The Ellard Collection

Some rules for killing people

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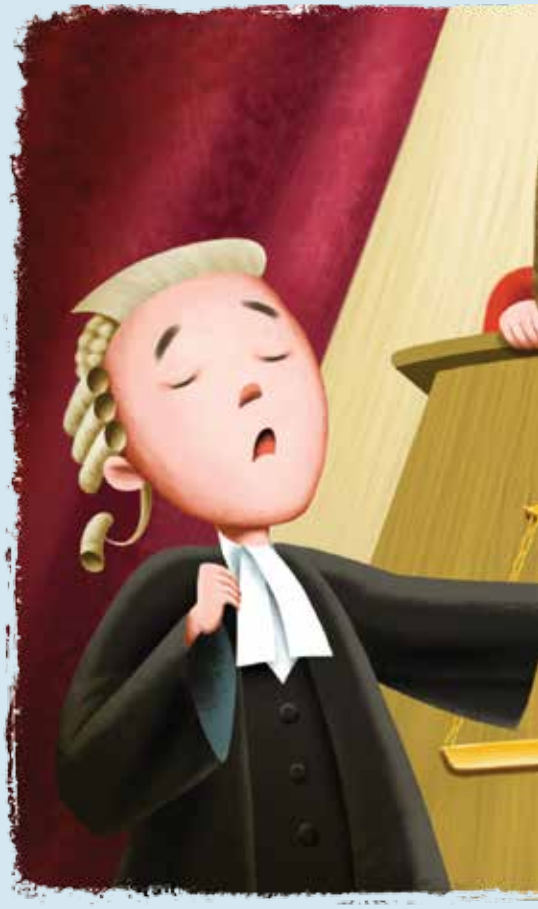

'Some rules for killing people' is the second of the late Dr John Ellard's essays reproduced from the book *Some Rules for Killing People*.* Dr Ellard, revered former Editor of *Modern Medicine of Australia* and *Medicine Today* and a distinguished psychiatrist, wrote many essays in the 1970s and 1980s on society's most controversial and vexing issues. These were published in various journals including *Modern Medicine*, and a selection were chosen by Professor Gordon Parker, then Professor of Psychiatry at the University of New South Wales, for publication in 1989 as the book *Some Rules For Killing People*. The essay here originally appeared in a 1985 issue of *Modern Medicine of Australia*.

Depending on the circumstances, the killing of a human being may produce reactions ranging from applause to abhorrence and a desire for revenge. In times of peace the legal system is responsible for establishing the correct response within rules laid down by the parliaments. Understanding and categorising human motivation is one of the cornerstones of sentencing, yet the concepts used in the courts bear little relationship to those developed by the disciplines which have studied behaviour for generations. Clearing away the meaningless complexities would be a move towards rationality and simplicity.

Every social structure I have encountered has had conventions regulating the killing of people. My comprehension of them has always been incomplete, but over the years it has struck me as curious that the more the society has possessed the qualities generally believed to indicate development, and the more care that has been used to clarify the regulations, the less I have been able to understand them. This brief paper is no more than a record of my attempt – as a psychiatrist – to understand the relevant laws of New South Wales.

It is not difficult to prove that the usual prohibitions and approvals spring from practical and sentimental considerations, rather than from logic and an ordered morality. For example, within my lifetime, at various times I might have acquired merit by killing the citizens of say, Germany, Italy, Hungary, Bulgaria, Japan, North Korea and North Vietnam. For reasons which are difficult to clarify, it would have been considered particularly meritorious if I had killed several of them more or less simultaneously while exposed to great personal danger myself. To have died in the process would probably have attracted universal applause and a decoration which I suspect I would not have had an opportunity to enjoy. Strangely, if I had exhibited great efficiency and killed hordes of people from a position of total safety and relaxation, my fame and reward might have been less. There are other paradoxes. To shoot the women, children, aged and sick of enemy nations squarely between the eyes and so dispatch them quickly and painlessly, is to risk disapprobation and perhaps a court martial. If one were to ascend several miles and then drop sufficient bombs to ensure that they are incinerated in a fire storm, one would scarcely attract any attention at all. It should be noted that the organisations which regard themselves as specially concerned with morals usually support such activities to the hilt. Thus engaged, one is likely to be supported by anything from a fervent prayer for victory, to a cup of tea. One's opponents will probably receive the same benefits, temporal and spiritual.

The rules governing killing within societies, rather than between them, are equally perplexing. It should be noted, however, that the moral organisations tend to change. While bayoneting the Queen's enemies, one will be sustained by a Christian clergyman; the killing of one's husband in New South Wales is more likely to attract the blessing of Women Behind Bars. Let me begin

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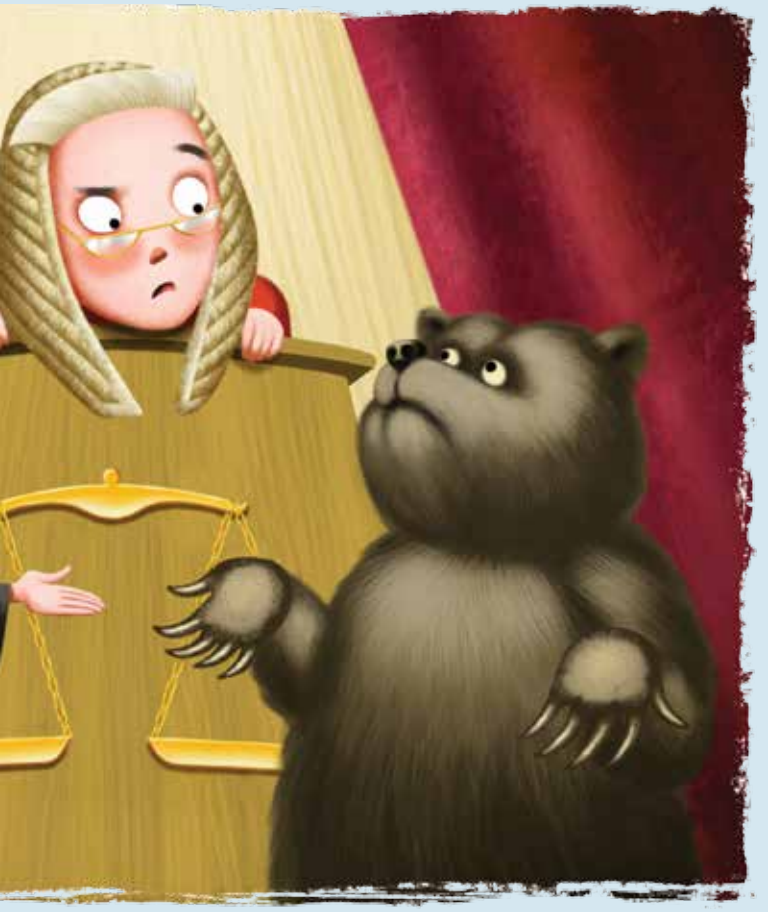
* Ellard J. Some rules for killing people. Parker G (ed). Sydney: Angus and Robertson Publishers; 1989.



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by making a fundamental and important point. I am all for regulating the matter. I have no desire to be killed, and there are others whom I would wish to see spared for the foreseeable future. As a corollary, rules must exist now, no matter how insecure their basis. One cannot reasonably criticise the law unless one can offer a suggestion for its advancement.

"Let us start with the simplest possible rule – if A kills B, then A is to be killed."

For simplicity of argument let us invent a community, not too dissimilar from our own, and observe the sequential changes which might occur in the regulations governing killing. Let us start with the simplest possible rule – if A kills B, then A is to be killed. Decision-making is not a burden, and there will be little recidivism. But there can be problems. Imagine that A, the best hunter in the tribe, hurled a rock at a bear. B raised his head to see what was going on, and the rock knocked it off. Everyone saw what happened, good hunters are hard to find and A is absolved because it was an accident. This is commonsense, and the exception confuses no one. Unfortunately, there are theorists around. They decide that commonsense and factual evidence are not enough; rather, rules must be devised which will let everyone know what penalty will be exacted under all circumstances in the future. They argue that accidental killing constitutes an exception (their descendants discover a few problems there later) but unhappily do not stop there. They observe that, if a bear kills a man, this event is considered unfortunate but not reprehensible, for such is the nature of bears. So, what if a man be so absolutely mad as to behave like a bear, what then? They ask Justice Tracy who opines that, 'if he does not know what he is doing no more than ... a wild beast'[1] then he may escape punishment. The rule proposed has admirable simplicity which is likely to remain untarnished, for no one can recall seeing anyone who would fall within its ambit and be capable of doing anything, except by accident. There are other more complicated difficulties. No one has ever seen an 'intent', felonious or otherwise; even more assuredly, no one has ever seen an absent 'intent'. The 'reason' is equally elusive.

"... rules must be devised which will let everyone know what penalty will be exacted under all circumstances ..."

Since neither observation nor commonsense can help, the matter is clearly one for experts. At first this gives everyone a feeling of great security but, as new cases turn up, uncertainty reappears. A now develops the delusional belief that all men are bears. This constitutes a problem which he resolves as he knows best, and amongst others C is killed. Once more, as in the case of the misapplied rock, there is no doubt about the facts. A spoke at length of the ursine characteristics of his victims, and of why he was disposing of them. His sincerity is beyond doubt. There can be no doubt about what to do. A is more dangerous than a bear, as well as being more intelligent and communicative. There is no question of accident, for he made his intentions clear. Fortunately, he has been provided with an expert (at the public expense) who sees a way out. 'Delusion', argues the expert,

where there is no frenzy or raving madness, is the true character of insanity; and where it cannot be predicated of a man standing for life and death of a crime, he ought not, in my opinion, to be acquitted; and if courts of law were to be governed by any other principle, every departure from sober rational conduct would be an emancipation from criminal justice. I must convince you, not only that the unhappy prisoner was a lunatic within my own definition of lunacy, but the act in question was the immediate unqualified offspring of the disease.[2]

"... if a bear kills a man, this event is considered unfortunate but not reprehensible, for such is the nature of bears. So, what if a man be so absolutely mad as to behave like a bear, what then?"

The court is convinced, A is acquitted, and half a century later another deluded A (whose real name was M'Naghten) is also acquitted. It is time for another look at the rules. Some helpful suggestions are made. For example, of fifteen wise men consulted, fourteen propose that

to establish a defence on the ground of insanity, it must be

clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, he did not know he was doing what was wrong.[3]

Few are satisfied but at least some are half-satisfied. Thus, Lord Bramble says, 'I think that, although the present law lays down such a definition of madness that nobody is hardly ever mad enough to be within it, yet it is a logical and good definition.'[4] There are other problems, too: different tribes have different opinions about the meaning of the word 'wrong',[5] so future A's will need an atlas to assess their chances. But someone has already had a very important thought, as can be seen in the words of the fourteen wise men who propounded the rules given above. If a man behaves like a beast, then the whole man has gone wrong, as it were. But if he is deluded, or cannot reason correctly, what then has gone wrong? The proposed answer is ingenious, and something like this. The people you see about you, conversing, earning their living, eating their dinner, are not what you think they are. They are, in fact, automata. That they can perform these complex tasks is accounted for by each of them being controlled by quite a separate creature. Almost invariably there is one creature to one automaton, but careful research by experts has discovered or created a few instances of automata equipped with more than one creature. Mercifully, such a combination has not killed anyone. The creatures have some unusual properties. They are invisible, and without mass or any particular location. There is some debate about whether or not they are confined within the automata, or whether under certain conditions they can roam about in the world at large. Opinions are divided about their fate when the automata perish. No one has seen one of these creatures, and no one expects to. One cannot communicate directly with them, and one cannot prove their existence. It is these creatures who reason, and who form the intentions which remain as ethereal as they do. There has been a fundamental shift in the rules; we are into a new game. We are no longer concerned with the doings and disorders of men, but of the creatures. They are christened 'minds', and there is a rush to anatomise them, and name their parts. This is a source of endless satisfaction, for the number of their parts is inexhaustible and no one can ever be proved wrong. The polyglot more readily achieve fame.

"... a fundamental shift in the rules; we are into a new game. We are no longer concerned with the doings and disorders of men, but of ... 'minds' ..."

We now come to the doctrine of convenient, but incorrect, fictions. As I write, I am sitting in a chair. I know that it is comprised essentially of a vacuum, the sole occupants of which are some rather complicated arrangements of energy. I sit undeterred. The 747 captain who navigates me across the world uses the physics of Newton and the geometry of Euclid, both found wanting. We arrive nevertheless. The Government Astronomer, looking through his telescope, contemplates the planets circling the sun; I suspect that when he arranges to go fishing he talks of sunrise. These and a thousand other fictions are good enough for daily life; indeed, without them, we would be paralysed. Difficulties arise when they are invested with a virtue they do not possess – that of being equivalent to some sort of reality – and therefore susceptible to intelligent analysis and elaboration.

Let us consider, as an example, the interesting problem of what the automaton can do if its mind is absent. Just where an aspatial entity can go, and indeed how it can be absent from anywhere in the universe, need not detain us. Nor should we wonder about how one can detect an absence of mind when its very presence is unobservable. These are questions for experts. A simple person like myself might think of the automaton as a puppet, and the mind as a puppeteer. Were the mind to go a-wandering, I would expect the automaton to lie abed, performing its vegetative functions until its mind returns. The English Court of Appeal has held that such a state can be a defence because 'the mind does not go with what is being done',[6] so my conception is not too simplistic. But that is as far as my understanding goes. If the automaton can perform acts sufficiently complicated to get itself into such trouble that it needs a defence, and if automatism is the defence, then we may ask what it is that directed the automaton during its unlawful behaviour. If not the mind, then what? Certainly not a disordered mind, with its reason overthrown, not knowing what it is doing, for that is insanity. Notice that commonsense has no problem. If there were no doubt that A injured B during an epileptic seizure, then most would agree that we should go a bit easy on A. The problems begin when we try to locate A's errant mind, to determine where it was on some occasion other than that of the examination, and then, by a process of great subtlety, further determine its state of health at a time when it could not be found. All this is done by interrogating what may only be the automaton after all. There are other possible complications, too. What if automaton and mind had gone off to the pub and got themselves drunk? Or taken LSD? What if they did such things habitually, and had reached a state of chronic but variable befuddlement? What if they can't remember what they did? Was the mind there at the material time or was it in its own little bed, sleeping it off? Was it diseased in such a way that it was capable of forming intentions but not capable of recording them? Or is it merely a devious and naughty mind, lying to cover its tracks? We should give praise to those who can unravel mysteries such as these.

"The problems begin when we try to locate A's errant mind, ... and then, by a process of great subtlety, further determine its state of health at a time when it could not be found."

What I have written to this point is meant to serve merely as an introduction to my confusion. I have endeavoured to argue that while there are certainly problems about the disposal of those who kill unlawfully, the invention of the mind, and contemplation of its presence, absence or

state of disarray has been a major impediment to the rational solution of this problem. In 1974 the legislature of New South Wales added section 23A to the Crimes Act of 1900.

23A. (1) Where, on the trial of a person for murder, it appears that at the time of the acts or omissions causing the death charged the person was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for the acts or omissions, he shall not be convicted of murder.

(2) It shall be upon the person accused to prove that he is by virtue of subsection (1) not liable to be convicted of murder.

(3) A person who but for subsection (1) would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

There are other sections not relevant to our purpose. It is self-evident that the new section is yet another attempt to deal with the problem posed in disposing of murderers who are clearly crazy or half crazy. It may be objected that the M'Naghten rules dealt with those that are crazy but I would reiterate that very few are really as crazy as all that.

You will note that in the new section we are once more concerned with the mind, and that this time it has a faculty called 'mental responsibility'. Here I have a real difficulty. I can think of minds in much the same way that I can think of infinity, virtual particles and tessaracts – that is, I have a limited grasp of what is proposed, and can assemble its facets into some sort of vague shifting entity. 'Mental responsibility' defeats me. Is it the mind that has responsible qualities or the responsibility which has mental qualities? Or what? Or is it all so nebulous that no one knows what it means? Let me try to put the problem in my own terms. If we investigate a collision between billiard balls or motor vehicles, we may, using the combined wisdom of Euclid and Newton, come to an understanding of what has gone on. You will recall that both these systems of thought have been refuted as correct descriptions of such phenomena, but that both are good enough for our purposes. In the same way, if A killed B unlawfully, then in most cases a sufficiently thorough investigation of the parties is likely to produce an explanation of A's behaviour which would satisfy any person with commonsense and some experience of life. As we become more experienced our account of A will become more complex and more satisfying.

"'Mental responsibility' defeats me. Is it the mind that has responsible qualities or the responsibility which has mental qualities?"

Often it will emerge that many other citizens have been in much the circumstances A was vis-à-vis B but will not have killed. We shall be able to demonstrate that in all probability the significant difference was that A had some predisposing factor in his development such as a singularly brutal upbringing, or early deprivation and impoverishment. Since killing is an exceptional solution to a human problem (other than when nations are involved) there will always be something exceptional about A. If there were not he would not have done what he has done. It follows that the more complete and skilful our investigation of A, the more likely we are to turn up the aberrant factor, the statistical abnormality associated with his abnormal behaviour. No one should be surprised at that, for *a priori* there was every reason to expect such an observation to be made in due course. Reasonable men would anticipate that knowing why A killed B might be helpful in predicting whether or not he would do such a thing to someone else, and whether or not this propensity might be removed (should it exist) and how. Such knowledge would have practical value. If A is intent on killing his fellows, believing them to be bears, his management is straightforward enough for the uncomplicated mind. If on the other hand he guns them down and empties their pockets convinced that the world has dealt harshly with him heretofore and owes him a living now, it is better that we assess the situation on its merits at the time rather than set up a series of rules which will determine the management in advance by propositions only remotely connected with observation and common experience.

I do not think that juries pay much attention to the accused person's mind. They consider his behaviour, and compare it with what they imagine their own might have been under similar circumstances. If the accused's behaviour has been alien, they think it mad. Simultaneously, they are aware of their judgemental feelings about the matter. If the accused's behaviour has excited their sympathy, or at least not aroused their indignation or anger, then they will modify their findings appropriately in the direction of less punishment and more treatment. Section 23A is probably relevant when they think him a bit mad but not completely mad. The case of *R. v. Byrne* (1960) 2 QB 397, cited by Mr Justice Taylor in his paper on compulsions and obsessions,[7] is relevant. Byrne had a propensity towards certain sexual practices: as a product of this he strangled and mutilated a young woman. The medical evidence was predictably circular in its logic. Because he habitually behaved in this way he was a sexual psychopath. Because he was a sexual psychopath he habitually behaved in this way. Therefore, he had a disorder of the mind which made it impossible for him to control his sexual desires. The law was no less circular. The judge directed the jury to find no abnormality of mind for the only evidence was the behaviour itself. Parenthetically, it is not easy to see what non-behavioural evidence there might have been of such a disorder. But the presence or absence of abnormality of mind is a matter of fact for a jury to find, so later the judge was held to be in error. It is inescapable that a jury proceeding logically must have found an abnormality of mind unless they were all doing similar things themselves. The real question is what are we going to do about a man whose usual sexual inclinations and practices have led to this catastrophe, and where on actuarial grounds (the best) the probability is that he will do such a thing again. Words such as mind, psychopath, abnormality, retarded development, mental responsibility and so on cloud the issue rather than assist to

resolve it. Another English case, *R. v. Matheson* (1958) 1 WLR 474, cited by Mr Justice Taylor,[8] makes the same point, but the other way round. A man killed a boy in 'particularly revolting circumstances'. Three doctors called on his behalf said that he had an abnormality of mind, and there was neither opinion nor evidence offered in rebuttal. The jury, with robust commonsense, found him guilty of murder. The English Court of Appeal observed that his behaviour was abnormal, and that the doctors had said that his mind was abnormal. Since nothing had been put to the contrary, therefore the jury's verdict was set aside as unreasonable and unsupported. It would seem to follow from this that the more destructive and revolting one's behaviour the more likely is one to receive the benefit of the section. If one has committed one abominable offence one would be wise to rush out and commit a few more, improving one's perverseness as one goes. Even if the first murder is logical and productive of gain and satisfaction one will be likely to attract a lesser penalty if one follows it up with a few fancy ones.

The confused nature of the concept emerges once again in the first case tried under section 23A in New South Wales. The trial judge took a view of the section which is not self-evidently correct to a layman. A man with a history of being in psychiatric institutions strangled and raped a young woman with whom he had been friendly. Then he stole her money and bank books and indulged in complicated manoeuvres to enrich himself, after which he disappeared. The judge pointed out that the section did not apply to all those with abnormalities of mind – certainly not to those who were 'just depraved or vicious'. For it to apply, the abnormality had to arise from a condition of arrested or retarded development of mind, and so on, in terms of the section. Since his had not been induced by disease or injury he was not within it. While I do not know the facts of the case, it is general clinical experience that those who are depraved and vicious are so because they have been subjected to depraved and vicious experiences themselves. The person who batters his or her child is very likely to have been battered himself – one injury flows from the other. Since, to the best of my knowledge, the judge did not define the words 'disease' and 'injury' it may be that he left the jury to take them as physical processes and so presented us with the paradox indicated before – that the insubstantial mind may be damaged only by blows or biochemistry, and not by mental events or forces, which is quite contrary to commonsense and experience.

"... the more destructive and revolting one's behaviour the more likely is one to receive the benefit of the section."

One might argue that the words 'depraved' and 'vicious', suggest that the judge's direction was not based upon established meanings of these words, but rather upon an unstated morality which produced in him an abhorrence of the accused's actions. It could be that the judge felt that it was quite wrong for such a person to benefit from section 23A (I would be completely with him) and therefore interpreted the word 'injury' in such a way as to limit its application. If this is so, the whole process is a cumbersome way of achieving a result which few would dispute. In a brief comment at the end of his paper, Mr Justice Taylor seems to me to make the general situation even more obscure. Discussing another case he wrote, 'I cannot see New South Wales juries entertaining a plea of diminished responsibility on the basis that the accused believed that he was somebody else and in that belief felt compelled to do what he did.'[9] There are two parts to this proposition. The first part is that A believes himself to be X. If he is not X, and if the belief is firm, then A is deluded. One hundred and eighty years ago Erskine[10] persuaded the courts that delusion was the true character of insanity and today most actions proved to be products of delusion would probably be regarded as 'M'Naghten mad'. The second part is that it is X's propensity to kill B, and that A, believing himself to be X, does exactly that. If A is not suffering from an abnormality of the mind, induced by disease, then who is? For example, if I hit someone over the head with an iron bar then, in the conventional terminology, I may injure his mind. Concrete action injures ghostly entity. Suppose that instead of that I confine him in a dark hole for his first twenty years, keeping him alive but otherwise neglecting him totally. There can be no doubt at all that there would be a gross abnormality of mind arising from retarded development. Is this not an injury of the mind? Or can one injure the mind only with an iron bar or its equivalent? Even on this basis would not confinement within a hole be a physical process modifying other physical processes in the brain and so amount to injury? If you grant me that, then what if I do not confine him in a hole but during these years taunt him, denigrate him and misuse him sexually; might this not also produce arrested development and abnormality of the mind, and would this not amount to injury again? But it is common experience that those who murder have backgrounds which are not much removed from this, for surely abnormal behaviour has abnormal determinants, and murder is very abnormal behaviour.

So far we seem to have encountered the following conditions:

(a) The mind is completely fit, and able to form rational intentions.

(b) The mind is abnormal, such that it does not know what it is doing and that what it is doing is wrong.

(c) The mind is abnormal, not to such a degree as in (b), but such that its capacity to form rational intentions is impaired.

(d) The mind is absent, but the automaton, guided by some other undescribed entity, may perform complex acts. There is also a distinction to be made between insane and sane automatism: let us save that one up for another time.

(e) The mind is fit, and able to form intentions with sufficient rationality to make the killing unlawful, but not sufficient to make the killing amount to murder. The mind is fit, but the intentions are not rationally formed.

I find the concept difficult, and not easy to distinguish from (c). As I understand it, this is the essence of manslaughter, but then I believe that there is a distinction between voluntary and involuntary manslaughter. Voluntary

manslaughter (I think) occurs where there is intentional killing, mitigated by (say) provocation. Involuntary manslaughter would occur in the case of unlawful killing done without malice. How a mind involuntarily forms an imperfect intention is not easy for me to comprehend – it seems to amount to an automatism of the mind, rather than that of the automaton, for how else can the mind act without willpower?

"Killing may attract anything from the Victoria Cross to a life sentence ..."

It has been my purpose to show that while the system of concepts set forth above may perhaps have a logic and validity of their own, it is more than I can do to perceive it. Further, if after much thought I find it difficult to understand, a jury encountering it for the first time may have at least as much trouble. Why has such a complex system arisen? If not from some intrinsic correctness which inevitably led to its formation then there may be a less direct reason. People kill for a variety of causes. Killing may attract anything from the Victoria Cross to a life sentence – which is another useful fiction, for in New South Wales 'life' is less than fifteen years. If the courts were charged with the responsibility of enquiring into killings, and deciding the best method of handling the killers, then the problem would be difficult, but not beyond solution, because commonsense, assisted by learning, experience and expert evidence, would prevail. But, until recently, the mandatory sentence for murder was death, and even now it can be prolonged imprisonment. Everyone can see that for some cases of unlawful killing these penalties are inappropriate. I have tried to show that the method which exists for resolving this problem is unsatisfactory. The essence of the argument is that, for more than half a millennium, there has been arising piecemeal, a complex rickety structure of poorly defined categories, based on obscure disorders in even more nebulous entities. The complex rules which determine the label attached to the person who kills are almost certainly beyond the comprehension of juries, and may well be so empty of meaning that they are beyond anyone's comprehension. It is surely significant that this whole apparatus of minds, wills, intentions, arrested developments, mental responsibilities, diseases, injuries and intrinsic defects bears little relationship to the concepts of psychiatry and psychology. No one can object to the law being arbitrary in its inventions, for decisions must be made no matter how elusive the underlying concepts, but it is unfortunate that the terms which have emerged as categorisations of behaviour mean little to those who have made the closest study of behaviour.

Nor is all the blame to be laid at the door of the lawyers, for there is no shortage of psychiatrists to go along to the courts and answer questions couched in terms of minds, wills, mental responsibility and so on as if they were experts in such matters, which quite assuredly they are not.

"Now that the judges have considerable discretion as to the penalties for unlawful killing, the fundamental necessity for the whole complicated system we have been considering disappears."

How else might one approach the problem? Once the fact of unlawful killing has been determined then three useful questions arise towards the answering of which a psychiatrist might make a contribution.

Why was the deed done? Careful medical, psychological and sociological investigation will provide information about the meaning of the act and the propensities of the person who did it.

Is that person likely to do it again? This question is much more difficult. Nevertheless, it has to be attempted, for sentencing is tied up with the answer.

What can be done about it? From a psychiatrist's point of view, quite often not much, but there will be exceptions which need not be discussed here.

Provided that the psychiatrist avoids words which he does not understand he should be able to make sense most of the time, and assist the court occasionally. Apparently simple terms – such as disease or injury of the mind – are far from precise in their meaning, and are likely to carry the added hazard of having one connotation to the lawyer and another to the psychiatrist. The members of the jury probably have their own individual ideas, too, but no one asks them. Once the court has heard what it needs to hear and reached its decision about these matters, the process of sentencing can begin. Now that the judges have considerable discretion as to the penalties for unlawful killing, the fundamental necessity for the whole complicated system we have been considering disappears. We should, I think, summarise in this way: the use of convenient fictions is an essential part of human activity. Unfortunately the fictions may acquire the semblance of reality, and be treated with more respect than they deserve. Where the field is one in which it is difficult to test hypotheses, fictions may grow apace until they achieve their own *reductio ad absurdum*. This seems to have happened in section 23A of the Crimes Act of 1900. MT

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