

# The Matter of Forensic Psychiatry: A Historical Enquiry

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Since antiquity, some men have not been considered accountable for their actions when they transgressed the law, and were exempted from legal penalties, or given lesser ones. Why? The rationale for legal exemption has varied over time. So have the labels assigned to such lawbreakers, and even the personnel involved in the labelling process. For centuries, settling the question of deviant mental states of relevance to the court seemed relatively unproblematic. It was thought that personal acquaintance would easily discover such states of mind and the court could then be notified. It was not until the nineteenth century that western society felt a need to regulate this *problematique*. As a result, or as a precondition for this process of settling the question of legal accountability, the matter came to be construed in part as a medical problem. Physicians, and later psychiatrists, came to be regarded as possessing specific knowledge in this area which qualified them to judge a person's legal accountability. Personal knowledge of the deranged defendant was supplanted by professional knowledge of sanity and insanity as the basis for authority on the matter of accountability.

This essay seeks to investigate how the question of legal accountability became transformed into a matter of medical authority, based on the case of Norway. The study involves an understanding of the relationship between forensic psychiatry and its disciplinary neighbours, jurisprudence, medicine and theology, and sensitivity to the language employed, the shifting terms used, and the changing meanings of those same terms. I believe that legal and medical matters such as these are largely shaped from below—that the specific encounter between a defendant, his judge and the medical expert is as important as the procedures detailed in authoritative texts by distinguished scholars. From this vantage point it is as interesting to explore events in marginal societies as to investigate developments in recognized centres of intellectual and professional advancement. Therefore my study rests on two not very extraordinary legal cases from Norway; two undistinguished murderers who faced the courts and their associated experts in the nineteenth century. But before presenting the cases, I will briefly outline current international historical research in this field.

## Profession and Discourse in the Historiography of Forensic Psychiatry

The literature on the history of forensic psychiatry seems to have been dominated by the framework of the sociology of professions. Medicine and law are the two prototypes of nineteenth-century professionalism, and their growing power is understood in terms of a quest for greater public esteem and influence in society.

Roger Smith construes the story of insanity in court as a story of a battle between law and medicine. “Medico-legal conflict was therefore inevitable . . . It appeared as if law and

medicine were vying with each other to describe psychological facts.”<sup>1</sup> The controversy as here described was to a high degree discursive, as the two professions spoke different languages, allowing for different explanations, conceptualizations and conclusions. “Boundary-drawing involved a decision about which discourse should be dominant.”<sup>2</sup> And the essence of this difference is the opposition between “the idealist language of knowledge” and “the mechanist language of causation”.<sup>3</sup> It follows from this perspective that the medical profession, as the new player in an old field, was the more aggressive, seeking to replace a discourse that appeared self-evident (the legal discourse) with an alternative one.

Somewhat in opposition to this interpretation is Joel P Eigen’s study of 1995.<sup>4</sup> Based on research into insanity trials in late-eighteenth- and early-nineteenth-century England, Eigen concludes that the introduction of defence lawyers was crucial in promoting the insanity defence and hence in enhancing the medical/psychiatric influence in court. The aspirations of the medical profession are explicitly played down in his account, as is the discursive opposition between medicine and law: “Assertions to professional expertise, when they do appear, seem to have been born in the designs of ambitious attorneys, endeavoring to secure an acquittal, rather than in the professional aims of soi-disant usurpers of the courtroom.”<sup>5</sup>

Though differing in their view of the causes of the increased use of expert medical witnesses in insanity trials, Smith and Eigen both accept the framework of the sociology of professions. Michel Foucault on the other hand places the forensic psychiatric testimony in a broader picture. For Foucault the psychiatric expert did not come forward at the expense of the power of the law, but rather as an expansion of it.<sup>6</sup> Though psychiatric expertise for a brief moment may have been introduced as an alternative mode of power, it soon found its place alongside the law in the medico-legal apparatus of the nineteenth century—thereby expanding power rather than usurping it. In this manner the alleged humanization of punishment in the nineteenth century was countered by the expansion of disciplinary power.

Foucault sought to abandon the term “interest” altogether, as part of his project of rethinking the subject. In an interesting discussion on the possibility of a “strategy without a subject” (an important Foucauldian idea), he deploys the emergence of forensic psychiatry in the nineteenth century as a historical example of the development of such a strategy. For Foucault it is impossible to see this process in terms of interest (“Can one talk of interests here? . . . Where is their interest as doctors in this?”).<sup>7</sup> The argument

<sup>1</sup> Roger Smith, *Trial by medicine: insanity and responsibility in Victorian trials*, Edinburgh University Press, 1981, p. 72.

<sup>2</sup> *Ibid.*, p. 124.

<sup>3</sup> *Ibid.*, p. 141.

<sup>4</sup> Joel P Eigen, *Witnessing insanity: madness and mad-doctors in the English court*, New Haven, Yale University Press, 1995.

<sup>5</sup> *Ibid.*, p. 5.

<sup>6</sup> This argument is particularly elaborated in Michel Foucault, *Les anormaux: cours au Collège de France, 1974–1975*, Paris, Gallimard; Seuil, 1999, *passim*. See also Michel Foucault, *Surveiller et punir: naissance de la prison*, Paris, Gallimard, 1975, pp. 21–9.

<sup>7</sup> In the round table talk ‘Confession of the flesh’, printed in Michel Foucault, *Power/knowledge: selected interviews and other writings 1972–1977*, ed. Colin Gordon, New York, Pantheon, 1980, pp. 194–228, quotation on pp. 204–5. The incredulity versus the idea of an interest-driven imperialist quest is repeated in the recent French study of crime and madness by Renneville: “one can validly ask what specifically has been gained by this” (“on peut se demander ce qu’ils avaient à y gagner concrètement”); Marc Renneville, *Crime et folie: deux siècles d’enquêtes médicales et judiciaires*, Paris, Fayard, 2003, p. 131.

remains somewhat unclear, though it seems that it is the complexity of the process and the heterogeneity of the forces behind that rules out the professional interest as a significant explanatory factor.<sup>8</sup>

Jan Goldstein has taken this remark of Foucault's as the specific occasion to re-argue the case of professional interest in this field. In her seminal study of the French psychiatric profession in the nineteenth century, Goldstein stresses the question of the profession's "public esteem" when she claims that this definitely was a matter of professional interest.<sup>9</sup> But in a thought-provoking afterword to the 2001 edition of her book she has herself pointed out that an unintended side effect of her focus on professions in *Console and classify* was that clashes between law and medicine were treated as an interdisciplinary boundary dispute. She opposes this perspective to that of Foucault, who "stresses the radical qualitative dissimilarity between law and discipline, construing them as two great but opposing discourses that structure modern life",<sup>10</sup> that is, as relatively free from the embodied professionals. Hence Goldstein acknowledges the dissimilarities between a discourse-oriented and a profession-oriented conceptual framework. But she still stresses the opposition between the two, downplaying the idea of a tight co-working between law and medicine that can also be found in Foucault's writings on forensic psychiatry in history.

In this way one might extrapolate two perspectives on the history of forensic psychiatry, one leaning on the historical sociology of professions, the other on discourse analysis. Hence it may be claimed that the historians of this subject do not disagree in interpretation as much as in perspective. While the perspective of the social history of professions sustains an internalist perspective on the emergence of forensic psychiatry, the model of the medico-juridical apparatus presents an externalist perspective, more preoccupied with effects than motives. Rather than replacing the former, the latter offers important nuances for our understanding of this history.

### **A Child Murderer and a Double Murderer: Two Legal Cases**

In 1819 a worker at the ironworks at Nes in southern Norway was charged with the murder of an eleven-year-old beggar, whom he had thrown into a smelting oven. He was prosecuted before a local court, consisting of a magistrate (*sorenskriver*) and two sworn men (*lagrettemenn*). At this period in history, the investigation was hardly separated from the trial itself. In this case there was an itinerant court, whose composition varied, that took testimonies from the witnesses, and eventually pronounced sentence.<sup>11</sup> There were also a

<sup>8</sup> "All sorts of subjects intervened, administrative personnel for example, for reasons of public order, but above all it was the doctors and magistrates." Foucault, *op. cit.*, note 7 above, p. 204.

<sup>9</sup> Jan Goldstein, *Console and classify: the French psychiatric profession in the nineteenth century*, 2nd ed., University of Chicago Press, 2001 (first ed. 1987), p. 168.

<sup>10</sup> *Ibid.* 414.

<sup>11</sup> For the documents in this case see the unpublished manuscript: *Tingbok 41 (1819–1824)*, *Nedenes sorenskriverembete*, held in the Statsarkivet i

Kristiansand (regional archive, Kristiansand).

The relevant section is transcribed on the website: [www.museumsnnett.no/jernverksmuseum/masovnsmordet.html](http://www.museumsnnett.no/jernverksmuseum/masovnsmordet.html). In 1819, the "sworn men" still combined the functions of witnesses and of judges, though the magistrate was the principal judge. (The documents declare the sentence was pronounced by the magistrate and the sworn men together.) The number of sworn men varied, not just from case to case, but from meeting to meeting in the same case. At the time of the sentence in this case, there were four of them.

prosecutor and a defence attorney present at these investigations. From the documents of the case (taken by the magistrate), there seems to have been no doubt—during the legal process—as to whether the man was the actual perpetrator of the deed (he seems to have confessed immediately). Nevertheless, doubt soon arose as to his subjective guilt. A number of neighbours and colleagues gave testimonies of a deranged mind, formulated in the elastic terms of common language (he was “not in his full senses” said one witness; “confused in his head” said another).<sup>12</sup> Even the owner of the works where the defendant was employed appeared in court to pronounce his doubts about the defendant’s wits. The testimonies raised doubts. Seemingly as a consequence of the employer’s testimony, but on the direct initiative of the defence attorney, a local physician was called upon to voice his opinion—to give a statement. His task was to act as an expert before the provincial court. The defence managed to obtain a suspension of the legal proceedings, waiting for a physician’s testimony. The physician’s examination, however, is not described in the sources. The doctor’s mandate, on the other hand, *is* included. His mandate was—and this is noteworthy—explicitly bound to the *physical* condition of the defendant. The physician was to investigate if the defendant showed any physical signs of “a weak mind”. It seems that he did not find any. But there was more. A priest was also cross-examined during the trial, and the way these two proto-professionals’ testimonies are juxtaposed in the verdict is of particular interest. The court ruling concluded the question, namely, by stating that neither the physician’s examination of the man’s body nor the priest’s examination of his speech provided evidence of the accused being demented. The man was then sentenced to death. (Whether he was actually executed or not, we do not know.)

What interests us here, however, is not the sentence of capital punishment, nor the entourage’s efforts to save the defendant’s life through some (improvised) kind of insanity defence, but the peculiar epistemological configuration of the physical and the moral that is staged. The physical and the moral, the body and the mind, the physician and the priest—they are in this case complementary.<sup>13</sup> *Dementia* is in this case conceived as a human condition with physical and mental symptoms (reflecting the physical and the moral aspects of man). And these two symptom groups were associated with two different fields of knowledge and two different professions. Furthermore, the relation between the two was not hierarchical; the one was not fundamental in relation to the other. It is the physical aspects of this complex that make dementia a potential scientific object.<sup>14</sup>

It should also be noted that the original denomination *vanvittig*, here translated as “dementia”, is a word employed for centuries in Norwegian legislation. Etymologically speaking the term was equivalent to the Latin terms *fatuitas*, *mente captio* or *idiotia*, and it has been argued that it was introduced in Norse legislation via German law specifically to

<sup>12</sup> “. . . ikke ved sin fulde Fornuft”, “ikke ved Forstandens fulde Brug”, “forvirret i Hovedet”, “vanvittig”, from; transcription at *Tingbok 41*, *Nedenes sorenskriverembete* at [www.museumsnett.no/jernverksmuseet/masovns mordet.html](http://www.museumsnett.no/jernverksmuseet/masovns mordet.html).

<sup>13</sup> This pairing echoes the much older co-operation between priests and medical men in the investigation procedures concerning people suspected for possession, as laid down in the Norwegian church

rituals of 25/06 1685; Paul Winge, *Den norske sindssygeret: historisk fremstillet. Første bind.*, 3 vols, Kristiania, Dybwad, 1913, vol. 1, p. 32.

<sup>14</sup> The complementarity between theology and medicine witnessed in this case is also evident in early scientific practices such as mesmerism and phrenology, and in early modern literature where the figure of the physician is frequently doubled by that of the priest.

denote inborn mental weakness.<sup>15</sup> However, these technical meanings seem to have faded, at least by the eighteenth century. From that time the term was frequent in common language, without the direct connotation to medical discourse that its Latin version had. Hence the vocabulary employed was embedded in legal as in common parlance, but hardly in any medical discourse.

The legal case presented here, which is of the inconspicuous, run-of-the-mill type, unmentioned on in the legal as in the medical literature, shows that the act of summoning a physician to evaluate a defendant's state of mind was not unheard of in legal practice in early-nineteenth-century Norway. But evidently we cannot tell from this single case whether this was a common practice. Furthermore, the case shows that the physician cum legal expert had a very restricted mandate: namely to read the physical signs of madness. And that it was within this restricted mandate, and the neat symmetry of *moral* and *physical*, that dementia could emerge as a scientific object. The co-operation of the three professional groups—medicine, law and theology—also testifies to a specific perception of the human being, according to which the moral and the physical aspects of man are neatly separated but still work intimately upon each other.

Seventy years later the bearing of insanity on criminal affairs had changed a great deal, as had the authority of physicians on the matter. The next case presents this radically altered picture. In 1888 a man from Stavanger in south-eastern Norway was imprisoned for life for the murder of an officer of the poor board.<sup>16</sup> A few years after his imprisonment (1893) the murderer was submitted to a mental examination by the prison's physician. The physician found the convicted man to be mentally "deranged" (it might be significant that the word "illness" is not mentioned in his report), and recommended his transfer to an asylum for the criminally insane. The country had just one institution of this kind, in Trondhjem, the very same town where the murderer from Stavanger was already incarcerated. We do not know how this recommendation was handled by the authorities. We do know that the year after this examination, the man, still in prison, committed a second murder. This time his victim was a prison warder.

Within a day of the murder, the legal authorities (*kriminaldommeren*) ordered a medical examination of the accused to be carried out by the medical superintendent and the assistant resident physician at the local mental asylum. The expressed task was to examine the mental condition of the defendant, as well as his criminal accountability. The superintendent, Jens Selmer (1832–1916), was at the time one of the country's most experienced alienists with twenty years experience as head of the second of the country's asylums.<sup>17</sup>

<sup>15</sup> Winge, op. cit., note 13 above, vol. 1, pp. 24–32.

<sup>16</sup> Henrik A Th Dedichen, *Paa begge sider af sindssygdømmenes grænse*, Kristiania, 1898. Dedichen gives an account of the case, including long extracts from the relevant documents. The poor board was a local administrative unit charged with the responsibility of caring for the poor, established in 1845. Apart from the minister, the board's members were elected by popular vote. In some communities the poor law was equipped with a salaried officer. (Anne-Lise Seip, *Sosialhjelpstaten blir til. Norsk sosialpolitikk 1740–1920*, Oslo, Gyldendal, 1984, pp. 54–64.)

<sup>17</sup> Throughout the nineteenth century the term "psychiatrist" was used interchangeably with that other term *sinnssygelæge* (analogous with the German term *irrenärzte*, literally the "physician of the insane"), which is here translated as "alienist". Though it may be argued that the term psychiatrist had stronger scientific connotations, whereas *sinnssygelæge* primarily referred to the occupation of running an insanity asylum, in this essay the terms are used synonymously.

The assistant resident physician, Henrik A Th Dedichen, was less experienced with the mentally deranged, but had studied with Emil Kraepelin in Heidelberg and would eventually become one of the most prolific writers of his generation of Norwegian alienists. The two doctors examined the prisoner by interrogating him in his cell, by reviewing the legal interrogations and by studying the documents of the case, among which were some fragments written by the defendant himself (poems and prose). Based on these investigations, the two alienists concluded unanimously on 26 November 1894 that the defendant ever since childhood had been “physically abnormal”, that the previous few years he had suffered from a chronic mental illness and consequently was not answerable for his actions. The implication was equally unambiguous: the defendant was unfit to plead and should be treated in an asylum rather than kept in gaol.

On the basis of this advice from the medical experts, the authorities inclined towards dropping the charges. However, the case circulated among the bureaucracy for some time. Eventually the Director General of Public Prosecutions (*riksadvokaten*) turned to the Medical Faculty at the University of Christiania for further expert advice. This was far from a path-breaking procedure. Ever since the early seventeenth century the professors in medicine at the University of Copenhagen had assisted the authorities in medical matters as a consultative body. This duty was in 1814 transferred to the newly established Medical Faculty of the University of Christiania (later Oslo), who kept it until 1900.

In this particular case, the professors of medicine found the available information too limited. Their recommendation was to submit the prisoner to further examination, this time in the controlled environment of a public asylum. But the public asylums seem to have been reluctant to accept the task; all three national asylums in the country hesitated. At this time the country had both a number of asylums established by the central government (national asylums) and some municipal or county asylums. In cases like this it seems that the authorities approached the state asylums only. However, a supposedly dangerous prisoner was not a desirable inmate in a mental asylum. The result, then, was that the two alienists Selmer and Dedichen had to reengage in the case. The prisoner was transferred to Rotvold, the mental asylum at Trondhjem, where he was kept for well over a month. After this period, the alienists submitted extracts of the case notes to the prosecution authorities and a brief statement in which they confirmed their previous conclusions. On the basis of these notes, the Medical Faculty gave their support to the verdict of doctors Selmer and Dedichen, whereupon the Director General of Public Prosecutions finally dismissed the case.

At this time, Norwegian courts operated with a jury system (established through a legal reform of 1887), but in this particular case, where the charges were not pressed, the jury never came to pronounce a verdict on the matter of accountability. Indeed this seems to have been the case even when charges were pressed: the question of accountability would normally not be presented before a jury.

In the case of the double murderer, the matter of responsibility was raised between the two crimes with the result that the second trial was called off. Based on an evaluation of the defendant’s personality, the prosecution authorities never pressed charges. Furthermore, the matter was not solved locally, but migrated up and down through the bureaucracy with a weighty engagement from various physicians acting as experts evaluating the murderer. None of these experts was a run-of-the-mill physician. The first was an expert on deviant personalities due to his position as a prison physician; the second and third physicians were



experts on alienation due to their positions at a public asylum. The last representative of medical authority, the Medical Faculty, was the embodiment of general national medical expertise, though none of the professors had experience in treating the insane. (A chair in psychiatry was not established at the University until 1914.) The backbone of the various evaluations of the defendant was a conception of “psychical abnormality”, and they did not engage much in the question of cognitive capacities associated with the specific act (as in the famous British formula of “knowing right from wrong”).

On a deeper level, we can argue that these two cases reflect an alteration of the image of Man taking place in the early to mid-nineteenth century. In the 1819 case the authority was divided between a priest and a physician, as the disease (*dementia*) consisted of physical and moral symptoms. Seventy years later, a whole medical hierarchy was called upon, and most significantly among them a small group of confident psychiatrists, whose field of expertise was not the “moral” (a term that had disappeared in the meantime), nor the “physical” but the *relationship between* the “psychic” (which had by now become the modern term) and the somatic aspects of man. Whereas the case from 1819 aligned the physician and priest, and the physical and moral aspects of madness and of man, this case of 1889 is rooted in a much less clear-cut co-working of various factors. Here we find a general physician as well as the specialist psychiatrist (whose claim to expertise stems from his position as an asylum superintendent) and even the academic medical élite at the Faculty. The limits of the competence of the different players in the game are rather unclear. There is, however, as compared with 1819, a new situation of contested claims of authority that corresponds with the new imagery of the person, where the boundaries of the “psychic” and the “somatic” have become muddled. The experts do not relate to a dualism of “moral” and “physical”. Man has become One, with the consequence that expertise should be one as well.

However, it is clear that neither of these cases can be properly understood in isolation. To deepen our understanding of the changes taking place from the time of the child murderer (1810s) to the time of the double murderer from the Trondhjem gaol (1890s), we need to penetrate the discourses surrounding these trials. We need to look at medicine’s engagement in court. In what follows, I will first explore the legal history surrounding these cases, before turning to the medical context, taking into consideration that the relevant contexts are both textual and institutional.

### **The Words of the Law**

The principle of legal exemption associated with certain deviating mental states precedes by far the professionalization of both jurisprudence and medicine. The legislation of early modern times does not seem to have demanded a specific expertise to identify the state of mind in question, nor did it tackle the matter with a particular technical vocabulary. In some cases, a specific crime (such as parricide) seems to have been accepted as a definite symptom of madness (or whichever term was chosen); in other cases also the recognition seems to have been a straightforward matter. Any man was supposed to be able to recognize a madman when confronted with such a creature.

In the Middle Ages the Norwegian legal system was based on the regional “things” (*ting*) and on oral traditions only belatedly written down in the form of law

books.<sup>18</sup> This ancient legislation does mention some mentally deranged lawbreakers as subject to legal exemptions, or at least to special considerations. For example the law text *Gulatingsloven* from western Norway rules that the madman (*óðr*) who kills his next of kin (father, son, mother, brother or daughter), should lose his right of inheritance, but not, as was normally the case, be expelled from the country (outlawed).<sup>19</sup> And the *Frostatingsloven* from central Norway comes close to recognizing the murder of one's closest relatives as a sign of madness in its own right.<sup>20</sup> The legislation lists three conditions for establishing a state of madness: firstly, the defendant had previously been restrained due to madness, secondly, competent men (*skynsamir menn*) previously had "seen him mad", and thirdly, the murderer did not flee the scene following the misdeed.<sup>21</sup>

In the late Middle Ages, Norway gradually lost its political independence and eventually became a province in a conglomerate state under the Oldenburg monarchs in Copenhagen. But this state was not one legal unit, so Norway retained to a certain extent the status of a legal entity, the subject of particular legislation. According to the 1687 Norwegian law of Christian V, a murderer who is "furious" (*i vildelse eller raseri*) should not be subjected to capital punishment, even though he had to pay the same fines as a sane man. In addition, dementia (*afsindighet*) is mentioned in relation to incarceration, arson, financial unaccountability, marriage and communion.<sup>22</sup>

However, all the above mentioned examples treat legal madness as a context-sensitive condition. When killing his father, the madman is not treated like any other murderer. It does not necessarily follow from this that the madman is never held accountable for his misdeeds. Nor can we assume the opposite, that the madman was regularly convicted, just because an exemption is not explicitly laid down in the law book.

In 1814, at the end of the Napoleonic wars, a new state was created out of the former Danish realm of Norway (though immediately driven into union with Sweden, among the victors of the wars), triggering a process of legislative reform. These reforms were in line with a wave of "rationalization" in European law. The old heterogeneous bodies of paradigmatic cases and common law were replaced by more or less systematic bodies of law, supposedly homogeneous in spirit and in words, epitomized by the Law Book. Although a comprehensive law book was never realized in Norway, a unified criminal law was enacted in 1842, informed by several European models. First and foremost these codes are characterized by an ambition of coherence; codification shifted away from a heterogeneous assembly of prescriptions to an (ideally) homogeneous collection of laws. The tendency towards coherence and consistency also became evident in the codification

<sup>18</sup> For the Norwegian legal system, see Ditlev Tamm, Jens Christian V Johansen, Eyvind Næss and Kenneth Johansson, 'The law and the judicial system', in Eva Österberg and Sølvi Sogner (eds), *People meet the law: control and conflict-handling in the courts: the Nordic countries in the post-reformation and pre-industrial period*, trans. Alan Crozier, Oslo, Universitetsforlaget, 2000, pp. 27–6.

<sup>19</sup> *Gulatingslovi, Mannhelgeboik*, ch. 15, translated by Knut Robberstad, Oslo, Samlaget, 1937, p. 165; see also *Innstilling I fra Straffelovkomiteen* (Report from the Parliamentary Committee on Penal Law), 1925, p. 43. Someone killing their next of kin under this

legal regime was normally submitted to a double punishment: economically compensating the relatives and being forced into exile (outlawed). The mad murderer, on the other hand, should just lose his right to inheritance.

<sup>20</sup> "Ef faðer verðr svá ærr, at han drepr son sinn . . .", *Frostatingsloven*, IV 31, see also *Innstilling I fra Straffelovkomiteen* (Report from the Parliamentary Committee on Penal Law), 1925, p. 44.

<sup>21</sup> The conditions mentioned are alternatives, not necessary conditions. *Innstilling I fra Straffelovkomiteen*, 1925, p. 44.

<sup>22</sup> *Ibid.*, p. 44.



of criminal responsibility. Hence, in the French Code Napoléon (art. 64) a general legal exemption was codified: “Neither a crime nor an offence has been committed if the defendant was in a state of insanity [*démence*] at the time, or if he was compelled to do it by a force which he could not resist”.<sup>23</sup> This established crime and insanity as two mutually exclusive registers, and this distinction is what made it possible to *translate* from one to another.<sup>24</sup> In the Norwegian Criminal Code of 1842, there was equally codified a general legal exemption (ch. 7 §2), based on an evaluation of mental capacity. The novelty was the general character of this codification: certain mental states made prosecution impossible, no matter what the offence. Unlike the French, however, the Norwegian legislators did not choose their words from a medical vocabulary (or from a vocabulary valid both in medical and in juridical discourse) when they codified a general exemption for certain groups of mentally divergent people.

What, then, were the conditions that qualified for legal exemption? The code of 1842 mentions three or four conditions (depending on interpretation): *galne* and *afsindige* in addition to those whose wits were weakened by disease or old age.<sup>25</sup> Seemingly there are two rationales in play: the disorders *galne* and *afsindige* apparently qualify for exemption automatically, whereas in other cases a causal relation between condition (disease or old age) and misdeeds had to be proven individually. The two key terms *galne* and *afsindige*, however, were not unproblematic. They were supposedly derived from the old Roman words *furiosi* and *dementia*; they were ancient juridical terms.<sup>26</sup> It is important that the criminal code did not employ what can be perceived as a medical vocabulary in naming the specific mental states.

The terms employed in this legislation were thus not part of the emerging psychiatric discourse, which in its own realm introduced new terms and new conditions. Nor is there evidence that any medical man took part in the framing of the code. Hence, the legislation did neither explicitly, nor by indirect reference, call for the enrolment of medical professionals in the daily workings of the court. However it was, in practice, increasingly (though not yet exclusively) to be medical men who were called upon to recognize the states of mind mentioned in the law. Furthermore, there occurred a notable increase in the number of forensic psychiatric reports following legislative reform in 1887 (the same reform that instigated the jury system simultaneously with enforcing the status of the “expert” in court). This reform regulated the practice of forensic experts. Prior to this measure, approximately twenty-eight forensic psychiatric reports were presented annually in Norway, whereas after 1887 the number nearly doubled to fifty a year.<sup>27</sup> Interestingly, “the experts” executing these duties were to a great extent country doctors (or General

<sup>23</sup> “Il n’y a ni crime ni délit lorsque le prévenu était en état de démence au temps de l’action, ou lorsqu’il a été contraint par une force à laquelle il n’a pu résister”, Frédéric Chauvaud, *Les experts du crime: la médecine légale en France au XIXe siècle*, Paris, Aubier, 2000, p. 263, n. 13.

<sup>24</sup> Foucault, *Surveiller*, op. cit., note 6 above, p. 25.

<sup>25</sup> “De handlinger er straffrie, som forøves af galne eller afsindige, eller af dem, som Forstandens brug ved Sygdom eller Alderdoms-svaghed er berøvet”, Norwegian Criminal code of 1842, ch. 7 § 2.

<sup>26</sup> Winge, op. cit., note 13 above, vol. 1, ch. 4.

<sup>27</sup> 1875–90: 140 examinations; 1890–95: 253 examinations; 1895–1900: 292 examinations; 1900–1904: 398 examinations. (Numbers from Hans Evensen, *Lovbestemmelserne om retsmedicinske forretninger, særlig med hensyn til lægernes pligter og honorarer: en historisk-kritisk fremstilling, Den norske lægeforenings smaaskrifter*, Kristiania, 1910.) In the years 1900 to 1914, i.e. the first fourteen years of the commission of forensic medicine, 777 expert testimonies were delivered (concerning 763 different persons), i.e. 55 cases a year (numbers from *Beretning fra den retsmedicinske kommission for aaret 1914*).

Practitioners) without any specific psychiatric education. These doctors—from the point of view of the courts of law—represented a specialty or professional opinion. The doctors had supplanted laymen and clergymen as experts of the mind.

It was only *after* the criminal code was enacted in 1842 that curative institutions for the insane (“asylums”) were established in Norway, thus founding a psychiatry that was a branch of practical medicine. This branch was by conviction medical, though it dealt with a completely different field than somatic medicine. Psychiatry in this sense was made possible in Norway by the Mental Illness Act of 1848. Initiated by a medical man (Herman W Major, 1814–54) who had studied mental medicine abroad, this act sought to establish mental illness as disease and the asylum as a medical institution.<sup>28</sup> This was done in part by introducing a new terminology into legislation and public administration, namely that of psychiatry. The hallmark of this discourse was the notion of “mental illness” (*sinnssygd*, a term equivalent to the German *Geisteskrankheit*), with an emphasis on illness. Hence the emerging specialty, as well as the new institutions and the legislation regulating them, was founded on the very notion that insanity was a somatic illness (as any illness) and consequently was a natural (*sic*) part of the medical domain. The implications this had for criminal law is of special interest here. By employing this new vocabulary, a crack was opened between the criminal code and the emerging specialism of psychiatry.

The first modern asylum in Norway was inaugurated in 1855, largely as a consequence of the act of 1848, to be followed by additional institutions in the 1870s and 1880s. Inside these institutions the professional alienists emerged during the latter half of the nineteenth century.<sup>29</sup> Associated with the new medical institutions and the new profession of alienist was also a new discourse of mental illness. In this discourse the key concept was “illness”, and there was hardly any place for the terms used in the penal code (*galne/afsendige*). This is more than merely a curious question of words, as a conflict arose over whether the discourse of the law could be translated into the medical discourse.

As a result of the discrepancy between the new discourse of psychiatry and the discourse of law, various attempts were made to give medically acceptable interpretations of the legal terms. We can empirically identify two different medical readings of the criminal law of 1842 and its regulation of the question of legal accountability: firstly, that mental illness automatically qualified for legal exemption; secondly, that lack of accountability *on grounds of* mental illness qualified for legal exemption.<sup>30</sup> Both these points of view claimed

<sup>28</sup> Major studied for a brief period with Peter W Jessen (1793–1875), professor at Kiel and the founder of the Hornheim asylum in Schleswig. Jessen allegedly belonged to the school of “somaticists”, with Maximilian Jacobi and Johannes B Friedreich, and this affiliation is supposedly the background for Major’s insistence on insanity being a *disease* of the mind. Major’s proposal for an “insanity law” was based on the equivalents from France (initiated by Esquirol, ratified 1838), Belgium (initiated by Joseph Guislain, ratified 1850, but the draft from 1842 was available to Major) and Holland (initiated by Schroder van der Kolk, ratified 1842). Winge, *op. cit.*, note 13 above, vol. 3, Kristiania, Dybwad, 1917, pp. 15–24.

<sup>29</sup> I label alienists as “professional” because they were a group of trained personnel associated with a set

of formal positions, constituting a specific hierarchy. They were medical men by education, but asylum superintendents by position—sharing certain common experiences and interests. Hence we have a kind of “profession inside the profession” decades before general medicine became fragmented by a number of specialist branches.

<sup>30</sup> The two readings occur in a debate in the Norwegian Medical Society in 1859. Significantly, the first reading is made by Ole Aa R Sandberg, medical superintendent of the then modern Gaustad asylum near Christiania, whence the second reading is made by F C Faye, professor of obstetric and paediatric medicine (*Norsk Magazin for Lægevidenskaben*, 1859, pp. 388–421, 423–38, 523–39, 618–63, 747–56, and 827–49).

to be founded in the code itself. According to the first interpretation medical men should logically determine the question of accountability; according to the second, equally logically, the judges or magistrates should decide the matter on the basis of medical advice.

The terminological discrepancy between the criminal code and the Mental Illness Act was to a certain extent solved in 1902 when the penal code was thoroughly revised, and the old terms, now turned into archaisms by the passing of time, were replaced by the “medical” notion of illness. The crack appeared to be bridged. From 1902 it was “the mentally ill” who could not be punished (no longer *furiosi* and *dementes*). But even in the new legislation, it was not self-evident whether the mentally ill *per se* were to be considered unaccountable, or if this point should be proven in each individual case. This ambiguity was brought to the fore by juxtaposing the term “mental illness” with non-medical terms such as “unconsciousness” and “unaccountability”. The relationship between the medical and the juridical discourse was still unsettled and open for negotiation, although the medical discourse was strengthened in the new legislation.

Even so, speaking of a “medical discourse” may be misleading in this context. From the point of view of a new group of specialists, the asylum superintendents, the doctors performing these forensic duties represented a conspicuous amateur element. It is remarkable how the arguments supporting a strengthened position for the expert in court in this field turned—during the nineteenth century—from supporting the medical witness to the detriment of the judge, towards supporting the alienist to the detriment of the general physician, hence making a former ally into an enemy. The following scenario seems to have unfolded through the nineteenth century: first the general physician was invited into the court, then the psychiatrist challenged the general physician’s position.<sup>31</sup>

The role of mental medicine was in this way intrinsically bound to the evolving legislation. But there was, of course, also a discourse largely independent of the concrete formation of the laws. Forensic psychiatry also emerged from a philosophical reflection on the nature of man, carried out by philosophical, juridical and medical men.

### From Philosophy through Medicine to Psychiatry

In 1774 the Danish judge Christian Ditlev Hedegaard published a manual on forensic examination (physical examination and its accompanying interrogation).<sup>32</sup> The manual has relevance here as it touches on the question of accountability and of the physician’s role in court. Interestingly, the book is addressed to a readership of lawyers and judges, not physicians, which may signify that what would eventually be identified as a forensic medical field, was in the 1700s predominately a legal field of knowledge.<sup>33</sup> The book treats the matter of legal examinations in a broad sense, but Hedegaard touched on the

<sup>31</sup> Svein Atle Skålevåg, *Fra normalitetens historie. Sinnssykdom 1870–1920*, Bergen, Stein Rokkan senter for flegfaglige samfunnsstudier, 2003, pp. 179–204.

<sup>32</sup> C D Hedegaard, *Kort, dog nogenlunde tilstrækkelig, Anviisning, hvorledes man i forefaldende criminelle Tilfælde har at forholde sig 1. ved den fornødne udvortes Besigtigelse 2. ved det derhos anstillede Examinations-Forhør, efter mange aars Praxin [sic] velmeenende meddelt dem til Tieneste,*

*som dertil kunde være trængende. Hvornæst og følge nogle Remarqver for en Voterende*, Copenhagen, 1774. I am grateful to Jørn Øyrehagen Sunde for bringing this source to my attention.

<sup>33</sup> Hedegaard had also touched on the matter of insanity and simulation in an earlier publication without even mentioning the possibility of summoning a physician (C D Hedegaard, *Juridisk-practiske Anmærkninger til Danske og Norske Lov: indeholdende*

subject of madness in particular with relation to infanticide. Women killing their babies often try to excuse themselves by claiming *mania* or *melancholia*, Hedegaard recorded. More often than not these claims are unfounded. The judge must therefore not rely on the witnesses' testimonies, but investigate the case thoroughly *by himself*. Hedegaard listed a number of factors by which the judge should direct his investigation. If the investigation left the judge still in doubt, he was advised to call for a physician to examine the woman in question and to present an expert's testimony.<sup>34</sup>

Hedegaard's book is, of course, a prescriptive source, seeking to instruct the court of law, and it does not in itself give evidence of specific forensic practice, even though the author claims the book to be based on personal experience as a judge. It does, however, provide evidence of the recognition of a certain problem, namely that of the danger of dissimulation, and it points to the physician as someone who can offer a resolution of this problem, even though this is suggested only as a last resort. Still, it seems that the recognition of madness as a rule is a rather uncomplicated matter; only when the question of dissimulation complicates it might there be a need for specific expertise.<sup>35</sup>

Hedegaard's comment on allegedly bewitched people (*forhexede og forgiorte mennesker*) is of additional interest. Hedegaard, here acting the enlightened rationalist, claims that this condition (bewitchment) is a product of the imagination, and he details three explanatory factors: imagination as the product of superstition, bad blood (*et fordervet Blod*), or bad conscience. That is: a cultural, a biological and a psychological source. These explanations mean that the people in question should not be pursued in court at all. Instead it should be left to a physician to deal with their physical condition, or to a clergyman to deal with their mental condition.<sup>36</sup> There is a neat symmetry in this—between body and mind, physician and clergyman—that points forward to the division of work between physician and clergyman in the case of the child murderer at Nes.

Hedegaard, the jurist, also gives a therapeutic prescription for these bewildered people, who seem somehow to merge the physical and the moral aspects of man, and that is *labour*. Hard and daily labour can chase out wrongful ideas (superstition) as well as evil humours (through perspiration). In this short passage, Hedegaard invokes a dialectic of mind and body where the practice of physical labour transcends the separation of the two, thus prefiguring the psychiatric practices of the nineteenth and twentieth century ("work therapy").<sup>37</sup>

*adskillige merkverdige Tilfælde eller Spørsmal som ere forefaldne i eller uden Rettergang*, 4 vols, vol. 2, Copenhagen, Johan Gottlob Rothe, 1765). The books of Hedegaard had their equivalents in Sweden, where the prominent jurist David Nehrman Ehrenstråle in his *Inledning til then swenska processum criminalem*, Lund, Berling, 1759, called for a similar legal examination as did Hedegaard in Denmark/Norway. Roger Qvarsell, *Utan vett och vilja. Om synen på brottslighet och sinnessjukdom*, Stockholm, Carlssons, 1993, p. 82.

<sup>34</sup> Hedegaard, op. cit., note 32 above, pp. 84–5.

<sup>35</sup> This case of simulation could be significant. Börjesson made a similar point in his book on forensic psychiatry in Sweden. He claims that until c.1840 medical competency in court was restricted to that of

disclosing simulations of mental illness (Mats Börjesson, *Sanningen om brottslingen: rättspsykiatri som kartläggning av livsöden i samhällets tjänst under 1900-talet*, Stockholm, Carlssons, 1994, pp. 38–45).

<sup>36</sup> "... hvorfor det er best, at overlade slige Mennesker til Medicos i Henseende til Legemet, og til de Geistlige hva sindet er angaaende", Hedegaard, op. cit., note 32 above, p. 87.

<sup>37</sup> Hedegaard, op. cit., note 32 above, p. 87. Physical labour as a form of therapy was perhaps the most important therapeutic idea sustaining the modern asylums of the mid-nineteenth century. It was a major rationale for situating public asylums outside towns and boroughs, where farmland could be annexed to the institutions, so giving plenty of opportunity for the patients to work.

Hedegaard's text engages implicitly in a wider European discourse on agency and its forensic and medical consequences. At the end of the eighteenth century German experts in law disputed with experts on the body of man regarding the forensic relevance of a medical notion of madness. In this debate, Immanuel Kant, a contemporary of Hedegaard, engaged with enthusiasm against the authority of the physicians.<sup>38</sup> In his *Anthropology from a pragmatic point of view*, Kant addresses this debate:

Supposing someone has intentionally caused harm, and the question arises whether he is guilty of it and to what extent, so that the first thing to be determined is whether or not he was mad at the time. In this case the court cannot refer the question to the medical faculty but must refer it (because of its own incompetence) to the philosophy faculty . . . And if it tries to answer the question of whether the agent was crazy or whether he made his decision with sound understanding, *forensic medicine* (*medicina forensis*) meddles in affairs beyond its scope.<sup>39</sup>

The very title of the book which contains this passage reminds us of the degree to which this debate over the nature of man was fundamentally a question of anthropology, at the same time as being a question of professional competence. Kant explicitly engages in a struggle of competence, where philosophers oppose medical men. However, in this debate and well into the nineteenth century, both "philosophy" and "medicine" are conceived of as general bodies of knowledge. "Philosophy" includes all scientific activity except medicine (and possibly law). It seems that Kant's engagement was not so much a defence of philosophy as a critique of medicine, when engaged in matters outside the physician's competence. Against this position stood a number of physicians emphasizing the need for a general medical competence in these matters. It is important to note that for these discussants, it was not because of expert knowledge of mental illness that medicine was qualified to pronounce on these matters, but because of its generalized knowledge of the body.

Despite philosophical and theological resistance, the medical community grew more confident in the early nineteenth century. Its case was supported by the network of mental asylums being established, providing medical personnel with experience of the mad. When the German Johannes B Friedreich (1796–1862), professor in medicine at Würzburg, discussed the magistrates' and judges' competence on these matters in 1832, his discourse bore the mark of this new confidence, based on an experience that was not his own, but was nevertheless that of the medical community.<sup>40</sup> Friedreich's book must have had a wide distribution that included Scandinavia, as it was translated into both Swedish and Danish.<sup>41</sup>

<sup>38</sup> On the German debate, see Paul Winge, *Den norske sindssygelovgivning*, Kristiania, Brøggers bogtrykkeri, 1901, pp. 53–7; and also J B Friederich, *Den retslige Psychologi: systematisk fremstilt for Læger og Jurister*, trans. Harald Selmer, Aalborg, Rée, 1846, p. 80.

<sup>39</sup> Immanuel Kant, *Anthropology from a pragmatic point of view*, transl. Mary J Gregor, The Hague, Nijhoff, 1974, §51, pp. 83–4. These lectures were given in 1772–73, and first published in 1798. See also Gerlof Verwey, *Psychiatry in an anthropological and biomedical context: philosophical presuppositions and implications of German psychiatry, 1820–1870*, Dordrecht, D Reidel, 1985.

<sup>40</sup> On Friedreich, see Otto M Marx, 'German romantic psychiatry. Part 1', *Hist. Psychiatry*, 1990,

I: 351–81, pp. 377–80. Friedreich was an academic, writer and publicist, with close to no practical experience. Marx singles out Friedreich as the leader of the German somaticists, together with Maximilian Jacobi.

<sup>41</sup> Friedreich's book, *Systematisches Handbuch der gerichtlichen Psychologie für Medicinalbeamte, Richter und Verteidiger*, originally published in Leipzig in 1835, was translated into Danish (which was also the literary language in Norway) in 1846 by the founding father of Danish psychiatry, Harald Selmer. The book was also translated to Swedish in 1839, by the Swedish psychiatric pioneer Georg Engström. Apparently both the translations were abridged versions.



Friedreich declares (based on his colleague Friedrich Nasse's argument<sup>42</sup>) that the judge's knowledge of philosophy and "psychology" would not be sufficient; the task also requires the judge to be "anatomist, physiologist and pathologist", as it requires him to have "moved in circles of experience in these fields; which is to say, he would have to be both a lawyer and a physician".<sup>43</sup> In this way two generalized forms of knowledge are opposed to each other—one revolving around the mind (philosophy), another revolving around the body (medicine). From this we learn that the task of "forensic psychology", as Friedreich calls it, not only requires knowledge alien to the lawyer, but also a general medical knowledge, as opposed to some specialist forensic knowledge. The legitimacy of forensic medicine still rested in its knowledge of the body. However, as the medical voice grew more confident, it became more fragmented. The new institutions gave the weight of experience to the medical community, but experience also led to differentiation within this community.

The philosophy–medicine debate never took hold in Denmark and Norway. During the late eighteenth and early nineteenth century Norway hardly had any alienists, and the medical establishment does not seem to have been particularly interested in madness or the forensic role of medicine (though legal medicine was taught as a subject at the university). When a psychiatric discipline was established the debate had moved to a different arena. Nevertheless, we can recognize the positions as the medical community debated the role of alienists in court in the latter half of the nineteenth century.

From 1814 the Medical Faculty of the Royal Frederik University in Christiania—the only university in Norway for 150 years—was to act as a superior council in matters of forensic psychiatry. The Faculty's advice on such affairs does not seem to have been given frequently, but when the medical professors did speak on the subject, they often chose to highlight questions of principal importance, acting as some sort of supreme court of legal medicine, without being invested with the powers of a supreme court. The experts of the Faculty, commenting on previous expert opinion expressed by others, thus constituted an ad hoc debate on forensic psychiatric matters. Another arena, where the debate was brought into the open, was the Medical Society, an important meeting point for the collegium and other physicians. The Society assembled the medical notabilities of the capital, counting all the medical professors among its members. It may be considered as Norway's most important forum for the discussion of medical and professional matters.

In a debate in the Medical Society in 1859, Frans C Faye, professor and teacher in paediatrics and obstetrics, distinguished psychological from legal accountability.<sup>44</sup> Faye was explicitly opposed to the idea of non-determined imprisonment that he found intrinsic to the very enterprise of forensic psychiatry: "no one has the right to deprive a person of his future, just because one has a reason to fear the eruption of insanity and violence."<sup>45</sup>

<sup>42</sup>Friedrich Nasse (1778–1851) was a notable "somatiker", a professor of medicine at Bonn, director of the medical clinic there and editor of the *Zeitschrift für psychische Ärzte* (1818–1822).

<sup>43</sup>"... med mindre han var Anatom, Physiolog og Patholog, og allerede have bevæget sig i en Cyklus af Erfaringer i denne Retning; det vil sige, med mindre han var baade Jurist og Læge", Friedreich, op. cit., note 2 above, p. 87. "Psychology" is the precise term

employed by Friedreich in this work. Evidently it has quite a different connotation from the modern, being a pre-positivist, pre-Freudian notion of psychology.

<sup>44</sup>The debate is referred to in the periodical *Norsk Magazin for Lægevidenskaben*, 1859.

<sup>45</sup>"... ingen har ret til at dømme en fremtid fra nogen person, fordi man har grund til at frygte udbrud af sindssygdom og voldsomhed", *Norsk Magazin for Lægevidenskaben*, 1859, p. 654.



The medical superintendent Ole R Aa Sandberg, representing psychiatry in the debate together with his second in command, Ludvig Dahl, reassured the audience firstly that they represented a systematic and scientific knowledge, and secondly that their science represented true humanism. Imprisoning an insane man is a social practice that “belongs to a century more barbaric than ours”, claimed Dahl in the debate.<sup>46</sup> The more humane alternative was to treat this man in an asylum. Faye challenged both Sandberg’s claim to knowledge and also his claim to humanism. Faye voiced scepticism of the emerging specialty of psychiatry, expressing unease about, and even hostility to, the mixture of punishment and cure he found there—one might say towards the emerging medico-judicial apparatus.

Fifteen years later a homicide case caused the disagreement to resurface. A man was sentenced to asylum treatment after having murdered a workhouse guardian (*tvangsarbejdsanstalt*) in 1872. As in the previous case described, forensic psychiatric reports were produced by several physicians: a country physician, the superintendent of an insane asylum and the Medical Faculty. Professor Carl W Boeck, a dermatologist, in an appendix to the Faculty’s report, took the occasion to declare the non-identity of the medical term mental illness and the legal term accountability. The two terms should not be conflated, Boeck argued, because this would “make the physician the real judge”.<sup>47</sup> This warning against the legal physician aspiring to be the “real judge” in legal matters was a recurrent theme in the debates surrounding forensic psychiatry. If the terms “mental illness” and “legal unaccountability” were conflated, the question of prosecution would be determined by the physician’s pronouncement on illness. When there was illness, there could not be a trial. Hence the doctor’s word would be decisive, leaving the judge to a mechanical confirmation of a sentence already determined. In Boeck’s words, the physician would be the real judge. It becomes evident that Boeck’s notion of psychiatry fits fairly well with the old distinction of the moral and the physical. Indeed, he defined “the study of psychiatry” as “based on experience of the material means that can alter the pathological state that causes the abnormality in thought”.<sup>48</sup> This “study of psychiatry” is distinguished from “the study of psychology”, i.e. the study of mental activity in general, a study that does not demand a specific medical knowledge. By making this distinction, between psychology and psychiatry (at a time when psychology was not a profession), Boeck highlighted the therapeutical aspect of psychiatry, indicating its diminished relevance in court. And more importantly, he situated psychiatric knowledge firmly in man’s material basis, by alluding to a coexistent matter of psychology outside the medical realm.

Boeck’s definition of psychiatry places the judgement of accountability outside the medical realm, not as a consequence of some philosophical voluntarism, but as a consequence of a strict dualism of man. This dualism is certainly not to be found in the argument of Boeck’s opponent, Sandberg. Sandberg called upon his experience, not

<sup>46</sup> “. . . et mer barbarisk aarhundre end vort”, *Norsk Magazin for Lægevidenskaben*, 1859, p. 632.

<sup>47</sup> “. . . det bliver lægen som i virkeligheden bliver dommer”, *Norsk Retstidende*, 1874, p. 368.

<sup>48</sup> “Det psykiatriske studium forudsætter erfaring om, med hvilke materielle midler den sygelige legemstilstand, der betinger det abnorme i tankegangen, kan hæves”, Boeck in *Norsk Retstidende*, 1874: 368.

primarily with therapeutic intervention, but with abnormal personalities. In his statement presented before the court in this particular case, he listed seven cases of patients who had proved themselves to be dangerous individuals by attempting surprise attacks on the alienist.<sup>49</sup> His claim to expertise was not associated with effective therapy as much as with *his having seen*. The lesson supposedly to be drawn (from the alienist's perspective) is that it takes an alienist to recognize the dangerous madman because the alienist is the only one with broad experience in observing madmen. The implicit understanding of psychiatry is not that of a discipline "based on experience of the material means that can alter the pathological state that causes the abnormality in thought" (Boeck), but rather of a discipline based on experience in recognizing dangerous individuals.

Throughout the nineteenth century the Medical Faculty of Christiania appears as a stronghold of anti-professionalism when it comes to deciding between accountability and non-accountability in a legal setting. When an emerging criminological movement, generally close to the psychiatric community, professed *determinism* as a frame for understanding human agency in general and deviant agency in particular, several medical professors chose to speak from a position of philosophical *voluntarism*.<sup>50</sup> The opinion of the professors was balanced by the medical staff of the public asylums, primarily of the capital, speaking with a voice more in tune with the criminologists. Thus the "medical voice" speaking on forensic matters was a diverse one, consisting of the country doctors, who performed most of the duties, the Medical Faculty's professors, who carried the greatest authority, and the asylum directors, who struggled for acceptance.

At the core of the disagreement between alienists and academic medicine was the question of the degree of compatibility of the legal and medical discourses. Does "insane" equal "unaccountable"? In 1877 three of the professors answered the question unanimously: "We do not in every case hold the question of accountability to be settled by there being a possibility of proving that he was insane at the time of the act."<sup>51</sup> And again in 1890: "we do not hold that the presence of insanity excludes the state of accountability."<sup>52</sup> This terminological controversy is explicitly linked to the question of the status of psychiatric knowledge. Professor Ernst F Lochmann, a hygienist, known also in other cases to be a staunch opponent both of specialization and materialism, declared in 1878: "The alleged expertise of the alienists has in this as in other cases led to confusion rather than enlightenment; the case should be better solved by relying on common

<sup>49</sup> *Norsk Retstidende*, 1874, p. 366.

<sup>50</sup> Tove Stang Dahl has described "the victorious march of positivism" in the field of crime and punishment as a tripartite movement, consisting of the criminological movement, preoccupied with the reasons of crime, the criminalist movement, dealing with the effects of criminal law, and the penitentiary movement, seeking the most effective correctional institutions. Through these intermingling movements international networks were formed, involving psychiatrists, lawyers, judges, law makers and prison managers. (Tove Stang Dahl, *Barnevern og samfunnsvern: om stat, vitenskap og profesjoner under barnevernets oppkomst i Norge*, Oslo, 1978.) On the history of criminology, see also David Garland,

'The criminal and his science: a critical account of the formation of criminology at the end of the nineteenth century', *Br. J. Criminology*, 1985, 25: 109–37.

<sup>51</sup> "Vi antager forøvrig ikke i ethvert Tilfælde Tilregnelighedsspørgsmaalet afgjort derved, at der kan føres endog fuldgyldigt Bevis for, at en Forbryder var Sindssyg i den Periode han udførte Handlingen", *Kopibok ang. responsa medica* (manuscript), 1877, no. 13, Det medisinske fakultet, Universitetet i Oslo, Riksarkivet.

<sup>52</sup> "... idet man ikke antager at sindssygdøm uden videre skal udelukke tilregnelighed", *Kopibok ang. responsa medica* (manuscript), 1890, no. 13, Det medisinske fakultet, Universitetet i Oslo, Riksarkivet.

sense . . . The alienist knows [only] what we all know.”<sup>53</sup> In this statement the status of the forensic psychiatrist is again linked to the question of the possibility of positive knowledge of man. Thus Lochmann wrote in 1881: “In modern psychology and the so-called social science, unaccountability is, at least by some authors, defined so widely as to encompass all man’s actions, the results by necessity of congenial predispositions, external influences etc. In other words, the free will of man is categorically denied.”<sup>54</sup> Hence the matter is explicitly linked to the contentious state of man, the philosophical question of free will. We should note, however, that it is for the opponent of the emerging forensic expertise that the matter of psychiatry is of philosophical importance. For the defence, the matter is much more down to earth. For the physician with a foothold in the asylum, the struggle was on the one hand for professional acceptance in the medical as well as the legal communities, and on the other for a conflation of the notions of “legal unaccountability” and “insanity”. The terminological, epistemological and professional battles were one and the same.

As the legal system consisted of a hierarchy of courts, the medical system constituted a hierarchy from the local medical officer up to the *collegium* of the Medical Faculty. The emerging medical specialties, however, hardly had a defined place in this hierarchy. As for the alienists—they constituted their own hierarchy, based on the new insane asylums. The two hierarchies were incompatible. As a result, the alienists and the generalists occasionally barked together on questions of authority. This situation constituted a structural anomaly for the medical body lasting till the dawn of the new century. In 1900, the Medical Faculty lost (or was relieved of) the position of superior council in matters of forensic medicine, and was replaced by a permanent national commission with consultative powers (*Den retsmedicinske kommission*).<sup>55</sup> The new commission, consisting of five specialists, two of whom were psychiatrists, was supposed to examine every expert opinion delivered by a doctor in a Norwegian court of law, to ensure the quality of the examinations. This body, then, reflects the specialization of medicine in general which took place in the last decades of the nineteenth century. Two years later, as we have seen, the criminal law suppressed the old denominations of mental states qualifying for acquittal, and adopted a terminology in line with psychiatric discourse. This process supplanted the generalist

<sup>53</sup> “Sindssygelægernes erklæring og deres præsumptive sagkyndighed har her som ved tidligere leiligheder mere bidraget til at forvirre end til at klare sagen, der afgjøres bedre ved almindelige sund sands . . . Sindssygelægerne ved omtrent, hva vi alle ved”, *Kopibok ang. responsa medica* (manuscript), 1878, no. 6, Det medisinske fakultet, Universitetet i Oslo, Riksarkivet. It is remarkable the degree to which Lochmann’s words echo those of a lawyer who was a staunch opponent of Georget and the French psychiatrists of monomania in the late 1820s, when Éliás Regnault stated: “In order to be at the level of current knowledge in this branch of human science, plain common sense suffices” (Goldstein, op. cit., note 9 above, p. 185). The quote is from Regnault’s *Du degré de compétence des médecins dans les questions judiciaires relatives aux aliénations mentales*, Paris, B Warée, 1878.

<sup>54</sup> “I den moderne psykologi og den saakaldte sociale videnskab føres utilregneligheden ialfald af enkelte forfattere saa vidt, at den omfatter et menneskes samtlige handlinger betegnet som utilregnelige, fremgaaende med nødvendighed af de medfødte anlæg, ydre paavirkninger etc, med andre ord: Menneskets frie vilje benegtes fuldstændig”, Lochmann, *Kopibok ang. responsa medica* (manuscript), 1881, no. 3, Det medisinske fakultet, Universitetet i Oslo, Riksarkivet. This critique was elaborated by Lochmann in a separate publication: *Den nyere Naturanskuelse* (The Recent Perception of Nature), Christiania, Aschehoug, 1888.

<sup>55</sup> Aina Schiøtz, ‘Medisin og juss: Ambisjoner og ulikheter. Opptakten til Den rettsmedisinske kommisjon 1880–1900’, in Edgeir Benum, et al. (eds), *Den Mangfoldige velferden*, Oslo, Gyldendal Akademisk, 2003, pp. 175–92.

competence of the Faculty by specialist competence in the medico-legal field. But there was more to it: a complete epistemological system was transformed. No longer was the anthropological dualism, the moral and the physical, the basis of organized knowledge of man. Instead a range of specialties arose, all based on materialist positive knowledge. As for psychiatry, this transformation of the medical body permitted one of its leading spokesmen in Norway to pronounce, by the end of the nineteenth century: “Psychiatry has become biology, whereas in its childhood it was a theological or philosophical discipline.”<sup>56</sup> The implication being that as a biological discipline it should easily find its place among the disinterested, unbiased, advisers of a court of law.

### **Conclusion: The Problem of Forensic Psychiatry, or Forensic Psychiatry as a Problem**

In this essay I have presented two criminal trials from the nineteenth century with bearings on the matters of agency and accountability, both involving medical experts, and I have shown how the medical involvement in these cases is embedded in a widespread web of discourses of a political and institutional as well as of a scientific nature, emanating from Königsberg (Kant), Copenhagen (Hedegaard), and Christiania (the Medical Faculty) as well as various courtrooms.

If we compare the case of the double murderer of 1893 with that of the child murderer of 1819, we first note the disappearance of the priest, who seems to have been as important as the physician in the earlier case. A second feature is that “medicine” in 1893 does not appear as a monolithic entity, but as a heterogeneous community with internal dynamics and frictions, where different sectors compete for authority in the encounter with legal culture. In particular it is the small psychiatric community, associated with the new insane asylums that, by 1893, struggles for acceptance within the medical as well as the legal communities. The co-operating duo of priest and physician of 1819 has been replaced by the competing duo of physician and psychiatrist in 1893. While priest and physician were complementary in 1819, the physician and the alienist compete for authority in 1893. The alienists of 1893, anchored in the new socio-institutional reality of the asylum, do not so much envisage themselves as the inheritors of the country physician of 1819, but as the inheritors of the entire priest/physician duality. The alienist of 1893 does not, unlike certain professors of medicine, accept the separation of the moral and physical aspects of man associated with different bodies of knowledge. It was in this way that the alienists in late-nineteenth-century court proceedings came to profess a new conception of the person where the “moral” and the “physical” was replaced by the “psychic”.

The history of forensic psychiatry is often conceived of as “the entrance of medicine into court”, or even a “medicalization of law” (see “the professional interest model” in the introductory pages of this paper). This may well hold some credence, but seems to over-emphasize the medical side of psychiatry. Psychiatry is—as the case of forensic psychiatry shows—more than a branch of medicine. When we look at the transformation from the

<sup>56</sup> “Psykiatrien er bleven biologi, medens den i sin barndom var en theologisk eller filosofisk disiplin”; *senere 3–4 Decennier*, Kristiania, Alb. Cammermeyer, 1896, p. 7. Paul Winge, *Hovedtræk i Psykiatriens Udvikling I de*

eighteenth to the nineteenth century, we see that the duo of clergyman and physician is supplanted by the psychiatrist engaging in a co-operation with the law. In this context the psychiatrist does not *represent* medicine, but finds himself *opposed* to medicine. This opposition was to a certain extent concealed by the fact that the psychiatrist was also a physician.

What then about the interpretative models, presented initially? Can one, as Foucault once asked rhetorically, talk of professional interest here? For the advocates of the professional interest model, the interest is usually related to the question of professional *prestige*. The men of a profession had a shared interest in enhancing the profession's public esteem. By entering yet another public sector, that of the court, medical men are supposed to have enhanced the public relevance and hence the dignity of the profession. The problem is, however, that this prestige, as a strategic goal, can only be projected onto the sources. We can assume it, that is all. However, when studying forensic medical practice there might be less reason for assuming so, than while studying forensic medical discourse in scientific journals, position papers, etc. In the first of the two cases discussed, a district physician appears, and one can hardly see how his interests would be served by presenting his expertise before the court. The second of the two legal cases illustrates how medical men participate in the extension of society's judgemental powers outside the realm of the court. As the murderer is considered unfit to plead, the sentence and the incarceration is in effect dealt with by the medical men. The medical sentence does certainly have to be confirmed by the authorities, but not by the court. Again, it is difficult to say that medicine gained prestige by (i.e. had interest in) this outcome. On the contrary, the extension of judgemental authority of a murderer beyond the court might very well be expected to arouse the public, creating animosity towards the whole psychiatric institution.

The anthropological theme indicated by my readings, the shift from one perception of man to another, suggests that the expertise is inscribed in a larger text, outside the control of one particular author. If one can talk of professional interest, this is certainly not to be considered the dominant theme in the story of the emergence of forensic psychiatry.

Molière in 1665 had one of his *médecins ridicules* express it this way: "Because the mind has a firm hold upon the body, it is quite often through the mind that illness arises, and my habit has always been to heal the mind before proceeding to the body."<sup>57</sup> In this sentence a medical anthropology is articulated, depicting man as a dualistic being of mind and body. The dualism was witnessed by Molière in the seventeenth century as by Hedegaard in the eighteenth and Boeck in the nineteenth. The moral and the physical together constituted the self, and they constituted madness as a *problématique* of the self. For this reason philosophers with no clinical experience whatsoever could engage in the problem of madness, as did, for example, Immanuel Kant. It is in this philosophico-anthropological context that the first of the trials discussed here belongs. The case from 1893, on the other hand, bears witness to a new and stricter separation of body and mind. With the emerging science of psychology (based on the ideals of empiricism and experimentalism) as well as a marked

<sup>57</sup> Molière, *L'amour médecin* (1665), Paris, Nouveaux Classiques Larousse, 1975, p. 53, quoted in

Edward Shorter, *A history of psychiatry* New York, Wiley, 1997, p. 20.

materialist turn in the medical sciences, *psyche* and *soma* were becoming separated in a new and more decisive way. From this time on it became difficult to speak of the moral and the physical in the same language. This situation made it problematic for general physicians to establish an authority over the mind, and it opened a field for the psychiatrists to enter.