is not only very

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(1) "Le Droit Pénal et les Nouvelles Théories" Luigi Lucchini, Chap. III, p. 92
(2) "La responsabilité" - Étude psycho-physiologique Prof. A. Mairet, p. 77/78
It must be said, however, that, while being convinced of the reality of Free Will, Dr. Burnier is of opinion that this conception has no concern for Penal Law and the question of Responsibility, having a social and not a metaphysical basis, alone is its concern. To a certain extent he adopts the principles embodied in the Lombrosian Theories, which he submits to discussion.

To the question - is there such a thing as Free Will? - Dr. Heinrich Oppenheimer in his work already referred to, credits Jules Falret with having said:

"The unanimous consent of mankind, the innermost feeling of every one of us, all religions, all systems of philosophy and of law unite in affirming this great psychological fact, which forms the basis of human action, of morals and of law, that man is free to choose between good and bad, free to decide by means of his Will, between the different motives which urge him on in various directions, and that he is, therefore, morally responsible and legally punishable if he has voluntarily done an act reprobated by morality and forbidden by law. The Freedom of Will, as primitive psychological fact, and the moral and legal responsibility, as the practical sanction of this principle in the individual life of man as well as in the collective functions of society, these are the great facts which govern human existence and which form the basis of morals, of law, and of all legislative systems." (2)

Professor Raymond Saleilles in his admirable work, "L'Individualisation de la Peine", treats freely the classical theory in the Law of France, and traces the modifications of the theory. He says that in spite of the fact that the classical theory was to some
extent tempered in the Penal Code of 1810, its essential principles underwent no change:

"Responsibility was determined as before, by the Freedom of the Will, and a Free Will implied the power to choose equally between two courses, which, in turn, depended upon the motives between which the choice was to be made."(1)

Perhaps one more quotation will suffice on this point of the basis of the Classical Theory. This time we shall turn to the Report of Professor Garraud of the University of Lyons, which he presented at a congress of the International Union of Penal Law held at Lisbon. The subject of his report is the notion of moral and penal responsibility. As his report shews great thought, and as it has been taken as the framework of this our study, we may be excused for quoting at some length:

"The question of the foundation of penal responsibility is inevitable. The invariable doctrines, which have applied themselves to its solution take count, firstly, of the primitive distinction between social responsibility and individual responsibility.

"It is known - and it is scarcely worth recalling - what are, in the majority of actual legislations, the psychological conceptions and facts included in the idea of responsibility, and what consequences result therefrom.

"From the very first one distinguishes the analysis of the idea, social or external responsibility from moral or internal responsibility. As individuals isolated by hypothesis from social environment, we shall answer for our acts, even if they should remain hidden and escape all exterior punishment. We shall answer for our intentions, even if they should be effaced by the independent circumstances of our volition. The individual responsibility would be thus irreducible, antecedent to social responsibility, and distinct from that responsibility."

(1) Individualisation of Punishment. R. Saleilles. p. 57.
"But moral responsibility, inherent in the individual, should suppose a certain number of conditions, or of essential postulates. The first would be the existence of a moral law, superior to man. A second condition, implying the belief in individual responsibility would be the notion of Free Will, that is, a uniform power of choosing between one Volition and another. Finally, the individual could only feel himself responsible if he had consciousness of his personality, that is, of the identity and of the permanency of his being. From these three postulates - Obligation, Free Will, Personality - would result as consequences, merit and demerit, and when the social order had been disturbed, reparation and social sanction."(1)

Such is the traditional theory which is now at the present time the legal theory.

According to Professor Garraud, therefore, the Classical or otherwise Traditional Theory is based on the three essentials:

1. On Obligation, which supposes the existence of a moral law superior to man.

2. On the Free Will, which is the power of choosing between one Volition and another.

3. On Personality, which is the consciousness of the individual of the identity and permanence of his ego.

It consequently follows that to be clearly responsible, an individual must realise and understand that he is doing ill, and he must be free, or, in other words, he must be able to have done otherwise if he had so decided. Without the intelligence and the liberty of the individual there can be no imputability established. The offender must have understood the illegality or even impropriety of the act which he has committed, and he

must have freely willed that act, or, at the very least, he must have refrained from employing sufficient of his power of volition, which, of course, implies liberty to refrain.

Before submitting the Classical or Traditional Theory to criticism, it is felt that the term, Moral Responsibility, which occurred for the first time in this study in quoting Professor Garraud, calls for attention in that there is a divergence of opinion as to whether Penal Responsibility is separated from Moral Responsibility, or whether they are inseparable.

M. Louis Proal, in his work, "Le Crime et la Peine", very clearly shows in the following quotation that he is favourable to the view that they are inseparable:-

"Intelligence and Free Will are the two conditions of Moral Responsibility. A man is only guilty if he knows the moral law and if he has the power of observing it. These two conditions of Moral Responsibility are also exacted for legal responsibility. Civil and penal law are founded as moral law on the belief in free will. In effect, when the law imposes on man an obligation with a civil or penal sanction, is it not evident that she presumes in him the power to accomplish the obligation and to avoid the application of the sanction?"

and further:-

to sum up, when Free Will is abolished by madness, as by constraint, the man ceases to be responsible before the law. The material injurious act does not suffice; in order to justify the application of a punishment it is necessary that this act should have been committed by a person morally responsible; at such a point there is not even a contravention simply punishable by the police, if the accused has not his free will. M. Falret and M. Cullerre have made
"a mistake in believing that legal responsibility is separate from moral responsibility; they are inseparable."(1)

It will be of interest to compare with that assertion the statement made by Dr Oppenheimer relative to the same matter, contained in his work already referred to, namely, "The Criminal Responsibility of Lunatics". He emphasizes strongly that criminal responsibility is a term of positive law, as it is, and not as it ought to be, and he remarks how both Maudsley and Mercier have fallen into error on this matter. He quotes Mercier as having said in his "Criminal Responsibility":

"This pitfall I shall try to avoid, but I do not think its avoidance need compel me to confine myself exclusively to the legal sense of the term "responsibility;"

and again:

"The sense which I attach throughout the discussion, to the term 'responsible', is rightly 'liable to punishment', and responsibility becomes the quality of being rightly liable to punishment on grounds that appear fair and just to the ordinary man when they are explained to him - grounds that commend themselves as equitable and right...

Dr Oppenheimer, in discussing this statement of Dr Mercier states that such an investigation into the question of responsibility as defined by him is a perfectly legitimate one, but his enquiry is not a legal one; in fact, his explanation of the term "responsibility" in the sense in which he uses it is a very

(2) "The Criminal Responsibility of Lunatics". H. Oppenheimer. p. 5.
good definition of Moral Responsibility. It appears quite clear that Dr Oppenheimer does not concur with M. Louis Proal in the belief that Criminal Responsibility and Moral Responsibility are inseparable. For him, Dr Oppenheimer, 'Criminal Responsibility' is a legal term and means liability to punishment for crime.

From what has been said in our first chapter, it will be seen that our attitude can only be that of distinguishing the two.

We must, however, at once admit that this study does not and cannot reserve itself (and has no intention of so doing) to the legal conception of Criminal Responsibility, which, being as it is a legal one, can only be considered with reference to a definite system of law, be it English, French or German. The very theories which fall to be discussed at once exclude the possibility of such a restriction. These, being submitted in some cases by non-legal authors, and in others in the light of a continental system, perhaps not entirely akin to ours, exclude any generalisation on the legal aspect.

The Legal Conception of Criminal Responsibility in no way can attempt to exclude discussion on possible substitutes therefor. When all is said and done, the term, Criminal Responsibility, may remain in all systems no matter what have become the underlying criteria. The latter have given rise to discussions and to the creation of theories, and it is with these criteria and
discussions we shall deal.

It is submitted that Dr Oppenheimer had isolated systems in view, when he wrote his criticism of Dr Mercier's work, whereas the latter, and to a greater degree M. Proal, saw the universal underlying elements of Criminal Responsibility, be they moral or otherwise.

We do not, however, fail to appreciate with Dr Oppenheimer the grave consequences resulting from misuse and confusion of technical terms.
2. THE TRANSCENDENTAL THEORY OF PENAL RESPONSIBILITY.

The Philosophical Doctrine of a form of Knowledge that transcends all experience, consisting in a priori principles that precede, transcend, and condition all human knowledge, seems to furnish us with another phase of the conception of freedom, and must consequently have a bearing on the question of the Theory of Penal Responsibility. Very reluctant though we are to attempt to introduce into this study anything so highly Philosophical as Kantian Transcendentalism, we feel that we are bound to pass some comment thereon.

Kant was undoubtedly a determinist, and, consequently, was prepared to admit that the whole of the recognized system of physical science was based upon the principles of causation, but he was not prepared to admit that causality, according to the laws of nature, is the sole causality from which the phenomena of the world as a whole are deducible. It is necessary for their explanation also to assume a causality by freedom.

To extend the principles of natural necessity beyond the sphere of physical science, or the natural world into the realm of morality or the spiritual world, involves the elimination in man's life of the idea of Duty. To the question - what ought we to do if the will is free, if there is a God and a future
life? - there can be no answer, for the ideas of "God, freedom and immortality" can be explained away by the principles of Necessity. For Kant, the idea of 'Duty' is paramount, and he is compelled to maintain it at the summit of his system, and as Duty cannot exist without liberty he must postulate the latter. The problem, of course, which faces him is merely this: - Whether freedom and natural necessity can exist without opposition in the same action. His answer is that as the former stands in a relation to a different kind of conditions from those of the latter, the law of the one does not affect the law of the other, and that, consequently, both can exist together in independence of, and without interference with, each other.

For Kant, the existence of Freedom, like that of God and Immortality, is possible in the world of "Noumena". The reality of such ideas is incapable of determination by pure human reason. The human mind is such that it can never penetrate by its speculative powers to such conceptions as these, but in his system of "Noumena", that is to say, "things-in-themselves", as opposed to "Phenomena", or "things-as-they-appear-to-us", these ideals are the inevitable intuition of the practical nature of man, and these 'intuitions', since man is essentially a practical and moral being, have therefore not a mere sentimental but a real validity. In the realm of phenomena, there is no freedom; everything acts in accordance with the laws of caus-
ation, but freedom exists in a transcendental universe, a sphere above the limitations of sense, space, time, and causation.

We can readily appreciate the convenience from a determinist standpoint of Kant's thesis of Transcendental Freedom, an absolute beginning, whence phenomenal cause emanates. We are not, however, convinced that anything further has been contributed to the proof of the existence of freedom. Kant himself, we believe, cherished no ambitious hopes of so doing. The conception of freedom, whether retained in the realm of 'phenomena' or transcended to the universe of 'noumena', is one which we are not persuaded is essential as a criterion in the reaction by society against crime. Theories of a metaphysical nature, such as the one with which we have just attempted to deal, must, in our opinion, make way for one of purely social significance.
Kant cannot be accredited with the sole effort to reconcile metaphysical idealism with the naturalistic and mechanical standpoint of science. Doubtless, many other partisans of Determinism experience considerable apprehension at the probably results which will ensue if the doctrine of Necessity, from being solely the concern of a few superior intellects, becomes diffused amongst the masses and passes into the practice of life as an element of encouragement and an energetic incentive to the indulgence of the passions, which, conceived as the product of the human organism and other causes of an exterior nature, are incapable of being curbed. Undoubtedly, Professor Fouillé anticipates such a danger, and he endeavours to avoid it by means of his very ingenious system of "Les Idées Forces", which might be translated as "Force Ideas".

Having attempted, in a somewhat cursory manner, it must be admitted, to indicate the general lines of Transcendentalism, whereby Kant aspired at providing the synthesis between Determinism and Indeterminism, we deem it our duty to take some cognizance of the efforts directed in the same direction by Professor Fouillé.

Fouillé, being, like Kant, a determinist, but...
apparently disinclined to share the views of the latter anent "Noumena", accordingly must, in order to retain the cherished conception of Duty without admitting the idea of Liberty as conceived by the Indeterminists, seek another conciliatory medium, and this he finds in the doctrine already mentioned, namely that of "Les Idées Forces".

It would appear that Fouillée maintains that every idea conceived in the human mind tends to realise itself in appropriate movement, and, in fact, the movement has commenced by the mere conception of the idea.

One of these "Force Ideas" is the "idea of liberty". Human liberty consists practically and scientifically in the idea which we have of this Liberty, and the possible modifications of determined conduct which may ensue from the conception of that idea. Man at a given moment enthralled by passion in a determined direction may conceive of the idea of power of modifying that direction. This Idea of power of liberty is, according to Fouillée, the commencement of a real power, and is a force placed in immediate opposition to, and capable of counterbalancing, the existent determined forces, with the result that the determined direction may be superseded.

The scope of Professor Fouillée's doctrine of Force Ideas is not confined entirely to a consideration of the antinomy of Freedom, although in that connection
it is especially important. The doctrine has ramifications of a physical, psychological, ethical, and sociological significance, and the latter are of particular interest to us, for by means of "Les Idées Forces" Fouillée attempts to temper Determinism and to render it acceptable and reconcilable with Moral and Penal Responsibility. There is some call for observation thereon, although it may be that it would have been more appropriately dealt with under our chapter on the Utilitarian Theory.

In the second edition of "L'Idée Moderne du Droit", Professor Fouillée remarks:

"The primitive idea of Law is, according to us, the same as that of morality; it is the ideal of a free and disinterested will, that is to say, capable of progressive independence by reference to all inferior and limited causes.... The sociological Law as we have defined it presupposes as the end of social science the ideal of Liberty alike personal and impersonal. We possess thus as the first principles of our doctrine two things which have a primitive and scientific value, two things which no system can refuse us or deny, an idea and fact, the idea of Liberty and this fact that Liberty tends to realise itself and therein to realise, progressively, Law."(1)

Law as well as Liberty appears to be recognized by Fouillée as a "Force Idea", and the two in conjunction would tend, according to him, to enable man to attain perfection.

Having admitted Liberty and Law as "Force Ideas", it is not surprising to find idealism established as

the basis of Moral and Penal Responsibility and as a logical consequent, a justification of punishment.

Fouillée says:--

"It is necessary to repress the malefactor in the name of ideal law..............The moral legitimacy of Punishment is deduced from ideal Liberty conceived as a principle of Law. Responsibility of self to itself consists in this consciousness of self and in this possible comparison of what one is and what one ought to be." (1)

Again, in "La Pérennité des Appuis Sociaux de la Morale", he remarks:--

"Like human laws, human sanctions ought to confine themselves to the assurance of Justice." 

It might be added that here again Justice, which is the object of Laws, Fouillée declares, exists, as every other ideal exists, in so far as it is conceived and wished. It is an idea and a force.

"It is to-day commonplace to discard the old notion of the right to punish, of expiation properly called..............The social sanction only implies responsibility of a relative order: it suffices that the thief or the assassin should have accomplished an anti-social act with consciousness and intention. The question is to know, not if that intention was metaphysically the act of a free will, but if it was psychologically conscious of itself and its end. Every accused who is not in an abnormal or pathological state is rightly considered capable of that auto-determinism which, by the very force of the ideas and sentiments, can prevent acts detrimental to others." (2)

It consequently appears that, according to Fouillée, mankind as a whole, with perhaps the exception of the mentally alienated, is capable generally

(2) "La Pérennité des Appuis Sociaux de la Morale". M. Fouillée. Tome VIII. No. 18. p. 549.
of entertaining the ideas of Liberty and Law, etc. etc.,
and these ideas by apprehension become forces increasing
in strength according to the duration of time of their
retention in the mind. Accordingly, any being who
remains indifferent to these ideas and who would con­tentedly remain enslaved to his passions, dominated by
anti-social motives, is reprehensible in being guilty
of not having done what was in his power. He can be
justly reproached for not having conceived of the
ideas of Liberty and Law, and having failed thus to
call to his aid forces which would have enabled him to
withstand the forces of a determined nature actuating
anti-social conduct.

We certainly do not feel competent to indulge
in any detailed criticism of the elaborate reconcil­
iation advanced by Professor Fouillée. We might,
however, say that the "Ideal of Liberty" as a basis of
Moral and Penal Responsibility and a justification for
Punishment is a conception of the certainty of which we
are not convinced. We have observed no proof that
this "Liberty" is existent in all men, and even if it
were so it appears to us to be little more than the
classical conception of Free Will under a new name.

Personally, we cannot conceive of the success
of any attempted synthesis between Determinism and In­
determinism. In the case of Professor Fouillée's
attempt we find it difficult to - in fact we must admit we cannot - reconcile the attitude which he as a
Determinist is bound to take, that the belief in Free Will is a pure illusion with the recognition in man of the power of "Liberty", whereby, by his own efforts, he can check his anti-social instincts and cause the sentiment of "Duty" to prevail, and consequently remain a responsible master of his actions. There appears to us to be a flagrant contradiction. To accredit man with such a faculty is, to our mind, equivalent to according to him the power of controlling Determinism, which we would submit, Determinists admittedly deny.

We might conclude by repeating the criticism voiced by Monsieur Forsgrive in his Essay on Free Will:

"All this seductive arguing rests on an im-exact interpretation of the law of realisation of ideas. Without doubt, every idea tends to realise itself, but conditionally, that is, that the realisation is possible; not only an abstract ideal possibility but a real physical possibility. If the laws of nature are opposed to the realisation of the idea, the idea will nowise tend to realise itself. We shall have to meditate well on a life without end, to desire it for ourselves and even generously to wish to see it gratified to others without any return on our account. The duration of human life will not be prolonged by an hour. But this is precisely the case of the idea of Liberty. According to the Determinists, Liberty is opposed to the laws of nature, and M. Fouillee admits the absolute immutability of its laws. But the law of realisation of ideas is that every idea which does not oppose itself to the laws of nature tends to realise itself. But the idea of Liberty opposes itself to the laws of nature. The law of realisation of ideas does not apply then to the idea of Liberty." (1)

(1) "Essai sur le Libre Arbitre." M. Forsgrive. IIme partie. Ch. VI. p. 408
In the Introduction to his daughter's work - Madame Gina Lombroso Ferrero - Professor Cesare Lombroso says:-

"The Classical School based its doctrines on the assumption that all criminals, except in a few extreme cases, are endowed with intelligence and feelings like normal individuals, and that they commit misdeeds conversely, being prompted thereto by their unrestrained desire for evil. The offence alone was considered, and on it the whole existing penal system has been founded, the severity of the sentence meted out to the offender being regulated by the gravity of his misdeed."

Professor Lombroso again remarks in his own work - "Crime, Its Causes and Remedies": (1)

"If we compare the different attempts at different codes, we see how difficult it is for the legal expert to fix the Theory of Responsibility and to find an exact definition for it. The whole world knows what a good or a bad motive is, but it is difficult, even impossible, to tell whether the deprived act has been committed with a full, or only an incomplete, knowledge of evil," says Mittermayer. May writes:-

'We have not yet any scientific knowledge of responsibility.' (Die Strafrechtliche Zurechnung", 1851). And Mahring says:-- 'Irresponsibility is a matter which criminal justice cannot decide with certainty in any special case.' ("Die Zukunft der Penitentiären Rechtspflege" p. 188). In fact, there are men who are afflicted with incipient insanity, or are so profoundly predisposed to it that the slightest cause may make them fall into it. Others are driven by heredity to eccentricity or to immoral excesses.

(1) Lombroso's "Criminal Man". G.L. Ferrero.
"'Knowledge of the Act', says Delbruck, "'with an examination of the body and the mind before and after it, is not enough to clear up the question of responsibility; it is necessary to know the life of the Criminal from the cradle to the dissecting table.' ("Zeitschrift für Psychiatrie", 1864, p. 72.) - now as long as the criminal is living it is hardly possible to dissect him. Camara presumes 'absolute responsibility where both intellect and will combine in the accomplishment of a criminal action', but he adds immediately afterward 'upon the condition that the action of the will has not been lessened by physical, intellectual, or moral causes.' Now we have seen that there is no crime in which these causes are lacking."(1)

Lombroso maintained strongly that the presence of certain physical characteristics found frequently in criminals afforded ground for treating the criminal as an anthropological type, and he was the founder of the new school of criminal anthropology which might be said to be the Natural History of the criminal as it embraces his organic and psychic constitution and social life. To another of the same School, namely, Baron Raffaell Garofalo, we might perhaps turn for his opinion of the Classical School. In his "Criminology" he remarks:--

"In modern society the science of crimes is treated as merely a branch of the science of law: punishment has been vested with a judicial character: the function of the lawyer extends not only to the making of criminal laws but to their application. One and the same class of public officers delivers judgment in matters both civil and criminal: the jurists have taken possession of the science of criminality. They have been allowed to do so, and this, it seems to me, has been a mistake.......

One of the chief reasons for his last assertion

is grounded on his strong belief in the absolute inadequacy of the legal notion for crime. For him there exists the natural crime. He says thereanent:

"The necessities of scientific study have required us to isolate the natural crime. No such study would be possible if we were obliged to deal with all punishable acts heterogeneously assembled in codes. So, too, the legal notion of crime must be laid aside as valueless for our purpose. In a word, it is not upon the violation of rights but upon the violation of sentiments that the concept of natural crime must be based. In this, the principle for which we contend is totally different from that of the jurists."

He, of course, advocates the direct study of the criminal, and crime for him consists in the violation of either of the sentiments of pity and probity.

He asserts that the two postulates which form the keystone of criminal law are Moral Responsibility and Penal Proportion. He says, in regard to these:

"(1) Crime does not exist unless the agent is morally responsible for his act; from which it follows that the gravity of the crime varies with the degree of moral responsibility.

"(2) The quantum of punishment must be in direct ratio to the gravity of the Crime."

With regard to the second of these postulates we have no concern in this study. Speaking of the former Moral Responsibility and its essence, namely, Free Will, he says:

"Without entering into the question of Free Will, we venture the assertion that the consciousness of our moral liberty does not extend so far as to warrant us in believing that we possess the power of thinking and feeling in any different way than that in which we felt..."

(1) R. Garofalo. "Criminology" p. 54 & p. 60.
"and thought on a given occasion. We know that "the Ego cannot create itself, and that the char-"acter has already been formed by a series of "anterior facts, for the most part ignored by the "consciousness at the instant of its determination."

We might add without quoting Professor Gabriel Tarde that his view of Free Will coincides very closely with that of Professor Garofalo. In fact, the latter expressly mentions this. From the above quotation it is quite apparent that Garofalo is a determinist, and, being so, every crime is for him a necessary effect. The Will manifests itself without doubt, but it is governed by a motive which is all pervading and which itself is the result of causes which have existed hitherto. He concludes by saying:-

"Moral Responsibility is a phrase void of "meaning, except in so far as we admit free choice, "that is to say, the arbitrary or undetermined "choice of the Will. With this as an element of "Crime, how can any sentence be intelligibly pro-"nounced?(1)

It must be said that Garofalo, on account of his deterministic views could not have conceivably arrived at any other conclusion.

Dr Maurice Parmelle in his work,"Anthropology and Sociology", also gives the matter of the Classical School's Doctrine his attention, and, in this connection, remarks:-

"........Justice administered in a vindictive "spirit tends to carry too far the authority of "society over the individual, and thus destroys the "balance between social and individual rights.... "(so also) autocratic or strongly centralized "government........

"........The modern rise of democracy was necess-"ary to reassert the rights of the individual.

"It was the arbitrariness and cruelty of repression resulting from this excessive use of social authority against which the eighteenth century philosophers protested. They then proclaimed the democratic doctrine of the equality of men against the usurpations of power by autocrats and tyrants. The Classical School applied this doctrine of equality by setting up as a standard of punishment the character of crime committed by the criminal. Its object in doing so was the very generous one of putting all men on an equality before the law......in failing to discriminate between criminals the Classical School was guilty of an exaggeration of Individualism."

He goes on to shew how the Classical School adopted as a basis for punishment the criminal's Moral Responsibility; this Moral Responsibility having been introduced into the treatment of criminals by religion from its doctrine of Free Will, and he asserts that the doctrine of Free Will is still very generally accepted as a basis for Penal Responsibility. We shall continue quoting:-

"In the first place, this doctrine (the doctrine of Free Will) has always been seriously questioned. Many philosophers might be cited in this connection, for example, Spinoza, who said that consciousness of our liberty is only the ignorance of the causes which make us act."

"......But the strongest evidence against the doctrine of Free Will has been furnished by the modern science of Physiological Psychology.....At no time in the evolution of the highest forms of psychic phenomena......is there any evidence that the power of Moral Liberty has been introduced. The introduction of such a power would be an exception to the law of the conservation of energy which is the fundamental principle of science, and would therefore destroy the foundation of modern science."

"Furthermore a study of human psychic processes furnishes no evidence of a Free Will......the inductions......of the modern science of"
"Physiological Psychology........seriously ques-
tion, if indeed they do not completely disprove 
the doctrine of Free Will. In view of this 
fact is it wise to base Criminal Legislation on 
a foundation so uncertain and unstable, and 
which is being attacked and shaken on all sides?"(1)

We must now turn to Dr R. M. McConnell, who in 
his learned work, "Criminal Responsibility and Social 
Restraint", furnishes further information on the sub-
ject in hand.

In dealing with mental causation he says:-

"The causation of volitional phenomena runs 
back in an unending series. Indeed, Will be-
longs to those forms of psychical causation, the 
connections of which we can most easily follow. 
Not only the immediate causes in the motives 
are apparent, but also the origin and diverse 
condition of the individual and general social 
development. An intentional act, which takes 
place as the result of forethought and delib- 
eration, we can retrace in circumstances extend- 
ing back into the earliest history of the agent. 
We may, indeed, discover some of the elements 
in inherited qualities of the family or tribe."

"Can any one really believe that the Will is 
unconditioned and out of causal connection with 
other elements of reality, or that it was pro-
duced of itself? Must it not be said to be in 
relation with other things on which it depends, 
and by which it has been formed?"

He then continues to quote at length Paulsen. 
(System der Ethik", Bd.1S.448-450).

"A man is a psycho-physical organism with a 
certain body, a certain system of organs, certain 
impulses, certain sensibility, certain intelli-
gence, and certain Will. Was his beginning with- 
out cause, a result of his own free choice? 
Hardly; he was conceived and produced by parents, 
whom he resembles in body and soul, inheriting 
their temperament, their desires, their sensuous 
intellectual powers, as well as their bodily 
characteristics. He receives all the psychic 
spiritual qualities of his ancestors, as his

(1) "Anthropology and Sociology". M. Parmelee. 
natural endowment. His sex, too, which exercises such a decisive influence upon his entire life, is determined, by what causes we do not know, yet no one will claim that it is the result of his own choice. Hence nothing in the origin of man indicates that he constitutes an exempt territory in the kingdom of nature, and is not subject to her laws. These innate predispositions or tendencies are then developed under the determining influences of environment, of natural, and, above all, human environment. The child is educated by the family in the form of life peculiar to his people. He acquires their language, and with the language a more or less complete system of concepts and judgments. He is educated into the customs and practices of his country, by which the actions and judgments of most persons are governed during their entire lives. He is sent to school, and there obtains the general culture of the age; he is taken into the church, where he receives further training, which, positively or negatively, exercises a permanent influence upon his inner life. When at last he leaves the home and the school, it is only to be subjected to the influence of a new educational force, - society. He belongs to a certain social class by descent, and, as a rule, for life. Society works upon him incessantly, telling him in words and in deeds what is right or wrong, what is proper or improper, what is attractive or repulsive. It assigns to him his tasks, by example and by command. In all these ways his whole life, with all its activities, is determined. There seems to be no break in the chain: nation and age, parents and teachers, environment and society, decide the predisposition and development, rank and life, problems, of each individual human being. He is the product of the collective body from which he springs. Just as the twig on a tree does not owe its form and function to its Will, but to the whole body in which it grows, so a man does not exist prior to himself, as it were, and choose his Will, his nature, and his lot in life by a decision of his Will. He comes into the world and acts in the world as a member of the collective body. And as a part of this people his life forms a part of the total historical life of humanity, and, finally, of universal nature."

Dr McConnell then concludes:

"In view of such facts as these we may be led to agree with Spinoza that:

1. The soul acts according to fixed laws,
'and is as it were an immaterial automaton'.

(Spinoza "On the Improvement of Understanding." p. 32.)

'In the mind there is no absolute free Will; but the mind is determined by another cause, and this last by another cause, and so on to infinity.'

(Spinoza "Ethics" tr. Elwes, p. 119.)

'Experience teaches us no less clearly than reason, that men believe themselves to be free, simply because they are conscious of their actions, and unconscious of the causes whereby those actions are determined.'

(Spinoza "Ethics" tr. Elwes, p. 134.)

Dr McConnell deduces from this the deterministic formula opposed to the Classical Doctrine of Free Will:

"The formula used by determinists is thus: -
"The action of man constantly proceeds with necessity from two factors - his character and the motives which come from the environment. Each of these factors is under the guidance of causality and is strictly necessitated. The germ of the character is innate; its development is conditioned by the experiences of life. The motives that act on man are introduced with inevitableness by the absolutely fixed course of the world. Any action, then, is the necessary result of a determinate character in contact with determinate circumstances......"

"This is all there is of man's so-called 'Freedom'." (1)

Professor Raymond Saleilles in his work already referred to, namely, "The Individualization of Punishment", in dealing with Freedom, says: -

"The problem of Freedom, like the problem of the soul, of which it is but a phase, and like the problem of God, is one which cannot be demonstrated by reasoning, nor established by scientific induction, but which demands other

modes of proof, which are, however, not essentially different from those that serve to convince us of the objective reality of the external objects perceived by our senses. To believe in the latter requires the same act of faith in regard to the data of our external senses as is the act of faith demanded of our inner senses to believe in those other realities, or, let us say, idealities, of which Freedom is assuredly a part. Instinctive convictions that differ from scientific certainty are equally indispensable; they do not command the universal adherence, the objective certitude, if we may so speak, that attaches to the truths of scientific observation. And this is of capital importance to Penal Law. It is doubtless sufficient, in order to regard Freedom as the basis of Penal Law, that the idea of Freedom shall be susceptible of proof appropriate to our nature. At all events let us take this for granted. However, such conviction remains a personal issue, even though considered as universally applicable. For its basis of practical application Penal Law cannot use a conception that evades scientific investigation and belongs to the realm of faith.(1)

Monsieur Gabriel Tarde in his work, "Penal Philosophy", remarks:

"...Responsibility made to depend on Free Will adjudged to be actual existence is ruined at its very base by the progress of Scientific Determinism."(2)

Dr Wilson, in his "Education, Personality and Crime", is yet another who denies the existence of Free Will, at least so far as the majority of human beings are concerned. He says:

"If these facts be true, and they are supported by observation and experiment, there is for some people no such things as responsibility or Free Will. Normals, who are few, have it, as their brain machines are perfect. The deficient are however more numerous than would appear, and require careful examination when in trouble, not by the police, the lawyer, or even the judge, but by the expert psychologist, to see exactly what amount of workable machinery they possess.

(1) "Individualization of Punishment". R. Saleilles. p.179.
(2) "Penal Philosophy". G. Tarde. p. 83.
"Till then many will be incorrectly credited with Free Will and punished, where will paralysis or absence of will robs them of place of Responsibility."

"The terms, Free Will and Responsibility, must be considered in the light of fresh knowledge. We are but machines, of varying potential endurance and capability, and according to the quality of the mechanism so we should be judged."(1)

Mr George Ives in a work produced by him which shews an exceedingly lengthy research, and although he refuses to discuss Free Will on the ground that practical criminology has nothing to gain therefrom as no progress has ever been made thereanent, he nevertheless vouches the opinion that:-

"Acting upon erroneous premises, the Penal Law has been of course predoomed to failure. The 'Moral Fetish' followed in olden times was the idea of 'possession'; but while the 'devils' disappeared before the rise of scientific daylight, a new crime creed rose up and deceived many, which was to prove at least as powerful a plea for cruelty - the Fetish of Free Will."(2)

Professor Fere in his treatise, "The Pathology of Emotions", says:-

"......The basis of penal law reposes on the doctrine of Free Choice which has not itself any scientific foundation and which is contrary to what physiology teaches us. The penal law admits two categories of individuals, the one responsible, the other irresponsible. This distinction is not founded on any scientific argument; desire, passion, impulsion, virtue, vice, madness, are allied to organic conditions betwixt which science can only establish degrees of intensity......The sole criterion of moral value of an act is its utility, and the sole principle of the law can only be right of social defence."(3)

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(3) "The Pathology of Emotions" Fere. p.507 et seq.
Professor August Forel in "The Sexual Question":

"Again, on further examination, we find that the accepted and historical notion of Free Will, that is to say, the absolute liberty of man's will, which constitutes the very existence of our old penal law, becomes not only more problematical but may even be considered as a purely human illusion resting on the fact that the indirect and remote motives of our actions are mainly subconscious."(1)

He believes that Penal Law has only one thing to do. That is to cut itself free from its roots and transplant itself on a social and scientific soil.

It is quite obvious that Professor Fere and Professor Forel, both physicians, are agreed on this matter, and in the light in which the unnatural offences with which the latter deals in extenso the penal law with a social and scientific basis would certainly be more equitable.

Dr J. L. de Lanesan in "La Lutte contre le Crime" ably remarks:

"It is important, therefore, first of all, to determine if Free Will and Moral Responsibility really exist as our penal codes implicitly admit................. In short, the more one probes the question of Free Will, the more one is led to be convinced that there does not exist a single human act which is not determined by an extrinsic impression or an internal sensation. How, moreover, could the existence of an effect be admitted without a cause?"

and he agrees with Schopenhauer, who, in his Essay on the Free Will, when speaking of the so-called free actions of the honest man or criminal, said:

"Everything that happens, the smallest as well as the greatest things, happen necessarily. Quidquid fit, necessario fit."(2)

(1) "The Sexual Question". A. Forel. p. 365.
(2) "La Lutte contre le Crime". J.L. de Lanesan. p. 177.
"Freedom of Will is nothing but a dream of the "metaphysician" (Tommasi). (1)

"Concerning the results of modern research it "is no longer permissible to speak of a Free "Will". (Puglia) (1)

A halt must be called to this continual quotation of opinions against the basic conception of the Theory of the Classical school - Free Will. We have attempted to set forth the claims of the Free-Willist, and in submitting these to criticism have clearly indicated those of the Determinist. Much has been said by both parties on the very controversial conception of the belief in Free Will, but it may be all summed up in this, that the Free-Willist believes that man is Free and the Determinist believes that he does not possess this Freedom, and, in our opinion, the proof adduced by either party is not conclusive. At any rate, we ourselves have not been convinced to share the opinion of either school. The Freedom of indifference, which would appear to be the highest form of Free Will does not appeal to us, and an absolute fatalistic attitude has as little appeal.

Furthermore, we are incapable of conceiving of the faculty of willing as a function of the brain separate from all the other functions thereof. In considering the mind we are convinced of the impossibility of isolating the psychic functions. These must of necessity be viewed together.

"A special function of the brain", says Mendel, "co-ordinate with perception, feeling, imagination, and memory, which might be called the faculty of willing, does not exist. Modern psychiatrics has, therefore, ceased to distinguish diseases of the Will, such as abulia, hyperbulia, etc., of which formerly much was made, and rightly looks upon acts which seem to be the outcome of a deranged will as being the product of a morbid disturbance of the faculties of perception, reasoning, and feeling."

metaphysical, philosophical, and moral considerations is pre-eminently desirable.
From what has already been said, it will be seen that the Classical School hold tenaciously to the doctrine of The Freedom of The Will according to which any Crime is a Free Act. From the mass of contrary opinion already quoted by us it will not be surprising to find a reactionary school which is radically opposed to this Classical Legal Conception. Of the many names given to this school we feel inclined to accept the name of the Italian School on account of the fact that Italy, although affording, as all other Continental Countries, members of the Classical School, was the seat of the scientific movement commenced by Cesare Lombroso in 1875, which is primarily anti-classical. Under the leadership of this great Criminal Anthropologist, Cesare Lombroso, the Italian School sought to apply to the study of the criminal the positive inductive method of modern science. The Classical School bases its doctrines on the assumption of universal Free Will, and criminals accordingly commit offences, consciously willing the evil consequences for the sake of evil, having discarded the good by deciding on action. The Italian School, on the contrary, sees Crime in an altogether new light. For them there can only
be a negation of this so-called Universal Free Will, and the almost general choice of evil for evil's sake is far from being the case. They are convinced that a Crime is a purely Natural Product, being the result of natural factors, leaving no place whatever for Freedom of Will. Lombroso, although he did to a certain extent admit Sociological Factors as contributing something towards Natural Crime, laid particular stress on the Anthropological Factors, whereas Enrico Ferri on the contrary placed greatest stress on the former, admitting the latter only to a limited extent. Recognising, as they do, these natural and sociological factors, the Criminal Anthropologists are bound to regard crime from a fatalistic or positivist standpoint, and a criminal can never be considered morally responsible, but responsible only, in the light of liability to punishment on the ground of his danger to society, for society is always rightly entitled to defend itself.

Baron Rafaele Garofalo, who is the legist of this Italian School, says:

"Hitherto, penalties have been graduated according to a false idea of Free Will and Moral Responsibility. None being free, we no longer punish in proportion to the degree of liberty, but in view of the interests of society only, and proportion the punishment to the formidable quality of the criminal". ("Criminology").

It is thus apparent that the Italian School seeks to base Penal Responsibility on Social Responsi-
bility, and would abandon the hypothesis of Free Will and Moral Liberty. Free Will does not exist for them, and the belief in our liberty of action is an illusion arising from our ignorance of the determining causes and the processes involved in a voluntary action.

In his work already referred to, "La Responsabilité Pénale", Dr Adolphe Laudry, when referring to the Utilitarian Theory, says:—

"Punishments in the utilitarian doctrine are not inflicted on criminals with a view to them expiating their faults, but to render crimes less frequent. Punishment is a means made use of to combat criminality."

and again later:—

"The notion of penal responsibility being in the utilitarian doctrine, at once, independent of that of moral responsibility, it is no longer a question of enquiring if, in committing such an act in itself reprehensible, we have sinned, and what would be the gravity of our fault, it is a question of knowing if it is useful that we should be punished, and what punishment would be the most useful. Penal responsibility in the utilitarian doctrine is something that says that we ought, for the general good, to be punished, and to be punished with one punishment rather than another............." (1)

The only rational foundation upon which one can erect the right to punish is the right of society to social protection. Perhaps we might turn to Enrico Ferri for some light on the subject of Social Responsibility as (as has already been remarked) he is particularly impressed by the sociological factors which contribute to the creation of Natural Crime. He says:—

"If imputability is the possibility of

(1) "La Responsabilité Pénale." A. Laudry. p.109 & 118."
attributing a determined effect to someone as the cause by which this effect is produced, re-
ponsibility is the possibility of recognising that someone is obliged to repair a determined damage and to submit to a determined punishment by virtue of this determined effect, that is to say, there is material imputability because Titus is the author of the act in question; and social and judicial imputability, because Titus is held to put up with the social and judicial consequences of this act accomplished by him.

Both material and judicial responsibility are entirely dependent on the existence of Society. The former cannot exist unless the offender has some one to whom he can render account, and the latter fails too, for unless there be a society no law can exist.

Ferri continues:

"It is thus not because man has a moral liberty or ideal liberty or a relative liberty to act, that he is juridically, that is to say, socially, accountable or responsible for his actions, it is solely because, from the moment that he lives in society, each of these actions produces effects not only individual, but social, which spring from surrounding society on the individual who acts. The latter thus, necessarily, inevitably, by the sole fact that he lives in society, ought to feel and support these effects which will be useful or good for himself, if his action has been useful or good for society, which will be injurious or bad if his action has been injurious or bad for society." (1)

Ferri is convinced that man is always responsible for every anti-juridical action, solely because, and so long as, he lives in society.

Society is by its instinct of conservation, forced to react, as it is rightly entitled to, against one of its recalcitrant members.

The importance attached by Lombroso and by other

members of this School to the Anthropological Factors in the composition of the natural phenomena of crime is in some cases ignored, and in others treated as insignificant by other learned thinkers, who nevertheless recognise the value of the Utilitarian Theory. They are not strictly members of the Italian School. They are really, in many cases, aptly called Socialists.

We have, for example, Dr W. A. Bonger in his "Criminality and Economic Conditions", remarking:-

"The penal law is one of the means, the object of which is combating the illegal satisfaction of wants. Everyone knows, however, that this means does not always attain the end sought. The penal law will, in fact, produce a diminution of criminality only when it shall have brought about profound penal changes - when punishment shall be no more than the useful and necessary reaction against acts that are harmful to the well-being of the community and to the development of society." (1)

The words, useful and necessary reaction, call for attention as clearly Dr. Bonger has the same ideas as Dr. Ferri.

The question might well be asked, upon what authority can punishment be meted out to offenders with a view to the well-being of the community and the development of society.

Dr. Maurice Parmeleè in his work already mentioned "Anthropology and Sociology in relation to Social Procedure" remarks in this connexion that of all the many theories formulated the most famous and the one of most influence in modern times is that of Social

(1) "Criminality and Economic Conditions". W. A. Bonger. p. 174.
Contract according to which each member of society surrenders voluntarily an equal amount of liberty in order to receive back the advantages of union with others; the sanction of Punishment of criminals being very easily deduced from this theory. He quotes J. J. Rousseau as having remarked:—

"Every malefactor, attacking the social law, becomes by his transgressions rebel and traitorous to the country: he ceases to be a member of it in breaking its laws, and he even makes war against it. Then the preservation of the State is incompatible with his preservation; it is necessary that one of the two should perish, and when the guilty one is killed it is less as a citizen than as an enemy." (On Contrat Social. Livre II. Ch. 5).

Monsieur A. Fouillée dealing with the matter under discussion in "La Science social contemporaine" said:—

"In entering into Society, I bind myself to obey the laws which as long as I am a citizen I contribute in establishing. If I break the agreement, I am restrained and a compensation is imposed on me: in that there is no injustice, because there is nothing there after all contrary to my will. I wished to live in society; on account of that I consented to the social laws; when the laws restrain me, I restrain myself by them, it is my anterior will which restrains my present will: it is my self as legislator who defends myself against myself as a violator of the law. There is nothing there which I do not accept."(2)

It can be safely said that Social Contract if it does exist does so only as an ideal to be attained and it is a hypothesis with little or no historical foundation and little modern application that men


(2) "De la Notion de la Responsabilité morale et pénales. M. R. Garraud, already cited."
consciously and voluntarily bind themselves by this contract.

Professor Garraud in the report, already mentioned, to the Congress of the International Union of Penal Law remarked, and that quite rightly we think, that the idea of Social Defence under its multiple aspects is another form of the same idea of Social Contract. We have already dealt with one of its aspects namely that of the Italian School.

Dr. P. A. Parsons in "Responsibility for Crime" says:

"... The only real responsibility is Social Responsibility. All men whether free or not, no matter what their physical or mental condition, are responsible for their deeds to society. Society has a right to defend itself and preserve itself. Man is responsible because he lives in society and only because he lives in society and only because of his social existence. We are thus brought, as Hamon more points out, to the acceptance of the old English legal maxim that everyone, whatever his state of consciousness, always acts at his own risk or peril. The insane and abnormal are socially and necessarily responsible."

"Thus the question of Moral Freedom is not of the slightest interest. It is the result of response to stimuli which is of interest to society, not whether or not the individual could have responded differently from the way in which he did." (1)

Dr. Bernaldo de Quiros in his Modern Theories of Criminology when speaking of Penal Tutelage as the future solution of the criminal question points out that this Penal Tutelage is the uninterrupted continuation of punishment having the same biological...

(1) "Responsibility for Crime". Philip A. Parsons. p. 69.
basis as the classical system, namely reaction against crime, and remarks:

"The intricate problem of responsibility which disturbs scholars disappears. Since the main object of the problem is now to distinguish the Responsible from the Irresponsible in order to punish the one and acquit the other, the day when punishment disappears shall we not be able to say that no one is responsible or that all are?"

and again later -

"When the claims of Responsibility make way for the claim of the necessity of public tutelage there will be an end to the disputes between the advocates of Free Will and those of Determinism: for whether the crime is due to the most ungovernable freedom of choice, or to the moral fatal pressure of innumerable agencies, such necessity remains and is not changed by the intervention of foreign elements."

It is quite apparent that Dr. de Quiros, like those thinkers before cited, recognises also the right of society to defend itself independently of the will of the offender. The very conception of Public Penal Tutelage essentially bears out this idea.

Sufficient it is submitted has been said to indicate that this the second Theory which we have submitted - The Utilitarian Theory - is synonymous with the Doctrine of Social Defence. The offender has committed an offence indicating that he is a danger to society and accordingly he must be placed outwith the possibility of rendering himself dangerous; as Dr. de Quiros has indicated for an indefinite period. Society holds count of the danger to

(1) "Modern Theories of Criminology". C. Bernaldo de Quiros. p. 238/239.
which it is being exposed and this factor of social peril is made the measure of defence. Responsibility ceases in fact to exist. It is a mere abstraction. As Monsieur Tarde has aptly remarked - Responsibility based on Social Utility to the exclusion of everything else has nothing in common with Responsibility, as understood in the classical sense. Of course many of the most rigorous Utilitarians would not hesitate to discard the conception Responsibility in their idea of the Utilitarian Theory. Dr. de Quiros, for instance, would appear to have discarded it. We have, however, thinkers, Professor Maurice Vauthier of the University of Bruxelles for instance, who appreciates this fully and would retain the conception of Responsibility and tenders the doctrine of Social Reaction, according to which the offender is prosecuted as an enemy. He is punished for the acts which he has committed and not for those which he will commit and moreover the degree of peril to which the presence of the delinquent exposes society is not considered the measure - or at least the only measure - of the enmity entering the analysis of the psychological causes of the infraction and a moral element is found in the penal law which the theory of Social Defence wishes to exclude. The Theory of Social Reaction does not exclude by any means the notion of Responsibility. Only in place of connecting this notion to the ideas of absolute liberty and of free will, it
has derived it from the antisocial intention of the
author of the act.

Professor Vauthier remarks:

"The notion of responsibility implies nat-
urally that of irresponsibility. If he is
judged criminal whose intention is evil, be-
cause it is anti-social, because it opposes
itself to the intention of the community, he,
on the contrary, is reputed innocent whose in-
tention manifests no antagonism with regard to
the collective intention......"(1)

It will be seen therefore that whereas the ad-
herents to the doctrine of Social Defence make an
abstraction of the Responsibility of the guilty one
this very Responsibility is for the adherents of the
document of Social Reaction of great importance and
according to the strength of the Responsibility is
punishment measured.

(1) "De la Responsabilité dans le droit pénal et
dans le droit civil". M. Vauthier. p. 264.
2. CRITICISM of the UTILITARIAN THEORY.

Although considerable space could be devoted to an interesting discussion of the anthropological data observed by the members of the Italian School in the study of the Criminal, it is felt that such a discussion would not be fruitful of results so far as the task in hand is concerned. It must be said, however, that these anthropological data can hardly be said to carry much weight in modern times although they have certainly called attention to the criminal and tended to relegate the actual crime to a much more inferior position in the minds of the general public than hitherto. This, it is felt, is a no mean attainment. We do, however, feel most emphatically that, apart from any question of Anthropological science on which we are incapable of offering an opinion, the Italian School is not logically entitled to conclude from its studies and researches amongst madmen, criminals and degenerates that because Free Will and consequently Responsibility (in the Classical conception) is wanting in them, these faculties are wanting in mankind generally, and mankind is as determined as matter. The negation of Free Will and of Responsibility must of course result in the acceptance of the doctrine of Determinism. As we have already said, we hold no brief for the idea of the
Liberty of Indifference by which man can act without motives; such a hypothesis to us is quite untenable and quite fantastic. Still it behoves us to hesitate accepting a doctrine which attributes to man no faculty of liberty and would have him obeying blindly the physical and psychological causes over which he has no control. The doctrine of Determinism would have man a mere machine, and such a postulate we personally cannot accept.

To refer again to the excellent report of Professor Garraud at the Congress at Lisbon, we find that of all the theories relative to penal responsibility he concludes that there are only two logical ones, the classical theory and the positive theory. The latter is of course the theory under discussion according to which the individual is socially responsible solely on account of the fact that he lives in society. He, however, cannot rid himself of the idea of moral Responsibility for he remarks -

"...We feel ourselves responsible not only towards society, that is to say towards our fellow-men, but moreover towards ourselves, that is to say our conscience.... Accordingly, the school which brings back the problem of responsibility to the exclusive notion of a social responsibility avoids explaining an elementary distinction.... A question is not solved by not replying to it.... Social Responsibility is only able to support itself on Moral Responsibility." (1)

Social Responsibility supported on Moral Responsibility is of course the Classical Theory.

We are somewhat inclined to disagree with the learned Professor. We are disposed to accept the basis of Social Accountability without any consideration whatever of the conceptions of Free Will or Determinism both of which are incapable of absolute proof. There appears to us no necessity for the retention of the former or the substitution of the latter, as the criterion of Penal Responsibility. The issue of Responsibility is one which is quite outwith the power of human decision. We would discard the Classical conception and recognise that man is accountable by virtue of the fact that he lives in society and society is as justly entitled to protection from him as he is to receive it from her.

It must be clearly understood that in accepting the Thesis of Social Accountability we do not deny absolutely the existence of Free Will nor do we admit totally the Determinist standpoint and it is for the very reason that we adhere somewhat to relativity in these conceptions and our inability to reconcile the philosophical with the psychological tenets that we are compelled to seek a basis where there is no call upon us to accept by way of reconciliation a position which would inevitably involve the sacrifice of cherished views. There is little fact and much hypothetical speculation attached to both the Classical and positive conceptions and the lawyer called upon to supervise the working of the penal
system seeks the former to the exclusion of the latter which is of little practical use to him.

M. Louis Proal, an adversary of Determinism, like Professor Garraud, experiences the same difficulty of conceiving of Social Responsibility apart from Moral Responsibility and he remarks: in "le Crime et la peine":

"A determinist doctrine which would demand for criminals pity without blame, would be a corrupt doctrine. Let us give up this unwhole-some compassion, which sees in the criminal an infirm or sick person. Let us maintain, with the precise sense that the belief in Free Will has given to them, the words Virtue and Crime, recompense and punishment, esteem and contempt. Humanity does not deceive itself in believing that there are men, by the rectitude of their mind, merit esteem, and others who, by their voluntary depravity merit contempt. The Legislator is not any more deceived in founding penal responsibility on moral responsibility."

and later:

"It is in vain that one should force himself to preserve the idea of culpability without Free Will. Called by his duty to judge accused persons, to condemn them, to blame them, when he finds them guilty, a practical magistrate ought, I imagine, to find himself in a greatly embarrassing position if a positivist...........
The conscience and the good sense of the magistrate revolt against the idea of punishing, without indignation or contempt, to strike, as a butcher does, without hatred, or temper, 'every individual reputed noxious, guilty or not'. On the other hand, how can one believe that a man is still able to be guilty if he is not free? Moral responsibility, is it not the effect of Free Will? These two ideas, are they not indissolubly bound?(1)

We agree with M. Proal that it is impossible to preserve the idea of culpability without Free Will but we do not seek to preserve it. In the conception

(1) "Le crime et la peine". Louis Proal. p. 423/424.
of Social Accountability there is no question whatever of culpability nor of pity for the offender for that matter of it. Our sole aim is the protection of society or in other words the prevention of crime although conceivably the cure of criminals might fall thereunder. The question might be asked as to how this social protection or prevention of crime is to be executed. We hardly think that there is any call upon us to answer it here as it is really a matter of Penology and one on which much has been already said. It is felt that whatever the Utilitarian system adopted may be there might be guaranteed at least the same extent of crime prevention as results from the existing penal system.

M. J. L. de Lanessan in the work "La lutte contre le crime" already referred to, would appear to fail to recognise the distinction between Punishment and Social Reaction for on this matter he says:-

"It is notably impossible for us to admit the distinction that M. Enrico Ferri, who denies the free will, would wish to establish, on the one hand between Moral Responsibility and what he calls Social Responsibility, on the other hand between 'punishment' regarded from the 'spiritual' point of view and 'punishment' considered as 'social reaction'. The individual who is not responsible in his own eyes ought not to be so in the eyes of society, and then when he is not responsible he ought not to have any kind of punishment. Neither is it possible for us to compare as he does, the situation of a civilised society to that of a criminal."(1)

The idea of culpability being absent in the Theory of Social Accountability the conception of punishment disappears.

Social reaction is at most cure, and at least elimination. There is no question of punishment.
V. THE NEO-CLASSICAL THEORY OF ATTENUATED RESPONSIBILITY.

1. The Theory.

We have so far disposed of Theories adduced by the Classical School and the Italian or Positive School and indicated briefly the views held generally by the partisans of these Schools. It now behoves us to deal with the Theory presented by another School, which might be said to be intermediate between the two Schools with which we have hitherto dealt and which has been called the Neo-Classical or Eclectic School. The Classical doctrines have been profoundly modified by the adherents of this School, although they hold tenaciously to Responsibility and will have nothing of Determinist principles. For the Eclectic School, Moral Liberty is a fundamental postulate incapable of denial, upon which alone Responsibility rests, and all new theories created upon any other basis are useless and ought to be discarded. It is to France to which we must turn for an exposition of the doctrines of this School, in particular that of the Theory of Attenuated Responsibility.

Although in the French Judicial Practice practical effect has been given, at least partially, to the principles of the Theory of Attenuated Responsibility; for on the evidence of medical expert wit-
nesses that there is existent in an accused only an Attenuated Responsibility a Judge at his discretion may admit such, and although recognizing the culprit guilty may admit in his favour attenuating circumstances, and may award accordingly an attenuation of punishment conform to one or other of the two degrees in Article 463 of the French Penal Code; it is undoubtedly the case that the French Legislature has so far failed to recognize them and the efforts of the partisans of this Theory, which in its practical operation renders punishment, from being a mathematical rigidity, incapable of degrees, flexible and capable of application to a graduated scale according to the degree of responsibility of the offender, are directed in the main towards the realisation in Statute of their cherished views.

In spite of the fact that the Theory of Attenuated Responsibility has given rise to much discussion to which little value can be ascribed, nevertheless, it is of considerable interest and certainly comes within the scope of our study.

Professor Raymond Saleilles, a member of this School and ardent supporter of the principles thereof, devotes considerable space in his works to them. In his "Individualization of Punishment", a work to which we have already had occasion to refer, in criticising the Classical System he remarks that its sole virtue is that it eliminates arbitrary sentences. This
virtue, however, does not, he adds, warrant the existence of a system the formula of which is:

"the punishment for the same Crime should be the same because the responsibility is the same."

He says:

"At every point this artificial and abstract construction runs counter to the facts of life. It sets up abstractions and constructions of a wholly logical and ideal type. While in practice Criminal Law must deal with concrete realities. Ultimately, practice must make or mar every system. As a consequence, a Neo-Classical Theory is coming to the front, which, without abandoning the Classical position, and while taking its stand upon the same data, is yet proposing to transform and revolutionize the legal structure of the penal code. It is developing apart from the law and even in opposition to it. It is proceeding under the influence of the facts primarily, but also under the inspirations of a new school properly called the Eclectic School. In a measure, it reflects the accredited traditional position; yet it contributes a new insight growing out of the increased emphasis of the subjective aspects of the problem of crime, and contributes as well to the complementary problem of social protection. It proceeds directly to conclusions without succumbing to the attacks of theories."

Professor Saleilles mentions Rossi, Ortolan, Garaud, Joly, Le Poittevin and Garçon as adherents to the Neo-Classical Theory; a distinguished group without doubt, the latter, two of which, particularly deal with Attenuated Responsibility.

Dr Stefanesco in his work, "De la Responsabilité Partielle", remarks:

"The Neo-Classical School does not wish to destroy entirely the old Classical School. It proposes only to renew it. It maintains the primordial notions of liberty and of responsibility, but gives them another explanation."

(1) "Individualisation of Punishment". R. Saleilles. P. 61.
In place of the abstract conception of Free Will, it places a concrete conception which is not found in disaccord with modern scientific data. The Classical School supposes that every act is a matter of liberty, and that all men have an equal liberty relative to the same act. Every free act comprehends the same liberty, which ought to have degrees and admit of a Partial Liberty.

The following are the fundamental notions of the Neo-Classical School. Liberty - it says - consists in the power of standing still in the face of resistance, which is found in each of us, in face of an impulsion external or internal. From that can one say that liberty thus understood ought to be identical in presence of no matter what act and for each individual? Our conscience tells us the contrary, and we know, moreover, by experience, that the impulsions and the passions are able to obscure this force of resistance, they are able even to annihilate it.

Again, the Neo-Classical School lays down the following principle. Responsibility emanates from Liberty; that which exists in all men is nevertheless susceptible of degrees. Accordingly in the application of punishment there is room for taking into account its variations. Responsibility is susceptible of graduations since liberty is susceptible of being more or less great; the force of resistance depends on the natural psychic state of the individual, it is variable with him. Thus it is necessary that punishment should represent this degree of variability in the liberty of the individual.

In order to arrive at attenuating punishment the individual is thus considered and punishment is diminished according to his responsibility; individualisation is realised here subjectively. (1)

There is nothing illogical in the deductions made by the Neo-Classicists from the axiom that imputability is founded on Free Will, that according as man is or is not free, or is more or less free in the choice of evil, such evil is or is not, or is in a more or less degree, imputable to him, and that the

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(1) "De la Responsabilite Partielle". N. N. Stefanesco. P. 32/33.
punishment awarded should vary correspondingly.

In a perusal of the French Literature anent the Theory of Responsibility held by this School, we have observed that the expressions, "Attenuated Responsibility" and "Partial Responsibility", are repeatedly used as if they were synonymous. We contend that this is not correct, and we shall accordingly endeavour to justify our contention that they are absolutely independent of one another.

Professor Le Poittevin in discussing Attenuated Responsibilities in the penal realm before the "Société Française de Philosophie" on 30th January, 1908 laid particular stress on this confusion, and, in doing so, expressed the desirability of a recognised separation. He said:

"Partial Responsibility corresponds to the cases of monomania. The monomaniac has a fixed idea, a besetting idea; on that account he is declared irresponsible for all the crimes and delicts of which the cause or the nature is traceable to his insane ideas. But inversely if he commits a felonious act outside of his insane ideas ought he to be considered as responsible for it? Some are convinced of the affirmative, for he has then acted outside of his circle of obsession. One should then have Responsibility for acts entering into Monomania, responsibility for acts which are committed within the province of the obsessing idea.

"Responsibility would be partial responsibility for a part of the actions of an individual, distinguished according to their cause."[1]

The believers in Partial Responsibility thus hold that where there is a partial insanity, there is a possibility of partial responsibility. There is a

manifestation of the latter when the offence in question is not linked to the object of the delusion.

We thus find Professor B. Ball in his work, "De la Responsabilité Partielle des Aliénés", concluding that:—

"There exist in effect the insane who, if they do not possess in a fashion very complete the notion of good or bad, have at least a very precise perception of the danger to which they expose themselves, from the point of view of penal responsibility. We preserve thus the old principle of Partial Responsibility, and we are aware of recognising in it one of these practical necessities which impose themselves on all well organised societies despite the subtleties of logic."(1)

The sphere of application of the Theory of Partial Responsibility would appear to be co-extensive with that of Mental Alienation.

The Theory of Attenuated Responsibility, on the other hand we should imagine, provides for all the cases which are outwith the province of Mental Alienation. Thus any feeble mindedness not amounting to a pathological state would warrant Attenuated Responsibility without absolute suppression of Responsibility.

Again we find that Attenuated Responsibility is frequently called Limited Responsibility and although these two would appear to be synonymous, it is very unfortunate that the two expressions should exist side by side particularly when we find the epithets Partial Limited and Attenuated being used indiscriminately. It is, however, quite clear that Partial Responsibility stands alone. Its birth is capable of discernment

(1) "De la Responsabilité Partielle des Aliénés." B. Ball. Chap. V. p. 32 et seq.
historically and its associations are those of a medical category.

What is understood by the expression of "Attenuated Responsibility?" It would indeed be difficult to furnish a comprehensive definition. The adherents of this Theory would appear to be convinced that there are beings capable only of attenuated responsibility. It is declared that between absolute integrity of the intellectual faculties and absolute mental alienation there are almost an infinite number of degrees; such being so it is most certainly logical that a corresponding number of degrees must exist between complete responsibility and complete irresponsibility. It is maintained that there are in our midst people possessed of physiological and psychological stigmata, which, although not sufficient to nullify responsibility, are nevertheless sufficient to obscure their intelligence, to render their will inactive, and, according to the gravity of the tares, to minimise their responsibility. These, we would submit, are the fundamental ideas of those who admit the Theory of Attenuated Responsibility.

Professor F. Thiry of the University of Liege, in a discourse on "La Responsabilité Limitée", said:

"Among criminals, there exist normal individuals who are punished, and abnormal individuals, in other words lunatics or insane, who are not punished. There has been added - and it is the theory which I am placing before you - an intermediate class comprising those who, without being altogether normal, nevertheless cannot be considered altogether mad, people generally affected with physiological tares insufficient
"to cause the disappearance of their responsibility, but sufficient to diminish their reason. There are beyond measure eccentric, queer, half-mad people, more or less degenerate, unbalanced or 'intoxiques'; we brush shoulders with them daily in our path. Are such people responsible for their offences? No, maintains the new school, seeing that they are not normal. Are they irresponsible? No more so, seeing that they are not insane. What are they then, for it is very necessary to give a qualification to these wretched people? There has been created one expressly for them; they have been called criminals of limited responsibility. Much more, this special class having been imagined, it has been contrived to stretch it as far as possible; there have been included not only the infirm, as those I have just mentioned, but healthy individuals, suffering the consequences of a vicious education, of immoral examples or of violent passions. Settled the addition of those of the first and those of the second series, you see that the responsible delinquents and the irresponsible delinquents of old become more and more rare, and that soon one will finish by only finding besides well-defined delinquents, attenuated delinquents." (1)

It should be added that Professor Thiry is not a supporter of this doctrine, and that he protests strongly against it. What has been quoted above are merely his ideas of the purport of the Theory of Attenuated Responsibility.

Dr Paul Lefort, in his Thesis, "De la Responsabilité partielle en Droit Pénal", amplifies what we have already said. It will be observed that he speaks of Partial Responsibility, by which we must understand Attenuated or Limited Responsibility. In dealing with the causes of "Partial" responsibility he remarks:

"The Free Will, the principle of which we admit, is, as we have said............susceptible of great variations. These are pro-

(1) "La Responsabilité Limitée". F. Thiry. p. 7, et seq.
duced under the influence of a number of circumstances which we can divide into two classes. Indeed, if the infirmities of the body are able to influence greatly the morality of an individual and render his will less energetic in resisting evil, what we can call moral infirmities are not in any less degree susceptible of profoundly modifying the measure of responsibility. We have thus two species of causes of 'demi-responsibility', the moral causes and the pathological causes.

The moral causes modifying the Free Will and leading in certain cases to an attenuated responsibility are rarely studied specially.

The pathological causes of partial responsibility are very numerous and that manifests the incontestable influence of the physique on morality.

The moral causes spoken of by Dr Lefort are: Education, the influence of social environment, and the influence of the passions. The pathological causes are hardly capable of enumeration as the brain being the seat of our intelligence and at the same time the centre where all the physical impressions reunite, it is very natural that any pathological change manifesting itself in the body will immediately cause a reverberation in the brain. The doctor, as medical assessor, must accordingly wait in constant attendance in the courts to assist the judge in a sphere quite beyond his comprehension in order that justice may be dispensed.

Dr Grasset, to whom we shall have occasion to refer again shortly, in his much criticized work, "Demifous et Demiresponsables", has furnished a list of the "demi-responsibles", which, although hardly

(1) "De la responsabilité partielle en droit pénal." Paul Lefort. p. 23.
comprehensive, for the simple reason that it is a list continually growing, is of some interest as it indicates those falling within this class who are incapable of the full degree of responsibility. His list runs thus:

1° Imbeciles and those of feeble intelligence.
2° Satyrs and nymphomaniacs.
3° Monomaniacs.
4°Erotomaniacs.
5° The Jealous.
6° Dipsomaniacs.
7° Squanders and adventurers.
8° The Proud.
9° The Wicked.
10° Cleptomaniacs.
11° Those of suicidal tendencies.
12° Inebriates.
13° Lucid maniacs. (1)

Such a list can hardly be described as unimposing and perhaps there is some justification for a hasty conclusion drawn from a cursory glance at the list that there cannot be many criminals who do not possess, to some extent at least, one or other of the tares conspicuous in these classes just mentioned.

Perhaps the most fruitful source for a further exposition of the Theory of Attenuated Responsibility is the Thesis of Dr A. Neret entitled "La Responsabilité Atténuée". This is indeed an excellent work and has afforded us great assistance in our study. Professor Saleilles himself called particular attention to it and that quite rightly we would submit. Dr Neret is certainly well conversant with his subject and has spared no pains to impart his information.

He gives a history of the idea of the attenuation of

(1) "Demifous et Demiresponsables". J. Grasset. p.9.
responsibility from its announcement, and he carefully avoids confusion by distinguishing the idea of partial responsibility and its reference to monomania. We hardly think there is any call upon us to detail de novo this history which must of necessity be a duplication of the work already so capably executed by Dr Neret. A historical resume is in itself interesting but we would submit outwith the scope of our study. We have most concern with the question of Attenuated Responsibility as it exists to-day.

On the practical ground there would appear to be unanimous accord amongst those who adhere to the Theory of Attenuated Responsibility. One and all are agreed that there does exist a class of individuals who cannot justly be categorised amongst the responsible sane, or the irresponsible mad, and for whom special treatment must be provided. There does, however, exist a divergence of opinion amongst these self-same adherents as to the classification of this abnormal intermediate category. In this connection there would appear to be three subsidiary theories, each classifying differently these normals. The first theory, recognising, as it does, only two classes, the responsible sane and the irresponsible insane, is compelled to class the normals as irresponsible. Then those holding the second theory have created a class specially for these normals. According to these theorists there exist the responsible sane, the
irresponsible insane, and the 'half responsible half mad'. Finally, in the third theory there are recognised no such clear cut distinctions as those of the other two theories. The abnormal form just a link in the chain running from absolute sanity involving responsibility and absolute insanity involving irresponsibility. "Ou finit la raison? Ou commence la folie?"

We may again be allowed to avail ourselves of the copious reference to the ipsissima verba of the authorities on the subject, and this time to Dr Néret and to his work already referred to. He says:-

"We find ourselves in presence of three theories:-

The first, and the most simple, is that which divides humanity into two very distinct groups; the mad and the sane, and consequently the irresponsible and the responsible. This theory would be the most easy for the exercise of justice. One condemns when one intern. For the partisans of this theory, the attenuated responsibility is an invention of embarrassed doctors, who conceal badly under this word their ignorance; it is the conclusion of experts who do not wish to compromise themselves, in order to retain the theory or part of the idea of the unity and the indivisibility of the human person. When the ego is intact the subject has his reason and his responsibility. On the contrary, be it destroyed or even simply altered, he is insane and irresponsible. Being indivisible, the human person cannot be partially destroyed or altered; you can have neither partial madness, or attenuated responsibility." (1)

At first blush it might appear that this first subsidiary Theory is a contradiction pure and simple

(1) "La Responsabilité atténuée." A. Néret.
   p. 90 et seq.
of the parent Theory of Attenuated Responsibility, and that a discussion of this Theory might be more appropriately utilised as a potent adverse criticism of the parent Theory, but it must be kept in mind that there exists only the theoretical difference of classification. In practice there is universal accord.

Dr Legrain, chief physician of the asylum of Ville-evrard, has expressed himself strongly as an adherent to this first Theory, aptly designated as the Theory of two blocks. Before "La Société Générale des Prisons" in 1905, when the subject under discussion was "The Treatment to apply to delinquents of Limited Responsibility", Dr Legrain remarked:

"This conception of an attenuated responsibility is only - it is very necessary to say so - a useful means to disguise our ignorance: it is a formula of simple agreement, which has meanwhile taken the place of a more correct knowledge of the causes and effects, and of reconciling the exigencies of the defence of certain abnormal beings with the exigencies of the Code. When one is hesitating, or when one does not dare to risk a firm opinion, one is delighted to find a half solution, which seems to settle everything. But I have the conviction that it is a transitory thesis; it has nothing scientific about it, and it is far from giving intellectual satisfaction...."

He continues:

"......First of all, the abnormal upon whom weigh genuine tares, influences of an intrinsic order, hereditary influences, in particular; these are the most important. But, in the perpetration of their crime or their delict, they have manifested in spite of all a certain lucidity, and, in virtue even of this lucidity, one does not wish to declare them altogether irresponsible and an attenuation of punishment is asked for them."
"Very well! I say that individuals upon whom weigh such heavy tares are not in principle capable of being declared responsible nor of being individuals to whom a penalty should be applied. To punish an abnormal being is a disgraceful thing; I shall accordingly class them amongst the irresponsibles, but I shall demand for them the benefit of a particular treatment.

"In reality, what complicates the problem is that the same principle is always desired to be applied uniformly to all who are very different; always there is the desire to punish; the belief in the right to punish is always maintained, and, on account of that, in practice the notion of responsibility has been adopted in order to avoid the application of punishments which would appear scandalous to public opinion. But in fact, and in whatever case, it is always a punishment which is applied. I believe then that if a rational solution of the difficulty is desired, it is necessary to resolve it to a clear classification, and to arrange without hesitation the subjects, either amongst the responsibles or amongst the irresponsibles, and to apply to them thereafter an appropriate treatment." (1)

Again in his Treatise, "Éléments de Medicine Mentale appliqués à l'Étude du Droit", Dr Legrain relates how the question of Attenuated Responsibility arose in a discussion in Court. An advocate, M. Henri Robert, was asked by the Dean of the Faculty of Advocates, M. Barboux, if there existed a class of criminals sufficiently mad never to go to prison and sufficiently reasonable never to be placed in an asylum. To this M. Henri Robert replied that there was there an excellent definition of attenuated responsibility. Commenting on this remark by M. Robert, Dr Legrain says:

"I regret greatly to be unable to share the

"opinion of the distinguished advocate, but I consider that, if there are criminals so mad as not to go to prison, they are irresponsible, and that if they are sufficiently wise not to be in an asylum they are responsible. However, I am unable to conceive of two such mental conditions existing in the same brain."

To continue with Dr. Neret's quotation:-

"The second theory, which can be called the theory of three blocks, is maintained with much force by Professor Grasset of Montpelier. This theory admits between the two blocks formed by the irresponsibles on the one side, and the responsibles on the other, the presence of a third block corresponding to definite clinical types, and forming what Professor Grasset calls the half mad (demi-fous) and the half responsible (demi-responsable).

From our study of the matter, and that under great difficulty, for the theory of Professor Grasset is really too medical for our comprehension, it appears that this theory is based on the study of the psychic centres, and Professor Grasset maintains that, contrary to the beliefs of the adherents to the theory of two blocks that the psychic centres constitute a one and indivisible whole, and accordingly one is mentally sick or not so, the brain or the seat of the nervous apparatus has no such unity. It is a complex machine and it is quite possible to conceive of a lesion of one part of the machine and accordingly a diminution of reason and a corresponding attenuation of responsibility.

Professor Grasset has been indeed a prolific contributor to the literature on the subject of the three block theory due to a great extent to the

(1) "Éléments de médecine mentale appliquées à l'étude du droit." Dr. Legrain. p. 446.
conflict between Professor Gilbert Ballet and himself. At present we feel disposed to leave Dr. Neret and to turn to Professor Grasset to observe from himself more clearly what his actual beliefs are. In a contribution to the "Revue des Deux Mondes" on 1st January 1906 entitled "Demi-Fous et Demi-Responsables" he remarks, after discussing the rival theories, namely the Theory of two blocks and the Theory of one block (of which we have still to speak),

"... it can be concluded:--
1st That it is scientifically impossible to "group all men into a single group of beings, all more or less responsible.
2nd That it is scientifically impossible to "divide all men into two blocks, the one "containing the mad or irresponsible, the other the sane or responsible.
3rd That it is scientific to admit three distinct and separate groups: the responsible "sane, the irresponsible mad and the half "mad half responsible."

and he gives the medical definition of "demi-fous", which we have dared to translate as half-mad, as:-

".... the half-mad are subjects which one can "neither without an equal error and an equal in- "justice, class amongst the irresponsible mad or "amongst the psychically normal and responsible."(1)

Again in 1907 in a work with the same title "Demifous et Demiresponsables" (to which we have already had occasion to refer) he defends the "Half-mad" who to him have so far failed to secure in society their rightful place, namely that between the recognized mad and the sane. Somewhat displeased by the

by the severity of certain of the critics of his Theory
Grasset remarks:–

"This grave notion of demi-responsibility
"and of attenuated responsibility, with which
"in these days the intellectuals are so much
"preoccupied ought not to be considered as a
"formula of cowardice and of ignorance inven-
ted by embarrassed minds or those desirous of
"not compromising themselves. It is one of the
"most happy and the most scientific manifes-
tations of a tendency very highly philosophical
"which affirms itself more and more in the pre-
"occupations of contemporary criminologists."(1)

Again in 1908 another work of Professor
Grasset appeared, namely, "La Responsabilité des
Criminels", in which he amplifies the category of
"demi-fous". He concludes:–

"1st. Between the group of responsible sane
"and the mass of irresponsible mad there is the
"group of 'half-mad' of attenuated responsibility.

"2nd. These 'half-mad' have precise clinical
"characters which permit of saying that their
"existence is demonstrated scientifically.

"3rd. The 'half-mad' can be, and often are, dan-
gerous to society, which has the duty and the
"right to protect itself against their misdeeds...

"4th. The Doctors alone are able to decide the
"'half-madness' of a subject.

"5th. When a 'half-mad' person has committed a
"delict or a crime, one ought to both punish him
"and treat him by force.

"6th. It is necessary and right that 'half-
madness' ought to be officially introduced into
"the French Penal Code.

"These are the general conclusions of my 'half-
mad with the further following two:–

"1st. These 'half-mad' impose themselves always
"on the attention of the public at large and to
"extramedical observation; they also have in-
vaded the theatre and literature of all coun-
tries.

(1) "Demi-fous et Demi-responsables". J. Grasset.
p. 8.
"2nd. These 'half-mad' can have a high social value, as the numerous superior intellects who have shewn the stigmata of half-madness have borne witness."(1)

Sufficient has been said to indicate that Professor Grasset is a believer in the Theory of Three Blocks, and at the same time is an adherent to the greater Theory of Attenuated Responsibility.

We must again turn to Dr Néret and continue with the quotation from his work.

"We arrive now to the third theory, that of the single block, which appears to us the most scientific and the best established, so long as the hypotheses of Dr Grasset are not strictly established.

"For this Theory, humanity as a whole forms only a single group, and there is a continued series from the most responsible to the most irresponsible.

"It is impossible to establish a line of absolute demarcation between the normal physiological phenomena and the pathological troubles. The state of health and the state of illness extend themselves in a continuous fashion, and it is sometimes impossible to settle the frontier which separates them. Outside of affections clearly specific, the very nature of things determines that frequently health and illness offer points of contact. This continuity between the normal physiological and the pathological state appears still more evident in the psychic state.

"From the dream to the delusion there is only a difference of degree. From the rational to the impassioned, from the crazy to the demented, there are degrees of transition, and it is impossible to say where madness commences. Man answering to the ideal type of anatomy and normal physiology of perfect mentality does not probably exist. On the contrary, all of us present some tares, some anomalies, some feeble points."

Dr Raoul Graulle in his work, "Joyeux et Responsabilité", when speaking of attenuated respons-
sibility, makes reference to the Theory of the single block, and in this connection remarks that according to this Theory it is not necessary to divide men into responsible and irresponsible. There only exists a series of people more or less responsible. He quotes Albert Bayel as having said:-

"Absolute Free Will does not exist. It is as puerile to represent an individual, whoever he should be, responsible for his acts, as to blame the puny and to compliment the vigorous tree." (1)

Dr Grasset, who, as has been already indicated, is a supporter of the Theory of Three Blocks, has criticised the Theory of the Single Block. He has said in his "Demi-fous et Demi-responsables":-

"The frontiers of sickness are sometimes difficult to determine on account of our ignorance; but it is necessary to continue to distinguish and to consider separately the physiological phenomena and the pathological phenomena.

"In supposing that the day should come to suppress Moral Responsibility, merit and demerit, virtue and vice...... the question of social responsibility would survive before law and society; this responsibility would vary according to the psychic make of each, and for this responsibility, as for the psychic make up, it is scientifically impossible to group all men into a single mass".

Independently of what subsidiary Theory the various adherents of the Attenuated Responsibility hold it may be perhaps quite permissible to conclude that one and all are agreed that in the consideration of Responsibility the Nervous System and its seat, the

(1) "Joyeux et Responsabilité". Dr Raoul Graulle. p. 55.
Brain, are incapable of evasion. He alone is responsible who is psychically normal or sound. The state of the psychic neurones with reference to this psychic normality is the base upon which attenuated responsibility is established. According to the psychic state alone can the gravity of any crime be considered. It is maintained that between the absolutely healthy nervous system - sanity - and the absolutely diseased nervous system - insanity - there exists the abnormal nervous system. This abnormality itself is susceptible of degrees on account of the fact that the psycho-pathological stigmata may be of a great or less magnitude and may be of an acute or chronic nature.

Clearly such a Theory, involving as it does an immense fund of modern psychiatric and psychological knowledge, is one which can hardly be expected to emanate from or be strongly sustained by juridical thinkers. It is almost wholly of the medical province and calls for an assistance in the judicature from that source which has hitherto, in many countries at least, been greatly in disrepute on account of the vagaries of its opinion on the important matter of responsibility of the Insane. We refer to the Medical Profession. It is absolutely clear that the services of doctors as expert witnesses to enlighten judges on the psychic state and mental worth of the accused would be indispensable if the Theory of
Attenuated Responsibility were universally accepted by the legislature, and, on account of the undoubtedly important functions which would be assigned to these witnesses, the Theory has been submitted to one line of criticism at least, although personally we estimate it of little weight if directed against the leaders in the science of Psychiatry.

The whole question of Attenuated Responsibility is one of essential practical importance to the adherents of the Neo-Classical School. Apart from all problems of Philosophy, Metaphysics, and Determinism, there remains awaiting solution a question of prime practical importance, videlicet:—What is to be done with those of attenuated responsibility? Having admitted that there do exist individuals who are incapable of full responsibility and yet who cannot be considered as irresponsible, the fact remains that many of these individuals are frequently as dangerous as, and in some cases more dangerous to society than, the responsible sane and the irresponsible insane for whom there exist institutions. Society must of necessity, and that justly, protect itself against the socially dangerous half-mad. But how can she do so? The Prison for the Sane Responsible and the Mental Hospital for the Insane Irresponsible are the only institutions available in most civilised countries. To the Neo-Classicists it would appear scandalous to relegate these unfor-
tunates to either of these, so they have conceived of the "Special Asylum" - la casa di custodia - where, when judged necessary the "half-mad" can be placed until cure if that should prove possible, and indefinitely if impossible. The Judge or Jury are alone competent to decide on the question of "Half-madness" and the consequent Attenuated Responsibility, and that with the aid of a medical expert witness.
Before proceeding to a criticism of the Theory in hand we feel disposed to deal with a Theory deduced which has been designated "The Eclectic Theory". We feel justified in treating of it here for one reason, that it bears to be Eclectic, and of course we have just been enunciating the principles of an Eclectic School, and, moreover, the author has been generally considered as a supporter of Attenuated Responsibility, although it must be admitted that he would not consider mitigation of punishment on that account.

The Eclectic Theory in question owes its creation to Professor Prins of Bruxelles. According to him Free Will involves an act of faith as it is incapable of scientific proof. He himself is prepared to exercise his faith for he says:-

"Without Liberty humanity would no longer have moral significance; it is lost in a kind of vague unconsciousness where good and bad are confounded."

But he does not extend his faith to a belief in absolute or abstract Liberty. For him Liberty is a notion essentially relative and real. Keeping in view this idea of the relativity of Liberty, Professor Prins cannot logically admit ideal responsibility of man fully free, but he is compelled to
recognize only a contingent responsibility in view of the imperfect state of his liberty. We thus observe the modification of the generally accepted classical ideas of Liberty. Professor Prins realises that Determinism demands likewise an act of faith, for, like Liberty, Determinism is incapable of scientific establishment. In a work of great merit from which our first quotation was extracted, "Science pénale et Droit positif", we observe the cogent reasoning which enables the learned Professor to arrive at this conclusion.

"The Will depends on the physical organisation, on the social environment, on heredity, but each of these influences becomes decomposed into an infinite number of factors. The physical organism resolves itself in a final analysis into milliards of cellules and nervous fibres acting and reacting the one against the other; the social environment is a complex entanglement of physical and moral factors which penetrate each other and blend with each other without the role of each of them being capable of being clearly defined; the biological law of heredity makes itself felt to the tenth generation, which represents for each individual at least two thousand different ancestral influences, which are accumulated, or are neutralised, at the will of the combination of atoms. So that the principle of causality is diluted, is enfeebled, is lost in the infinite variety of the causes, and goes to join in the unknown the principle of liberty." (1)

We shall see later that Professor Vidal shares very much the same opinion, although he, unlike Professor Prins, is prepared to prefer faith in Free Will. Professor Prins rather indicates his reluc-

(1) "Science pénale et Droit positif". A. Prins. p. 158.
tance to take sides, and accordingly we find the Eclectic Theory evolved.

In an early work, "Criminalité et Répression", we observe clearly his eclectic views when he says:

"Every man, obscure or famous, has in him an element of liberty and an element of necessity. From liberty is derived his own individuality, that mysterious something which constitutes his personality. He derives from tradition the impression which he receives from his family, from his environment, from his race and from his epoch.

"We ought to conclude that liberty in this domain is nothing absolute or abstract. It is a notion essentially relative and real.

"The question, moreover, should be recognised only to influence the system and the nature of punishments. With regard to the law of social defence, it remains intact, it is proportional to the danger occasioned, and does not depend on the degree of responsibility recognised in the guilty person."

In our opinion "Social Defence" is for Professor Prins a conception of magnitude far transcending his Eclectic Theory.

Professor Prins has been described as a Biosocialist, a designation which he clearly merits from the trend of the quotations we have just made, and it is not surprising that we find him attaching himself to the Utilitarian Theory. Metaphysical controversy does not call for the settlement of a Judge. The philosophical problem of Moral Responsibility is again not his concern. His mission is one of social defence. He is called upon to seek the most useful measure which must be taken to ensure the safety of...

(1) "Criminalité et Répression." A. Prins. p. 34.
society against its members who are anti-socially inclined.

In another work, "La Défense Sociale et les Transformations du Droit Pénal", in this connection we find him saying:

"Penal Law has no more an absolute character than Civil, Commercial, or Rural Law. It has not as its essential end the triumph of Moral Law. Happily it is so, for it does not possess the means of realising such a task; if it attempted it, it would only shew its lack of power and would only provoke deceptions.

"Penal Law has a relative end. It sustains in the affairs amongst men a relative order. It guarantees in the measure of possibility, the person, the life, the patrimony, the honour of citizens...........

"It is necessary to combat all manifestations of criminality by measures of juridical or social defence, and the high mission of the State in this domain is to reconcile the possible maximum of social security with the possible minimum of individual sufferance.

.........To sum up, the principle of social defence signifies a very simple fact. We are convinced that, as in the same manner as the physical life of men is impossible without the stability of the laws of nature, their social life is impossible without social laws. It is thus necessary in order to assure this stability that the power of the State with its improved apparatus, its machinery, and its multiple organs, and its regular procedure exist.

"The modern State has for its mission our protection first of all against all injuries, be they civil or criminal, whether they be due to civil or criminal act, to civil or criminal mistake, or even to natural forces, independent of the existence of man; it protects us against those who cause the injuries, that even by agents having nothing with which to reproach themselves, (for example the possessor in good faith of my goods........)

.........And as it is nevertheless indispensable..."
"to obedience and to the stability of society
that juridical trouble should be repaired,
we are forced to this bold solution, contrary
"to traditions of Roman Law and of the Code
"Napoleon: no longer should the restoration af­
"forded by the Law be made to depend on proof of
"fault (faute)........(1)

This last solution mentioned by Professor
Prins is quite a step further than anything already
mentioned. "La Responsabilité sans Faute" was
dealt with by Professor Henri Rolin of Bruxelles,
and, although his study deals with delict and quasi
delict, his conclusions are interesting and agree
with those of Professor Prins. It would appear that
both these professors are agreed that the factor of
greatest importance is reparation to the victim and
that should be made independently of proof of fault
on the part of the offender. Clearly Professor
Prins is a supporter of the Social Defence Theory,
but to some extent he proceeds rather farther than
any of the other thinkers already referred to. It
cannot be said that on the whole the supporters of
the Social Defence Theory are so imbued with the im­
portance of the social rights of individual members
of society that their right of defence entails im­
mediate reparation to the offended members without
proof of "faute". It strikes us that the general
welfare of society is nearest their heart, although
it must not be thought that on account of this there
is a general disregard of the individual. If such
were the case we could expect little consideration

(1) "La Défense Sociale et les Transformations du
Droit Pénal. A. Prins. p. 39 et seq.
for the offenders, but this is not so. It is one of the gravest criticisms against the Italian School, that the Criminal receives too much attention.

Professor Prins, in spite of his apparently Utilitarian views, is perhaps correctly classified as a Neo-Classicist, for it must be remembered that the Eclectic School strives amongst its other aims to strengthen social protection, and he cannot on account of his social views be excluded therefrom. His Eclectic Theory saves him from a charge of Positivism, and we feel we have rightly included a discussion of his views within this Chapter.
3. CRITICISM OF THE NEO–CLASSICAL

THEORY OF ATTENUATED RESPONSIBILITY.

We have already alluded to the fact that, should the Theory under discussion have universal adoption by the Legislatures, the importance accorded to the Medical Expert Witness in the realm of Crime would be one far transcending even that of the Judiciary. It is undoubtedly the case that he alone would be capable of appreciating the integrity or the non-integrity of the psychic constitution, and on that account, in our opinion, he would be alone capable of appreciating the Responsibility attending the commission of any offence.

Let it be said that we are personally not at all ill-disposed to the constitution of a recognised impartial authoritative body of medical experts. The labours of such a body if composed of the leaders in the realms of Forensic Medicine, Psychiatry, and Psychology, would certainly, we believe, be productive of greater lasting benefit to the community in general and to the science of Criminology in particular than that which results at present from the conflicting opinions voiced by Medical Expert Witnesses, in some cases obviously biased and in others totally unsupported by the very necessary experience indis-
pensable to those being of any inherent worth.

Professor Grasset undoubtedly advocates the paramount position for the Medical Expert Witness, but his views are not generally accepted. The medical fraternity itself, as a whole, is not agreed that the acquisition of that position coveted by so many of its members would be at all desirable.

There are not wanting Medical Expert Witnesses who would be unprepared to accept an office involving the expression of opinion as to the responsibility or irresponsibility of an accused. They would confine themselves solely to their medical sphere and would leave to the Judicature the answer to the question: Is the accused responsible? - a question, to their minds, outwith their province, involving controversies of a metaphysical and psychological nature.

Dr Ballet would appear to share these latter views, and much arguing has resulted from the conflict between him and Professor Grasset on this matter.

Personally, we are disinclined to agree that a Medical Expert Witness, in voicing an opinion as to whether a malefactor acted within or without his psychic neuroses, would involve himself in questions relative to the liberty of the Will or acts of faith. Surely it is conceivable that if the normality of the psychic neurones is the basis upon which Criminal Responsibility is to be erected the metaphysical con-
ception of Free Will disappears. Without doubt, the fear, that in answering such a question as to whether or not a delinquent is responsible involves a conflict with scientific determinist principles, has compelled certain medical men to adopt an attitude akin to that of Dr Ballet.

We would submit that the conception of 'Med-
as conceived by Professor Grasset ical Criminal Responsibility' is one which is not altogether unjustifiable, although perhaps he could have made a wiser choice in designating his thesis. Would accountability, involving as it does no metaphysical tenets, not have been superior?

We must remark that this Theory adduced by the Neo-Classical School is greatly preferable to the 'Attenuating Circumstances' which are provided for in our own Penal Law. Undoubtedly the Abnormal or Half-mad do, when convicted, receive attenuation of punishment in virtue of the fact that their 'Liberty' has been diminished on account of certain psychological tares. What does this attenuation of punishment mean? Simply an elimination from society for a shorter period of time than would have been the case had the attenuating circumstances been non-existent; in other words, society will all the sooner or be in danger once more. The Theory of Attenuated Responsibility, on the other hand, would avoid this reduction of punishment, consequent upon the reduction of responsibility, and would substitute therefor
the transformation of punishment and the Special Asylum — *l'aile spécial* — comes to the fore. The abnormal beings considered hardly mad enough to go to an ordinary asylum, and insufficiently responsible to go to prison, would be confined in this prison asylum, where the treatment would be at the same time punitive and curative, and on account of the fact that the offender has been eliminated from society indefinitely, to us, appears to meet the case of the abnormal much better than an attenuation of punishment and a consequent acceleration of social danger. We do, however, assuredly feel that whenever there is any question of Abnormality and the term "half-madness" can be justifiably used the conception of responsibility from the penal point of view disappears, and, in our opinion, there is no necessity for a "special asylum". The "ordinary asylum", which exists for the "whole-mad", is the place of internment. There is, to our mind, nothing akin to injustice in treating the "half-mad, half-responsible" as simply mentally alienated. There would appear to be less stigma attached to the designation of 'insane' than in the designation 'half-mad criminal', for in the former there can be no imputation of crime in the penal sense. Moreover, where does the frontier exist between responsibility and irresponsibility when you are faced with the intermediate states? There cannot, in our mind, be any precise indication when the medium filum has been reached.
Having sought in our previous Chapter to distinguish Partial Responsibility and Attenuated Responsibility, we feel there is some call upon us to voice a word or two of criticism regarding the former, perhaps more so on account of the fact that we are unable to agree with our legal confreres. We feel convinced that Modern Psychiatry has amply shewn that the convictions of the Psychiatrist of the old school are erroneous. It is false to believe that a man can be more or less mad or sane and insane at the same time; insane with regard to certain sentiments or ideas and sane with regard to others. It is generally admitted that when an individual is insane he is so to the finger tips, and that responsibility exists or does not exist. A hereditary or acquired cerebral malady having become manifest, from the moment of its appearance, there exists a lesion of the mind as a whole or a general functional anomaly of that organ, and no one can affirm that the individual of incidence is capable of responsibility of any degree whatever.

We maintain strongly with the alienists that it is impossible to conceive of the mind existing in separate departments each independent of the other, and the possibility of a lesion of one having no effect on the other. Man can only be considered as a unity. Every function, physical or psychic, has ramifications which, perhaps, on account of in-
sufficiently advanced scientific knowledge, cannot be appreciated in full, but on that account cannot be ignored.

The Theory of Partial Responsibility is still tenaciously maintained by the Jurists of Modern Classical Penal Law Systems including our own, on what grounds we cannot say for they are certainly unable scientifically to justify their position. When they admit that there is a cerebral malady existent sufficient to abolish Responsibility in one sphere, what is their proof that there can still remain any responsibility? We have failed to find it. We have still to observe satisfactory proof adduced that a mind can be at the same time insane in some of its departments and sane in others, and by virtue of the latter act normally as if the whole mind were sane.

Incidental to the question of Attenuated Responsibility an enormous amount of discussion has ensued relative to the 'Abnormals' or 'Half-mad'. The Study of Abnormal Psychology has led to discoveries which would appear to indicate that the exemptions from Responsibility accorded at present by Modern Penal Law Systems are not sufficiently comprehensive. There exist psycho-pathological states which equally warrant these exemptions. Many individuals are at present unjustly held fully responsible for their acts. There exist mental states
which are profoundly defective and disordered, produced by pathological lesions of the brain. For these there can only be Attenuated Responsibility if Responsibility exists at all. A further glance at Professor Grasset's list of "Demi-fous" will indicate the type of person to whom this Attenuated Responsibility would be held to apply.

There undoubtedly do exist human beings capable of extraordinary conduct, and in many cases of a criminal nature, which have a connection with certain sexual psycho-pathological conditions. These conditions may have congenital origin. Science has shewn that many sexual Abnormalities, Perversions and Inversions have their origin in pre-natal state, and in neuropathic diathesis. On the other hand, such conditions may be traced to some mental disorder resulting from the physiological changes of life. And yet again such conduct may be due to acquired degenerate habits. We have taken this class of Abnormals as an instance, in order that we may criticise the Theory in hand.

Having admitted such psychically abnormal states, are we bound to agree that they warrant a verdict of Irresponsibility in each case where the offender charged can be diagnosed as a psycho-path? We would answer emphatically in the negative. In spite of a not altogether unjustifiable inference to the contrary, there is no proof available that the
sexual impulse in the psycho-path is generally greater than in the normal. In that event, is it altogether illogical to conclude that the impulse in the former is as capable of resistance as it is in the latter? We think not. Again, although certain psychic and physical stigmata are alleged to be capable of observation in the true psycho-path, there exists the great difficulty of determining aright whether the offender is congenitally or habitually abnormal, that is to say, whether there is existent an anomaly of mental development or an acquired vice. But the Theory in question does not appear to claim absolute Irresponsibility, but only Attenuated Responsibility for such unfortunate beings. We are convinced that the difficulty is not thereby diminished. We maintain that it is well-nigh impossible to determine what degree of irresponsibility is warranted by virtue of the psycho-pathological tare present. The difficulty is, of course, accentuated by the admission of Partial Free Will on the one hand, and psycho-pathological - determined - conditions on the other. A reconciliation appears impossible between these two factors so obviously opposed. We cannot agree that scientific determinism is at all compatible with a doctrine of free will, no matter how rational the latter may be made to appear.

The Problem of Penal Responsibility is not solved by the Theory of "Half-mad, half-responsible". To halve the problem and tender a half solution can
We are convinced that the only satisfactory solution is to abandon absolutely the idea of Free Will and Human Liberty as a base of our Penal Law and replace it by Social Accountability of which we have spoken already. By abandoning Free Will in this connection we do not deny or admit it. There is no call for either. Again there is no call for admission or denial of Determinism when Free Will has been discarded as the basis. Man is accountable because he lives in society. His acts if dangerous to society call for reaction, by which society endeavours to avoid in the future a recurrence of such acts. What form such reaction shall take does not call for our discussion here, but let it be said the efforts of the Criminal Anthropologists, Psychologists and Psychiatrists will be of much use in the determination of the line of treatment to be administered to the offender that society's aim of immunity from Anti-Social conduct should be attained. Apart from scientific reaction against the anti-socially minded, in order that Crime should cease, society must attempt to eradicate the sources of crime attributable to its arrangements and institutions. There is, without doubt, great justification for Ferri's law of Criminal Saturation. No effort sustained against offenders alone will within any appreciable extent attain a solution of the whole Criminal Question, while amongst other factors economic conditions and al-
(96).

coholism exist as they do at present.
VI THEORIES OF CRIMINAL RESPONSIBILITY BASED
ON A PRINCIPLE OTHER THAN FREE WILL.

1. Social Similarity and Individual Identity.

We have seen so far that the Classical School holds to the postulate of Free Will as the fundamental basis of Criminal Responsibility, whereas for the Italian or Positive School Free Will is an illusion and logically without it Criminal Responsibility is non-existent. A Criminal can never be held responsible for an act determined by causes over which he has no control. The term, "Responsibility", if preserved in the vocabulary of the Determinist can retain none of its classical significance. The Neo-Classical School upholds, to a certain extent, the tenets of the Classical School, particularly those of Free Will and its corollary, Criminal Responsibility, while, at the same time, it accepts these in the light of modern criminological knowledge.

The Theories of Criminal Responsibility which we have submitted do not, however, exhaust the number of those actually created.

Certain Philosophical, Medical, and Legal thinkers have attempted to adduce Theories of Criminal Responsibility having some criterion other than Free Will or Moral Freedom. Some have been convinced
of the illusory nature of Free Will, and others, although going so far as to admit its existence, have been impressed with the undesirability of accepting it as the base of Criminal Responsibility, one and all have discarded, or attempted to discard, Free Will in its Classical sense, and have aimed at the retention of conception of Responsibility, providing what in their opinion is a more solid and less controversial basis. Among the bases tendered we find the most striking to be that of Personal Identity and Social Similarity.

The Theory of Responsibility, having as its foundation Personal Identity and Social Similarity, is that which we shall endeavour first of all to elucidate and submit to criticism. It is the creation of the late Professor Gabriel Tarde, a French Judge of distinguished intellect, a subtle metaphysician and an ardent sociologist. His Theory is generally admitted to be the most original of all Theories created with a view to saving Responsibility. For Tarde, Moral Responsibility remains independent of the belief in Free Will - a conception which he asserts is useless. Free Will is considered by him as a rejected hypothesis and he is clearly of the opinion that it is possible to separate Moral Responsibility from Free Will - in other words, to separate the effect from the cause. The association of the idea of Culpability with that of Liberty involves an act of spiritualistic faith such as cannot be warranted in the sphere
of Criminal Law. Convinced as he was that the conception of moral Liberty was of recent date - born in his opinion in the middle ages when the wranglings anent Predestination were prevalent - and that the Legislature is not concerned with the idea of Free Will when punishment is being awarded, and, furthermore, persuaded as he was that responsibility was capable of divers degrees and that it is impossible to reconcile such with the idea of Free Will, which if existent ought to exist absolutely, it is little wonder that he concluded that Free Will could be, and in fact was, separate from Moral and Penal Responsibility.

Tarde was undoubtedly a determinist, and it is somewhat anomalous that he should attempt to retain a conception - Responsibility - so radically opposed to determinist thought. This, without doubt, he fully appreciated. He recognised the progress made by scientific determinism, and as a determinist was, of course, bound to assert that responsibility based on Free Will visualised as a reality was ruined. Some thinkers had maintained that Free Will as an ideal to attain was a reliable basis. This, too, he could not admit. The Transcendental conception of Freedom was one which he could not accept, the Ideal of Liberty as conceived by Professor Fouillée yet another. In spite of his
determinist views he nevertheless refused to admit that responsibility founded solely on social utility was tenable. He recognised that responsibility, understood in this latter sense, contained nothing of the essentials of the classical idea of responsibility. For sociological reasons he was persuaded of the absolute necessity of retaining the conception of Responsibility as hitherto understood, but independent of Free Will.

In setting forth the Theory of Social Similarity and Individual Identity, he claims for it, the rational foundation of the idea of responsibility, which is plainly visible to all humanity, which enlightens every man coming into the Social World, and which is no superstition in process of receding before the advance of civilization, but an exact conception, spreading as civilization increases and expands, such claims cannot be described as unambitious.

Professor M. R. Garraud, in his Report already mentioned, remarks:-

"Finally, some have realised the necessity of re-establishing the notion of personality as a base of responsibility. It is worth while noting in this connection the interesting endeavours either of Tarde or of Von Liszt. The former finds the foundation of responsibility in the combination of two distinct notions, individual identity and social similarity. The former consists in the permanency of the person: if a madman is not responsible, it is because he does not possess this identity, because he is not himself. (Alienated). The latter consists in a certain basis of necessary resemblance between the individuals in order that they should feel responsible towards one
another: in other words, it is necessary that
the author and the victim should be more or
less social compatriots, that they should pre-

sent a sufficient number of resemblances of
social origin.............(1)

Monsieur Tarde, before the 2nd International
Congress of Criminal Anthropology held at Paris in
1889, in dealing with the old and new foundations of
moral responsibility discussed his Theory. His
preliminary remarks are of considerable interest, in-
dicating, as they do, the underlying impetus within
him to have a fresh basis. He is reported as having
said:

"If Moral Responsibility supposes necessar-
ily Free Will, as that is admitted without ex-
amination even by the majority of learned de-
tuminists, it is certain that it has had its
day. But the belief in determinism............
which nothing justifies theoretically, and
which, practically, leads to the most scandal-
ous acquitments, to the most dangerous indul-
gence of the jury, of the tribunals and of
the public opinion, calls for abandonment. For
one thing, it is impossible to found much longer
the notion of culpability on the hypothesis,
that a man, at the moment when he committed a
crime under given circumstances internally or
externally determined could have acted other-
wise. For another thing, it is not less im-
possible, and it would be much more deplorable,
still, to expel from our consciences the idea of
culpability, and, positive though one may be,
it is necessary to believe a man guilty in or-
ner to judge him punishable.

"What can one do? The problem is diffi-
cult and urgent. It has received multiple
solutions.

"But at the root of all these conceptions,
the same convictions are found, the same belief in
the impossibility of founding Morality without
Free Will.............But This pretended impos-

(1) "De la Notion de la Responsabilité Morale et
"Impossibility is by no means proved." (1)

Monsieur Tarde evinced the opinion that culpability was not only an act contrary to utility, but to the general will. It supposes essentially two things, Individual Identity and Social Similarity, two notions very positive, which explain moral merit and demerit.

There can be little doubt that M. Tarde's object in introducing his Theory was to rid the Penal Law of anything pertaining to a metaphysical basis.

In his "Penal Philosophy", Tarde says:

"............The best means, as we look at it, by which to combat or to acquire control over the various theories hereinbefore set forth, is to oppose to them some theory which has in it nothing scholastic, but which evolves itself and ought to formulate itself, if one closely scrutinizes what men in fact have always meant when they say that in their opinion one of themselves is responsible, either civilly or criminally. Have they thought that he was responsible for some action because in carrying it out he, through his voluntary decision, through his freedom of choice, made necessary a mere possibility which, previous to this decision born 'ex nihilo', would have had not one of the characteristics of a necessity? Never has human common sense entered into such subtleties. From all time a being has been adjudged to be responsible for an act when it was thought that he and no one else was the author, the willing and conscious author, be it understood, of this very act. The problem solved by means of this judgment is one dealing with causality and identity, and not with freedom. Just as soon as Free Will shall be a truth and not a hypothesis, the fact alone that its existence is denied almost universally by the learned men of our time and an ever increasing proportion of educated people, should make us feel the urgency of seeking elsewhere for the support of responsibility. In fact, when consulted by justice on the point of whether an accused is responsible in the classical interpretation of the word, the medical legal expert ought always to reply in

"the negative; and from this arise acquittals as scandalous as they are logical. Our utilitarians have indeed felt this danger and they have endeavoured to avert it. But they have not been successful in doing so. By reason of the obligation which they believe to be imposed upon them after having denied the existence of Free Will, of defining responsibility as being a thing apart from any idea of morality, that is to say, of decapitating and destroying it, they appear to justify this pretension, so often advanced by the partisans of Free Will, that, their principle having been destroyed, morality falls to the ground...."

Tarde, by historical study, came to the conclusion that throughout the ages Identity has been a factor of greater importance than Liberty. The latter he was prepared to admit as a latent force, but he recognised that there was a most incontestable practical advantage in making Responsibility rest upon the former, which appeared to him a patent fact. When the family was held responsible and the individual was of little or no concern, and later, when the individual himself came to the fore, and the present day, when the individual is receding to the background, in favour of the psychic functions there has always existed, and does exist, the fundamental principle that in attributing Responsibility there must be no mistaken identity. It is thus not surprising that we find, as one of the ideas of his Thesis, Individual Identity. To this, however, he felt compelled to add Social Similarity. The study of man living in society was for him incapable of dis-

(1) "Penal Philosophy." Gabriel Tarde. P. 84/85.
association from any search into the problem of Responsibility. The latter idea, however, is secondary and accessory if it be compared with Personal Identity. As Tarde himself says:

"The latter (Personal Identity) is the foundation which is permanent, and ought to become the more and more conscious foundation of Moral Responsibility, whereas Social Similarity should be demanded less and less, and should end by not being demanded at all, at least among the superior civilised beings...." (1)

To judge a culprit responsible these two conditions must exist, that is to say:—that there must exist a certain degree of Social Similarity between the culprit and the victim, the cause of the crime must be himself, and furthermore the culprit must remain or appear to remain identical with himself.

In speaking of Social Similarity, he says that it has nothing to do with physical similarities, not even with every kind of physiological similarity. There is no necessity that individuals, in order to feel responsible to one another, should resemble one another in features of the face, the conformation or the capacity of the skull, the colouring, or the physical abilities. Should such exist so much the better. There appears as little necessity that they should have the same tastes. Tarde seems to be in doubt as to whether Moral Sense is an attribute necessary in order that the required Social Similarity

(1) "Penal Philosophy". Gabriel Tarde. P. 99. (Footnote by him).
should be obtained. The opinions of blame or of approbation brought to bear on the acts of another, be they implied or verbal, are of the greatest importance, and their similarity is especially requisite. Conformity, as far as judgments of blame and of praise are concerned, is demanded. There also exists the necessity that the perpetrator of the act which is blamed be judged to belong to the same society as his judges, and that he recognizes willingly or unwillingly this profound community. This territoriality is in constant change on account of the progress of assimilation. Tarde gives an example serving as a means of estimating, of approximately setting a date to, the progress of international assimilation in "Extradition Treaties". When one of these has been concluded between two peoples, it proves that each one of them begins to feel affected by the crimes committed amongst the other, that the citizen of the neighbouring people has in its eyes ceased to be a being apart, against whom everything is permissible.

Besides this, Social Similarity, which might be said to consist in this, that the author of an act shall be compelled, by means of his habits of judging, inspired by someone else, and by means of his social intercourse with his victim, to judge of his act as blameworthy, there must exist, and that above all, Individual Identity. The culprit must recognise
Tarde says:—

"Identity is the permanence of the person, "is the personality looked at from the point of "view of its duration."

Obviously it is with the Psychological Individual that Tarde deals. The Psychological Individual he defines:—

"The Psychological individual, the 'myself', "is an assemblage and a connection of states of "consciousness or of subconsciousness, that is, "of information and impulses, of external informa"tion called sensations, or internal called "'cnenesthesia' by the new psychologists, feelings "of the body, of external impulses called tastes, "or internal ones called appetites. And if "these states are simultaneous they have as a "characteristic a concurrence towards a same "theoretical or practical action, and their logi"cal agreement in entering into, for example, "the general system of opinions as regards loca"tion, called space, or of opinion as regards "the naming of things, called language, and to "agree in a teleological manner in serving for "the play of these complicated mechanisms called "instincts or habits. If they are successive, "they have as a characteristic the indefinite, "and, for the most part, almost identical repeti"tion of themselves, either in the form of "images and memories, or in the form of that sort "of a soundless murmuring in the very depths of "which is the continuous base of consciousness; "upon which the diversity of outside sights soon "becoming monotonous casts light modulations, "phrases themselves reverberated in a thousand "echoes of memories, and developed in a sort of "long discourse; the whole marked with the "stamp of a special physiognomy which the great"est changes in feature scarcely alter. Howev"er, I do not say that 'myself' consists in "nothing more than this: but it is certain it "does consist in this................(1)

M. Tarde saw clearly that the "my-self" was capable of change, and he recognised fully that one "my-self" must not be mistaken for another. He foun—

(1) "Penal Philosophy". Gabriel Tarde. P. 116/117.
ded his criterion of Responsibility on the individual identity persisting in the interval between the act and the accusation. If the identity rests constant during that period then the culprit is responsible. Tarde was particularly struck by the example of alienation where he saw that man in a state of alienation is not himself. He concluded from this that man alienated lost his "myself" and his illness substituted another.

Tarde, too, was considerably impressed with what might be called the psychological phenomenon of internal duality of personality as so remarkably evidenced by Jean-Jacques Rousseau, and undoubtedly he drew from instances similar to that famous one at least some of the conclusions which we have just attempted to indicate.

It certainly appears to us that the ideas of Individual Identity and Social Similarity, with which Tarde would seek to replace Free Will and so rid the penal law of a metaphysical basis, are as metaphysical as Free Will. Such a Theory as has been created by M. Tarde clearly calls the Judicature to act in a sphere outwith its comprehension. We are assuredly of opinion that it is the concern of Judge only to deal with objective personality, or, in other words, the identification of the culprit, and it is not, and could hardly possibly be, his duty to deal with subjective personality, as would be the case if he were
called upon to decide on the identity of an offender's psychic personality.

Of course, to such a Theory there has at once been voiced the criticism that all men are responsible to society, the criminals as well as the honest. There is no question of merit or demerit; factors which Tarde would assuredly retain.

The Determinists would, of course, be expected to take up such an attitude, and for them Tarde's Theory is insufficient and false.

Let us attempt to deal with the less important of his two conditions - Social Similarity. We must confess that, so far as we have been able to appreciate this factor, it appears to us to be exceedingly vague. Personally, we cannot perceive any clear cut limits to indicate where Similarity commences and Dissimilarity ends. We should certainly hesitate to discard the criterion Free Will, involving as it does an act of faith, in favour of a conception so vague as Social Similarity. M. Tarde realised fully the incongruous situations which might arise as a result of an insistence on this condition of Social Similarity. It will be recollected that to be socially similar, an author of an act recognised as blameworthy by the victim, that is, society as a whole or an individual victim in particular, must judge his act as blameworthy. Clearly there are individuals
living in society who do not judge their acts as blameworthy, particularly Political Criminals. Such Criminals never consider themselves as blameworthy. They fully recognise the import of their offences, but, far from considering them anti-social or blameworthy, they claim for them laudation. Accordingly, Tarde would be bound according to his own Theory, on account of dis-similarity, to hold these Criminals as irresponsible. As we have said, Tarde appreciated the case of these Political Criminals, and as he was Sociologically minded he was compelled to declare that there are cases where it is necessary to punish although there is absence of responsibility, as in the case just mentioned. Society must be protected in spite of the fact that the offender is irresponsible.

This savours somewhat of the Utilitarian Doctrine. Tarde did not hesitate to separate Moral Responsibility and Penal Responsibility. For, although the Political offenders clearly were outwith the scope of the former for the protection of society, they assuredly came under the latter.

One might almost say that all criminals lack this first essential of Social Similarity. There is little Social Similarity between them and honest men. Tarde would have, to our mind, to considerably modify the scope or limit the sphere of Social Similarity, for, although obviously socially similar
to the criminal class or fraternity, they hold nothing in common with the non-criminal class. The question unavoidably arises according to which class are they to be judged. To us, it appears that if judged according to the honest they are Morally Irresponsible according to Tarde's Theory. Here again Tarde may have conjectured on Penal Responsibility from a utilitarian point of view.

Too much importance must not be placed on this requisite of Social Similarity, as apparently Tarde recognised it as of much less importance than Individual Identity. Individual Identity is the important condition of Responsibility although not its base. Tarde seems to convey to us his belief that in a state of mental alienation, and on account of this alienation, the "ego" is substituted by another. Although we hardly dare to express an opinion on such a matter, involving so much of psychological and physiological importance, we might indicate that we rather think that the ego is not ousted, but to a certain extent and to a greater or less degree modified.

Again we are convinced of the great uncertainty of M. Tarde's Theory. His conception of Individual Identity, for us, appears to be far from scientific. The individual certainly, to our mind, is in a constant state of change. He is perpetually at the mercy of all manner of influences, physical, psychic,
and environmental. He is not the same at any two instants. Tarde undoubtedly sought to constitute personality as a rigidity, although he did admit that identity changes but that only negligibly. This contradiction by Tarde we would submit cuts to the root of his whole Theory, for again we are faced with uncertainty. To admit change no matter how negligible is to deny the assertion of the permanence of the Ego. This permanence of the Ego must be a certitude, and it is not so according to Tarde himself.

Then again Tarde looks to the interval between the moment of the commission of the act and the accusation as the period which will indicate the culprit's responsibility or irresponsibility, according as the "Ego" changes or changes not. We insist that it is the instant of the commission of the Crime which is the crucial point. The period subsequent thereto, although doubtless giving some indication of the mental state of the accused, is of no real importance. The state of the mind of the accused when the act was committed is our concern. This interval does not appear to us to serve as a means of distinguishing the responsible from the irresponsible; in fact, it does not serve as a medium of establishing a demarcation between the irresponsible mad and the responsible criminal. At the moment the crime is committed can this medium and demarcation be obtained.

Social Similarity and Individual Identity
combined do not appear to us to provide a base for Moral Responsibility or Penal Responsibility any more free from objection than that of Free Will. We cannot conceive of any attempt at finding a base for Responsibility or Culpability succeeding which would abolish Moral Responsibility based on Liberty. The idea of Culpability as we have already indicated is inextricably bound to Free Will. There can be no blame or punishment for a man who is not free. It is strange indeed that M. Tarde, an avowed Determinist, should declare otherwise.
Let us now turn to Dr Paul Dubuisson, a medical jurisprudent, who, like M. Tarde, attempts to find for Responsibility a base other than Free Will, and for him that base is Intimidability. He is of opinion that man is responsible because he is Intimidable. The constant dread of punishment serves as a check on the anti-social or criminal motives and intentions of man. Society has created punishment to enable man, ordinarily unable to resist his evil inclinations, to refrain from acting criminally. For Dr Dubuisson the criterion of Responsibility is the Non-Intimidability of the delinquent. Dr Dubuisson was fully impressed with the apparent lack of scientific proof of such bases as the immaterial soul, the innate notion of good and evil, and, furthermore, Free Will. He sought to establish a real basis capable of scientific proof and open to discussion. He was profoundly of opinion that man is a responsible creature, and in a work, "Responsabilité Pénale et Folie", he makes learned excursions into the realms of psychology and psychopathology, and from these he concludes that Intimidability is the foundation of Responsibility. From all the varieties of human types submitted to examination he is convinced that all men other than the insane are intimidable and con-
sequently responsible. Mental Alienation contains all the exceptions to the general rule of Responsibility.

We have designated Dr Dubuisson as a medical jurisprudent and that quite correctly we think. Being such, it is not surprising to find him endeavouring to retain the conception of Responsibility in spite of the fact that for him as for many others Free Will is a pure illusion.

He certainly entertains Determinist views, and, retaining, as he would, the conception of Responsibility, we find that he, very naturally indeed, seeks a justification for Punishment. He recognized that man exists and can be considered only as a member of society, which is composed of individuals, and as such a member he must submit to the exigencies of the collectivity receiving as a *quid pro quo* the advantages of living in community. Society has a right to defend its order against its members antisocially minded, and to intimidate and punish them provided always that such individuals are not by mental alienation rendered Unintimidable.

Dr Dubuisson has so clearly set forth his own Theory that we hesitate to resort to a short paraphrase, and would prefer to repeat here his own words. In "Les Archives de l'Anthropologie Criminelle et des Sciences Pénales", he says:

"Man is responsible for his acts, although he has inherited from heredity intellectual and..."
"moral inclinations, which necessarily impel him
in a determined manner, for man born perverted,
or perverted by his vicious education, is not
by that fact alone drawn into evil without
possible resistance, and consequently, he is not
irresponsible..........For badly endowed though
he be, he is only a more or less unfortunate
variety of a species, but whose intellectual
and moral functions work normally........"

These functions he describes as:-

"The one is to distinguish the good from the
bad, an operation purely intellectual, and the
other is to feel oneself driven towards the
good or the bad, a phenomenon purely moral.

The same individual consequently is able
to understand what is good and how to do bad.
......in presence of an individual incapable
of relying upon himself, an individual rebelling
at all suggestions of superior order, What
remains to counterbalance the wicked tendencies
which dominate in this brain?.........It is this
(Penal Repression) which comes to the aid of
the miscreant.

"Cupidity, sexuality, the destructive in-

tinct, want to be satisfied. But the intell-
gegence shows to man that the result of these
gratifications will be to harm him in his pro-

perty, in his liberty, in his life, that is to
say, in the very instincts which he is ready to
satisfy, and provided that there is sufficient
intimidation it then happens that the wicked
tendencies, drawn in a contrary direction,
check themselves and become neutralised......

Man, the fatalists say, ought not to be pun-
ished, because he is not capable of resisting
his tendencies, precisely because he is able to
be punished, because a penalty exists. With-
out the penal system, that is to say, without
intimidation, this perverted individual would
be without help against his perversity, and he
would only be able to obey it.........On
account of that I have established, in a gen-
eral way, without concerning myself with ex-
ceptions (all contained in mental alienation)
that all men being intimidable ought to be con-
sidered as responsible for their acts.......It
is because there exists a penal system that man
insufficiently intelligent ought to be consid-
ered as responsible for his acts, this penal
system being in reality the only compensating
"influence thrown by society in the balance of "human proclivities." (1)

Dubuisson is obviously of opinion that, should the Criminal be sufficiently intelligent to know what is permitted and what is forbidden by the Laws of his country, he is Responsible. The Penal Law of his country is the intimidatory medium. Dubuisson would doubtless say that the efficacy of the sanctions afforded by the Penal Law does not rest in their application, but rather in the threats therein contained. The aim of Punishment is the prevention of crime, and this aim Penal Law attempts to attain by means of Determent. The Penal Law contains a perpetual threat which intimidates or deters all men from putting into action their criminal proclivities, and accordingly men generally ought to be punished. The insane fall outwith this sphere of general application, for the Penal Law cannot deter them from breaking its commands whether positive or negative.

There is little doubt that punishment is a factor more or less strong in the determination of acts, but a factor, we would submit, which is quite incapable of estimation with any degree of certainty. It is generally admitted that punishment is a counter-impulsion to the impulsion to commit a criminal act, but it must be one of varying degrees.

A point greatly in favor of Dr Dubuisson's

Theory is that apparently, at any rate, it is based on a foundation entirely non-metaphysical. There is no question of Morality. The Morality of the act in question is no concern of the judge. All of which he need be convinced is that the author of the act, at the moment of its commission, was intimidable, that is to say, he was possessed of sufficient intellect to realise that in acting as he did the sanction of the law would be enforced. The capacity to understand the Law's Threat is in itself quite an excellent formula for Legal Responsibility.

Baron Bramwell in "Nineteenth Century", December, 1885, in this connection remarks:—

"Whom ought the law to punish? The answer is easy: all that it threatens on conviction. But then comes the question:—Whom ought the law to threaten? The answer is also easy: all who would be influenced by the threat, all whom it would, or might, deter or help to deter. The question, therefore, in any case would be......Whether the person accused understood the law's threat. If he did not, it might be wrong to punish him because it would be useless to threaten him."

But does Dr Dubuisson really create a Theory independent of Free Will? We think not. From the obviously positive methods utilised in the enunciation of his Theory one might be inclined to conclude that the old idea of responsibility based upon Free Will has been successfully discarded by Dr Dubuisson. Such a success, however, we would submit cannot be claimed to have been achieved. Although there may be no apparent evidence that this old idea has been
borrowed, nevertheless we are certainly of opinion that the Theory of Intimidability implies that much discussed postulate, Freedom. Man to be responsible must be intimidable, in other words, he must be capable of realising what will be the result of his act, that is to say, the punishment attending the violation of the Penal Law. He calls to his assistance the psychological impulsion afforded by the law's sanctions to resist his innate criminal or anti-social impulsions, and to avoid responsibility he refrains from action. Clearly this implies the power of willing or of not willing. In our opinion Dr Dubuisson, unconsciously, perhaps, supports the Classical Doctrine and contributes additional knowledge to the Deterrent or Intimidable qualities of Punishment.

Dr Dubuisson certainly did not intend to appear as a Free Willist, for we have in quoting from his work sufficiently indicated that, to a certain extent at least, he shared the opinions of Determinists. He did believe that man was determined in a degree by heredity and environment. It is indeed difficult to reconcile his determinist opinions with the idea of Free Will, which his Theory clearly implies. This illogicalness has led to the criticism that the ideas underlying his Theory are contradictory.

Given the criterion that all men are intimidable and accordingly responsible does it not follow that all criminals, by such we mean those who have committed acts contrary to Penal Law, are irresponsible...
in as much as that by the mere fact that the crimes have been committed their non-intimidability has been indicated? Surely it is not too much to say that every time a crime is perpetrated the apprehension of the penalty has been weaker than the depraved impulse. The counter-impulsion of penal sanction has not been sufficient to counteract the psychological, physical, and environmental, all determinist, impulses to act. The criminal has been determined and not intimidated, and continuing in the same line of argument we reach the logical but paradoxical conclusion that the only individuals who are responsible are those who have refrained from committing crimes, as they, of course, have been intimidated, and as the insane cannot be held to commit crimes do they fall under the heading of Responsible or Irresponsible? We would say Responsible, but Dubuisson has expressly declared the opposite.

This last line of criticism results from the part admission by Dr Dubuisson of Determinist doctrines and an attempt to retain the conception of Responsibility, which, as we have already indicated, is quite irreconcilable therewith.
3. THE SUSCEPTIBILITY OF EXPERIENCING PSYCHIC COERCION.

Very much akin to the ideas of Dr Dubuisson are those held by Monsieur Alimena. The latter is one of the chiefs of a school known as the Terza Scuola. Between the determinist theories which discard all idea of punishment and the Classical theories which, of course, retain it, we find the theories enunciated by an intermediate school aptly named in Italian, Terza Scuola. The adherents of this school attempt to reconcile determinism with punishment conceived classically; their chief aim being to retain the last named conception.

Alimena is undoubtedly a Determinist. He refuses to admit the notion of Free Will. Free determination has no part in human actions which are the necessary consequence of circumstances in which man finds himself placed. Free Will is an illusion, and it is accordingly far from being judicious to attempt to erect Responsibility on such a basis. As a Determinist he could not fail to recognise punishment as primarily an instrument of Social Defence. Nevertheless, the traditional or classical function of punishment, as an intimidatory medium and a consequent mode of preventing crime, appealed to him. Alimena was convinced that Punishment is a capable menace of
counter-balancing criminal impulse, and it ought to be applied always when the individual has sufficient intelligence to appreciate the sanction to which he will be compelled to submit as a result of violating the Penal Law.

Dr Adolphe Laudry in "La Responsabilité Pénale", reports M. Alimena as having said:--

"Penal defence differs from the other means of social defence in that it acts not as a material force, but as a moral determinant in the conscience. The specific element which distinguishes the penal system from the other defensive functions, is the determining influence which it exercises on the conscience of men, by the menace which it exercises on those of evil inclinations. ... The precautions taken against the dangerous animal, the elimination of the madman, have nothing in common with the juridical function properly called, that which has for its object men capable of feeling the influence of determining motives. The true utility of punishment is not so much to eliminate refractory delinquents and all those who have already trespassed, as to comprise much more other men who, without this determinant, would allow themselves to commit delicts."

It will be observed that what has just been accredited to M. Alimena is very analogous to the opinion of Dr Dubuisson, and they seem to be both agreed that those in a state of mental alienation are irresponsible for they cannot appreciate this fear of punishment.

Dr Laudry again in this connection quotes M. Alimena:--

"Society defends itself against the madman; but one cannot conceive of a legislation which could carry an efficacious determinant into the troubled brain of an insane person. Without doubt, the madman can sustain an immediate intimidation, especially if it is exercised with a great display of force, but he does not feel
the general menace contained in a law which forbids certain things and permits others; if it is possible to influence the mind of a madman, it is impossible, by way of retaliation, to influence madmen. The determining motive is felt at the moment by the madman, and, at the most, by the madmen present, but never by those who are absent. The madman is intimidable, the madmen are not. (1)

Both Dr Dubuisson and M. Alimena are of opinion that, in order that man should be considered as responsible, he should feel to some degree the fear of punishment.

The very same criticism which has been directed against Dr Dubuisson can here be directed against M. Alimena. We feel inclined to add anew that we are particularly struck with the lack of certainty of both the conceptions, Intimidation and Psychic Coercion. We cannot conceivably appreciate how the Intimidability of individuals can be measured. To our mind there exists no means of estimating to any correct degree the extent to which each man is susceptible of being influenced by the fear of punishment. Of the functions which comprise man's psychic personality - his mind - that of susceptibility to fear is, we would submit, a minor one, but, apart from any question of the relative importance accorded to these functions, we must again voice the adverse criticism of any Theory of Penal Responsibility which would seek its base in the integrity of an isolated psychic function to the exclusion of the remainder. The mind of man like his body exists as

(1) "La Responsabilité Pénale". A. Laudry. p. 135/136.
a unity, and as such can alone be considered. There would accordingly appear to be little to choose between the criteria of Intimidability, Psychic Coercion and Free Will, if the latter is considered as a function apart. We feel that there has certainly been no conclusive proof adduced to persuade us that the acceptance of either of the former would in any way be preferable to the latter.
4. INDIGNATION.

Monsieur Alfred Binet in presenting his very remarkable article entitled "La responsabilité morale" in "La Revue Philosophique" of September 1888 provides an interesting theory of Moral Responsibility upon which he would appear to allege that Penal Responsibility is based.

Moral Responsibility subordinated to Free Will is for him one of the radical errors of Moralists. Free Will, if not a fiction, is at least a conception which has not reached the stage of being beyond discussion.

Nevertheless Monsieur Binet does not hold that responsibility should not have for its first condition Liberty. In order to be responsible for an act, it is necessary to have willed and acted freely but this liberty is not identical with the free will of philosophers; it consists simply in the power to act in conformity with one's character; this power being a real fact, up to a certain point objective and existent or non-existent.

The learned writer maintains that Moral Responsibility can be studied from two distinct points of view; from the subjective point of view of the agent who himself appreciates the moral value of his act, who judges and condemns himself, and from the objective
point of view of the emotional reaction which an act produces on other individuals, the witnesses of an act or society in general. It is the latter of these two aspects with which he deals.

He asserts that whereas in ancient criminal law the offence was purely a private affair and the sentiment of vengeance of the offended had alone to be satisfied, in modern criminal law, crime has become a public affair but repression has still for its end the satisfaction of sentiments these being now of a different category. These are of two classes, the sentiment of indignation raised against the author of the crime and the sentiment of pity experienced by the members of society in cogitating the suffering which will be the lot of the perpetrator of the offence when he is compelled to undergo the punitive sanction. In other words the crime inspires the sentiment of repulsion against the offender: the execution of the punishment inspires that of pity. These opposing sentiments enter into conflict and the measure of responsibility of each delinquent is regulated, in Monsieur Binet's opinion, by the measure in which one or the other of them predominates. "According as the jury is, the more impressed by the punishment of the crime or the prospect of the guillotine, it convicts or acquits."

It must be carefully noted that although Monsieur Binet asserts that such is the conception of Moral
Responsibility, the foundation of Penal Responsibility, he is distinctly adverse to the acceptance of such a basis for, moral responsibility being a purely sentimental thing, our penal legislation should cease to be dependent thereupon. The repression of crimes ought to have no concern with the emotional states which are the basis of Moral Responsibility. It is no part of the sphere of Penal Justice to seek to satisfy the sentiments of Indignation and of Pity. Its end is simply to assure with growing efficacy the defence of society and the elimination of those members thereof who are dangerous thereto. In this respect, therefore, Monsieur Binet obviously shares the views of the Positive Italian School with which we have already dealt. Accordingly he would appear to produce nothing new.

Although there is here no novel attempt to create a new basis for Penal Responsibility and there is really a reiteration of the Utilitarian doctrine we feel disposed to voice some little criticism on Monsieur Binet's sentimental conception of Moral Responsibility.

The fund of implied opinions and accumulated ideas which might be said to be generally accepted as constituting the conception Morality does not appear to appeal to Monsieur Binet, for he would rather, it would seem, be inclined to resolve notions of Morality into moral feelings which are a condensation of
these notions themselves.

Professor Hamon in his work already referred to has so capably criticised Monsieur Binet's ideas that we might be pardoned in stating with him:—

"It appears to us that Monsieur Binet errs in wishing to establish responsibility on the "duel between the sentiments of pity and of indignation. Pity is never provoked by crime. "The cause is the idea of punishment born in the "individual as soon as he has knowledge of the "crime. If the punishment does not seem a logical correlation with the act; if it seems too "severe, too great, there is pity. This compassionate sentiment is accordingly produced "from the penal reaction and not from the criminal action. With regard to the sentiment of "indignation it is not the producer of responsibility, it is on the contrary, a result. Indignation caused by an act is an effect of education. At present it is provoked by the act "and involves, when it exists, the idea of responsibility. But primitively, the act involves "only a defensive, protective reaction..... "Whence has this sentiment of indignation arisen? "...... It was at first a moral coaction for the "delict committed to one of a group. For those "committed outside of the tribe, this sentiment "only existed much later, always subsequently "to the conception of responsibility. It is the "idea of responsibility which engenders indignation. The same act provokes or does not provoke indignation according as the agent is judged "by us responsible or not. One cannot rationally base Moral Responsibility on the sentiments of indignation and pity."(1)

Professor Gabriel Tarde in his Penal Philosophy replies to Monsieur Binet's conclusion that moral responsibility, being a purely sentimental thing, our penal legislation should cease to be dependent upon it by stating:—

(1) "Déterminisme et responsabilité". Prof. A. Hamon. p. 212 et seq.
"...this conclusion does not follow from the premises. Were it true that the idea of moral responsibility had in it nothing but emotions, it would not follow that the law should take no account of it. Who has better shown than Binet and his friend Féré the importance of the ways of feeling in psychological and social life? Their fault lies in often exaggerating it, as when, for example, convictions seem to them to be passions in disguise."

He continues:

"Our object..... is precisely to investigate and to test the principles upon which our feeling of indignation at the sight of the misdeed and the malefactor is founded, has been founded, or ought to be founded. Now this emotion is the complex result of two different sorts of ideas, and is proportioned, either according to the degree of responsibility which our reason, by virtue of certain principles which are conscious or unconscious, attributes to the delinquent, or according to the degree of gravity which, by virtue of other principles, it attributes to the crime for which we judge him to be responsible..... Let us not confuse these two sorts of considerations as Binet seems to do." (1)

(1) "Penal Philosophy". Gabriel Tarde. P. 151/153.
5. THE INTEGRITY OF THE WHOLE CHARACTER.

Professor Georges Vidal of Toulouse would appear to be the chief exponent of this Theory. In his "Principes fondamentaux de la penalité" he clearly indicates that he is not prepared to accept entirely the position of the Determinists. He declares that he cannot accept a doctrine which, by calling to its assistance the influence of physical and psychological causes, tends to make man a pure machine obeying blindly those causes of which he is not the master and over which he has no control. On the other hand he would appear to be reluctant to take sides with the Free Willists. He voices his disbelief in the pretended liberty of indifference which permits man to act without motives; a chimeric hypothesis contrary to inmost and common sense, but he on that account is not prepared to discard the idea of human liberty. He very aptly remarks:-

"The determinists treat as an illusion this belief in free will, inspired according to them, by frequent ignorance of all the motives which incite our activity: we do not know all the causes which make us act and we conclude from this that we are ourselves the cause of our acts. - But do they not fall precisely into a mistake analogous to that with which they reproach the partisans of Free Will, in concluding from this ignorance that the unknown and imperceptible causes really exist?.....

"They treat as a pure assertion without proof and without foundation this declaration which we furnish, according to our consciousness of our liberty. But what then is their negation of this same liberty, and on what does it rest?.....(1)"

(1) "Principes fondamentaux de la penalité". Prof. G. Vidal. p. 425 et seq.
Professor Vidal in spite of the inability to prove the existence of Free Will scientifically is not disposed to discard as valueless such a universal belief which has been found in man during all epochs and in all countries. Nevertheless he does not deny the reality and influence of the character on the conduct of life; he recognises that soon passion and pleasure acquire in our mind a habitual force which permit of predicting the conduct of each, of judging such a man as honest, such an other as passionate and selfish, of placing confidence in one and distrusting the other.

The preponderating force of habits in the sphere of human activity is nothing more or less than the Character. The Character owes its constitution not to nature or social environment or education: These factors certainly influence it but man is, within certain limits, the master of his character. He is its formative agency, he can reform it, he can perfect it for he is all powerful in the domain of habits. He creates his habits and he can at his inclination reject them or make himself a slave to them and when he takes the latter course the habit has passed or merged into Character. It has been asserted that the Character of man is immutable. This is contrary to actuality, the Character of man is variable at his will to the habits which he contracts, the new ideas which beset his mind.
Professor Vidal concludes:

"...The idea of justice which... is inherent in human nature and awakens when occasion arises.... supposes moral liberty, the notion of merit and demerit, the conception of penalty, at least in part, under the form of punishment, of expiation, of retribution of a present physical or moral hardship for a social evil accomplished."

Professor Vidal was very much adverse to the Determinist principles. As he himself has said, Penal Responsibility cannot be conceived without the fundamental notions of moral liberty and the consequent notions of merit and demerit. Apart from his ideas on Character this theory might well have been included under the Classical head. We do not feel disposed to adversely criticise his ideas on the Character. In our opinion he is on very firm ground. Moreover we are at one with him in his negation of the Freedom of Indifference. Moreover Professor Vidal signifies clearly our attitude to the postulates of Free Will and Determinism. We are of accord in the opinion that both are equally insusceptible of proof, but we have already indicated that we are not disposed to emulate the learned Professor's example and exercise our faith in accepting the tenets in part at least of the Free Willist. For us Social Accountability is the only tenable solution devoid of all metaphysical wranglings.

We do feel that Professor Vidal can hardly claim to have created a Theory independent of Free Will as
a basis. Man as a character creative agency must undoubtedly possess the faculty of Liberty and that in no insignificant degree. The very power inherent in him which permits him to discard or retain ideas in order that they should or should not formulate as habits and thence merge into Character in our opinion assuredly implies Free Will.

Professor Vidal in his work already quoted sought to refute the principles of Determinism but we see that the conception of Character when formed is determinist although by ascribing to it variability at the hands of its possessor the learned Professor attempts to free himself from a charge of fatalism.

The conceptions of Free Will and Determinism must be reconcilable in Professor Vidal's opinion. This we are not prepared to admit. The fact remains that to us a criterion of Responsibility untrammelled with Philosophical and Metaphysical controversy is the only one desirable and practicable.

Dr. Maurice de Fleury in "The Criminal Mind" indicates that M. Paulham places considerable weight on the element of Character and as Paulham would appear to deny Free Will it may be of interest to observe what his views are.

Dr. de Fleury says -

"M. Paulham holds that Moral Obligation is "a manifestation of the organizing tendency of "our mind, that is to say, of our natural need
"to keep ourselves in harmony with the general laws which register the evolution of the world. Remorse of conscience is a reaction of that organizing tendency against everything that tends to disorganization. Legal Sanction is the expulsion of the individual who disturbs the social organism; Moral Sanction is the reaction of the mind against the acts which are a violation of natural laws. This is an ordinary, foreseen consequence; to expose oneself to it, to render oneself liable to provoke that reaction is Moral Responsibility, absolutely independent of Free Will which M. Paulham does not admit. Consequently, then, the man is so much the more Responsible according to the greater or less conformity of his actions to his character, his habits and his passions. For from being excuses, habit and passion become aggravating circumstances, and the ordinary scale of Responsibilities may be reversed. The lunatic himself may be Responsible if the deed that he commits is consistent with his character. Likewise the merit of a good action is not in direct but in inverse ratio to the effort, and it is not true that there ought to be more joy in heaven for the conversion of a sinner, than for the coming of the just." (1)

Dr. de Fleury remarks that Paulham has created a doctrine significant of great psychological ability but very theoretical. We have ourselves consulted M. Paulham's contributions on the subject and we agree that they are of considerable merit, philosophically, but we hesitate to attempt any lengthy exposition of these as the labour that would attend this would not be justified. We shall, accordingly, pass on to the treatment of what must be, for us, the Final Theory.

We do not claim to have enunciated all the Theories which have been created, our lack of know-

(1) L'ame du criminel". Dr. Maurice de Fleury. p. 82/83.
ledge of many of the Continental languages excludes any possibility of uttering such a claim. An effort to deal with any question of criminological importance attended by such a grave disability must inevitably be made more difficult and incomplete. With the exception perhaps of the translations of a few of the important foreign criminological treatises so capably executed under the supervision of the American Institute of Criminal Law and Criminology there is little other material available in our own language. In spite of any shortcomings on this account we would submit that at least the most important and representative Theories have had our attention.
6. NORMALITY OF ACTION.

The theory which would maintain that in that most controversial conception, Penal Responsibility, which is really an innate quality of the mind, a psychic function, there is not presupposed any liberty of the will removed from the law of causality but that the will itself is determined and determinable in conformity with that law through the medium of the normes of social conduct pertaining to the spheres of religion, morality and law &c., in other words the Intelligence, is the creation of German Criminalists to whose contributions to the science of Criminology we have up till now had little occasion to refer.

Undoubtedly the most outstanding member of this group is Professor Von Liszt of Berlin, a determinist, but a partisan of Penal Responsibility conceived classically and a logical adherent to its corollary Punishment which, in his opinion, one would be inclined to gather, is instituted in order to inspire with fear those who would attempt to commit offences and to retain them within the realm of innocence. There would appear to be some similarity in the views entertained by the learned Professor and those of Dr. Dubuisson and M. Alimena as to the psychic susceptibility of experiencing intimidation although there is this apparent difference that
whereas he does not demand actual intimidation or coercion the others require that to be responsible man must experience to some degree the fear of punishment.

The Theory enunciated by Professor von Liszt to reconcile his Determinist and Indeterminist principles is that of his compatriots, namely that of the Normality of the Intelligence (or, as has been remarked by Professor Hamon, sometimes somewhat incorrectly designated the Liberty of the Intelligence) although so far as he is concerned he seems to have earned the credit of the creation of an independent Theory - Normality of Action - according to which the criterion of Responsibility is the faculty of acting normally but as this really amounts to the faculty of being determined by motives in the normal way there is little justification for the award and accordingly we would perhaps have been more correct in having adopted as the title of this, the final theory - "The Normality of the Intelligence".

According to these theorists, we would submit, man of mature and sane mind has at his command the notions, the conceptions or ideas of religion, morality, law etc., which are capable of restraining him from conduct prejudicial to the exigencies of social collective life. He is capable of normal determination and he is accordingly responsible for his actions. The only man who is responsible is the normal man and
the normal man is he who reacts normally against his impulses. Responsibility in turn is abolished by those troubles of the mind which render the reaction abnormal, and where there is absence of mental maturity as in Infancy.

It appears, therefore, that the Intelligence, in which such notions are bred and whence they must emanate to become a determining influence on any impulse of an anti-social nature, directs the Will.

Undoubtedly Professor von Liszt aimed at the creation of a Theory which would not have as its basis the integrity of an isolated psychic function. For him as for us the mind of man exists as a whole. His success, however, is questionable for his Theory would appear to presuppose the Intelligence as an indetermined mental faculty distinctly separated from all others.

Monsieur Saleilles in his "Penal Philosophy" very cleverly shews how this criterion of Normality was reached. He shews how Responsibility apart from the usual reference to Free Will is Social or Sociological in character; and it must also be given a legal recognition which is to serve as the requisite between the insane and criminal, alike in preventive, curative and protective aspects. The power to distinguish between Right and Wrong constitutes one but not the sole factor of the moral nature; that,
in addition, the strength of will and of the entire Moral Personality has to be considered. There is thus reached the conception of normality. A Normal Being is one capable of exercising Responsibility. Such Normality is especially related to the Will; and since the Will is determined and conditioned by the motives that make it effective, the Normality in question must be referred to the human faculty of determining conduct through motives. Hence the Normality ultimately becomes related to the motives themselves.

"The Normality of a human being consists "in his being subject as are other men to the "influences of the ordinary motives that regul­"ate conduct and human actions, such as those "derived from religion, ethics, and conventions."

Saleilles goes on to state that to remain unim­pressed by what impresses others leads at first to an Insensibility to these Motives, then to a gradual failure to understand them, and finally to a with­drawal from a Normal Condition. Eventually ordinary and normal motives tend to arouse almost reflexly an antagonistic reaction in all aspects contrary to that experienced by other men. The conduct appears to be reached without motive. In the extreme such conduct approaches complete Abnormality and constitutes mental alienation.

Enough, we would submit, has been said to indic­ate Dr. von Liszt's ideas on the conception of Normal­ity as a basis of Criminal Responsibility, ideas
which were advocated before him by Poletti. Dr. C. Bernaldo de Quiros in his "Modern Theories of Criminality" remarks that the Theory of the Normality of Action was first advocated by that forgotten philosopher and criminalist who believed that crime is recognised by signs that leave no room for doubt. As soon as it is committed an unusual and spontaneous activity is being displayed. The essential feature of crime consists in its opposition to the most intimate and delicate attributes of our nature, to that wonderful combination of tendencies, ideas, and sentiments found in the individual and in society and the general features that enable us to recognize a criminal action cannot be derived from our sentiments, social interest, or the idea of justice itself, but from something naturally more complex, more vast and at the same time more invariable and certain.

Poletti concluded that the first victim of any crime is the delinquent himself; for his deed betrays the abnormality of his constitution through lack of "that powerful shield which preserves other men in the tranquillity of their existence" and of "the harmony and equilibrium between effectiveness "and the principles which all make as a rule for "moral conduct."

Dr. Bernaldo de Quiros quotes Poletti as having
said:—

"Henceforth, we will not say that man is responsible for his actions because he possesses a will or because he is free; but because having been created by the power of natural laws which trace for him the way of true humanity, he acquires in the relations which he establishes and changes through human intercourse rational and human aptitudes which make him responsible for his actions...... Only the normal man is responsible for crime because of the fundamental conditions of his being and of his physiological and psychic development: conditions which he does not meet in nor receive from society, but carries in his autonomous constitution and inner atmosphere.(1)

From a perusal of the Theories of Normality enunciated by Liszt and Polleti the first question which occurs to us is, Who is the Normal man? Such a criterion as Intellectual Normality like Intimability appears to us to be astoundingly vague. There does not seem, in our minds, to be any standard to which this Normality can conform. Is the Normal man an ideal? Is he the most common specimen? Such questions we would submit are incapable of reply. There is nothing of certainty about this conception.

It would appear from the Theory just submitted that the Intelligence ought to direct the Will; on account of that, it would be a necessary and sufficient cause of moral and penal responsibility. It is clear, therefore, that these theorists conceive of the Intelligence as a mental faculty absolutely

(1) "Modern Theories of Criminality" C. Bernaldo de Quiros. p. 147 et seq.
separate from the other faculties of the mind. It is absolutely Free. It is in no way determined by facts and circumstances. This we would submit is obviously contrary to actuality. We must again reiterate our belief - perhaps it is best described as an act of faith for we must conscientiously admit that we are face to face with psychological data incapable of positive scientific proof - in the inseparability of the Psychic faculties. The psychic faculty of Intelligence is one which we have least hesitation in believing is dependent upon the others. Personally we cannot conceive of the Intelligence being brought into play without man's volition and on this account we are not convinced that the Theory at present under discussion does not imply if it does not admit freedom of the Will.

It can be readily observed why the Intelligence has been maintained as an indetermined function for otherwise it would be quite illogical to base Moral and Penal Responsibility on the liberty of the Intelligence which is an illusion.

Having admitted the possibility of the isolation of the psychic faculty, Intelligence, is it not conceivable in mental alienation that that part of the mental mechanism may retain its integrity and that an insane person having committed a delictuous act having had a very clear idea of its import and the consequences is logically responsible. Nevertheless
these Theorists, like all others, emphatically deny the Responsibility of the Insane, so again we are face to face with an illogical conclusion. Any theory which would isolate the psychic functions of the mind lays itself open to such a charge.

This Theory is open to yet another criticism. If the criminal by natural constitution is accepted as a reality obviously he is not responsible. If we are to hold all criminals as irresponsible then the need for any criterion of Responsibility disappears and we are left with a conception which can only amount to Social Accountability according to which the only essential is the commission of an act be it that of a sane or an insane person.

In maintaining that the Intelligence is absolutely independent of all causes external or internal is there not a close approximation to the Classical Theory? There, it will be recollected, the Liberty of the faculty of the Will was the criterion. Here it is the Normality or Liberty of the Intelligence. Is there anything to choose between them? To one who can conceive of the mind of man as a unity and a unity only there is little.
In the Introduction to this Study we indicated that it would be our endeavour to decide to what extent the claims made for the Theories set up as rivals to the Classical Theory of Penal Responsibility were justifiable and that we would attempt to indicate wherein lies, in our opinion, the true solution.

At what conclusion have we arrived? When submitting the various Theories to criticism we feel that we have sufficiently voiced our opinions of their respective merits and demerits and that accordingly there is no call for any amplification here. We conclude that the Classical Theory by which man is responsible to society because he is morally free is certainly preferable to its rivals which would aim at preserving the conception of Responsibility independently of the postulate of Free Will. A few of these rival theories, we have seen, although claiming to discard Free Will as their basis owe their very existence to the postulate which they would deny. Any rival theory which would attempt to preserve Capability alongside of a denial of the faculty of Liberty is inevitably doomed to failure. Without Liberty there can be no Responsibility. We share the same opinion as Professor Garraud that the only two logical theories are the Classical Theory and the Utilitarian
Theory but as the former is based on Free Will and in so far as the latter is based on Determinism we are not convinced of the desirability either of the retention of the former or the substitution of the latter as the criterion of Penal Responsibility. Without doubt throughout the ages man has believed himself free and has regulated his own conduct and acted in his relations with his fellow men on this assumption but it is nevertheless equally true that man has also realised that, to some extent at least, he has been determined by factors outwith his control. Theoretical and Practical Morality and Theology undoubtedly rest on the basis of Human Liberty and the Law also for the conservation of the social organisation bases its system both Civil and Criminal on that belief but we find Psychology and Psychopathology running counter to the unscientific claims of these. Ere now it will have become quite apparent, we fear, that the scientific data, inadequate though they may be, weigh more with us than the illusory conception of Free Will.

In such questions there are bound to be opposing opinions and we are convinced that the science of Criminology gains little by the contribution of speculative treatises on them.

We feel warranted in again uttering our cherished view that it is eminently desirable that the social organisation should seek to protect itself against
those who, by their acts, have proved themselves to be a danger to the social weal by holding them accountable. Every member of society is accountable for his acts. There are no exceptions. There is nothing philosophical, psychological or metaphysical about this conception, Accountability. There is no question of Moral Responsibility involved. The antisocial act having been performed the actor is accountable. The Judicature has only to decide that the act was performed and that the identity of the actor has been established.

Responsibility or imputability having disappeared the corollary Punishment must needs vanish also. This is clearly within our intention. The question may quite well be asked what procedure will society adopt following upon proof of Accountability. The same procedure will ensue as results in the case of the elimination of the Insane. It is never suggested that the insane are punished in being relegated to Mental Hospitals where although primarily the cure of the patient is the main object yet the safety of society is another not very remote from the point of view of importance. In the case of those held accountable for antisocial performances there will be subjection to such social protective and curative agencies as are in force and warranted as efficacious as science can vouch. We can hear the retort,
what if the anti-socialist feels himself punished? We fully appreciate the potency of this remark but we would respond by stating that obviously the same might be said with regard to the treatment of the insane. There can be little doubt that many of the insane experience psychically the effects of punishment in being deprived of liberty and freedom of social intercourse. In neither case, however, is there the intent on the part of society to punish and that clearly, in our opinion, is conclusive.

The question may be then asked: What has happened to Crime? In our attempt at elucidating the Theory of Social Accountability we have certainly eschewed any tendency to incorporate the Lombrosian conception of 'Natural Crime' although we have approached very near to the conclusions of the Italian School as to the treatment of 'Criminals'.

We cannot admit the existence of a psychopathological phenomenon 'Crime' from the data at present existent; although we most emphatically admit certain congenital psychopathological predispositions which, if of sufficiently grave proportions, must inevitably result in what is generally admitted anti-social conduct - but on that account we are in no way prejudiced against the efforts of Criminalists whatever they may be. In fact we are avowedly in favour of such efforts.
It is a source of great regret to us that neither the Criminal Law nor the Science of Criminology have acquired or shown signs of acquiring in these islands the academic and, one might add, the judicial dignity and importance which they have acquired on the Continent and in the United States of America.

We have been particularly impressed with the efforts of the French Criminalists and more especially with those of the coterie attached to the Sorbonne in Paris. The labours of these Parisian thinkers, at least up to recent times, have been untiring; to mention only three, Professor Garçon, Saleilles and Le Poittevin.

Forensic and Mental Medicine are certainly far from being neglected in Great Britain and it is to a co-operation of the specialists in these sciences and of the jurists to which we must look for any contribution to the still unsolved problem of Crime. There is little doubt that neither of the parties suggested in this co-operation are eminently capable of tackling the question alone. The Medical Jurisprudent and Psychiatrist must inevitably be imbued with the psychological or pathological phenomena observed by him and that perhaps to the exclusion of the social consequences which would result from an immediate admission of his views by the Legislature or Judicature. Whereas the Jurist, on account of his judicial
training and his sphere fully appreciates the sociological elements to the exclusion of those of a scientific nature and officiating, as he does, in the dispensation of penal justice, he has the unquestionable advantage over the scientist of being able to exclude everything contrary to his personal views. Obviously from such an impasse the science of Criminology can gain nothing.

We do not for one moment claim that there should be a general acceptance by the Legislature and the Judicature of the principles of the Lombrosian School - far from it. In our opinion many of the conclusions of the adherents to that school like those of that learned Criminologist were hastily drawn from insufficient data. What we do ask for is a transformation, nay an extinction, of the present system of punishments and in the light of modern science a protective and curative system set up upon the basis of Social Accountability.
The origin of the Bill presented to the House of Lords to amend and supplement the existing English Law and Practice anent the responsibility of the Insane can be traced to the trial of and subsequent dismissal of appeal by Ronald True in 1922. He was charged with the murder of a woman named Olive Young.

At the trial the presiding Judge, Mr. Justice McCardie, when charging the Jury observed:

"Even if the prisoner knew the physical nature of the act and that it was morally wrong and punishable by the Law, yet was by mental disease deprived of the power to control his actions, then the verdict should be Guilty, but insane."

Although this is a principle which has long been maintained by the Medical Profession it is undoubtedly the as/Lord Chief Justice in the Court of Criminal Appeal remarked an extension of the McNaghten Rules which since their formation in 1843 have, nominally at least, formulated the law as to the Criminal Responsibility of the Insane, and of the substance of which Dr. Oppenheimer would appear to give quite an accurate account when he says:

"To establish a defence on the ground of insanity, it must be proved that, at the time of committing the act, the accused was prevented by disease affecting the mind, from knowing the nature and quality of his act or from knowing that the act was wrong. A person labouring under specific delusions but in other respects sane shall not be allowed to benefit by the plea of insanity /
"insanity, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act ..........(1)"

It might be safely said that Mr. Justice McCardie was not the first to charge a Jury in such terms. In fact, does not the statement of the law accepted by the late Mr. Justice Stephen (with doubt admittedly) contain this very provision? We quote from the Digest of Criminal Law Article 28.

"No act is a crime if the person who does it is at the time when it is done prevented (either by defective mental power or) by any disease affecting the mind - (a) From knowing the nature and quality of his act; or (b) From knowing that the act is wrong; (or (c) From controlling his own conduct unless the absence of control has been produced by his own default") (2)

Moreover True's defending Counsel had cases available to substantiate his contention that the extension, if it were one, had become virtually Law. This, however, was not conceded by the Court of Criminal Appeal.

There appeared therefore an immediate necessity to have the legal doubts dispelled and the law elucidated. To this end, amongst others, the Lord Chancellor of Great Britain, Viscount Birkenhead,

(1) The Criminal Responsibility of Lunatics - H. Oppenheimer

in July 1922 appointed a "Committee on Insanity and "Crime" under the Chairmanship of Lord Justice Atkin. The terms of reference to the Committee were as follows

"To consider and report upon what changed, if any, are desirable in the existing law, "practice, and procedure relating to crimin-"al trials in which the plea of insanity as "a defence is raised, and whether any, and "if so what, changes should be made in the "existing law and practice in respect of "cases falling within the provision of "Section 2 subsection 4, of the Criminal "Lunatics Act 1884".

Subsequent to the remit to the Committee, the Lord Chancellor indicated that the inquiry intended was to be wide in scope, and to include consideration of the Rules in McNaghten Case. It is to the recom-: mendations of the Committee relative to the latter field of enquiry that we shall confine our attention.

Immediately it became known to the Medical Profession that this Committee, one purely legal and admin-:istrative, was about to undertake such an important task both the British Medical Association and the Medico. Psychological Association undertook the prep-:paration of evidence for submission to the Committee. The subject of remit was one to which the former Association had already devoted attention and the Memorandum submitted by it was based upon a report of one of its Committees issued in 1915 and approved by the Council on the 14th February 1923. The document submitted by the latter Association took the form of a
Report and was adopted on the 22nd of February 1923. In addition both the Report and the Memorandum were supported by Specially appointed witnesses.

In comparing these two documents, containing the expression of the opinions of some of the most eminent Representatives of the Medical Profession it is noticeable that whereas there are several important matters relating to this much debated subject upon which they are agreed yet there are others upon which they appear to be opposed. It has been asserted that the differences such as they exist are more apparent than real and that in substance the Associations are in accord and that any discrepancy is due to the two Committees not having consciously directed their minds to exactly the same point. If this is so it is highly regrettable for in the report of the "Committee on Insanity and Crime" considerable time is paid to the divergence of opinion and there is concurrence in substance with the recommendation of the British Medical Association which amounted to little more than a retention of the existing law with a modification as to lack of control and a dismissal of that of the Medico. Psychological Association which sought the entire abrogation of the famous Rules and the substitution therefor of certain formulated questions to the Jury.

Both Associations were certainly agreed that the "McNaghten Rules" based as they are, in their opinion,
on a conception of "unsoundness of mind" now antiquated, were obsolete. In this point of agreement and criticism which has long been directed against the "Rules" by the Medical Profession Lord Atkin's Committee discerned a basis of misapprehension. The Report contains an expression of the view, and a right one we would submit, that the Judges in the answers to the questions propounded to them in 1843 by the House of Lords following upon the acquittal of McNaghten on a charge of murder, may have taken into consideration the medical view of insanity then prevalent but they did not, neither was it their intention, to define it. We quote from the "Report on Crime and Insanity":

"When once it is appreciated that the question is a legal question, and that the present law is that a person of unsound mind may be criminally responsible, the criticism based upon a supposed clash between legal and medical conceptions of insanity disappears. It is not that the law has ignorantly invaded the realm of medicine, but that medicine with perfectly correct motives, enters the realm of law."

The Committee concluded that the existing Law that a person may be of unsound mind and yet be criminally responsible like that contained in the McNaghten Rules is sound. To the latter, however, they would add either by decision or statute the view of law expressed by Mr. Justice Stephen relative to "uncontrollable impulse" which appears within brackets, in our quotation from the Digest, the idea being "to make it quite clear that the Law does
recognise irresponsibility on the ground of insanity where the act was committed under an impulse which the prisoner was, by mental disease, in substance deprived of any power to resist."

We find accordingly in Lord Darling's Bill to the House of Lords an attempt to have the recommendation of the Committee given the force of law. So far as the Bill concerns us we quote therefrom:

1. (1) A person is not responsible to the law for an act or omission charged against him as a crime, if, at the time of doing the act or making the omission he is proved to be suffering from such a state of mental disease as deprives him

(a) of capacity, at the time, to know, understand, and appreciate the physical nature and quality of the act done or omission made; or
(b) of capacity to know, understand and appreciate at the time that the act done or omission made was wrong; or
(c) if, at the time the act was done or omission made he was suffering from such a state of mental disease as therefrom to be wholly incapable of resisting an impulse to do the act or omission.

(2) A person who is suffering from mental disease at the time of doing the act or making the omission charged against him as a crime, and, by reason of such mental disease is affected by delusions on some specific matter or matters, but whose mental condition does not render him irresponsible to the law within the meaning of subsection (1) of this section is criminally responsible for such act done or omission made to the same extent and as if the facts with respect to which such delusions exist were real.

The attempt was destined to meet with failure. The adverse opinions voiced and the lack of support offered at the consideration of the Bill on 15th May 1924
indicated clearly that the Members of the House of Lords did not recognise with Lord Darling the advisability of the admission of "Uncontrollable or Irresistible Impulse" as a defence. It was generally felt that resulting from such not only would many criminals have additional means of escaping punishment but there would be an additional incentive to the commission of crimes.

There appears to have been some indication by the Lord Chancellor of the possibility of a consideration of the matter by the Judges probably after the fashion of the "McNaghten Questions". Lord Darling accordingly withdrew his Bill.

Personally we can readily appreciate with the medical fraternity that a proposition of law, such as the McNaghten Rules as they now exist, based entirely upon the question of the knowledge held by an accused of the nature and quality of his acts to the exclusion of any power inherent in him to choose the act or refrain therefrom or in other words the absence in him of the power of controlling his actions, is not at all in keeping with modern Psychological and Psychiatric thought. It is being recognised more and more that "unsoundness of mind is no longer inessence a disorder of the intellectual or cognitive faculties."

At the same time, however, we cannot fail to appreciate the great difficulty which would face the legal fraternity were the additional defence of "Irresistible Impulse" added to the law. There undoubtedly exist
recognised examples of this impulse as for instance in Puerperal Insanity but in certain other Psycho-pathological states with which we have had occasion to deal in the foregoing Study we fully realise an insuperable difficulty in determining a right whether or not the impulse to anti-social conduct is irresistible.

We have been dealing solely with the English Law. The Law of Scotland on the question of the Responsibility of the Insane resembles closely that of England and any amendment or addition to the latter would certainly have had an effect on the former. As however the change suggested has not materialised so far, there appears little necessity to labour this Appendix with quotations from the Authorities in Scots Law.
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